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.

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

Madison-Kipp Corporation ("Madison-Kipp") submits the follow reply to Plaintiffs' Response to Defendant Madison-Kipp Corporation's Proposed Findings of Fact (Dkt. #197), as follows:

1. The Madison-Kipp site has been used as an industrial metal casting facility for more than 100 years. (Bianchi Dec. ¶ 120, Ex. 118)

   RESPONSE: Not disputed.

2. Madison-Kipp started operations in its current facility in 1902. (Bianchi Dec. ¶ 120, Ex. 118)

   RESPONSE: Not disputed.

3. Madison-Kipp originally manufactured lubrication parts for farm tractors and power units. (Bianchi Dec. ¶ 120, Ex. 118)

   RESPONSE: Not disputed.

4. Madison-Kipp now produces precision machined aluminum die cast components for transportation and industrial end users. (Meunier Dec. ¶ 2)

RESPONSE: Not disputed.

5. The Madison-Kipp facility is on the east side of the City of Madison, and is bound on the north by a bike path, on the south by Atwood Avenue, on the east by South Marquette Street, and on the west by Waubesa Street. (Meunier Dec. ¶ 11, Ex. 7 at MK010498)

RESPONSE: Not disputed.

6. The facility's footprint has changed over the years but now the 130,000-square foot building occupies much of the site. (Kubacki Dec. ¶ 2, Ex. 1)

RESPONSE: Not disputed.

7. There are thirty-four (34) homes that share a property line with Madison-Kipp. (Kubacki Dec. ¶ 2, Ex. 1)

RESPONSE: Not disputed.

8. These thirty-four homes were built after the Madison-Kipp facility was built. (Meunier Dec. ¶ 11, Ex. 7 at MK010498)

RESPONSE: Disputed. The reference cited does not support the proposed fact. (Doc. 152 – 7 at MK010498)

REPLY: The referenced cite (Dkt. #152-7, at MK010498) is a Sanborn Map from 1908 that depicts the Madison-Kipp Corporation site and does not depict the thirty-four homes that share a property line with Madison-Kipp. Plaintiffs' response does not provide any different evidence. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

9. Given the residences' close proximity to the facility, the company has paid particular attention over the years to neighbor relations. (Meunier Dec. ¶ 9, Ex. 5)

RESPONSE: Disputed. "Madison-Kipp has not been forthcoming in clearly articulating to us [DNR] and the public a clear, comprehensive and timely path forward to resolve the environmental contamination issues on and off your property." (Doc. 195 – 6, 35)

REPLY: Plaintiffs do not challenge that the proposed finding is supported by the evidence cited. The evidence cited by Plaintiffs in their response does not dispute the fact that Madison-Kipp has paid particular attention over the years to neighbor relations. Moreover, the response addresses something different (e.g., the path forward) and is written in 2012 from the perspective of the DNR; it does not address the company's efforts to pay attention to the neighbors' concerns over the years. Therefore, the proposed finding is not disputed with any evidence, and as a result, should be entered.

10. For much of the last century, PCE was believed to have low toxicity and was widely used in medicine, industry and household products. (Dkt. #144 at 53)

RESPONSE: Disputed. The dangers of PCE have been known for over 60 years. (Doc. 185 at pp. 19-25)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, 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 expert report 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. Further, Plaintiffs have not challenged the evidence

cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

11. Perchloroethylene ("PCE") was widely used in metal degreasing operations at industrial facilities. (Dkt. #145 at 3; Bianchi Dec. ¶ 53, Ex. 51; Bianchi Dec. ¶ 54, Ex. 52)

RESPONSE: Not disputed.

12. PCE is not a banned substance and is readily available today at any local hardware store in cleaning products. (Bianchi Dec. ¶ 131, Ex. 129; Bianchi Dec. ¶ 102, Ex. 100)

RESPONSE: Disputed. PCE is banned in the state of California. (Doc. 142 at pp. 47-48)

REPLY: Plaintiffs do not challenge that the proposed finding is supported by the evidence cited and Plaintiffs' response does not address the evidence cited. Further, Dr. David Ozonoff, upon whose testimony Plaintiffs' rely to dispute M-KPFOF ¶ 12, does not testify that "PCE is banned in the state of California." Instead, the testimony of Dr. Ozonoff is that:

> Q. Is PCE a banned substance from any use in the United States?
> A. Well, it will be -- in California I think it's going to be banned for dry cleaning use. If not already, in a year or two, but it's not yet banned but likely will be in the not too distant future.
> Q. Do you know if it's banned in Wisconsin for use in dry cleaning?
> A. I don't know.
> Q. Is it banned in Massachusetts for use in dry cleaning?
> A. Not yet. Actually, I think Los Angeles county is the only place where such a ban has actually been put into effect or about to be put into effect, but Los Angeles county is bigger than most countries in the world so.
> Q. Do you know if the use of PCE is banned in various cleaners and cleaning substances?
> A. Not that I'm aware of.
> Q. Is it banned at all in any application to your knowledge?
> A. Well, I think we just talked about dry cleaning.

Q. In Los Angeles but how about nationwide?
A. Not yet.

(Dkt. #142 at pp. 47-48.) Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

13. Most dry cleaning operators still use PCE in the dry cleaning process. (Bianchi Dec. ¶ 57, Ex. 55)

RESPONSE: Disputed. The reference cited does not contain support for the proposed fact. (Doc. 163 – 18)

REPLY: Plaintiffs' dispute is not valid. Indeed, Plaintiffs' expert Dr. Everett readily agreed that PCE is used in dry cleaning and is readily commercially available. (Dkt. #188 at 19 (Everett Dep. at 78:19-23).) USEPA agrees. (Dkt. #164-3 ("Tetrachloroethylene is a widely used solvent that is produced commercially for use in dry cleaning, textile processing, and metal-cleaning operations").)

14. Madison-Kipp received a letter from the Wisconsin Department of Natural Resources ("WDNR") dated July 18, 1994 requesting Madison-Kipp to investigate the occurrence of volatile organic compounds ("VOCs") found in shallow groundwater at two neighboring properties [to the west and north]. (Bianchi Dec. ¶ 87, Ex. 85)

RESPONSE: Not disputed.

15. Madison-Kipp informed WDNR that it had retained the environmental consulting firm Dames & Moore, Inc. in a letter dated August 24, 1994. (Bianchi Dec. ¶ 137, Ex. 135)

RESPONSE: Not disputed.

16. Dames & Moore, on behalf of Madison-Kipp, submitted a work plan for site investigation to WDNR dated September 14, 1994. (Bianchi Dec. ¶ 135, Ex. 133)

RESPONSE: Not disputed.

17. Following approval by WDNR, site investigations were initiated by Dames & Moore in September 1994 to evaluate the presence of VOCs, including perchloroethylene ("PCE"), in soil and groundwater in the northern portion of the Madison-Kipp site (the "Site"). (Bianchi Dec. ¶ 135, Ex. 133)

RESPONSE: Disputed. The reference cited does not demonstrate WDNR approval or the actual initiation of a site investigation. (Doc. 167 – 28)

REPLY: The cited document supports the proposed finding. Plaintiffs' response does not contest the evidence or provide any different evidence. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

18. The Dames & Moore investigation that began in September 1994 included multiple soil borings, soil and groundwater sampling, as well as the installation of one monitoring well (MW-1). (Bianchi Dec. ¶ 136, Ex. 134)

RESPONSE: Plaintiffs do not dispute that PCE and other VOCs were found in soil and groundwater samples in September and October of 1994.

REPLY: The Finding is undisputed.

19. Additional soil and groundwater sampling was recommended in a December 14, 1994 Dames & Moore status report to WDNR. (Bianchi Dec. ¶ 136, Ex. 134)

RESPONSE: Plaintiffs do not dispute that further sampling was identified in part to evaluate a possible source of VOCs, other than Madison-Kipp ("Kipp").

REPLY: The Finding is undisputed.

20. Dames & Moore submitted a site investigation report to WDNR dated April 20, 1995 that noted groundwater flow was generally toward the south and elevated concentrations of VOCs were found in shallow groundwater in the vicinity of a former drainage ditch on the northern portion of the Site and in shallow groundwater in the northeast portion of Madison-Kipp's parking lot. (Bianchi Dec. ¶ 101, Ex. 99)

RESPONSE: Not disputed.

21. The April 20, 1995 letter also noted that lower VOC concentrations were found in groundwater monitoring well MW-1, in the north parking area, and in an off-site downgradient well installed by a neighboring property owner. (Bianchi Dec. ¶ 101, Ex. 99)

RESPONSE: Not disputed.

22. Site investigations by Dames & Moore that occurred in 1995 were presented to WDNR in a March 20, 1996 progress report. (Bianchi Dec. ¶ 100, Ex. 98)

RESPONSE: Not disputed.

23. The March 20, 1996 progress report submitted to WDNR indicated that a PCE aboveground storage tank was formerly located outside the northern portion of the building. (Bianchi Dec. ¶ 100, Ex. 98)

RESPONSE: Not disputed.

24. The former drainage ditch, which had been filled and paved, was identified in the site investigation report dated April 20, 1995 and was located along the east side of the building and extended from the former aboveground storage tank area northward to the property boundary. (Bianchi Dec. ¶ 101, Ex. 99)

RESPONSE: Disputed. Although a drainage ditch is referenced in the document cited, the remaining proposed facts are not referenced in the cited document. (Doc. 164 – 27)

REPLY: The cited document supports the proposed finding. Specifically, the document references a "former drainage ditch located near the northeast corner of the building" (Dkt. #164-27 at PLF002151) and depicts the former drainage ditch on a map (Dkt. #164-27 at PLF002148). Plaintiffs' response does not contest the evidence or provide any different evidence. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

25. Soil and groundwater investigations, including the installation of three additional groundwater monitoring wells (MW-2, MW-2A and MW-3) were installed to further define the extent of subsurface VOCs in the northern portion

of the site, in the vicinity of the former aboveground storage tank and ditch. (Bianchi Dec. ¶ 100, Ex. 98)

RESPONSE: Not disputed.

26. The March 20, 1996 letter recommended additional investigation and a pilot study to assess remediation options for vapors and groundwater. (Bianchi Dec. ¶ 100, Ex. 98)

RESPONSE: Not disputed.

27. By letter dated April 29, 1996, Dames & Moore confirmed its conversation with DNR regarding the agency's approval of the work proposed in March 20, 1996 progress report. (Bianchi Dec. ¶ 134, Ex. 132)

RESPONSE: Not disputed.

28. Site investigations conducted by Dames & Moore in 1996 were presented to the WDNR in a report dated March 18, 1997. (Bianchi Dec. ¶ 99, Ex. 97)

RESPONSE: Not disputed.

29. The March 18, 1997 Dames & Moore report proposed excavation of VOC-impacted soils in source areas and included an evaluation of groundwater remedial action options. (Bianchi Dec. ¶ 99, Ex. 97)

RESPONSE: Disputed. According to the cited document, excavation of VOC contaminated soils in source areas would be dependent upon the final delineation of impacted areas. (Doc. 164 – 25)

REPLY: The cited document supports the proposed finding. Plaintiffs' response does not contest the evidence or provide any different evidence. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

30. According to the March 18, 1997 Dames & Moore letter, Dames & Moore reviewed historical information to identify likely contaminant sources. (Bianchi Dec. ¶ 99, Ex. 97)

RESPONSE: Not disputed.

31. One of the likely contaminant sources identified in the March 18, 1997 letter was a former PCE vapor degreaser that used at in the Madison-Kipp facility. (Bianchi Dec. ¶ 99, Ex. 97)

RESPONSE: Not disputed.

32. The PCE vapor degreaser had an external vent, located in the northern portion of the Waubesa building, along the east exterior wall. (Dkt. #149 ¶ 8)

RESPONSE: Not disputed.

33. The March 18, 1997 letter noted that elevated concentrations of VOCs were found in soil in the vicinity of the former degreaser vent. (Bianchi Dec. ¶ 99, Ex. 97)

RESPONSE: Not disputed.

34. The other likely contaminant source identified in the March 18, 1997 letter is the former PCE aboveground storage tank. (Bianchi Dec. ¶ 99, Ex. 97)

RESPONSE: Not disputed.

35. Additional monitoring wells (MW-4S and MW-4D) were installed at multiple depths along the south property boundary to define the lateral extent of shallow groundwater contamination in the bedrock and additional soil sampling was conducted in suspected source areas. (Bianchi Dec. ¶ 99, Ex. 97)

RESPONSE: Plaintiffs do not dispute the wells were installed, however, the cited document does not say that the wells were to "define the lateral extent of shallow groundwater contamination." (Doc. 164-25)

REPLY: The Finding is undisputed.

36. Dames & Moore installed a groundwater extraction test well for hydraulic test purposes. (Bianchi Dec. ¶ 99, Ex. 97)

RESPONSE: Not disputed.

37. By July 1996, a total of six (6) groundwater monitoring wells had been installed at the Site. (Bianchi Dec. ¶ 99, Ex. 97)

RESPONSE: Not disputed.

38. In the March 18, 1997 letter, Dames & Moore concluded, based on the measured groundwater flow direction toward the south and the lower VOC concentrations found in MW-2 (the well located on the west side of the Waubesa building, between the facility and Waubesa Street), that the lateral definition of VOCs in shallow groundwater was generally defined. (Bianchi Dec. ¶ 99, Ex. 97)

RESPONSE: Disputed. The document cited does not specify whether Dames & Moore's conclusion relates to shallow or deep groundwater. (Doc. 164 – 25)

REPLY: The cited document supports the proposed finding. Although Plaintiffs question whether the cited document relates to shallow or deep groundwater, the previous site investigation reports (referenced in the cited document) and well boring logs included in the cited document make clear that the letter report relates to shallow groundwater. (Dkt. #164-25 at PLF001976-PLF001984.) The Plaintiffs' response does not contest the evidence or provide any different evidence. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

39. The Dames & Moore report dated May 30, 1997 and submitted to WDNR summarized additional site investigations, including soil sampling in the area of the drainage ditch along the north property boundary and in the area of the former degreaser vent to further define the extent of contamination. (Bianchi Dec. ¶ 98, Ex. 96)

RESPONSE: Not disputed.

40. As reported to WDNR in the report dated May 30, 1997, Dames & Moore noted that elevated PCE concentrations were found in shallow soil samples along the drainage ditch but much lower VOC concentrations were found in soil immediately south and east, thereby generally defining the lateral extent of soil contamination in the drainage ditch area. (Bianchi Dec. ¶ 98, Ex. 96)

RESPONSE: Disputed. The document cited does not conclude that it has defined the lateral extent of soil contamination in the drainage ditch area. (Doc. 164 – 24)

REPLY: The cited document supports the proposed finding. Specifically, the cited document notes that Dames & Moore collected additional soil samples to "define the full horizontal and vertical extent of impacted soil" at two locations for purposes of remedial activities. (*See* dkt. #164-24 at PLF001874.) The report then outlines the proposed remedial approach to "remediate soils impacted at concentrations above site-specific residual contaminant levels." (*Id.* at PLF001874.) Thus, the document cited does conclude that the lateral extent of soil contamination was defined. Plaintiffs' response does not contest the evidence or provide any different evidence. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

41. Site-wide groundwater sampling of all installed monitoring wells was conducted in February 1998. (Bianchi Dec. ¶ 132, Ex. 130)

RESPONSE: Not disputed.

42. Site-wide groundwater sampling of all installed monitoring wells was conducted in May 1999. (Bianchi Dec. ¶ 97, Ex. 95)

RESPONSE: Not disputed.

43. Site-wide groundwater sampling of all installed monitoring wells was conducted in August 1999. (Bianchi Dec. ¶ 132, Ex. 130)

RESPONSE: Not disputed.

44. Between February 1998 and August 1999, VOC concentrations remained stable in almost all monitoring wells, while VOC concentrations in MW-2S decreased significantly. (Bianchi Dec. ¶ 132, Ex. 130)

RESPONSE: Disputed. The document referenced shows that many of the VOC concentrations measured between February of 1998 and August of 1999 were increasing. (Doc. 167 – 25)

REPLY: The cited document supports the proposed finding. Specifically, the cited document notes that "Concentrations at well MW-1 and MW-3 (in the source area), are comparable to previous results. At MW-2S, the samples have yielded a steady decline in concentrations, as have concentrations at MW-4S and MW-4D. Although the results from MW-2D were slightly higher than in the previous (May 1999) sample, the overall trend in concentrations at location is downward." (Dkt. #167-25 at PLF010865.) Plaintiffs' response does not contest the evidence or provide any different evidence. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

45. By letter dated December 7, 1999, WDNR notified residents in the vicinity of Madison-Kipp that "The degree and extent of groundwater contamination at the facility has, for the most part, been determined." (Bianchi Dec. ¶ 119, Ex. 117)

RESPONSE: Disputed. The document cited does not establish that residents in the vicinity of Kipp received this document. (Doc. 167 – 12)

REPLY: The cited document supports the proposed finding. The cited document is addressed to "Madison Residents, in the Vicinity of Madison Kipp Corporation" and is marked PLF008970-008971, indicating that it was produced to Madison-Kipp by the Plaintiffs. Plaintiffs' response does not contest the evidence or provide any different evidence. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

46. By letter dated December 7, 1999, WDNR notified residents in the vicinity of Madison-Kipp that "Efforts to fully delineate the contaminated groundwater plume have been delayed due to the difficulty of finding appropriate locations to advance groundwater quality monitoring near the site which are not obstructed by utilities or other physical barriers." (Bianchi Dec. ¶ 119, Ex. 117)

RESPONSE: Disputed. The document cited does not establish that residents in the vicinity of Kipp received this document. (Doc. 167 – 12)

REPLY: The cited document supports the proposed finding. The cited document is addressed to "Madison Residents, in the Vicinity of Madison Kipp Corporation" and is marked PLF008970-008971, indicating that it was produced to Madison-Kipp by the Plaintiffs. Plaintiffs' response does not contest the evidence or provide any different evidence. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

47. By letter dated December 7, 1999, WDNR notified residents in the vicinity of Madison-Kipp that "Madison-Kipp has to date complied with requirements to identify and remediate the contamination found at the site." (Bianchi Dec. ¶ 119, Ex. 117)

RESPONSE: Disputed. The document cited does not establish that residents in the vicinity of Kipp received this document. (Doc. 167 – 12)

REPLY: The cited document supports the proposed finding. The cited document is addressed to "Madison Residents, in the Vicinity of Madison Kipp Corporation" and is marked PLF008970-008971, indicating that it was produced to Madison-Kipp by the Plaintiffs. Plaintiffs' response does not contest the evidence or provide any different evidence. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

48. According to the December 7, 1999 WDNR letter, "[t]he two most likely routes of exposure to contamination at the Madison Kipp site are by direct ingestion of contaminated soil or by drinking contaminated groundwater. The risk is quite low for both potential routes of exposure, contaminated soil is limited to an area behind the Madison Kipp building and the City of Madison is served by a series of municipal wells rather than private wells." (Bianchi Dec. ¶ 119, Ex. 117)

RESPONSE: Plaintiffs do not dispute the language quoted is contained in Ex. 117.

REPLY: The Finding is undisputed.

49. According to the December 7, 1999 WDNR letter, contamination was identified in two discharge points at the facility. The soil contamination is limited to an area around these two point sources and from these points vertically to the groundwater, approximately 20 feet below the ground surface. The groundwater is impacted, from a point directly below these areas of soil contamination and vertically form these directions in a direction of groundwater flow (generally towards Lake Monona). The concentrations of the contamination in groundwater decreases significantly away from the source areas. (Bianchi Dec. ¶ 119, Ex. 117)

RESPONSE: Plaintiffs do not dispute the language quoted is contained in Ex. 117.

REPLY: The Finding is undisputed.

50. By report to WDNR dated September 14, 1999, Dames & Moore summarized the results of well installation and sampling for two (2) additional deeper monitoring wells (MW-3D and MW-4D2). (Bianchi Dec. ¶ 132, Ex. 130)

RESPONSE: Plaintiffs do not dispute.

51. The September 14, 1999 report noted that although elevated PCE concentrations were found in MW-3D, much lower PCE levels were found in deeper well MW-4D2, further defining the extent of PCE in shallow groundwater. (Bianchi Dec. ¶ 132, Ex. 130)

RESPONSE: Disputed. The cited reference only reports groundwater sampling and draws no conclusions as to the extent of PCE in shallow groundwater and even today, 14 years later, Kipp's contractor, ARCADIS, confirms that the extent of groundwater contamination has not been determined. (Doc. 190 at p. 120)

REPLY: The cited document supports the proposed finding. Specifically, the cited document, which is a groundwater monitoring update to WDNR from Dames & Moore, summarizes the groundwater sampling efforts to date and those results

informed Dames & Moore as to the extent of PCE contamination in shallow groundwater. In addition, Plaintiffs' response cites to the deposition transcript of the ARCADIS project manager who confirmed that, in fact, the extent of shallow groundwater contamination has been determined. (Dkt. #190 at 120 ("Q. … Shallow groundwater contamination emanating from the Madison-Kipp facility, you believe that the extent of that shallow groundwater contamination has been determined? A. Yes.").) Therefore, not only is Plaintiffs' response irrelevant to the proposed finding, it relies on a document that does not support Plaintiffs' response. As such, Plaintiffs' response does not contest the evidence or provide any different evidence. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

52. In a March 11, 1998 meeting with WDNR, as referenced in a letter from Dames & Moore to WDNR dated April 6, 1998, Madison-Kipp proposed in-situ remediation of VOC-impacted soils in the area of the former PCE aboveground storage tank, drainage ditch and the degreaser vent suing the soil treatment process BiOx process. (Bianchi Dec. ¶ 132, Ex. 130)

RESPONSE: Disputed. The cited reference makes no mention of a March 11, 1998 meeting or an April 6, 1998 letter. (Doc. 167 – 25) Additionally, these proposed facts are not material to the issues raised in the motion for summary judgment.

REPLY: Madison-Kipp inadvertently cited to Ex. 130 of the Bianchi Declaration, instead of Ex. 131. The correctly cited document is Dkt. #167-26 (Bianchi Decl. ¶ 133, Ex. 131) and that document, a letter from Dames & Moore to WDNR dated April 6, 1998, references a March 11, 1998 meeting and supports the proposed finding. Plaintiffs' response does not contest the evidence or provide any different evidence.

Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

53. BiOx is designed to promote the rapid oxidation and degradation of chlorinated VOCs, include PCE. (Bianchi Dec. ¶ 131, Ex. 129)

RESPONSE: Disputed. Soils at the Kipp property are currently highly contaminated with VOCs and other hazardous substances. (Doc. 195 – 26) Additionally, the proposed fact is not material to the issues raised in the motion for summary judgment.

REPLY: The cited document supports the proposed finding. Specifically, the cited document states that BiOx "is designed to accomplish two mutually-beneficial goals: 1) Rapid oxidation of contaminants; and, 2) Creation of an oxygen-and nutrient-rich soil environment to speed the natural degradation of these contaminants." (Dkt. #195-26 at PLF010815.) Plaintiffs' response does not contest the evidence or provide any different evidence. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

54. The BiOx soil remediation option was discussed with the WDNR prior to its implementation. (Bianchi Dec. ¶ 96, Ex. 94)

RESPONSE: Plaintiffs do not dispute that the cited reference refers to a discussion about the use of BiOx, but dispute that this proposed fact is material to the motion for summary judgment.

REPLY: The Finding is undisputed.

55. Three (3) BiOx injections were completed at multiple locations during June and July 1998 within the two (2) source areas. (Bianchi Dec. ¶ 96, Ex. 94)

RESPONSE: Plaintiffs do not dispute that the cited reference refers to BiOx injections, but do dispute that this proposed fact is material to the motion for summary judgment.

REPLY: The Finding is undisputed.

56. Additional BiOx injections were completed in December 1998 and May 1999 to further treat VOC-impacted soils in the former drainage ditch area. (Bianchi Dec. ¶ 96, Ex. 94)

RESPONSE: Plaintiffs do not dispute that the cited reference identifies these injections, but dispute that it is material to the summary judgment motion.

REPLY: The Finding is undisputed.

57. By letter dated March 21, 2000, Dames & Moore submitted a soil remediation documentation report to WDNR. (Bianchi Dec. ¶ 96, Ex. 94)

RESPONSE: Plaintiffs do not dispute that the report was submitted and that it recommended no further action with respect to soil remediation at the Kipp Site.

REPLY: The Finding is undisputed.

58. The March 21, 2000 soil remediation documentation report submitted to WDNR concluded that soil in both source areas was remediated to the extent practicable. (Bianchi Dec. ¶ 96, Ex. 94)

RESPONSE: Disputed. Soil contamination continues to be found at Kipp, including as recently as February of 2013. (Doc. 195 – 26)

REPLY: The cited document supports the proposed finding. Specifically, the cited document states that "Verification soil samples collected from both areas indicate that both hot spots have been remediated to the extent practical." (Dkt. #164-22 at PLF001724.) Plaintiffs' response does not contest the evidence. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

59. The environmental consulting firm URS, on behalf of Madison-Kipp, installed additional shallow and deeper groundwater monitoring wells (MW-3D2 in the north parking area and MW-5 and MW-5D along the eastern side of the property). (Bianchi Dec. ¶ 95, Ex. 93)

RESPONSE: Plaintiffs do not dispute that the letter identifies these wells, but dispute the materiality of this statement to the summary judgment motion.

REPLY: The Finding is undisputed.

60. URS performed routine groundwater monitoring at the site in March 2001. (Bianchi Dec. ¶ 95, Ex. 93)

RESPONSE: Not disputed.

61. By letter dated December 27, 2001, URS reported groundwater monitoring results to WDNR. (Bianchi Dec. ¶ 95, Ex. 93)

RESPONSE: Not disputed.

62. The concentrations detected at MW-5D and MW-5S, along the eastern side of the property, lead URS to conduct additional source area investigation in the area of the MW-5 wells. (Bianchi Dec. ¶ 95, Ex. 93)

RESPONSE: Plaintiffs do not dispute that according to this letter, in December of 2001, seven years after beginning its investigation, URS identified the former location of a vapor degreaser as a possible source of soil and groundwater contamination. (Doc. 164 – 21)

REPLY: The Finding is undisputed.

63. The December 27, 2001 letter to WDNR indicated that a vapor degreaser and external vent was at one time located in the building adjacent to the MW-5 well nest. (Bianchi Dec. ¶ 95, Ex. 93)

RESPONSE: Not disputed.

64. An investigation was completed in 2002 to evaluate soil conditions in the area of the former vapor degreaser vent location on the east side. (Bianchi Dec. ¶ 94, Ex. 92)

RESPONSE: Plaintiffs do not dispute that a 2002 investigation of soil conditions in the area of a former vapor degreaser showed that "PCE was present in most of the study area" and "high PCE concentrations" were in the groundwater. (Doc. 164 – 20)

REPLY: The Finding is undisputed.

65. The environmental consulting firm URS, on behalf of Madison-Kipp, reported the results of the 2002 soil investigation to WDNR in a letter dated August 30, 2002. (Bianchi Dec. ¶ 94, Ex. 92)

RESPONSE: Not disputed.

66. The August 30, 2002 soil investigation report noted that: "Subsequent investigation by Madison-Kipp resulted in the identification of a former vapor degreaser in the vicinity of the MW-5 well nest….Although the area is now paved, the former degreaser pre-dates the pavement, which would have prevented condensate from the degreaser hood to migrate into the subsurface." (Bianchi Dec. ¶ 94, Ex. 92)

RESPONSE: Not disputed.

67. The August 30, 2002 soil investigation report submitted to WDNR recommends additional field screening to fully define the vertical extent of contamination in the MW-5 area and monitoring to evaluate potential improvements after remediation of the MW-5 source area. (Bianchi Dec. ¶ 94, Ex. 92)

RESPONSE: Disputed. The August 30, 2002 soil investigation report recommends the construction of a deeper piezometer, adjacent to the existing well nest along with field screening to evaluate the appropriate depth to set the well. (Doc. 164 – 20)

REPLY: The cited document supports the proposed finding. Plaintiffs' response does not contest the evidence or provide any different evidence. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

68. By letter dated October 31, 2002, URS reported the results of soil and groundwater sampling to WDNR. (Bianchi Dec. ¶ 93, Ex. 91)

RESPONSE: Not disputed.

69. The October 31, 2002 letter to WDNR noted that Madison-Kipp would evaluate remedial options for impacted soil and groundwater remediation. (Bianchi Dec. ¶ 93, Ex. 91)

RESPONSE: Not disputed.

70. The WDNR drafted a memo to file regarding the October 31, 2002 submittal and summarized Madison-Kipp's proposed next steps. (Bianchi Dec. ¶ 130, Ex. 128)

RESPONSE: Not disputed.

71. Soil sampling was conducted between November 25, 2002 and November 26, 2002 at three adjacent residential properties - 150, 154 and 162 South Marquette

Street. (Bianchi Dec. ¶ 115, Ex. 113; Bianchi Dec. ¶ 116, Ex. 114; Bianchi Dec. ¶ 117, Ex. 115)

RESPONSE: Not disputed.

72. A URS memo to WDNR dated December 4, 2002 provided sample results from soil samples taken between November 25, 2002 and November 26, 2002 adjacent to Madison-Kipp's east property line. (Bianchi Dec. ¶ 129, Ex. 127)

RESPONSE: Not disputed.

73. By letter dated January 3, 2003, URS informed Deanna Schneider of 150 South Marquette that there were "low" concentrations of PCE in three (3) of five (5) soil samples collected from her backyard. (Bianchi Dec. ¶ 115, Ex. 113)

RESPONSE: Disputed. The cited reference does not characterize the PCE soil concentrations as "low" (Doc. 167 – 8), and in fact, Kipp's contractor, URS, characterizes the PCE concentrations as "elevated." (Doc. 167 – 6)

REPLY: M-KPFOF ¶ 73 inadvertently referenced an incomplete January 3, 2003 letter; the complete letter to Ms. Schneider supports the proposed finding. (Ziemba Decl. ¶ 3, Ex. 3) Further, the URS characterization of "elevated" concentrations referenced in Plaintiffs' response does not relate to the samples taken on Ms. Schneider's property but related to samples taken on Madison-Kipp's property. (Dkt. #167-6 at PLF008277-008279.) Plaintiffs' response does not contest the evidence or provide any different evidence. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

74. According to the January 3, 2003 letter to Deanna Schneider, the PCE concentrations in soil samples from 150 South Marquette were 0.031 ppm, 0.086 ppm and 0.266 ppm. (Bianchi Dec. ¶ 115, Ex. 113)

RESPONSE: Disputed. The cited reference inaccurately references the PCE concentrations found in the soil samples. (Doc. 167 – 8)

REPLY: M-KPFOF ¶ 74 inadvertently characterized one of the results identified in the January 3, 2003 letter to Deanna Schneider as 0.266 ppm when, in fact, the January 3, 2003 letter correctly stated the result as 0.166 ppm. Although Plaintiffs' response points out a typographical error, Plaintiffs' response does not contest the actual evidence or provide any different evidence. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

75. By letter dated January 3, 2003, URS informed Barbara Brownstorm, the then owner of 154 South Marquette, that there were low concentrations of PCE in three (3) of the seven (7) soil samples collected from her backyard. (Bianchi Dec. ¶ 116, Ex. 114)

RESPONSE: Disputed. The cited reference does not characterize the PCE soil concentrations as "low" (Doc. 167 – 9), and in fact, Kipp's contractor, URS, characterizes the PCE concentrations as "elevated." (Doc. 167 – 6)

REPLY: M-KPFOF ¶ 75 inadvertently referenced an incomplete letter; the complete letter to Ms. Brownstorm supports the proposed finding. (Second Meunier Decl.¶ 5, Ex.5.) Further, the URS characterization of "elevated" concentrations referenced in Plaintiffs' response does not relate to the samples taken on Ms. Brownstorm's property but related to samples taken on Madison-Kipp's property. (Dkt. #167-6 at PLF008277-008279.) Plaintiffs' response does not contest the evidence or provide any different evidence. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

76. According to the January 3, 2003 letter to Barbara Brownstorm, the PCE concentrations in soil samples from 154 South Marquette were 1.43 ppm, 0.032 ppm and 0.036 ppm. (Bianchi Dec. ¶ 116, Ex. 114)

RESPONSE: Not disputed.

77. By letter dated January 3, 2003, URS informed Peter Uttech of 162 South Marquette that there were low concentrations of PCE in one (1) of six (6) soil samples collected from his backyard. (Bianchi Dec. ¶ 117, Ex. 115)

RESPONSE: Disputed. The cited reference does not characterize the PCE soil concentrations as "low" (Doc. 167 – 10) and in fact, Kipp's contractor, URS, characterizes the PCE concentrations as "elevated." (Doc. 167 – 6)

REPLY: M-KPFOF ¶ 77 inadvertently referenced an incomplete letter; the complete letter to Mr. Uttech supports the proposed finding. (Ziemba Decl. ¶ 4, Ex. 4.) Further, the URS characterization of "elevated" concentrations referenced in Plaintiffs' response does not relate to the samples taken on Mr. Uttech's property but related to samples taken on Madison-Kipp's property. (Dkt. #167-6 at PLF008277-008279.) Plaintiffs' response does not contest the evidence or provide any different evidence. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

78. According to the January 3, 2003 letter to Peter Uttech, the PCE concentration in the soil sample from 162 South Marquette was 0.221 ppm. (Bianchi Dec. ¶ 117, Ex. 115)

RESPONSE: Not disputed, although the letter is actually dated January 7, 2003.

REPLY: The Finding is undisputed.

79. The December 4, 2002 soil sample results were provided to Dr. Henry Nehls-Lowe of the Wisconsin Department of Health Services by Dino Tsoris at WDNR on April 3, 2003. (Bianchi Dec. ¶ 113, Ex. 111)

RESPONSE: Disputed. The soil sample results were from November of 2002. (Doc. 167 – 8, 9, 10)

REPLY: The wording of M-KPFOF ¶ 79 could have more clearly stated that the November 2002 soil samples, transmitted to WDNR via a memo dated December 4,

2002, were provided to Dr. Henry Nehls-Lowe of the Wisconsin Department of Health Services on April 3, 2003. Regardless, the cited document supports the proposed finding. Plaintiffs' response does not contest the evidence or provide any different evidence. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

80. In February 2003, three additional monitoring wells (MW-5D2, MW-6S and MW-6D) were installed at multiple depths at the site as reported to WDNR by letter from URS dated April 17, 2003. (Bianchi Dec. ¶ 91, Ex. 89)

RESPONSE: Disputed. The cited reference contains analytical test results from 2004 and 2005, not a URS letter dated April 17, 2003. (Doc. 164 – 17)

REPLY: The cited document supports the proposed finding. Specifically, the cited document is a URS letter dated April 17, 2003 that references three wells of multiple depths installed in February 2003 and reports the groundwater monitoring results related to the same. (Dkt. # 164-17 at PLF001388.) Plaintiffs' response does not contest the evidence or provide any different evidence. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

81. On June 3, 2003 soil sampling was performed by URS at 150, 154 and 162 South Marquette. (Bianchi Dec. ¶ 126, Ex. 124; Bianchi Dec. ¶ 127, Ex. 125; Bianchi Dec. ¶ 128, Ex. 126)

RESPONSE: Not disputed.

82. According to July 8, 2003 URS letters to homeowners of 150, 154 and 162 South Marquette, the United States Environmental Protection Agency's ("USEPA") risk-based residential residual contaminant level ("RCL") for PCE in soil was 32 ppm. (Bianchi Dec. ¶ 126, Ex. 124; Bianchi Dec. ¶ 127, Ex. 125; Bianchi Dec. ¶ 128, Ex. 126)

RESPONSE: Disputed. There is no reference to a residual contaminant level in the cited references. (Doc. 167 – 19, 20, 21)

REPLY: M-KPFOF ¶ 82 should have also referenced a series of December 4, 2003 letters to support the proposed finding regarding USEPA's risk-based residential residual contaminant level for PCE in soil. (Dkt. #167-18 at PLF010738, PLF010741 & PLF010743.)

83. By letter dated July 8, 2003, URS informed Deanna Schneider of 150 South Marquette that PCE was detected at her property at 0.11 ppm at two (2) feet of depth, below the USEPA regional risk-based residential RCL for PCE in soil of 32 ppm. (Bianchi Dec. ¶ 126, Ex. 124)

RESPONSE: Disputed. There is no reference to a residual contaminant level in the cited reference. (Doc. 167 – 19)

REPLY: See reply to M-KPFOF ¶ 82, above.

84. By letter dated July 8, 2003, URS informed Barbara Brownstorm of 154 South Marquette that PCE was detected at her property at 0.272 ppm at two (2) feet of depth, below the USEPA regional risk-based residential RCL for PCE in soil of 32 ppm. (Bianchi Dec. ¶ 127, Ex. 125)

RESPONSE: Disputed. There is no reference to a residual contaminant level in the cited reference. (Doc. 167 – 20)

REPLY: See reply to M-KPFOF ¶ 82, above.

85. By letter dated July 8, 2003, URS informed Peter Uttech of 162 South Marquette that PCE was detected at his property at 2.68 ppm at two (2) feet of depth, below the USEPA regional risk-based residential RCL for PCE in soil of 32 ppm. (Bianchi Dec. ¶ 128, Ex. 126)

RESPONSE: Disputed. There is no reference to a residual contaminant level in the cited reference. (Doc. 167 – 21)

REPLY: See reply to M-KPFOF ¶ 82, above.

86. URS conducted soil sampling again at 150, 154 and 162 South Marquette in July 2003. (Bianchi Dec. ¶ 125, Ex. 123)

RESPONSE: Not disputed.

87. By letter dated October 6, 2003, URS provided to WDNR results from the July 2003 sampling efforts and draft letters to 150, 154 and 162 South Marquette for WDNR's review. (Bianchi Dec. ¶ 114, Ex. 112)

RESPONSE: Disputed. There are no sampling results attached to the cited reference and there are no draft letters to the property owners at 150, 154 and 162 South Marquette. (Doc. 167 – 7)

REPLY: The proposed finding is not disputed. A December 4, 2003 URS letter to Madison-Kipp also references incorporating the comments of Mr. Dino Tsoris of the WDNR into the December 4, 2003 letters to the homeowners of 150, 154 and 162 South Marquette regarding the July 2003 sampling efforts. (Dkt. #167-18 at PLF010736.)

88. On October 13, 2002, WDNR faxed the October 6, 2003 URS letter to Henry Nehls-Lowe of the [Wisconsin Department of Health Services] for Nehls-Lowe's review and comment. (Bianchi Dec. ¶ 114, Ex. 112)

RESPONSE: Disputed. A fax was sent to the attention of Henry Nehls-Lowe in October of 2003. Additionally, Plaintiffs dispute this has any materiality to the issues raised in the summary judgment motion. (Doc. 167 – 7)

REPLY: Plaintiffs' response correctly notes that the cited document is a fax dated October 13, 2003 – not October 12, 2002. Besides this inadvertent typographical error, the cited document supports the proposed finding. Plaintiffs' response does not contest the evidence or provide any different evidence. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

89. By letters dated December 4, 2003, URS informed the homeowners of 150, 154 and 162 South Marquette that the WDNR, Wisconsin Department of Health and City of Madison's Health Department concluded the soil sampling results "[did] not pose a public health concern." (Bianchi Dec. ¶ 125, Ex. 123)

RESPONSE: Disputed. In a letter dated June 23, 2011 from DNR to Kipp, DNR requests that soils at 150, 154 and 162 South Marquette be excavated or remediated despite concentrations not exceeding current health based direct contact guidelines because "given the exposure scenario of children on very small residential lots the

Department believes remediation and elimination of any level of direct contact is justified." (Doc. 195 – 33)

REPLY: The cited document supports the proposed finding. Plaintiffs' response does not contest the evidence or provide any different evidence. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered. The June 23, 2011 letter referenced in Plaintiffs' response relates to sampling completed in June 2011 when WDNR recognized that the "detected concentrations [on 150, 154 and 162 South Marquette] do not exceed current health based direct contact guidelines." The June 2011 results confirm the December 4, 2003 correspondence.

90. By letter dated December 4, 2003, URS informed Deanna Schneider of 150 South Marquette that the highest concentration of PCE detected in soil samples collected from her property had a concentration of 0.166 ppm, below the USEPA regional risk-based residential RCL for PCE in soil of 32 ppm. (Bianchi Dec. ¶ 125, Ex. 123)

RESPONSE: Plaintiffs do not dispute the letter was sent, but do dispute the characterization of the information in the letter as it pertains to risk. (Doc. 195 – 33)

REPLY: The cited document supports the proposed finding. Plaintiffs' response does not contest the evidence or provide any different evidence. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

91. By letter dated December 4, 2003, URS informed Barbara Brownstorm of 154 South Marquette that the highest concentration of PCE detected in soil samples collected from her property had a concentration of 0.272 ppm, below the USEPA regional risk-based residential RCL for PCE in soil of 32 ppm. (Bianchi Dec. ¶ 125, Ex. 123)

RESPONSE: Plaintiffs do not dispute the letter was sent, but do dispute the characterization of the information in the letter as it pertains to risk. (Doc. 195 – 33)

REPLY: The cited document supports the proposed finding. Plaintiffs' response does not contest the evidence or provide any different evidence. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

92. By letter dated December 4, 2003, URS informed Peter Uttech of 162 South Marquette that the [highest concentration of PCE detected in soil samples collected from his property had a concentration of 0.272 ppm, below the USEPA regional risk-based residential RCL for PCE in soil of 32 ppm. (Bianchi Dec. ¶ 125, Ex. 123)

RESPONSE: Disputed. The concentrations of PCE found in soil at 162 South Marquette is inaccurate. (Doc. 167 – 18) Plaintiffs additionally dispute the characterization of the information as it pertains to risk. (Doc. 195 – 33)

REPLY: Plaintiffs' response correctly identifies a typographical error. The highest concentration of PCE detected in soil samples at 162 South Marquette was 2.68 ppm, "well below the USEPA risk screening concentration" [of 32 ppm]." (*See* dkt. #167-18, PLF010741.)

93. Madison-Kipp's 2003 groundwater sampling efforts were summarized in an April 12, 2004 report to WDNR by its consultant, RSV. (Bianchi Dec. ¶ 92, Ex. 90)

RESPONSE: Not disputed.

94. As of the April 12, 2004 report, the groundwater monitoring network consisted of 14 wells at 6 locations. (Bianchi Dec. ¶ 92, Ex. 90)

RESPONSE: Not disputed.

95. In a May 7, 2004 letter from WDNR to Madison-Kipp, WDNR requested monitoring of soil vapor on the property boundary to assess migration of vapors onto adjacent property. (Bianchi Dec. ¶ 108, Ex. 106)

RESPONSE: Disputed. According to the May 7, 2004 letter, soil gas probes will be installed to evaluate the potential for PCE vapor gas in the vadose zone. There is no mention of the location of these gas probes. (Doc. 167 – 1)

REPLY: The cited document supports the proposed finding. Plaintiffs' response does not contest the evidence or provide any different evidence. The location of the gas probes are identified in Dkt. #163-33 at PLF007328 ("Four soil vapor-monitoring wells will be installed along the eastern property line of the Madison-Kipp facility"). Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

96. According to the May 7, 2004 letter, representatives of Madison-Kipp and WDNR met on April 27, 2004 to discuss the status of the PCE soil and groundwater investigation. (Bianchi Dec. ¶ 108, Ex. 106)

RESPONSE: Not disputed.

97. By letter dated June 21, 2004, RSV submitted a Proposal and Remedial Options Analysis for Soil and Groundwater Remediation to WDNR. (Bianchi Dec. ¶ 118, Ex. 116)

RESPONSE: Not disputed.

98. The June 21, 2004 submittal recommended chemical oxidation for in-situ soil treatment. (Bianchi Dec. ¶ 118, Ex. 116)

RESPONSE: Plaintiffs do not dispute that the letter recommended chemical oxidation, but do dispute the letter's conclusion that the extent of impacted soil and groundwater has been determined. (Doc. 190 at pp. 120-121, 160).

REPLY: The cited document supports the proposed finding. Plaintiffs' response does not contest the evidence or provide any different evidence. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

99. By letter dated July 21, 2004, WDNR approved the conceptual remedial action options summarized in Madison-Kipp's June 21, 2004 submittal. (Bianchi Dec. ¶ 107, Ex. 105)

RESPONSE: Plaintiffs do not dispute that WDNR approved remedial action options with many conditions, but dispute the materiality of this reference to the summary judgment motion.

REPLY: The Finding is undisputed.

100. By a letter to WDNR dated October 8, 2004, RSV proposed additional soil sampling, a pilot test for soil injection on Madison-Kipp property, treatment of one off-site soil area using soil injection, and soil vapor probe construction and sampling. (Bianchi Dec. ¶ 124, Ex. 122)

RESPONSE: Not disputed.

101. By email correspondence dated October 15, 2004, WDNR communicated its approval of Madison-Kipp's submittal dated October 8, 2004 with certain modifications. (Bianchi Dec. ¶ 123, Ex. 121)

RESPONSE: Not disputed.

102. 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. (Bianchi Dec. ¶ 90, Ex. 88)

RESPONSE: Plaintiffs do not dispute that the vapor monitoring probes referenced were installed, and testing showed elevated concentrations of VOCs and petroleum distillates and naphtha.

REPLY: The Finding is undisputed.

103. RSV conducted a pilot test in December 2004 for remediation of VOC-impacted soils in the loading dock area of Madison-Kipp's parking lot using Cool-Ox, an oxidizing agent similar to BiOx. (Bianchi Dec. ¶ 90, Ex. 88)

RESPONSE: Disputed. The reference cited does not mention the use of Cool-Ox for a pilot test in December of 2004. (Doc. 164 – 15, 16)

REPLY: The cited document supports the proposed finding. Specifically, the cited document notes that "A soil remediation pilot study by means of reagent injection was completed on December 4 and 5, 2004. Reagent was injected into the upper 10 feet

of strata in the area shown …" (Dkt. #164-15.) Cool-Ox is also fully explained at Bianchi Declaration ¶ 89, Ex. 87 (Dkt. #164-13 at PLF000775). Plaintiffs' response does not contest the evidence or provide any different evidence. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

104. A reagent treatment was injected into shallow soils at multiple locations in the loading dock area of Madison-Kipp's parking lot as well as twelve (12) off-site locations, including an off-site area in the backyard of 162 South Marquette. ("Bianchi Dec. ¶ 89, Ex. 87; Bianchi Dec. ¶ 110, Ex. 108)

RESPONSE: Disputed. The reference cited does not mention off-site injection locations. (Doc. 164 – 13, 14; Doc. 167 – 3)

REPLY: The correct factual citation for M-KPFOF ¶ 104 is Bianchi Declaration ¶ 90, Ex. 88. (Dkt. #164-15) ("Reagent was injected into the upper 10 feet of strata in the area shown on Figure 4, which is also the area in which the highest off-site concentrations of CVOCs have been detected in soil samples. A grid of 12 nodes were established in that area, and 25 gallons of reagent was injected at each node.").) Plaintiffs' response does not contest the evidence or provide any different evidence. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

105. RSV provided an annual soil and groundwater report to WDNR by letter dated March 25, 2005. (Bianchi Dec. ¶ 90, Ex. 88)

RESPONSE: Not disputed.

106. The March 25, 2005 annual report was also provided to homeowner Deanna Schneider by letter dated May 11, 2005. (Bianchi Dec. ¶ 110, Ex. 108)

RESPONSE: Plaintiffs do not dispute that a letter addressed to Deanna Schneider is referenced, but do dispute the letter is material to the summary judgment motion.

REPLY: The Finding is undisputed.

107. WDNR observed Madison-Kipp's installation of soil borings on the east side of the facility, as noted in a May 20, 2005 WDNR memo to file. (Bianchi Dec. ¶ 104, Ex. 102)

RESPONSE: Not disputed.

108. In August 2005, Cool-Ox was also injected into soils under the loading dock driveway. (Bianchi Dec. ¶ 89, Ex. 87)

RESPONSE: Plaintiffs do not dispute the reference, but do dispute its materiality to the summary judgment motion.

REPLY: The Finding is undisputed.

109. Confirmation soil sampling taken in October, 2005 indicated that the in-situ Cool-Ox treatment reduced PCE concentrations in soil. (Bianchi Dec. ¶ 122, Ex. 120)

RESPONSE: Disputed. The referenced cite does not mention the in-situ Cool-Ox treatment. (Doc. 167 – 15)

REPLY: The cited document supports the proposed finding. (Dkt. #167-15 at PLF010691 ("Additional soil vapor sampling was conducted in October 2005 after the soil remediation was completed in August 2005. The soil vapor concentrations of PCE detected were dramatically reduced from the preceding analysis conducted in July 2005).) Further, the Cool-Ox treatment referenced in M-KPFOF ¶ 109 is referenced in M-KPFOF ¶ 108, above, which Plaintiffs do not dispute. Plaintiffs' response does not contest the evidence or provide any different evidence. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

110. As documented in a November 14, 2005 memo to file, WDNR considered Madison-Kipp's soil remediation efforts to have been "very effective in cleanup

of PCE contaminants on the east side of the property." (Bianchi Dec. ¶ 122, Ex. 120)

RESPONSE: Disputed. High levels of PCE contamination continued to be found on the east side of the Kipp property. (Doc. 195 – 13)

REPLY: The cited document supports the proposed finding. Plaintiffs' response does not contest the WDNR's statement regarding Madison-Kipp's soil remediation efforts being "very effective in cleanup of PCE contaminants on the east side of the property." Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

111. In a February 7, 2012 "Frequently Asked Questions" document on the WDNR webpage regarding Madison-Kipp, WDNR noted that:

> The soil investigations conducted to date have identified three primary areas of soil contamination at the Kipp property: (1) along the northeastern property boundary bordering the bike path, and in 2 places along on the eastern side of the building, (2) in the location of monitoring well 3 (in the middle of the property along the east side) and (3) in the location of monitoring well 5 (bordering the backyards of several Marquette Street properties)…
>
> Between 1998 and 2005, all three areas of soil contamination were remediated in-place by injecting a chemical into the soil to break down the contamination (known as in-situ oxidation). This treatment method reduced soil tetrachloroethene (PCE) contamination levels from the several hundred parts per million (ppm) to less than 5 ppm, and in some instances to below 1 ppm.

(Bianchi Dec. ¶ 140, Ex. 138)

RESPONSE: Disputed. High levels of PCE contamination continued to be found in these areas. (Doc. 195 – 13)

REPLY: The cited document supports the proposed finding. Plaintiffs' response does not contest WDNR's statement regarding Madison-Kipp's soil investigation and remediation efforts. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

112. Madison-Kipp submitted its annual soil and groundwater report for 2005 to WDNR by RSV letter dated March 23, 2006. (Bianchi Dec. ¶ 89, Ex. 87)

RESPONSE: Not disputed.

113. Madison-Kipp submitted its annual soil and groundwater report for 2006 to WDNR by RSV letter dated February 7, 2007. (Bianchi Dec. ¶ 88, Ex. 86)

RESPONSE: Not disputed.

114. By letters dated November 11, 2004, RSV informed the owners of 150, 154 and 162 South Marquette of the results of soil samples collected October 25, 2004. (Bianchi Dec. ¶ 105, Ex. 103; Bianchi Dec. ¶ 106, Ex. 104; Bianchi Dec. ¶ 109, Ex. 107)

RESPONSE: Disputed. The documents cited do not establish that soil samples were collected on October 25, 2004, and results of sampling from October of 2004 were not discussed in the letters. (Doc. 164 – 31, 32; Doc. 167 – 2)

REPLY: The cited document supports the proposed finding. The letter to 162 South Marquette (Dkt. #164-32) inadvertently omitted the referenced Figure; the complete letter supports the finding. (Ziemba Decl. ¶5, Ex. 5.) The letters referred to the attached Figure 1 and summarized the results. (Dkt. # 164-31 at PLF007309; dkt. #164-32 at PLF007314 and dkt. #167-2 at PLF007681).) Figure 1 to each of the letters contains the soil data, as well as the October 25, 2004 collection date. (Dkt. #164-31 at PLF007311; dkt. #167-2 at PLF007683 & Ziemba Decl. ¶ 5, Ex. 5 at PLF008269.)

Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

115. As noted in the November 11, 2004 letters, USEPA revised its non-industrial RCL for PCE from 32 ppm (also expressed as 32 mg/kg) to 1.23 ppm (also described as 1.23 mg/kg). (Bianchi Dec. ¶ 105, Ex. 103; Bianchi Dec. ¶ 106, Ex. 104; Bianchi Dec. ¶ 109, Ex. 107)

RESPONSE: Disputed. The documents cited reference that Kipp's contractor, RSV, not USEPA, calculated an RCL of 1.23 mg/kg. (Doc. 164 – 31, 32; Doc. 167 – 2)

REPLY: RSV did calculate the non-industrial RCL for PCE based on the soil screening calculation website established by the USEPA. The cited document supports the proposed finding. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

116. Of the samples collected at 150, 154 and 162 South Marquette on October 25, 2004, only one sample – at 162 South Marquette – exceeded the revised USEPA non-industrial RCL for PCE (2.68 ppm, also expressed as 2.68 mg/kg). (Bianchi Dec. ¶ 105, Ex. 103; Bianchi Dec. ¶ 106, Ex. 104; Bianchi Dec. ¶ 109, Ex. 107)

RESPONSE: Disputed. The documents cited do not establish that soil samples were collected on October 25, 2004, and results of sampling from October of 2004 were not discussed in the letters. (Doc. 164 – 31, 32; Doc. 167 – 2)

REPLY: See Reply to M-KPFOF ¶ 114, above.

117. In December 2004, a reagent treatment was also injected at twelve (12) off-site locations. (Bianchi Dec. ¶ 90, Ex. 88)

RESPONSE: Not disputed.

118. Also in December 2004, a reagent treatment was injected into shallow soils in the area of the exceedance at 162 South Marquette. (Bianchi Dec. ¶ 90, Ex. 88)

RESPONSE: Not disputed.

119. The owners of 150, 154 and 162 South Marquette were informed by letters from RSV dated November 9, 2006, that confirmatory sampling was conducted on

October 10, 2006 and VOCs were not detected above the detection limit at the three off-site residential properties. (Bianchi Dec. ¶ 111, Ex. 109; Meunier Dec. ¶ 6, Ex. 2; Meunier Dec. ¶ 7, Ex. 3)

RESPONSE: Plaintiffs do not dispute the cited letters contain the language referenced.

REPLY: The Finding is undisputed.

120. Soil vapor probes were installed at 150, 154 and 162 South Marquette in 2006. (Bianchi Dec. ¶ 122, Ex. 120; Dkt. #145 at A-18)

RESPONSE: Disputed. The document cited (Ex. 120) does not establish that vapor probes were installed at 150, 154 and 162 South Marquette in 2006. (Doc. 167 – 15)

REPLY: The cited document supports the proposed finding. The document cited includes several references to the installation of the vapor probes at 150, 154 and 162 South Marquette in 2006. Further, the Plaintiffs do not dispute in their response to M-KPFOF ¶ 121, below, that the soil vapor probes at off-site properties were sampled in October 2006. It goes without saying that the soil vapor probes have to be installed before they are sampled, thereby confirming that such probes were installed in 2006. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

121. The soil vapor probes at off-site properties were sampled in October 2006, December 2006, and April 2007. (Bianchi Dec. ¶ 88, Ex. 86; Bianchi Dec. ¶ 103, Ex. 101)

RESPONSE: Not disputed.

122. According to the annual soil and groundwater report submitted by RSV, on behalf of Madison-Kipp, concentrations of VOCs were not detected in soil vapor probes above detection levels at 150, 154 and 162 South Marquette from October

2006 to April 2007 with the exception of one December 2006 sample from 150 South Marquette. (Bianchi Dec. ¶ 88, Ex. 86)

RESPONSE: Plaintiffs do not dispute the tests were reported, but do dispute the materiality to the motion for summary judgment.

REPLY: The Finding is undisputed and it is material to the investigation conducted by Madison-Kipp.

123. By letter dated January 2, 2007, RSV prepared a pilot test work plan for an ozone sparge system for groundwater remediation. (Meunier Dec. ¶ 10, Ex. 6)

RESPONSE: Not disputed.

124. WDNR approved the pilot test for the ozone sparge system by letter dated January 19, 2007. (Bianchi Dec. ¶ 122, Ex. 120)

RESPONSE: Not disputed.

125. RSV performed the ozone sparge pilot test in April 2007 and reported the results to WDNR by letter dated June 6, 2007. (Bianchi Dec. ¶ 103, Ex. 101)

RESPONSE: Plaintiffs do not dispute that RSV performed the ozone sparge pilot test in 2007; the results of which had minimal, if any, impact on VOC concentrations in groundwater beneath the site. (Doc. 167 – 31, 32, 33, 34)

REPLY: The Finding is undisputed.

126. By June, 2008, an ozone injection/sparge system, including three injection wells, was installed in the eastern portion of the site. (Bianchi Dec. ¶ 138, Ex. 136)

RESPONSE: Not disputed.

127. By letter dated February 11, 2009, RSV submitted a soil and groundwater report to WDNR that summarized work completed in 2007 and 2008. (Bianchi Dec. ¶ 138, Ex. 136)

RESPONSE: Not disputed.

128. Quarterly soil vapor sampling continued at off-site residences in 2006, 2007, 2008, and 2009. (Bianchi Dec. ¶ 88, Ex. 86; Bianchi Dec. ¶ 138, Ex. 136; Meunier Dec. ¶ 35, Ex. 31; Bianchi Dec. ¶ 112, Ex. 110)

RESPONSE: Disputed. The reference cited does not demonstrate quarterly testing for 2006 and 2009. (Doc. 152 – 41, 42)

REPLY: The cited document supports the proposed finding. Further, the document cited in Plaintiffs' response also supports the finding. Quarterly sampling of the off-site soil vapor probes began in October 2006 (M-KPFOF ¶ 121) and quarterly sampling continued through 2009. (Dkt. #152-41 at MKDNR003255.) Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

129. By letter dated February 3, 2010, RJN submitted a soil and groundwater report to WDNR that provided a summary of groundwater and soil vapor monitoring for 2009. (Bianchi Dec. ¶ 121, Ex. 119)

RESPONSE: Not disputed.

130. In November 2010, RJN conducted sub-slab soil vapor sampling at 150, 154 and 162 South Marquette. (Meunier Dec. ¶ 8, Ex. 4)

RESPONSE: Disputed. The reference cited does not demonstrate sub-slab soil vapor sampling at 150, 154 and 162 South Marquette, in November 2010. (Doc. 152 – 4)

REPLY: Sub-slab soil vapor sampling was conducted at 150, 154 and 162 South Marquette. (*See* Ziemba Decl. ¶8, Ex. 8 at RJN003485.)

131. In February 2011, RJN collected samples of sub-slab soil vapor and indoor air at 150, 154 and 162 South Marquette. (Meunier Dec. ¶ 8, Ex. 4)

RESPONSE: Not disputed.

132. The February 2011 sampling detected PCE in the indoor air at one property (0.668 ppbv at 154 South Marquette) and subslab soil vapors ranged from 5.78 ppbv (150 South Marquette) to 470 ppb (154 South Marquette). (Meunier Dec. ¶ 8, Ex. 4)

RESPONSE: Disputed. Sub-slab soil vapor measured in February of 2011 at 150, 154 and 162 South Marquette ranged from 31 ppbv (162 South Marquette) to 470 ppbv (154 South Marquette). (Doc. 152 – 4 at MK002290)

REPLY: Plaintiffs' response correctly indicates that the sub-slab soil vapor measurements from 150, 154 and 162 South Marquette in February 2011 were 31 ppbv (162 South Marquette), 108 ppbv (150 South Marquette) and 470 ppbv (154 South Marquette).

133. In June 2011, soil vapor probes were installed by RJN at 142 and 202 South Marquette to evaluate soil vapor. (Meunier Dec. ¶ 8, Ex. 4)

RESPONSE: Disputed. "The wells installed in June 2011 were to verify that the extent of the presence of soil vapor has been defined." (Doc. 152 – 4 at MK002287)

REPLY: The cited document supports the proposed finding and plaintiffs' response does not present a genuine dispute. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

134. Soil vapor samples were collected from 142, 150, 154 and 202 South Marquette (the homeowner of 162 South Marquette had previously removed the vapor probe located on his property). (Meunier Dec. ¶ 8, Ex. 4)

RESPONSE: Not disputed.

135. As requested by WDNR, in the Spring of 2012 ARCADIS, on behalf of Madison-Kipp collected sub-slab vapor and indoor air samples from nine (9) residences near Madison-Kipp. (Kubacki Dec. ¶ 10, Ex. 9)

RESPONSE: Not disputed.

136. Access was not provided to two (2) residences that WDNR requested Madison-Kipp conduct sampling at – 106 and 138 South Marquette. (same as above) (Kubacki Dec. ¶ 10, Ex. 9)

RESPONSE: Disputed. Access has been provided for both 106 and 138 South Marquette. (Doc. 195 – 36, 37)

REPLY: At the time of the Spring 2012 sampling referenced in M-KPFOF ¶ 135, access was not provided to 106 and 138 South Marquette. (Dkt. #155-11 at ARCADIS007663 ("Despite repeated requests, the home owners of 106 South Marquette and 138 South Marquette Street denied access to perform vapor sampling activities.").)

137. ARCADIS provided standard operating procedures for its sampling efforts to WDNR and WDNR approved these SOPs via electronic correspondence on February 21, 2012. (Kubacki Dec. ¶ 10, Ex. 9)

RESPONSE: Not disputed.

138. A building survey and chemical inventory was also performed at each residence. (Kubacki Dec. ¶ 10, Ex. 9)

RESPONSE: Not disputed.

139. Two sub-slab vapor probes were installed in the basement of each of the 9 residences and two indoor air samples (one from the basement, one from the first floor of the residence) were taken from each of the 9 residences. (Kubacki Dec. ¶ 10, Ex. 9)

RESPONSE: Not disputed.

140. The indoor air and sub-slab vapor samples were analyzed for five (5) VOCs – PCE, TCE, cis-1,2-dichloroethene, trans-1,2-dichloroethene and vinyl chloride, as requested by WDNR. (Kubacki Dec. ¶ 10, Ex. 9)

RESPONSE: Plaintiffs do not dispute that samples were analyzed for five VOCs, but the reference cited does not indicate if this was requested by WDNR.

REPLY: The cited document supports the proposed finding and plaintiffs' response does not present a genuine dispute. (Dkt. #155-11 at ARCADIS007666 (The five VOCs were outlined in the Draft Scope of Work prepared with WDNR).) Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

141. The indoor air results were compared to the Wisconsin residential vapor action levels for indoor air and the sub-slab vapor results were compared to calculated screening levels for sub-slab vapor to indoor air in accordance with the guidelines presented in WDNR's Addressing Vapor Intrusion at Remediation and Redevelopment Sites in Wisconsin (dated December 2010). (Kubacki Dec. ¶ 10, Ex. 9)

RESPONSE: Not disputed.

142. The action levels and calculated screening levels used in analyzing the data collected in the Spring 2012 are based on the U.S. Environmental Protection Agency Residential Air Screening levels that represent health-protective concentrations that an individual can be exposed to for 30 years for 24 hours a day. (Kubacki Dec. ¶ 10, Ex. 9)

RESPONSE: Disputed. The measured levels of contaminants found in the Class Area present Class Members with an imminent and substantial long term health danger. (Doc. 186 at p. 2)

REPLY: The cited document supports the proposed finding and plaintiffs' response does not present a genuine dispute. Further, Plaintiffs' response relies on the report of Dr. David Ozonoff, and his 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. Therefore, the proposed finding is not disputed with any admissible evidence and, as a result, should be entered.

143. As summarized in the May 7, 2012 ARCADIS letter report, none of the VOC detections in the indoor air or sub-slab vapor samples exceeded the Wisconsin residential vapor action levels or calculated residential screening levels. (Kubacki Dec. ¶ 10, Ex. 9)

RESPONSE: Plaintiffs do not dispute the document cited identifies some test results, but dispute any inference that the VOC detections are not a threat to Class Members. (Doc. 195 – 1 at p. 3, 31, 32, 34)

REPLY: The Finding is undisputed.

144. Based on the U.S. Environmental Protection Agency's final Toxicological Assessment for Tetrachloroethylene (Perchloroethylene) in February 2012, WDNR set a Vapor Action Level of 6.2 parts per billion by volume (ppbv) for indoor air. (Dkt. #146 at 6)

RESPONSE: Disputed. The document cited is not a statement from WDNR. (Doc. 146 at p. 6)

REPLY: The cited document supports the proposed finding and Plaintiffs' response does not present a genuine dispute. The cited document provides a link to a WDNR document that defines the state's Vapor Action Level for Tetrachloroethylene to be 6.2 parts per billion by volume (ppbv) for indoor air. (Dkt. # 146 at 6.) (http://dnr.wi.gov/topic/Brownfields/documents/vapor/vapor-quick.pdf). Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

145. Based on the attenuation factors defined by the WDNR, the WDNR set a PCE Vapor Risk Screening Level of 62 ppbv for sub-slab soil gas after February 2012. (Dkt. #146 at 6)

RESPONSE: Disputed. The document cited is not a statement from WDNR. (Doc. 146 at p. 6)

REPLY: See reply to M-KPFOF ¶ 144, above. The cited document supports the proposed finding and does not present a genuine dispute. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

146. Results of indoor air sampling by ARCADIS at 102 South Marquette were: <0.033 ppbv (basement) and <0.033 ppbv (1st floor) for PCE on March 16, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

147. Results of indoor air sampling by WDNR at 102 South Marquette was <0.085*IS for PCE on October 15, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

148. Results of sub-slab sampling by ARCADIS at 102 South Marquette were 0.96 ppbv and 0.18 ppbv for PCE on April 13, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

149. Result of sub-slab sampling by WDNR at 102 South Marquette was 2.7*IS for PCE on October 15, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

150. Results of indoor air sampling by ARCADIS at 106 South Marquette was 0.061 ppbv (basement) and 0.045 ppbv (1st floor) for PCE on May 11, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

151. Results of sub-slab sampling by ARCADIS at 106 South Marquette were 0.52 ppbv and 2.0 ppbv for PCE on May 10, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

152. Results of indoor air sampling by ARCADIS at 110 South Marquette were 0.060 ppbv (basement) and 0.060 ppbv (1st floor) for PCE on March 15, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

153. Results of indoor air sampling by WDNR at 110 South Marquette was <0.085*IS for PCE on October 1, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

154. Results of sub-slab sampling by ARCADIS at 110 South Marquette were 0.28 ppbv and 1.5 ppbv for PCE on March 16, 2012 and March 17, 2012, respectively. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

155. Results of sub-slab sampling by WDNR at 110 South Marquette were 1.5*IS ppbv for PCE on October 1, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

156. Results of indoor air sampling by ARCADIS at 114 South Marquette were 0.084 ppbv (basement) and 0.092 ppbv (1st floor) for PCE on March 29, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

157. Results of sub-slab sampling by ARCADIS at 114 South Marquette were 0.50 ppbv and 1.7 ppbv for PCE on March 29. 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

158. Results of indoor air sampling by ARCADIS at 118 South Marquette were 0.14 ppbv (basement) and 0.061 ppbv (1st floor) for PCE on March 13, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

159. Results of indoor air sampling by WDNR at 118 South Marquette were 0.318 ppbv for PCE on September 17, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

160. Results of sub-slab sampling by ARCADIS at 118 South Marquette were 0.32 ppbv and 1.4 ppbv for PCE on March 13, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

161. Results of sub-slab sampling by WDNR at 118 South Marquette were 2.34*IS ppbv for PCE on September 17, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

162. Results of indoor air sampling by ARCADIS at 126 South Marquette were 0.046 ppbv (basement) and 0.045 ppbv (1st floor) for PCE on March 15, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

163. Results of sub-slab sampling by ARCADIS at 126 South Marquette were 0.79 ppbv and 5.8 ppbv for PCE on March 16, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

164. Results of indoor air sampling by ARCADIS at 128 South Marquette were <0.033 ppbv (basement) and <0.038 ppbv (1st floor) for PCE on March 13, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

165. Results of indoor air sampling by WDNR at 128 South Marquette were <0.085 for PCE on September 17, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

166. Results of sub-slab sampling by ARCADIS at 128 South Marquette were 0.18 ppbv and <0.15 ppbv for PCE on March 14, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

167. Results of sub-slab sampling by WDNR at 128 South Marquette were 0.407 ppbv for PCE on September 17, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

168. Results of indoor air sampling by ARCADIS at 130 South Marquette were 0.036 ppbv (basement) and <0.043 ppbv (1st floor) for PCE on March 14, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

169. Results of indoor air sampling by WDNR at 130 South Marquette were <0.085*IS for PCE on October 1, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

170. Results of sub-slab sampling by ARCADIS at 130 South Marquette were 0.46 ppbv and 2.4 ppbv for PCE on March 14, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

171. Results for sub-slab sampling by WDNR at 130 South Marquette were 2.0*IS ppbv for PCE on October 1, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

172. Results of indoor air sampling by ARCADIS at 134 South Marquette were 0.14 ppbv (basement) and 0.035 ppbv (1st floor) for PCE on March 15, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

173. Results of sub-slab sampling by ARCADIS at 134 South Marquette were 1.6 ppbv and 6.2 ppbv for PCE on March 16, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

174. Results of indoor air sampling by WDNR at 138 South Marquette were <0.085 ppbv*IS for PCE on October 1, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

175. Results of sub-slab sampling by WDNR at 138 South Marquette were 4.1*IS ppbv for PCE on October 1, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Plaintiffs do not dispute that Kipp's contractor and retained expert, Arcadis, reported these numbers. For the sake of completeness and consistency, Arcadis reports sub-slab detections of PCE of 5.5 ppbv and 1.5 ppbv on July 27, 2012. (Doc. 155 – 41)

REPLY: The Finding is undisputed. The cited document supports the proposed finding. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

176. Results of indoor air sampling by ARCADIS at 142 South Marquette were <0.035 ppbv (basement) and <0.036 ppbv (1st floor) for PCE on March 14, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

177. Results of sub-slab sampling by ARCADIS at 142 South Marquette were 1.4 ppbv and 0.52 ppbv for PCE on March 14, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

178. Results of indoor air sampling by WDNR at 146 South Marquette was <0.085*IS ppbv for PCE on May 17, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Disputed. Results of indoor air sampling by WDNR at 146 South Marquette for PCE on May 17, 2012 are not reported. (Doc. 155 – 41)

REPLY: WDNR's indoor air testing result for 146 South Marquette is in WDNR's December 2012 "Review of Vapor Sampling Results for the Neighborhood Surrounding the Madison Kipp Corporation" report. (*See* dkt. #167-35, Figure 5 at 12.) The result is "ND" for "Non-Detect".

179. Results of indoor air sampling by ARCADIS at 166 South Marquette were <0.14 ppbv for PCE on April 26, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

180. Results of indoor air sampling by WDNR at 166 South Marquette were 0.170* ppbv for PCE on April 26, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

181. Results of indoor air sampling by ARCADIS at 202 South Marquette were <0.18 ppbv for PCE on July 3, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

182. Results of indoor air sampling by WDNR at 202 South Marquette were <0.085*IS ppbv for PCE on April 26, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

183. Results of indoor air sampling by WDNR at 202 South Marquette were <0.085 ppbv for PCE on July 2, 2012 (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

184. Results of sub-slab sampling by ARCADIS at 202 South Marquette were 5.6 ppbv for PCE on July 2, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

185. Results of sub-slab sampling by WDNR at 202 South Marquette were 4.46 ppbv for PCE on April 26, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

186. Results of sub-slab sampling by WDNR at 202 South Marquette were 7.44 ppbv for PCE on July 2, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

187. Results of indoor air sampling by WDNR at 206 South Marquette were <0.085 ppbv for PCE on April 26, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

188. Results of indoor air sampling by WDNR at 206 South Marquette were 0.483 ppbv for PCE on July 5, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

189. Results of sub-slab sampling by WDNR at 206 South Marquette were 0.465 ppbv for PCE on April 26, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

190. Results of sub-slab sampling by WDNR at 206 South Marquette were 0.678 ppbv for July 5, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

191. Results of indoor air sampling by ARCADIS at 210 South Marquette were <0.034 ppbv for PCE on June 6, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

192. Results of indoor air sampling by WDNR at 210 South Marquette were <0.085 ppbv for PCE on June 6, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

193. Results of indoor air sampling by WDNR at 210 South Marquette were <0.085 ppbv for PCE on September 6, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

194. Results of sub-slab sampling by ARCADIS at 210 South Marquette were 0.69 ppbv for June 5, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

195. Results of sub-slab sampling by WDNR at 210 South Marquette were 1.50*IS ppbv for June 5, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

196. Results of sub-slab sampling by WDNR at 210 South Marquette were 1.22*IS ppbv for PCE on September 6, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

197. Results of indoor air sampling by ARCADIS at 218 South Marquette were <0.035 ppbv for PCE on July 3, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

198. Results of indoor air sampling by WDNR at 218 South Marquette were <0.085*IS ppbv for PCE on April 11, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

199. Results of indoor air sampling by WDNR at 218 South Marquette were <0.085 ppbv for PCE on July 2, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

200. Results of sub-slab sampling by ARCADIS at 218 South Marquette were 0.42 ppbv for PCE on July 2, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

201. Results of sub-slab sampling by WDNR at 218 South Marquette were 0.518*IS ppbv for PCE on April 11, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

202. Results of sub-slab sampling by WDNR at 218 South Marquette were 0.753 ppbv for PCE on July 5, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

203. Results of indoor air sampling by WDNR at 222 South Marquette were <0.085 ppbv for PCE on April 25, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

204. Results of indoor air sampling by WDNR at 222 South Marquette were <0.085 ppbv for PCE on August 1, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

205. Results of sub-slab sampling by WDNR at 222 South Marquette were 0.356*IS ppbv for PCE on April 25, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

206. Results for sub-slab sampling by WDNR at 222 South Marquette were 0.343*IS ppbv for PCE on August 1, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

207. Results of indoor air sampling by ARCADIS at 226 South Marquette were <0.034 ppbv for PCE on July 11, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

208. Results for indoor air sampling by WDNR at 226 South Marquette were <0.085 ppbv for PCE on July 10, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

209. Results for indoor air sampling by WDNR at 226 South Marquette were <0.085*IS ppbv for PCE on October 1, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

210. Results for sub-slab sampling by ARCADIS at 226 South Marquette were 0.45 ppbv for PCE on July 10, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

211. Results for sub-slab sampling by WDNR at 226 South Marquette were 0.415 ppbv for PCE on July 10, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

212. Results for sub-slab sampling by WDNR at 226 South Marquette were 1.1*IS ppbv for PCE on October 1, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

213. Results for indoor air sampling by WDNR at 233 Waubesa were 0.307*IS ppbv for PCE on April 12, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

214. Results for indoor air sampling by WDNR at 233 Waubesa were 0.376 ppbv for PCE on June 4, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

215. Results for sub-slab sampling by WDNR at 233 Waubesa were 0.502*IS ppbv for PCE on April 12, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Plaintiffs do not dispute that Kipp's contractor and retained expert, Arcadis, reported these numbers.

REPLY: The Finding is undisputed. The cited document supports the proposed finding. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

216. Results for sub-slab sampling by WDNR at 233 Waubesa were 1.45*IS ppbv for PCE on June 4, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

217. Results for indoor air sampling by WDNR at 241 Waubesa were <0.085*IS ppbv for PCE on April 11, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

218. Results for indoor air sampling by WDNR at 241 Waubesa were <0.085*IS ppbv for PCE on June 7, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

219. Results for sub-slab sampling by WDNR at 241 Waubesa were 2.67 ppbv for PCE on April 11, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

220. Results for sub-slab sampling by WDNR at 241 Waubesa were 4.01*IS ppbv for PCE on June 7, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

221. Results for indoor air sampling by WDNR at 245 Waubesa were 0.524 ppbv for PCE on May 17, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

222. Results for sub-slab sampling by WDNR at 245 Waubesa were 9.22*IS ppbv for PCE on May 17, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

223. Results for indoor air sampling by ARCADIS at 249 Waubesa were <0.034 ppbv for PCE on June 8, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

224. Results for indoor air sampling by WDNR at 249 Waubesa were <0.085 ppbv for PCE on April 25, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

225. Results for indoor air sampling by WDNR at 249 Waubesa were 5.88 ppbv for PCE on June 7, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

226. Results for sub-slab sampling by WDNR at 249 Waubesa were 3.47 ppbv for PCE on April 25, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

227. Results for sub-slab sampling by ARCADIS at 249 Waubesa were 3.2 ppbv for PCE on June 7, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

228. Results for sub-slab sampling by WDNR at 249 Waubesa for 5.99*IS ppbv for PCE on June 7, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

229. Results for indoor air sampling by ARCADIS at 249 Waubesa were <0.031 ppbv for PCE on January 11, 2013. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

230. Results for indoor air sampling by ARCADIS at 253 Waubesa were <0.037 ppbv for PCE on June 5, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

231. Results for indoor air sampling by WDNR at 253 Waubesa were 0.099*IS ppbv for PCE on April 12, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

232. Results for indoor air sampling by WDNR at 253 Waubesa were <0.085 ppbv for PCE on June 4, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

233. Results for sub-slab sampling by WDNR at 253 Waubesa were 4.90*IS ppbv for PCE on April 12, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

234. Results for sub-slab sampling by ARCADIS at 253 Waubesa were 3.6 ppbv for PCE on June 4, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

235. Results for sub-slab sampling by WDNR at 253 Waubesa were 5.60*IS ppbv for PCE on June 4, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

236. Results for indoor air sampling by WDNR at 257 Waubesa were 0.107*IS ppbv for PCE on April 12, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

237. Results for sub-slab sampling by WDNR at 257 Waubesa were 9.99*IS ppbv for PCE on April 12, 2012. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Not disputed.

238. In December 2012, WDNR released a report "Review of Vapor Sampling Results for the Neighborhood Surrounding the Madison Kipp Corporation" (PUB-RR-931) (this is available online, maybe produced as well). (Bianchi Dec. ¶ 139, Ex. 137)

RESPONSE: Not disputed.

239. The December 2012 WDNR report notes that "Indoor air and sub-slab vapors have been sampled by the [WDNR] and [Madison-Kipp] at 50 homes in the neighborhood surrounding the Madison-Kipp property." (Bianchi Dec. ¶ 139, Ex. 137)

RESPONSE: Not disputed.

240. The December 2012 WDNR report summarizes the 2012 WDNR-led investigation of the vapor intrusion risk in the South Marquette and Waubesa neighborhood surrounding Madison-Kipp and concluded that the investigation "[a]ll 47 homes evaluated were below the 2012, revised PCE health risk screening values for both sub-slab vapors and indoor air." (Bianchi Dec. ¶ 139, Ex. 137)

RESPONSE: Plaintiffs do not dispute that the statement cited is found in the report, but do dispute the inference that no risk to Class Members exist when the same report concludes that health risks do exist. (Doc. 167 – 35 at p. 8)

REPLY: The Finding is undisputed. Not only does the cited document support the proposed finding but the document cited in Plaintiffs' response does not support the premise that Plaintiffs assert. Therefore, the proposed finding should be entered.

241. The December 2012 WDNR report noted that WDNR "chose to use the older screening levels that were in effect in 2011 for evaluating the indoor air and sub-slab vapor samples results from homes near Madison-Kipp for the purpose of decided where mitigation systems should be offered to homeowners. This added a 10-fold factor of safety to the current 2012 screening levels, which are already considered very protective of human health." (Bianchi Dec. ¶ 139, Ex. 137)

RESPONSE: Plaintiffs do not dispute that the statement cited is found in the report, but do dispute the inference that no risk to Class Members exist when the same report concludes that health risks do exist. (Doc. 167 – 35 at p. 8)

REPLY: The Finding is undisputed. Not only does the cited document support the proposed finding but the document cited in Plaintiffs' response does not support the premise that Plaintiffs assert. Therefore, the proposed finding should be entered.

242. The December 2012 WDNR further noted that "Nine neighborhood homes had sub-slab PCE above conservative, project specific vapor screening levels. The source of sub-slab PCE at two of these homes is indeterminate." (Bianchi Dec. ¶ 139, Ex. 137)

RESPONSE: Plaintiffs do not dispute that the statement cited is found in the report, but do dispute the inference that no risk to Class Members exist when the same report concludes that health risks do exist. (Doc. 167 – 35 at p. 8)

REPLY: The Finding is undisputed. Not only does the cited document support the proposed finding but the document cited in Plaintiffs' response does not support the premise that Plaintiffs assert. Therefore, the proposed finding should be entered.

243. With respect to indoor air levels, the December 2012 WDNR report concluded that "Four homes exceed conservative, project-specific indoor air action levels. The source of PCE in indoor air at three of these homes is indeterminate." (Bianchi Dec. ¶ 139, Ex. 137)

RESPONSE: Plaintiffs do not dispute that the statement cited is found in the report, but do dispute the inference that no risk to Class Members exist when the same report concludes that health risks do exist. (Doc. 167 – 35 at p. 8)

REPLY: The Finding is undisputed. Not only does the cited document support the proposed finding but the document cited in Plaintiffs' response does not support the premise that Plaintiffs assert. Therefore, the proposed finding should be entered.

244. The December 2012 WDNR report concluded that "No homes exceeded the current (2012) DNR indoor air screening levels." (Bianchi Dec. ¶ 139, Ex. 137)

RESPONSE: Plaintiffs do not dispute that the statement cited is found in the report, but do dispute the inference that no risk to Class Members exist when the same report concludes that health risks do exist. (Doc. 167 – 35 at p. 8)

REPLY: The Finding is undisputed. Not only does the cited document support the proposed finding but the document cited in Plaintiffs' response does not support the premise that Plaintiffs assert. Therefore, the proposed finding should be entered.

245. By letters dated September 1, 2010, Class Members Schneider, Uttech, Berge and Yang were invited to a meeting at Madison-Kipp, with Madison-Kipp's consultant and WDNR on September 16, 2010 to answer questions about soil vapor sampling efforts (Meunier Dec. ¶ 34, Ex. 30)

RESPONSE: Not disputed.

246. Soil samples were collected in May 2011 from the backyards of 150, 154 and 162 South Marquette where prior soil sampling and soil remediation had been conducted in 2003. (Bianchi Dec. ¶ 139, Ex. 137)

RESPONSE: Disputed. The cited document does not reference soil testing at 150, 154, and 162 South Marquette. (Doc. 167 – 35)

REPLY: The Finding is undisputed. May 2011 soil testing occurred at 150, 154 and 162 South Marquette. (*See* dkt. #152-4.)

247. The May 2011 soil sampling results indicated that the prior 2003 soil remediation remained effective. (Bianchi Dec. ¶ 139, Ex. 137)

RESPONSE: Disputed. The cited document does not reference soil testing at 150, 154, and 162 South Marquette. (Doc. 167 – 35)

REPLY: The Finding is undisputed. See Reply to M-KPFOF ¶ 246, above. (*See* dkt. # 152-4 at MK002289.)

248. A June 2011 public meeting informed neighbors about vapor intrusion issues. (Meunier Dec. ¶ 5, Ex. 1)

RESPONSE: Not disputed.

249. At WDNR's request, soil samples were collected from backyards on South Marquette Street starting in April 2012 and from backyards on Waubesa Street in June 2012. (Kubacki Dec. ¶ 12, Ex. 11)

RESPONSE: Disputed. WDNR required Kipp to collect soil samples and sampling took place as early as 2002. (Doc. 155 – 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30)

REPLY: Madison-Kipp did collect soil samples from three (3) off-site properties starting in 2002. The soil sampling efforts were expanded in 2012 to include additional residences on South Marquette Street and Waubesa Street. The Finding is undisputed and, as a result, the proposed finding should be entered.

250. From April 2012 to August 2012, 121 soil samples were collected from 32 off-site residential properties. (Kubacki Dec. ¶ 12, Ex. 11)

RESPONSE: Not disputed.

251. The homeowners of 237 and 269 Waubesa have never provided Madison-Kipp with access to conduct soil sampling activities. (Kubacki Dec. ¶ 12, Ex. 11)

RESPONSE: Not disputed.

252. In response to an August 3, 2012 letter from WDNR regarding additional soil investigation requirements, additional soil samples were collected in August 2012 from residential samples along South Marquette Street. (Kubacki Dec. ¶ 12, Ex. 11)

RESPONSE: Plaintiffs do not dispute that Kipp's contractor and retained expert, Arcadis, reported that it conducted sampling in response to an August 3, 2012 letter from WDNR, however, the August 3, 2012 WDNR letter has not been provided.

REPLY: The Finding is undisputed. The August 3, 2012 letter from WDNR is available at Dkt. # 152-22.

253. By letter dated October 9, 2012, ARCADIS, on behalf of Madison-Kipp, summarized all off-site soil investigation activities that occurred from April 2012 to August 2012. (Kubacki Dec. ¶ 12, Ex. 11)

RESPONSE: Not disputed.

254. The 121 soil samples collected from April 2012 to August 2012 were analyzed for VOCs, polycyclic aromatic hydrocarbons ("PAHs"), polychlorinated biphenyls ("PCBs"), Resource Conservation Recovery Act ("RCRA") metals and total cyanide. (Kubacki Dec. ¶ 12, Ex. 11)

RESPONSE: Plaintiffs do not dispute that Kipp's contractor and retained expert, Arcadis, reported such testing had taken place.

REPLY: The Finding is undisputed.

255. PCE were detected in only one soil sample at 102 South Marquette Street at 2.19 mg/kg, below the non-industrial direct contact residual contaminant level ("RCL") of 30.7 mg/kg. (Kubacki Dec. ¶ 12, Ex. 11)

RESPONSE: Disputed. PCE was detected in soils at the following properties, between April 2012 and August 2012:

- 102 South Marquette
- 106 South Marquette
- 110 South Marquette
- 114 South Marquette

- 118 South Marquette
- 126 South Marquette
- 128 South Marquette
- 130 South Marquette
- 134 South Marquette
- 142 South Marquette
- 146 South Marquette
- 150 South Marquette
- 154 South Marquette
- 202 South Marquette
- 210 South Marquette
- 230 South Marquette
- 233 Waubesa
- 241 Waubesa
- 253 Waubesa
- 257 Waubesa
- 265 Waubesa

(Doc. 155 – 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30)

REPLY: The proposed finding should have been more clearly limited to the sampling results as of the May 7, 2012 RJN letter report to WDNR. (Ziemba Decl. ¶ 7, Ex. 7 at PLF_WDNR1_015814.) At that time, 102, 110, 114, 118, 126, 128, 130, 134 and 142 South Marquette were sampled. As stated in M-KPFOF ¶ 255, PCE was detected in only one soil sample at 102 South Marquette Street at 2.19 mg/kg, below the non-industrial direct contact residual contaminant level ("RCL") of 30.7 mg/kg. Further, as summarized in document cited in Plaintiffs' response, none of the soil samples contained PCE at a level that exceeded the non-industrial direct contact RCL. (*See* dkt. #155-15 at ARCADIS010347.) Thus, although subsequent samples were taken at additional properties, all detections were significantly below the non-industrial direct contact RCL of 30.7 mg/kg. (*See* dkt. #155-15.)

256. The only other detection of VOCs in the April 2012 to August 2012 sampling was at 106 South Marquette were trichloroethylene ("TCE") was detected at 0.71 mg/kg at 3-4 ft below ground surface, above the non-industrial direct contact RCL of 0.644 mg/kg. (Kubacki Dec. ¶ 12, Ex. 11)

RESPONSE: Part disputed and part not disputed. Plaintiffs do not dispute that TCE was detected at 106 South Marquette at a concentration above the non-industrial direct contact RCL. Plaintiffs dispute that this was the only other detection of VOCs. VOCs were detected in soils at the following properties, between April 2012 and August 2012:

- 102 South Marquette
- 106 South Marquette
- 110 South Marquette
- 114 South Marquette
- 118 South Marquette
- 126 South Marquette
- 128 South Marquette
- 130 South Marquette
- 134 South Marquette
- 142 South Marquette
- 146 South Marquette
- 150 South Marquette
- 154 South Marquette
- 202 South Marquette
- 210 South Marquette
- 214 South Marquette
- 230 South Marquette
- 233 Waubesa
- 241 Waubesa
- 253 Waubesa
- 257 Waubesa
- 261 Waubesa
- 265 Waubesa

(Doc. 155 – 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30)

REPLY: M-KPFOF ¶ 256 inadvertently referred to "detections" when the intent was to summarize any "exceedance" of the non-industrial direct contact RCL. As such, there was an exceedance at 106 South Marquette where trichloroethylene ("TCE") was

detected at 0.71 mg/kg at 3-4 ft below ground surface, above the non-industrial direct contact RCL of 0.644 mg/kg. (*See* dkt. #155-15 at ARCADIS010342-010343.)

257. 102 South Marquette was resampled on October 1, 2012 and TCE was detected at 0.18 mg/kg, below the non-industrial direct contact RCL of 0.644 mg/kg. (Kubacki Dec. ¶ 19, Ex. 18)

RESPONSE: Disputed. There is no reference to an October 1, 2012 resample of soils at 102 South Marquette at the cite provided by Kipp. (Doc. 155 – 41)

REPLY: M-KPFOF ¶ 257 inadvertently referenced 102 South Marquette when it should have related to soil sampling at 106 South Marquette. On November 14, 2012, the soil at 106 South Marquette was re-sampled and TCE was detected at levels below the non-industrial direct contact RCL of 0.344 mg/kg for TCE. (Dkt. #203-4 at ARCADIS027849, Table 5-2.)

258. In a February 7, 2012 "Frequently Asked Questions" document on the WDNR webpage regarding Madison-Kipp, in response to a question "Is it safe to garden in my backyard if my home is adjacent to Madison-Kipp Corporation?" the WDNR noted that "[t]here is known soil contamination in shallow soils on at least three properties on South Marquette Street. Soils were sampled, and detected concentrations do not exceed established health-based guidelines. Direct contact with these soils poses no apparent public health hazard." (Bianchi Dec. ¶ 140, Ex. 138)

RESPONSE: Disputed. There is no response to a question concerning the use of a garden in the cite provided by Kipp. (Doc. 167 – 36) The WDNR has stated the following concerning soil contamination on Class Member properties that do not exceed health based direct contact guidelines: "given the exposure scenario of children on very small residential lots, the Department believes remediation and elimination of any level of direct contact risk is justified." (Doc. 195 – 33)

REPLY: The citation for M-KPFOF ¶ 258 is WDNR's website (http://dnr.wi.gov/topic/brownfields/kipp.html) (last visited March 28, 2013) under the "FAQ" tab. Specifically this WDNR webpage states:

"Is it safe to garden in my backyard if my home is adjacent to Madison-Kipp Corporation?

There is known soil contamination in shallow soils on at least three properties on South Marquette Street. Soils were sampled, and detected concentrations do not exceed established health-based guidelines. Direct contact with these soils poses no apparent public health hazard. However, the DNR has asked MKC to take action to remediate the soils on the three properties, and is requiring MKC to conduct additional testing on nearby properties to determine the extent of the problem."

(Dkt. # 195-1 at p. 9 of 11.) The proposed finding is not disputed with any evidence and, as a result, should be entered.

259. On May 30, 2012, when WDNR conditional approved of Madison-Kipp's Work Plan for Polychlorinated Biphenyl Investigation, WDNR requested that Madison-Kipp add polycyclic aromatic hydrocarbon ("PAHs") to the analyte list for the requested soil samples. (Kubacki Dec. ¶ 12, Ex. 11)

RESPONSE: Disputed. The May 30, 2012 WDNR letter referenced in this paragraph is not contained in the cite provided by Kipp. (Doc. 155 – 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30)

REPLY: M-KPFOF ¶ 259 inadvertently refers to Exhibit 11 to the Kubacki Declaration instead of to Exhibit 11 of the Meunier Declaration. The correct citation is Dkt. # 152-17 at MK014264. The Finding itself is undisputed and, as such, should be entered.

260. The soil samples collected from April 2012 to August 2012 were analyzed for PAHs. (Kubacki Dec. ¶ 12, Ex. 11)

RESPONSE: Not disputed.

261. By letter dated September 11, 2012, ARCADIS submitted to WDNR results of further investigations regarding the off-site occurrence of PAHs in an Off-Site Residential Polycyclic Aromatic Hydrocarbon (PAH) Results Summary. (Meunier Dec. ¶ 22, Ex. 18)

RESPONSE: Not disputed.

262. The September 11, 2012 ARCADIS submittal concluded that PAHs are ubiquitous in an urban environment. (Meunier Dec. ¶ 22, Ex. 18)

RESPONSE: Disputed. The WDNR concluded that the Kipp property is the source of PAHs found on Class Area properties. (Doc. 195 – 2)

REPLY: The Finding is not disputed. The cited document supports the proposed finding. Specifically, the cited document concluded that "PAHs are associated with a wide variety of petroleum and combustion byproducts, and are common background constituents in the environment. The Wisconsin Department of Health Services' fact sheet on PAHs emphasizes their ubiquitous nature." (*See* dkt. #152-24 at MK020059.) At best, the cited DNR letter requested that Madison-Kipp investigate and provide a report regarding whether it was the source of PAHs, which Madison-Kipp did; and the report, as noted, established that Madison-Kipp was not the source. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

263. Soil sampling results presented to WDNR in by letter dated October 9, 2012 summarized the detections of one or more PAH compounds at concentrations above one or more WDNR PAH screening levels at most residential properties in the area. (Kubacki Dec. ¶ 12, Ex. 11)

RESPONSE: Not disputed.

264. WDNR responded by letter dated December 7, 2012 directing Madison-Kipp to submit a work plan "either … for determining whether any of the health-based direct contact exceedances can be attributed to background concentrations or … a remedial action plan to be employed by Madison-Kipp …" (Meunier Dec. ¶ 28, Ex. 24)

RESPONSE: Disputed. The WDNR responded by letter dated November 1, 2012 and concluded that the Kipp property is the source of PAHs found on Class Area properties. (Doc. 195 – 2)

REPLY: The Finding is not disputed. The cited document supports the proposed finding. *See* Reply to M-KPFOF ¶ 262, above.

265. On December 14, 2012, ARCADIS, on behalf of Madison-Kipp, submitted the Polynuclear Aromatic Hydrocarbons (PAH) Work Plan, Determination of Whether Health-Based Direct Contact Exceedances Can be Attributed to Background Concentrations. (Kubacki Dec. ¶ 15, Ex. 14)

RESPONSE: Not disputed.

266. By ARCADIS letter dated January 21, 2013, the results of the December 14, 2012 Work Plan were submitted to WDNR. (Dkt. #143)

RESPONSE: Not disputed.

267. Over 400 soil samples have been taken from the on- site and off-site locations. (Dkt. #143)

RESPONSE: Disputed. The cited document does not support the proposed fact. (Doc. No. 143).

REPLY: The Finding is undisputed. (*See* dkt. #203-1 at ARCADIS027593) (without including the significant soil sampling that has occurred on-site and off-site since 1994, over 500 samples have collected between February 2012 and January 2013).)

268. ARCADIS notified WDNR on March 26, 2012 that the sampled soil generated during the installation of the on-site SVE system had detectable concentrations of PCBs. (Kubacki Dec. ¶ 5, Ex. 4)

RESPONSE: Not disputed.

269. By letter dated April 19, 2012, WDNR informed Madison-Kipp that it was responsible for the investigation and cleanup of PCB contamination. (Meunier Dec. ¶ 12, Ex. 8)

RESPONSE: Not disputed.

270. In April 2012, RJN, on behalf of Madison-Kipp, collected samples from 102, 110, 114, 118, 126, 128, 130, 134 and 142 South Marquette and the soil samples were analyzed for VOCs and PCBs. (Kubacki Dec. ¶ 12, Ex. 11)

RESPONSE: Not disputed.

271. According to the September 26, 2012 ARCADIS letter report submitted to WDNR, in the June-August 2012 soil sampling efforts, PCBs were not detected above laboratory detection limits, above 1mg/kg or above 0.22 mg/kg (the WDNR's non-industrial direct contact residual contaminant level). (Meunier Dec. ¶ 25, Ex. 21)

RESPONSE: Disputed. PCBs were detected above laboratory detection limits, above 1 mg/kg and above .22 mg/kg. (Doc. 152 – 27, 28 at Table 1 and Table 2)

REPLY: The cited document supports the proposed finding and plaintiffs' response does not present a genuine dispute. M-KPFOF ¶ 271 related to the June-August 2012 soil sampling results. Subsequent sampling efforts are addressed at M-KPFOF ¶¶ 288 – 293.

272. By letter dated May 4, 2012, WDNR requested that Madison-Kipp prepare a work plan for PCB site investigation and subsequent clean-up. (Meunier Dec. ¶ 13, Ex. 9)

RESPONSE: Disputed. By letter dated May 4, 2012, WDNR required Madison-Kipp to prepare a PCB work plan. (Doc. 152 – 15)

REPLY: The cited document supports the proposed finding and plaintiffs' response does not present a genuine dispute. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

273. By letter dated May 11, 2012, WDNR notified Madison-Kipp of their expectations for the comprehensive investigation and remediation of the Madison-Kipp property. (Meunier Dec. ¶ 14, Ex. 10)

RESPONSE: Not disputed.

274. ARCADIS, on behalf of Madison-Kipp, submitted a Work Plan for Polychlorinated Biphenyl Investigation, to WDNR by letter dated May 21, 2012. (Kubacki Dec. ¶ 2, Ex. 1)

RESPONSE: Not disputed.

275. The WDNR provided conditional approval of the May 21, 2012 Work Plan by letter dated May 30, 2012. (Meunier Dec. ¶ 15, Ex. 11)

RESPONSE: Not disputed.

276. ARCADIS initiated investigation activities on June 1, 2012. [check PCB summary letter to confirm/cite to June 1st initiation date] (Kubacki Dec. ¶ 13, Ex. 12)

RESPONSE: Plaintiffs do not dispute that Kipp's contractor and retained expert, Arcadis, reports it began investigation activities on June 1, 2012.

REPLY: The Finding is undisputed.

277. ARCADIS submitted the results of PCB investigations through June 26, 2012 to WDNR on July 12, 2012. (Meunier Dec. ¶ 18, Ex. 14)

RESPONSE: Disputed. The July 12, 2012 ARCADIS letter cited by Kipp provides a summary of activities from June 30 through July 11, 2012. (Doc. 152 – 20)

REPLY: Plaintiffs' response correctly notes that the July 12, 2012 ARCADIS letter summarizes activities from June 30 through July 11, 2012.

278. During a July 12, 2012 telephone call with Madison-Kipp, ARCADIS, WDNR and USEPA, WDNR requested a work plan for supplemental investigation activities associated with PCBs. (Kubacki Dec. ¶ 3, Ex. 2)

RESPONSE: Plaintiffs do not dispute that the document cited by Kipp references a July 12, 2012 conference call.

REPLY: The Finding is undisputed.

279. ARCADIS, on behalf of Madison-Kipp, submitted a Work Plan for Supplemental Polychlorinated Biphenyls Investigation to WDNR on July 23, 2012. (Kubacki Dec. ¶ 3, Ex. 2)

RESPONSE: Not disputed.

280. By letter dated August 3, 2012, WDNR informed Madison-Kipp of additional soil investigation requirements. (Meunier Dec. ¶ 20, Ex. 16)

RESPONSE: Not disputed.

281. By letter dated August 6, 2012, WDNR provided final approval for the July 23, 2012 Work Plan with comments. (Meunier Dec. ¶ 19, Ex. 15)

RESPONSE: Not disputed.

282. Supplemental PCB investigation activities were completed from August 6 through August 15, 2012. (Kubacki Dec. ¶ 13, Ex. 12)

RESPONSE: Plaintiffs do not dispute that the document cited by Kipp references supplemental PCB investigations were completed during the period August 6 through August 15, 2012.

REPLY: The Finding is undisputed.

283. Results of the additional investigation activities were provided to WDNR via email correspondence on September 11 and September 12, 2012 and the data was presented to the WDNR and USEPA in the Polychlorinated Biphenyl (PCB) Investigation Summary and Work Plan for Recommended Activities by letter dated September 26, 2012. ("Meunier Dec. ¶ 21, Ex. 17; Meunier Dec. ¶ 24, Ex. 20)

RESPONSE: Disputed. The cited references do not indicate an email was sent on September 12, 2012, and also do not demonstrate that information was sent to USEPA. (Doc. 152 – 23, 26)

REPLY: The Finding is undisputed. (*See* dkt. #152-27 & dkt. #152-28.)

284. By letter report dated October 22, 2012, ARCADIS, on behalf of Madison-Kipp, presented the results of the supplemental soil investigation and presented a work plan to implement the recommended activities with respect to on-site PCB-impacted soils. (Kubacki Dec. ¶ 13, Ex. 12)

RESPONSE: Not disputed.

285. The October 22, 2012 letter report confirmed that PCBs were not present at Madison-Kipp's eastern property line above 1 mg/kg (USEPA's high occupancy cleanup level with no site restrictions) and the areas on-site containing PCB

concentrations above 50 mg/kg (the Toxic Substance Control Act disposal limit) have been delineated and are limited in depth to 0 to 2 feet below ground surface. (Kubacki Dec. ¶ 13, Ex. 12)

RESPONSE: Disputed. Further PCB testing of the Kipp property after October 22, 2012 found 15 samples above the USEPA high occupancy cleanup level of 1 mg/kg and 17 samples above the direct contact RCL of .744 mg/kg, including a sample as high as 20,000 mg/kg. (Doc. 195 – 26)

REPLY: The cited document supports the proposed finding and Plaintiffs' response does not present a genuine dispute. In addition, the document cited in Plaintiffs' response is addressed at M-KPFOF ¶¶ 288 – 293, below. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

286. In addition, the October 22, 2012 letter confirmed that of the 121 soil samples taken from off-site residences, PCBs were not detected above laboratory detection limits, above 1 mg/kg, or above 0.22 mg/kg (WDNR's non-industrial direct contact residual contaminant level). (Kubacki Dec. ¶ 13, Ex. 12)

RESPONSE: Plaintiffs do not dispute that Kipp's contractor and retained expert, Arcadis, reported these numbers.

REPLY: The Finding is undisputed.

287. Due to space limitations on the southwestern side of Madison-Kipp's facility, the October 22, 2012 letter report recommended additional soil sampling on off-site residential properties on Waubesa Street to further delineate soil conditions. (Kubacki Dec. ¶ 13, Ex. 12)

RESPONSE: Disputed. Additional offsite residential soil sampling was proposed to further define the PCB detections present within the southwest corridor on site. (Doc. 155 – 31, 32, 33)

REPLY: The cited document supports the proposed finding and Plaintiffs' response does not present a genuine dispute.

288. The additional off-site soil sampling on residential properties on Waubesa Street was completed in November 2012, at properties where access was provided. (Kubacki Dec. ¶ 16, Ex. 15)

RESPONSE: Not disputed.

289. Multiple revised work plans for on-site PCB-related excavation activities were submitted to WDNR and USEPA in October and November 2012 and by letter dated December 4, 2012, ARCADIS submitted a Final Revised Work Plan for Polychlorinated Biphenyl Recommended Activities to WDNR and USEPA. ("Kubacki Dec. ¶ 14, Ex. 13; Kubacki Dec. ¶ 16, Ex. 15)

RESPONSE: Plaintiffs do not dispute that the cited document references this language.

REPLY: The Finding is undisputed.

290. The Final Revised Work Plan was approved on December 5, 2012 for the on-site PCB-related excavation activities. (Meunier Dec. ¶ 30, Ex. 26)

RESPONSE: Not disputed.

291. By letter dated December 14, 2012, ARCADIS, on behalf of Madison-Kipp, submitted an Addendum to the Final Revised Work Plan for Polychlorinated Biphenyl Recommended Activities to WDNR. (Kubacki Dec. ¶ 16, Ex. 15)

RESPONSE: Not disputed.

292. This Addendum to the Final Revised Work Plan for PCBs presented the results of the soil investigation on off-site residential properties adjacent to Madison-Kipp's southwest property boundary. (Kubacki Dec. ¶ 16, Ex. 15)

RESPONSE: Not disputed.

293. For all but four (4) properties, PCBs were either not detected, or were detected below the WDNR residential action level of 0.22 mg/kg, which would also be below the USEPA residential action level of 1 mg/kg for PCBs. (Kubacki Dec. ¶ 16, Ex. 15)

RESPONSE: Disputed. PCBs were detected on seven of the eight residential properties sampled. (Doc. 155 – 38)

REPLY: The cited document supports the proposed finding and Plaintiffs' response does not present a genuine dispute. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

294. According to the Site Investigation Work Plan, submitted to WDNR on May 31, 2012 by ARCADIS, on behalf of MKC, additional groundwater monitoring wells (MW-7, MW-8, MW-9D and MW-9D2) were installed in 2011. (Kubacki Dec. ¶ 9, Ex. 8)

RESPONSE: Plaintiffs do not dispute the cited document references these wells.

REPLY: The Finding is undisputed.

295. By letter dated May 22, 2012, ARCADIS submitted a Bedrock Characterization Work Plan to install deeper borings and monitoring wells in the vicinity of existing wells MW-3 and MW-5. (Kubacki Dec. ¶ 8, Ex. 7)

RESPONSE: Not disputed.

296. WDNR approved the Bedrock Characterization Work Plan by letter dated June 7, 2012. (Meunier Dec. ¶ 16, Ex. 12)

RESPONSE: Not disputed.

297. By letter dated May 31, 2012, ARCADIS submitted to WDNR a Site Investigation Work Plan to take additional soil, soil vapor and groundwater samples. (Kubacki Dec. ¶ 9, Ex. 8)

RESPONSE: Not disputed.

298. WDNR approved the Site Investigation Work Plan by letter dated June 25, 2012. (Meunier Dec. ¶ 17, Ex. 13)

RESPONSE: Disputed. WDNR conditionally approved the May 2012 Site Investigation Workplan by letter dated June 25, 2012. (Doc. 152 – 19)

REPLY: The cited document supports the proposed finding and plaintiffs' response does not present a genuine dispute. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

299. By letter dated September 13, 2012, ARCADIS submitted a Site Investigation Work Plan Addendum for additional on-site and off-site groundwater monitoring wells. (Meunier Dec. ¶ 23, Ex. 19)

RESPONSE: Not disputed.

300. According to the Site Investigation Work Plan, submitted to WDNR on May 31, 2012 by ARCADIS, on behalf of MKC, three additional shallow monitoring wells (MW-10S, MW-11S and MW-12S) to the west, east and northeast of Madison-Kipp were installed in 2012. (Kubacki Dec. ¶ 9, Ex. 8)

RESPONSE: Not disputed.

301. There are currently 58 groundwater monitoring wells, multi-port groundwater sampling wells, and pilot test injection wells at depths ranging from 13 to 235 ft below ground surface ("bgs") on the Madison-Kipp property and in the surrounding area. (Dkt. #145 at A-29)

RESPONSE: Plaintiffs do not dispute that the cited reference contains this statement.

REPLY: The Finding is undisputed.

302. On September 28, 2012, ARCADIS submitted to WDNR a Site Investigation Work Plan Addendum, Building Subsurface Investigation. (Meunier Dec. ¶ 26, Ex. 22)

RESPONSE: Not disputed.

303. The Site Investigation Work Plan Addendum, Building Subsurface Investigation proposed up to 38 soil borings and two groundwater monitoring wells. (Meunier Dec. ¶ 26, Ex. 22)

RESPONSE: Not disputed.

304. According to the Site Investigation Work Plan Addendum, Building Subsurface Investigation, soil borings locations in the building were selected based on historical information regarding chemical use and handling at the facility. (Meunier Dec. ¶ 26, Ex. 22)

RESPONSE: Not disputed.

305. WDNR approved of the soil boring locations in the building. (Meunier Dec. ¶ 29, Ex. 25)

RESPONSE: Disputed. WDNR approved the installation of two interior wells. (Doc. 152 – 32)

REPLY: The cited document supports the proposed finding. WDNR approved the installation of the two interior wells as well as the soil boring locations in the building. (*See* dkt. #155–39 at MK024748) ("On September 28, 2012, a *Site Investigation Work Plan Addendum, Building Subsurface Investigation* (Addendum) was submitted to the WDNR to present the proposed investigation activities to fill data gaps concerning potential source areas beneath the on-Site building floor. The Addendum was approved by WDNR in a letter dated October 17, 2012."); *see also* dkt. #152-37.) Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

306. WDNR approved of the Site Investigation Work Plan Addendum, Building Subsurface Investigation by letter dated October 17, 2012. (Meunier Dec. ¶ 32, Ex. 28)

RESPONSE: Not disputed.

307. According to February 14, 2013 Building Subsurface Investigation Summary, prepared by ARCADIS and provided to WDNR, in October 2012, a total of 45 soil borings were completed within the Madison-Kipp facility (41 using the direct-push rig and 4 using the mini-sonic rig), from depths of approximately 8 feet below ground surface to approximately 16 feet below ground surface. (Kubacki Dec. ¶ 17, Ex. 16)

RESPONSE: Not disputed.

308. According to Building Subsurface Investigation dated February 14, 2013, a total of 68 soil samples were collected and submitted for laboratory analysis of VOCs, PCBs, PAHs, RCRA metals and total cyanide. (Kubacki Dec. ¶ 17, Ex. 16)

RESPONSE: Disputed. According to the Building Subsurface Investigation dated February 14, 2013, a total of 64 soil samples were collected and submitted for

laboratory analysis of VOCs, PCBs, PAHs, RCRA metals and total cyanide. (Doc. 155 – 39)

REPLY: Plaintiffs correctly note that there were a total of 64 soil samples collected and submitted for laboratory analysis of VOCs, PCBs, PAHs, RCRA metals and total cyanide.

309. According to Building Subsurface Investigation dated February 14, 2013, two monitoring wells and two piezometers were installed at two depth intervals at two locations in December 2012 to sample groundwater beneath the Madison-Kipp building. (Kubacki Dec. ¶ 17, Ex. 16)

RESPONSE: Not disputed.

310. According to Building Subsurface Investigation dated February 14, 2013, the locations of the wells were determined based on the soil analytical results and approved by WDNR via email correspondence on December 11, 2012. (Meunier Dec. ¶ 29, Ex. 25)

RESPONSE: Disputed. The cited reference does not reference the Building Subsurface Investigation dated February 14, 2013. (Doc. 152 – 32)

REPLY: The cited document supports the proposed finding. Specifically, the cited document confirms that WDNR reviewed and approved the locations of the two interior wells as proposed by ARCADIS. (Dkt. #152-32 at MK024222.) Further, the February 14, 2012 Building Subsurface Investigation report states that "[t]he locations of the wells were determined based on the soil analytical results from the 41 interior soil borings completed" and "[a]pproval for the location and design of the monitoring wells was provided via email correspondence from [WDNR] on December 11, 2012. (Dkt. #155-39 at MK024750.) Plaintiffs' response does not contest the evidence or provide any different evidence. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

311. By letter dated February 14, 2013, ARCADIS submitted to WDNR a Building Subsurface Investigation Summary. (Kubacki Dec. ¶ 17, Ex. 16)

RESPONSE: Not disputed.

312. The February 14, 2013 Building Subsurface Investigation Summary concluded that : "PAHs, PCBs, and mercury were detected beneath the building above the industrial direct contact RCL and the extent of soils exceeding the industrial direct contact RCL has been defined. The soil is located beneath 6 to 8 inches of concrete and is therefore, not a direct contact issue. As part of the overall site plan, an Engineered Barrier (Cap) Maintenance Plan and Soil Management Plan will be developed as described in the Final Revised Work Plan for Polychlorinated Biphenyl Recommended Activities, dated December 4, 2012, and incorporated into the site operation and maintenance. (Kubacki Dec. ¶ 17, Ex. 16)

RESPONSE: Plaintiffs do not dispute that the language quoted is contained in the report.

REPLY: The Finding is undisputed.

313. The February 14, 2013 Building Subsurface Investigation Summary also concluded that: VOCs and PCBs were detected at one or more of the new monitoring wells installed beneath the building above the respective ES. The concentrations of PCE and TCE are consistent or less than the concentrations present in the on-site wells with screens set at similar elevations. PCBs have only been detected in the interior monitoring wells at the site. As part of the Site Investigation report, a groundwater monitoring program will be proposed, which will include the collection of additional VOC data as well as PCB data at select wells to confirm the presence of PCBs in groundwater. (Kubacki Dec. ¶ 17, Ex. 16)

RESPONSE: Plaintiffs do not dispute that the language cited is contained in the report.

REPLY: The Finding is undisputed.

314. By letter dated February 8, 2012, ARCADIS, on behalf of Madison-Kipp, submitted to WDNR a Soil Vapor Extraction Pilot Study Work Plan. (Kubacki Dec. ¶ 6, Ex. 5)

RESPONSE: Not disputed.

315. As outlined in the Soil Vapor Extraction Pilot Study Work Plan, the purpose of the work plan was to evaluate the effectiveness of SVE in addressing soil gas concentrations and to collect the necessary data to complete a full-scale system design. (Kubacki Dec. ¶ 6, Ex. 5)

RESPONSE: Plaintiffs do not dispute that the language cited is contained in the work plan.

REPLY: The Finding is undisputed.

316. ARCADIS conducted the pilot test at Madison-Kipp on February 9-10, 2012 to evaluate the effectiveness of soil vapor extraction ("SVE") technology for removing subsurface VOCs and controlling off-site migration of vapors. (Kubacki Dec. ¶ 4, Ex. 3)

RESPONSE: Disputed. Arcadis performed a SVE system pilot test on February 9 and 10, 2012 to obtain site-specific data required to design a full scale SVE system. (Doc. 155 – 4)

REPLY: The cited document supports the proposed finding and plaintiffs' response does not present a genuine dispute. Plaintiffs' response does not contest the evidence or provide any different evidence. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

317. By letter dated February 27, 2012, ARCADIS presented the results of the pilot test to WDNR as well as a proposed full-scale SVE system design. (Kubacki Dec. ¶ 7, Ex. 6)

RESPONSE: Disputed. The summary report was prepared to describe the methods and results of the SVE pilot test that was conducted on February 9 and 10, 2012; and to outline the basis of design for the Phase I SVE system. (Doc. 155 – 7)

REPLY: The cited document supports the proposed finding and plaintiffs' response does not present a genuine dispute. Plaintiffs' response does not contest the evidence or provide any different evidence. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

318. From February 23, 2012 through March 9, 2012, ARCADIS installed a full-scale SVE system to capture vapors in the northeast portion of the Madison-Kipp site. (Kubacki Dec. ¶ 4, Ex. 3)

RESPONSE: Disputed. "The Phase I SVE system was installed at the Site between February 23 and March 9, 2012 under supervision by Arcadis." (Doc. 155 – 4)

REPLY: The cited document supports the proposed finding and plaintiffs' response does not present a genuine dispute. Plaintiffs' response does not contest the evidence or provide any different evidence. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

319. The SVE system, which includes nine SVE wells and a carbon treatment system, began continuous operation on March 9, 2012. (Kubacki Dec. ¶ 4, Ex. 3)

RESPONSE: Plaintiffs do not dispute that the Phase I SVE system began operation on March 9, 2012, but have no basis to know whether or not its operation has been continuous since the document cited by Kipp for this proposition is dated May 8, 2012.

REPLY: The cited document supports the proposed finding and plaintiffs' response does not present a genuine dispute. Therefore, the proposed finding should be entered.

320. By letter dated May 8, 2012, ARCADIS submitted a construction summary of the SVE system to WDNR. (Kubacki Dec. ¶ 4, Ex. 3)

RESPONSE: Not disputed.

321. Regular monitoring has confirmed the SVE is operating as intended. (See, e.g., Meunier Dec. ¶ 18, Ex. 14; Meunier Dec. ¶ 22, Ex. 18; Meunier Dec. ¶ 25, Ex. 21)

RESPONSE: Disputed. The cited references demonstrate continued VOCs, PCBs, and PAHs, both on the Kipp property and in the Class Area. (Doc. 152 – 20, 24, 27, 28)

REPLY: The cited documents support the proposed finding. Plaintiffs' response does not contest the evidence or provide any different evidence. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered. (*See* Dkt. #203-2 at ARCADIS027678 – ARCADIS027679.)

322. By letter dated December 4, 2012, ARCADIS submitted to WDNR and USEPA a Final Revised Work Plan for Polychlorinated Biphenyl Recommended Activities and WDNR, in conjunction with USEPA, provided approval of the Final Revised Work Plan for PCBs on December 5, 2012. (Meunier Dec. ¶ 31, Ex. 27)

RESPONSE: Disputed. The references cited contain no support for the proposition that WDNR and USEPA provided final approval of the Final Revised Work Plan for PCBs on December 5, 2012. (Doc. 152 – 34, 35, 36)

REPLY: The December 5, 2012 letter is available at Dkt. #205 at ARCADIS028214.

323. According to the December 4, 2012 Final Revised Work Plan for PCBs, on-site soils containing PCBs at concentrations above 50 mg/kg will be excavated and disposed of at a Toxic Substances Control Act approved landfill at two specific on-site excavation areas. (Meunier Dec. ¶ 31, Ex. 27)

RESPONSE: Not disputed.

324. The on-site soil excavation began on December 17, 2012 and Madison-Kipp mailed a Neighbor Notification letter to residents in the surrounding neighborhood to provide information on the on-site activities. (Bianchi Dec. ¶ 143, Ex. 141)

RESPONSE: Disputed. The cited document does not support the proposed fact. (Doc. 167 – 39)

REPLY: Madison-Kipp inadvertently omitted the second page of Dkt. #167-39 that provides further support for M-KPFOF ¶ 324. (*See* Second Meunier Decl., ¶4, Ex. 4.) Plaintiffs' response does not contest the evidence or provide any different evidence.

Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

325. ARCADIS, on behalf of Madison-Kipp, coordinated with WDNR during the excavation and conducted the excavation and confirmatory sampling efforts with WDNR's approval. (Kubacki Dec. ¶ 18, Ex. 17)

RESPONSE: Disputed. The reference cited does not address each proposed fact raised, and therefore, Plaintiffs cannot agree that the statement is undisputed. (Doc. 155 – 40)

REPLY: The cited document support the proposed finding. The cited document makes clear that ARCADIS coordinated with WDNR during the excavation and confirmatory sampling of on-site soils. (*See* dkt. #155-40.) Plaintiffs' response does not contest the evidence or provide any different evidence. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

326. By letter dated December 14, 2012, ARCADIS, on behalf of Madison-Kipp, submitted an Addendum to the Final Revised Work Plan for Polychlorinated Biphenyl Recommended Activities to WDNR. This Addendum to the Final Revised Work Plan for PCBs presented the results of the soil investigation on off-site residential properties adjacent to Madison-Kipp's southwest property boundary. (Kubacki Dec. ¶ 16, Ex. 15)

RESPONSE: Not disputed.

327. The Addendum to the Final Revised Work Plan for PCBs provided recommendations for managing the identified PCBs on four (4) properties, including the excavation of off-site soils containing PCBs at concentrations above 0.22 mg/kg (WDNR's non-industrial direct contact residual contaminant level) and disposal of excavated soils at an approved landfill. (Kubacki Dec. ¶ 16, Ex. 15)

RESPONSE: Not disputed.

328. Madison-Kipp has not yet received approval from WDNR or USEPA for the excavation work outlined in the December 14, 2012 Addendum to the Final Revised Work Plan for PCBs. (Meunier Declaration ¶ 3)

RESPONSE: Not disputed.

REPLY: Since the filing of Madison-Kipp's motion for summary judgment, the WDNR – in consultation with the USEPA and state and local health officials – have provided a conditional approval of Madison-Kipp's December 14, 2012 Addendum to the Final Revised Work Plan for PCBs. (Second Meunier Decl., ¶6, Ex. 6.)

329. Madison-Kipp will perform the necessary off-site excavation activities, as required by WDNR and USEPA and will perform coordination of such excavation activities as soon as regulatory approval has been granted and access to the properties is obtained. (Meunier Declaration ¶ 4)

RESPONSE: Disputed. Kipp has a 19 year history of failing to timely and comprehensively respond to WDNR. (Doc. 195 – 6)

REPLY: The cited document supports the proposed finding. Plaintiffs' response does not contest the evidence or provide any different evidence. Plaintiffs do not dispute that Madison-Kipp filed a work plan to address off-site excavation activities. (M-KPFOF ¶ 327.) Moreover, since the filing of Madison-Kipp's motion for summary judgment, the WDNR – in consultation with the USEPA and state and local health officials – have provided a conditional approval of Madison-Kipp's December 14, 2012 Addendum to the Final Revised Work Plan for PCBs. (Second Meunier Decl., ¶6, Ex. 6.) Plaintiffs' response fails to dispute M-KPFOF ¶ 329 with any evidence and, as a result, the finding should be entered.

330. By letter dated October 17, 2012, ARCADIS, on behalf of Madison-Kipp, submitted the In-Situ Chemical Oxidation (ISCO) Groundwater Pilot Test Work Plan, for treatment of VOCs in groundwater. (Kubacki Dec. ¶ 11, Ex. 10)

RESPONSE: Not disputed.

331. ISCO is a technology used to treat chlorinated VOCs in groundwater. (Kubacki Dec. ¶ 11, Ex. 10)

RESPONSE: Not disputed.

332. The ISCO Groundwater Pilot Test Work Plan was designed to determine the geologic and hydraulic design parameters necessary for full-scale remedial implementation and to evaluate the effectiveness of ISCO as a groundwater treatment remedy. (Kubacki Dec. ¶ 11, Ex. 10)

RESPONSE: Disputed. According to the document cited by Kipp, the ISCO Groundwater Pilot Test Work Plan was "designed to determine the geologic and hydraulic design parameters necessary for full-scale remedial implementation while evaluating the effectiveness of ISCO as a potential groundwater remedy and initiating source removal." (Doc. 155 – 14)

REPLY: The cited document supports the proposed finding and plaintiffs' response does not present a genuine dispute. The cited document specifically states "[t]his pilot test is designed to determine the geologic and hydraulic design parameters necessary for full-scale remedial implementation while evaluating the effectiveness of ISCO as a potential groundwater remedy and initiating source removal." (*See* dkt. #155-14 at ARCADIS010317.) Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

333. ISCO is a method of in-situ remediation that adds a chemical oxidant to the subsurface to break the carbon bonds in VOCs and allow complete degradation of chlorinated ethenes (e.g. PCE and TCE) to their non-toxic daughter products. (Kubacki Dec. ¶ 11, Ex. 10)

RESPONSE: Disputed. Vinyl chloride, a daughter product of PCE and TCE, is toxic and classified by the State of Wisconsin as a known human carcinogen. (Doc. 195-38)

REPLY: The cited document supports the proposed finding and plaintiffs' response does not present a genuine dispute. The cited document specifically states

"ISCO is a method of in-situ remediation that adds a chemical oxidant to the subsurface to break the carbon bonds in VOCs and allow complete degradation of chlorinated ethenes (e.g. PCE and TCE) to their non-toxic daughter products." (*See* dkt. #155-14 at ARCADIS010317.) The fact that vinyl chloride may be a toxic daughter produce of PCE and TCE is irrelevant because ISCO breaks down chlorinated ethenes into the *non-toxic* daughter products. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

334. By letter dated November 2, 2012, WDNR approved the ISCO Groundwater Pilot Test Work Plan. (Meunier Dec. ¶ 27, Ex. 23)

RESPONSE: Not disputed.

335. The ISCO Groundwater Pilot Test Work Plan was initiated in November and injection activities began on December 10, 2012. (Meunier Dec. ¶ 33, Ex. 29)

RESPONSE: Not disputed.

336. ISCO pilot test activities were conducted to support evaluation of potential full-scale deployment of the ISCO technology to treat VOCs in groundwater at the Site. (Meunier Dec. ¶ 33, Ex. 29)

RESPONSE: Plaintiffs do not dispute that Kipp's contractor and retained expert, Arcadis, reports this reason for the ISCO pilot test activities.

REPLY: The Finding is undisputed.

337. A pilot test injection and monitoring well network was installed, including two new injection wells and one new injection dose response well. (Meunier Dec. ¶ 33, Ex. 29)

RESPONSE: Plaintiffs do not dispute that Kipp's contractor and retained expert, Arcadis, reports the installation of these wells.

REPLY: The Finding is undisputed.

338. The injection wells were constructed to allow targeted delivery of a solution (sodium permanganate and non-reactive hydraulic tracers) to three separate depths – in shallow unconsolidated soil (20-30 feet below ground surface (bgs)), shallow bedrock (60-90 feet bgs) and deep bedrock (110-140 bgs). (Meunier Dec. ¶ 33, Ex. 29)

RESPONSE: Plaintiffs do not dispute that Kipp's contractor and retained expert, Arcadis, prepared this description.

REPLY: The Finding is undisputed.

339. Baseline groundwater monitoring was conducted before the event and the dose response well and wells in the groundwater monitoring network were sampled during and after the injection event. (Meunier Dec. ¶ 33, Ex. 29)

RESPONSE: Plaintiffs do not dispute that Kipp's contractor and retained expert, Arcadis, prepared this description.

REPLY: The Finding is undisputed.

340. By letter dated February 15, 2013, ARCADIS submitted a report titled Implementation Summary and Recommendations – In-Situ Chemical Oxidation Groundwater Pilot Test to WDNR. (Meunier Dec. ¶ 33, Ex. 29)

RESPONSE: Not disputed.

341. The interim results show that at least one monitoring well within each of the shallow unconsolidated, shallow bedrock and deep bedrock intervals showed reductions of PCE greater than 80% (83%, 88% and 85% PCE reduction, respectively). (Meunier Dec. ¶ 33, Ex. 29)

RESPONSE: Disputed. "Within the shallow bedrock interval, Monitoring Wells MW-19D, MW-20D, and MW-21D2 exhibit a PCE reduction ranging from approximately 29 to 88%. Within the deep bedrock interval, Monitoring Wells MW-20D2 and MW21D1 exhibit a PCE reduction ranging from approximately 54 to 85%, with an increase in concentration observed at MN-19D2, located 20 feet north of the injection well." (Doc. 152 – 38 at p. 16)

REPLY: The cited document supports the proposed finding and plaintiffs' response does not present a genuine dispute. Further, Plaintiffs' response supports M-KPFOF ¶ 341. Indeed, as Plaintiffs' response indicates, at least one monitoring well

within each of the shallow unconsolidated, shallow bedrock and deep bedrock intervals showed reductions of PCE greater than 80%. (*See* dkt. #153-38 (Plaintiffs' response omitted the unconsolidated interval which is "…Monitoring Wells MW-3S exhibits a PCE reduction of approximately 83% in the shallow unconsolidated interval.").) Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

342. The ISCO injection events achieved a measured benefit within the injection area and, because the injectate solution (sodium permanganate) continues to be present, it is anticipated that additional reductions in VOCs will occur. (Meunier Dec. ¶ 33, Ex. 29)

RESPONSE: Plaintiffs do not dispute that Kipp's contractor and retained expert, Arcadis, reports these results.

REPLY: The Finding is undisputed.

343. Continued post-injection monitoring will be used to monitor sodium permanganate present, washout, conductivity change, and potential concentration rebound in the injection area; this information will be utilized in evaluating final remedial design. (Meunier Dec. ¶ 33, Ex. 29)

RESPONSE: Plaintiffs do not dispute that Kipp's contractor and retained expert, Arcadis, reports these results.

REPLY: The Finding is undisputed.

344. The February 15, 2013 ARCADIS submittal concluded that injection reagents can be successful distributed in shallow unconsolidated soil, shallow bedrock and deep bedrock and the results of the pilot test and subsequent monitoring will be used to develop the full-scale groundwater remediation design. (Meunier Dec. ¶ 33, Ex. 29)

RESPONSE: Plaintiffs do not dispute that Kipp's contractor and retained expert, Arcadis, reports these results.

REPLY: The Finding is undisputed.

345. Of the 34 Class Members 27 responded to Madison-Kipp's First Set of Interrogatories. (Bianchi Dec. ¶ 3, Ex. 1; Bianchi Dec. ¶ 4, Ex. 2; Bianchi Dec. ¶ 5, Ex. 3; Bianchi Dec. ¶ 6, Ex. 4; Bianchi Dec. ¶ 7, Ex. 5; Bianchi Dec. ¶ 8, Ex. 6; Bianchi Dec. ¶ 9, Ex. 7; Bianchi Dec. ¶ 10, Ex. 8; Bianchi Dec. ¶ 11, Ex. 9; Bianchi Dec. ¶ 12, Ex. 10; Bianchi Dec. ¶ 13, Ex. 11; Bianchi Dec. ¶ 14, Ex. 12; Bianchi Dec. ¶ 15, Ex. 13; Bianchi Dec. ¶ 16, Ex. 14; Bianchi Dec. ¶ 17, Ex. 15; Bianchi Dec. ¶ 18, Ex. 16; Bianchi Dec. ¶ 19, Ex. 17; Bianchi Dec. ¶ 20, Ex. 18; Bianchi Dec. ¶ 21, Ex. 19; Bianchi Dec. ¶ 22, Ex. 20; Bianchi Dec. ¶ 23, Ex. 21; Bianchi Dec. ¶ 24, Ex. 22; Bianchi Dec. ¶ 25, Ex. 23; Bianchi Dec. ¶ 26, Ex. 24; Bianchi Dec. ¶ 27, Ex. 25; Bianchi Dec. ¶ 28, Ex. 26; Bianchi Dec. ¶ 29, Ex. 27)

RESPONSE: Disputed. Of the 33 properties in the Class, 29 Class Members (including the class representatives) answered Interrogatories propounded by Kipp. (Doc. 162 – 1 thru 27; Doc. 191 – 2; Doc. 192 – 2)

REPLY: The proposed finding of fact inadvertently omitted the discovery responses from the class representatives. Therefore, Plaintiffs' response correctly indicates that 29 of the 33 Class Members have answered Madison-Kipp's interrogatories.

346. All 27 responding Class Members responded that their properties have lost their value and that the value cannot be restored. (Bianchi Dec. ¶ 3, Ex. 1 ¶¶ 2, 5; Bianchi Dec. ¶ 4, Ex. 2 ¶¶ 2, 5; Bianchi Dec. ¶ 5, Ex. 3 ¶¶ 2, 5; Bianchi Dec. ¶ 6, Ex. 4 ¶¶ 2, 5; Bianchi Dec. ¶ 7, Ex. 5 ¶¶ 2, 5; Bianchi Dec. ¶ 8, Ex. 6 ¶¶ 2, 5; Bianchi Dec. ¶ 9, Ex. 7 ¶¶ 2, 5; Bianchi Dec. ¶ 10, Ex. 8 ¶¶ 2, 5; Bianchi Dec. ¶ 11, Ex. 9 ¶¶ 2, 5; Bianchi Dec. ¶ 12, Ex. 10 ¶¶ 2, 5; Bianchi Dec. ¶ 13, Ex. 11 ¶¶ 2, 5; Bianchi Dec. ¶ 14, Ex. 12 ¶¶ 2, 5; Bianchi Dec. ¶ 15, Ex. 13 ¶¶ 2, 5; Bianchi Dec. ¶ 16, Ex. 14 ¶¶ 2, 5; Bianchi Dec. ¶ 17, Ex. 15 ¶¶ 2, 5; Bianchi Dec. ¶ 18, Ex. 16 ¶¶ 2, 5; Bianchi Dec. ¶ 19, Ex. 17 ¶¶ 2, 5; Bianchi Dec. ¶ 20, Ex. 18 ¶¶ 2, 5; Bianchi Dec. ¶ 21, Ex. 19 ¶¶ 2, 5; Bianchi Dec. ¶ 22, Ex. 20 ¶¶ 2, 5; Bianchi Dec. ¶ 23, Ex. 21 ¶¶ 2, 5; Bianchi Dec. ¶ 24, Ex. 22 ¶¶ 2, 5; Bianchi Dec. ¶ 25, Ex. 23 ¶¶ 2, 5; Bianchi Dec. ¶ 26, Ex. 24 ¶¶ 2, 5; Bianchi Dec. ¶ 27, Ex. 25 ¶¶ 2, 5; Bianchi Dec. ¶ 28, Ex. 26 ¶¶ 2, 5; Bianchi Dec. ¶ 29, Ex. 27 ¶¶ 2, 5)

RESPONSE: Disputed. 29 Class Members (including the class representatives) have responded that their properties have lost their value and that the value cannot be restored. (Doc. 162 - 1 thru 27; Doc. 191 – 2; Doc. 192-2)

REPLY: The proposed finding of fact inadvertently omitted the discovery responses from the class representatives. Therefore, Plaintiffs' response correctly indicates that 29 of the 33 Class Members have responded to Madison-Kipp's interrogatories with a statement that their properties have lost their value and the value cannot be restored.

347. All 34 Class Members fail to provide any specific facts to support the loss of value to their properties. (See Bianchi Dec. ¶ 3, Ex. 1; Bianchi Dec. ¶ 4, Ex. 2; Bianchi Dec. ¶ 5, Ex. 3; Bianchi Dec. ¶ 6, Ex. 4; Bianchi Dec. ¶ 7, Ex. 5; Bianchi Dec. ¶ 8, Ex. 6; Bianchi Dec. ¶ 9, Ex. 7; Bianchi Dec. ¶ 10, Ex. 8; Bianchi Dec. ¶ 11, Ex. 9; Bianchi Dec. ¶ 12, Ex. 10; Bianchi Dec. ¶ 13, Ex. 11; Bianchi Dec. ¶ 14, Ex. 12; Bianchi Dec. ¶ 15, Ex. 13; Bianchi Dec. ¶ 16, Ex. 14; Bianchi Dec. ¶ 17, Ex. 15; Bianchi Dec. ¶ 18, Ex. 16; Bianchi Dec. ¶ 19, Ex. 17; Bianchi Dec. ¶ 20, Ex. 18; Bianchi Dec. ¶ 21, Ex. 19; Bianchi Dec. ¶ 22, Ex. 20; Bianchi Dec. ¶ 23, Ex. 21; Bianchi Dec. ¶ 24, Ex. 22; Bianchi Dec. ¶ 25, Ex. 23; Bianchi Dec. ¶ 26, Ex. 24; Bianchi Dec. ¶ 27, Ex. 25; Bianchi Dec. ¶ 28, Ex. 26; Bianchi Dec. ¶ 29, Ex. 27)

RESPONSE: Disputed. All Class Members (including the class representatives) have provided specific facts to support the loss of value to their properties, including Class counsel's retention of a property valuation damages expert. (Doc. 162 – 1 thru 27; Doc. 191 – 2; Doc. 192 – 2; Doc. 194)

REPLY: Plaintiffs have not contested the evidence cited. The fact that Plaintiffs' counsel has retained a property valuation damages expert is irrelevant because Plaintiffs have failed to put forth specific facts demonstrating that Class Members have suffered actual damage. (*See* Madison-Kipp Reply Br. at 30-36.) The Plaintiffs' response does not contest the evidence or provide any different evidence. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

348. For 2012, the property value at 102 S. Marquette Street was assessed to be $146,000 by the City of Madison. (Dkt. #135 at 8:3-11; Bianchi Dec. ¶ 30, Ex. 28 at 2-3)

RESPONSE: Plaintiffs do not dispute that the uncontaminated value of the property was assessed at $146,000 for 2012 by the City Assessor.

REPLY: The Finding is undisputed.

349. Class Member Leslie Anne Bellais did not disagree with the City of Madison's property value assessment. (Dkt. #135 at 8:14-25)

RESPONSE: Disputed. Leslie Ann Bellais believes that her property has lost value due to the contamination from Kipp. (Doc. 162 – 13)

REPLY: Plaintiffs have not contested the evidence cited. Ms. Bellais' personal belief does not change her admission that the city's assessment was correct. As a result the Finding is undisputed.

350. Class Member Bellais has not contacted the city assessor to attempt to lower the assessed value of her home. (Dkt. #135 at 28:11-15)

RESPONSE: Plaintiffs do not dispute that she has not contacted the assessor, but do dispute that this fact has any relevance to the damage she has sustained.

REPLY: The Finding is undisputed.

351. Class Member Bellais has not changed her use of her basement since learning of the alleged contamination. (Dkt. #135 at 10:14-17)

RESPONSE: Plaintiffs do not dispute that Mr. Bellais continues to use her basement for laundry because she has to. Plaintiffs do dispute the inference defendant is attempting to make that the use (and enjoyment) of her home is unchanged when in fact, her use of the home has changed. (Doc. 135 at p. 29:3-12)

REPLY: The cited document supports the proposed finding. (*See* dkt. #135 at 10:14-17 ("Q. And has your use of the basement changed at all since learning of allegations of environmental contamination? A. No.").) Plaintiffs' response does not contest the evidence. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

352. The home at 102 S. Marquette Street was purchased for $55,100 in 1992. (Dkt. #135 at 24:15-17)

RESPONSE: Not disputed.

353. The mortgage on the property at 102 S. Marquette Street was last successfully refinanced in 2011. (Dkt. #135 at 23:12-15)

RESPONSE: Plaintiffs do not dispute that the home was refinanced in 2011 and that the refinance did not consider environmental issues. (Doc. 135 at p. 35:1-16)

REPLY: The Finding is undisputed.

354. Class Member Bellais was not told by anyone that it was unsafe to have people in her home but still feels that her home is unsafe. (Dkt. #135 at 29:7-18)

RESPONSE: Plaintiffs do not dispute that Ms. Bellais believes her home is unsafe based upon the contamination found at her home. (Doc. 135 at pp. 42:1-13, 44:7-24)

REPLY: The cited document supports the proposed finding. Plaintiffs' response does not contest the evidence. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

355. For 2012, the property value at 154 S. Marquette Street was assessed to be $206,500 by the City of Madison (Dkt. #136 at 8:1-10; Bianchi Dec. ¶ 31, Ex. 29 at 2-3)

RESPONSE: Plaintiffs do not dispute that the uncontaminated value of the property was assessed at $206,500 for 2012 by the City Assessor.

REPLY: The Finding is undisputed.

356. Class Member Prentice Berge did not believe the City of Madison's 2012 property value assessment to be incorrect. (Dkt. #136 at 8:17-22)

RESPONSE: Disputed. Mr. Berge believes that his property has lost value due to the contamination from Kipp. (Doc. 136 at pp. 25:6 – 27:16)

REPLY: Plaintiffs have not contested the evidence cited. Mr. Berge's personal belief does not change his admission that the city's assessment was correct. As a result the Finding is undisputed.

357. Class Member Berge has not changed his use of his basement since first learning of the alleged contamination. (Dkt. #136 at 10:3-6)

RESPONSE: Plaintiffs do not dispute that the Berge family must continue to use their basement. Plaintiffs do dispute the inference that the use and enjoyment of their property is unchanged when in fact, it has changed. (Doc. 162 – 16)

REPLY: The cited document supports the proposed finding. (Dkt. #136 at 10:3-6 ("Q. And has your use of the basement changed since you first learned of the alleged contamination, environmental contamination? A. No.").) Plaintiffs' response does not contest the evidence. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

358. Class Member Berge has not attempted to sell the property at 154 S. Marquette Street within the last five years. (Dkt. #136 at 10:7-9)

RESPONSE: Plaintiffs do not dispute that Mr. Berge has not attempted to sell his home because he believes it would be pointless. (Doc. 136 at p. 27:14-16).

REPLY: The Finding is undisputed. The cited document supports the proposed finding. (*See* dkt. #136 at 10:7-9 ("Q. Have you attempted to sell your home within the last five years? A. No, I have not.").) Plaintiffs' response does not contest the evidence. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

359. Class Member Berge first received notice about testing his property for soil vapors back in 2004. (Dkt. #136 at 13:23-14:6; Bianchi Dec. ¶ 32, Ex. 30)

RESPONSE: Disputed. Mr. Berge was first notified about soil testing at his property in 2004. (Doc. 162 – 30)

REPLY: The cited document supports the proposed finding. Specifically, Mr. Berge's testimony relates to soil vapor sampling. (Dkt. #136 at 14:1-6.) Further, contrary to Plaintiffs' response, the cited document (addressed to Mr. Berge) relates to soil vapor. (*See* dkt. #162-30 ("Finally, within the next week, MKC will install soil vapor monitoring probes at two locations along the eastern property boundary.").) The Plaintiffs' response does not contest the evidence or provide any different evidence. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

360. The home at 154 S. Marquette Street was purchased in 2003 for $172,000. (Bianchi Dec. ¶ 31, Ex. 29 at 4)

RESPONSE: Not disputed.

361. The mortgage on the property at 154 S. Marquette Street was last successfully refinanced in August 2012. (Dkt. #136 at 22:21-25)

RESPONSE: Plaintiffs do not dispute that the home was refinanced in 2012 and that the refinance did not consider the environmental contamination. (Doc. 136 at pp. 13-23)

REPLY: The Finding is undisputed.

362. The bank still refinanced the mortgage even though Mr. Berge told him about the alleged PCE contamination issues. (Dkt. #136 at 33:5-11)

RESPONSE: Disputed. Mr. Berge mentioned the environmental contamination issues to his personal banker, but the contamination issue was not considered in the appraisal. (Doc. 136 at pp. 23:13-23, 33:5-25)

REPLY: The cited document supports the proposed finding. Mr. Berge discussed the alleged PCE contamination issues with his banker and was still able to

refinance his mortgage. (*See* dkt. #136 at 33:5-11 ("Q. In connection with the refinancing you did this past August, did you have any conversations with anyone at the bank about the PCE contamination issues? A. Yes, I remember talking to my personal banker, you know, does this effect what we are doing here.").) Mr. Berge's personal banker works for the same lending institution that originated Mr. Berge's refinanced loan. Dkt. #136 at 34:4-16. The Plaintiffs' response does not contest the evidence or provide any different evidence. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

363. Class Member Berge was not told by anyone that it was unsafe to continue to garden in his backyard but he feels that it is unsafe. (Dkt. #136 at 28:23-25, 29:1-7)

RESPONSE: Plaintiffs do not dispute that Mr. Berge believes it is unsafe to garden and live in his home based upon the contamination present on his property and discussions he has had with DNR and the Department of Health. (Doc. 136 at pp. 39:8, 42:11)

REPLY: The cited document supports the proposed finding. Mr. Berge testified that he made his own determination regarding whether it was safe to garden in his back yard. (*See* dkt. #136 at 28:23-25, 29:1-7 ("Q. Do you know who told you you could not garden in your back yard? Did someone tell you, and who was it, that it was unsafe to garden in your back yard? A. I made that determination myself. Q. So no one told you that from DNR? A. No, not that I recall. Q. And no one from the Madison Department of Health told you that? A. Not that I recall.").) The Plaintiffs' response does not contest the evidence or provide any different evidence. (*See* dkt. #136 at 42:12-16 ("As you sit here today, is there a single, specific individual who you can point to

who has told you that it's unsafe for you and your family to remain in your house? A. No.").) Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

364. For 2012, the property value at 222 S. Marquette Street was assessed to be $190,800 by the City of Madison. (Dkt. #133 at 6:8-23; Bianchi Dec. ¶ 33, Ex. 31 at 2-3)

RESPONSE: Plaintiffs do not dispute that the uncontaminated value of the property was assessed at $190,800 for 2012 by the City Assessor.

REPLY: The Finding is undisputed.

365. Class Member Dianne Booth has not contacted the City assessor to challenge this assessment. (Dkt. #133 at 22:2-4)

RESPONSE: Plaintiffs do not dispute that Ms. Booth has not contacted the assessor, but do dispute that this fact has any relevance to the damage she has sustained.

REPLY: The Finding is undisputed.

366. However, Ms. Booth knows how to contest here property tax assessment, as she successfully challenged here assessment when she first purchased the home. (Dkt. #133 22:5-15)

RESPONSE: Plaintiffs do not dispute that Dianne Booth challenged inaccurate information from the assessor's office, but disputes that this fact has any relevance to the damage she has sustained.

REPLY: The Finding is undisputed.

367. The home at 222 S. Marquette Street was purchased in 2005 for $130,000. (Bianchi Dec. ¶ 33, Ex. 31 at 4)

RESPONSE: Not disputed.

368. Ms. Booth has not done anything to ascertain or quantify any property damage the alleged contamination has caused to her home. (Dkt. #133 26:3-9)

RESPONSE: Disputed. Class counsel, on behalf of the Class, has retained a property valuation damages expert. (Doc. 194)

REPLY: Plaintiffs have not contested the evidence cited. The fact that Plaintiffs' counsel has retained a property valuation damages expert is irrelevant because Plaintiffs have failed to put forth specific facts demonstrating that Ms. Booth has suffered actual damage. (*See* Madison-Kipp Reply Br. at 30-36.) The Plaintiffs' response does not contest the evidence or provide any different evidence. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

RESPONSE: Plaintiffs do not dispute that the uncontaminated value of the property for 2012 was assessed at $173,500 by the City Assessor.

REPLY: The Finding is undisputed.

369. The 2012, the property value at 110 S. Marquette Street was assessed to be $173,500 by the City of Madison (Dkt. #119 at 8:8-9:5; Bianchi Dec. ¶ 34, Ex. 32 at 2-3)

RESPONSE: Plaintiffs do not dispute that the uncontaminated value of the property for 2012 was assessed at $173,500 by the City Assessor.

REPLY: The Finding is undisputed.

370. Class Member Elaine Bott changed her use of her basement from fear of contamination but no one told her that she needed to change her use of her basement. (Dkt. #119 at 9:6-10:1)

RESPONSE: Plaintiffs do not dispute that the Bott family has changed the use of their basement and home, but dispute that no one told the Botts to reduce their contact with contamination in their soil and in their basement. (Doc. 119 at pp. 9:6-10:5; 35:15-36:9)

REPLY: The cited document supports the proposed finding. Plaintiffs' response does not contest the evidence or provide any different evidence. Instead, Plaintiffs' response references inadmissible hearsay because it cites testimony by Ms. Bott

regarding what some (unnamed) public health official said to another (non-testifying) Plaintiff. This is clearly inadmissible when offered by Ms. Bott to prove the truth of the matter asserted. Therefore, the proposed finding is not disputed with any admissible evidence and, as a result, should be entered.

371. The home at 110 S. Marquette Street was purchased in 2007 for $167,000. (Bianchi Dec. ¶ 34, Ex. 32 at 4)

RESPONSE: Not disputed.

372. Class Member Bott had not obtained an appraisal of the value of her home for within the previous 12 months. (Dkt. #119 at 35:6-8)

RESPONSE: Disputed. Ms. Bott did not know if any appraiser had come through her house in the 12 months preceding her deposition. (Doc. 119 at pp. 35:6-8)

REPLY: The cited document supports the proposed finding. Dkt. #119 at 35:6-8 ("Q. Have you retained an appraiser? A. No. Q. To your knowledge has any appraiser come through your house in the last 12 months? A. No.") Plaintiffs' response does not contest the evidence or provide any different evidence. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

373. For 2012, the property value at 130 S. Marquette Street was assessed to be $206,800 by the City of Madison. (Dkt. #120 at 5:9-22; Bianchi Dec. ¶ 35, Ex. 33 at 2-3)

RESPONSE: Plaintiffs do not dispute that the uncontaminated value of the property for 2012 was assessed at $206,800 by the City Assessor.

REPLY: The Finding is undisputed.

374. Class member Barry Carlsen did not believe that the 2012 assessment was inaccurate. (Dkt. #120 at 15:20-16:16)

RESPONSE: Disputed. Barry Carlsen believes that his property has lost value due to the contamination from Kipp. (Doc. 120 at p. 24:9-11)

REPLY: Plaintiffs have not contested the evidence cited. Mr. Carlsen's personal belief does not change his admission that the city's assessment was correct. As a result the Finding is undisputed.

375. The home at 130 S. Marquette Street was purchased in 1986 for $55,900. (Bianchi Dec. ¶ 35, Ex. 33 at 4)

RESPONSE: Not disputed.

376. Class Member Carlsen added a screen porch onto his home in 2012. (Dkt. #120 at 8:16-21)

RESPONSE: Not disputed.

377. Class Member Carlsen refinanced the mortgage on his home at 130 S. Marquette Street between 2010 and 2011, which was at the same time he learned about the alleged contamination. (Dkt. #120 at 10:3-13)

RESPONSE: Disputed. Mr. Carlsen refinanced his home before he learned of contamination on his property. (Doc. 120 at pp. 13:20-14:25)

REPLY: The cited document supports the proposed finding. (*See* dkt. #120 at 10:3-13 ("Q. Okay. The – When was the last time you recall refinancing your home? A. Interestingly enough, right at the same time I became aware of this problem. I can't say – It was like within days or weeks of – I couldn't even tell you which one came first, but was right at the same time. Q. What year would that have been? A. I guess it's – it would have to be early '11 maybe. I honestly don't remember if it was '10 or '11, but right at the time. The turn of the year.").) The testimony cited in Plaintiffs' response does not relate to the period of time that Mr. Carlsen learned about the alleged contamination but, instead, relates to when Mr. Carlsen received certain testing results.

Plaintiffs' response does not contest the evidence or provide any different evidence. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

378. Class Member Carlsen has done nothing to ascertain that his home has diminished in value. (Dkt. #120 at 24:9-16)

RESPONSE: Disputed. Mr. Carlsen believes that his neighbor's inability to sell his house would also apply to him. (Doc. 120 at p. 24:9-16) In addition, Class counsel has retained a property valuation damages expert. (Doc. 194)

REPLY: The cited document supports the proposed finding. Plaintiffs' response does not contest the evidence or provide any different evidence. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered. Further, the fact that Plaintiffs' counsel has retained a property valuation damages expert is irrelevant because Plaintiffs have failed to put forth specific facts demonstrating that Mr. Carlsen has suffered actual damage. (*See* Madison-Kipp Reply Br. at 30-36.) The Plaintiffs' response does not contest the evidence or provide any different evidence. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

379. Although no one from the WDNR or Health Department has told Mr. Carlsen not to use his basement, but he uses it less because that is the way he feels it should be. (Dkt. #120 at 26:9-16)

RESPONSE: Plaintiffs do not dispute that Carlsen uses his basement less as a result of the contamination.

REPLY: The Finding is undisputed.

380. The property at 265 Waubesa is used by Class Member UCAN Tellurian, a non-profit organization, as a rental unit for patients. (Dkt. #127 at 7:3-21)

RESPONSE: Not disputed.

381. Because it is a non-for-profit property, there is no city tax assessment of 265 Waubesa. (Dkt. #127 at 11:20-13:12; Bianchi Dec. ¶ 36, Ex. 34 at 2-3)

RESPONSE: Not disputed.

382. Class Member UCAN Tellurian decided to remove 3 of its 4 patients that were renting the 265 Waubesa home based solely on information it heard in news accounts. (Dkt. #127 at 7:22-10:3)

RESPONSE: Plaintiffs do not dispute that Tellurian's Board of Directors decided to move patients out of the 265 Waubesa property for its patient's safety.

REPLY: The Finding is undisputed. Plaintiffs' response does not contest the evidence or provide any different evidence.

383. Class Member UCAN Tellurian's decision to not use the 265 Waubesa home for its patients is based on its feeling that the home is not safe. (Dkt. #127 at 20:6-12)

RESPONSE: Not disputed.

384. Class Member UCAN Tellurian has not had the home at 265 Waubesa appraised to determine its value or change in value. (Dkt. #127 at 20:22-21:1)

RESPONSE: Disputed. Class counsel has retained a property valuation damages expert who, according to the Court's schedule, will be submitting a report that includes an analysis of the property's value. (Doc. 194)

REPLY: Plaintiffs have not contested the evidence cited. The fact that Plaintiffs' counsel has retained a property valuation damages expert is irrelevant because Plaintiffs have failed to put forth specific facts demonstrating that UCAN Tellurian has suffered actual damage. (*See* Madison-Kipp Reply Br. at 30-36.) The Plaintiffs' response does not contest the evidence or provide any different evidence. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

385. Even when Class Member UCAN Tellurian was renting its home to four patients it was not receiving fair market rental value. (Dkt. #127 at 22:22-23:25)

RESPONSE: Disputed. Tellurian prepares a financial needs assessment for its patients when determining what rent to charge and any difference between what patients can afford to pay, and fair market rent is subsidized by fundraising. (Doc. 127 at pp. 22:22-23:20).

REPLY: The cited document supports the proposed finding and plaintiffs' response does not present a genuine dispute. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

386. For 2012, the property value at 249 Waubesa Street was assessed to be $186,800 by the City of Madison. (Dkt. #140 at 7:6-15; Bianchi Dec. ¶ 37, Ex. 35 at 2-3)

RESPONSE: Plaintiffs do not dispute that the uncontaminated value of the property for 2012 was assessed at $186,800 by the City Assessor.

REPLY: The Finding is undisputed.

387. Class Member Julie Bernhardt did not believe that the city assessment was incorrect and has never challenged the assessed value of her home at 249 Waubesa Street. (Dkt. #140 at 8:2-18)

RESPONSE: Disputed. Ms. Bernhardt believes that her property has lost value due to the contamination from Kipp. (Doc. 140 at pp. 35:10 – 36:12)

REPLY: Plaintiffs have not contested the evidence cited. Ms. Bernhardt's personal belief does not change her admission that the city's assessment was correct. As a result the Finding is undisputed.

388. It is Class Member Bernhardt's personal preference to not have herself or her dog on the soil in the yard of her home at 249 Waubesa Street. (Dkt. #140 at 19:15-19)

RESPONSE: Plaintiffs do not dispute that Ms. Bernhardt has changed the use of her home based upon the research she has done, the way she chooses to live her life, and the hydrogeologists she has spoken to. (Doc. 140 at p. 32:13-18)

REPLY: The Finding is undisputed. Plaintiffs' response does not contest the evidence or provide any different evidence.

389. Class Member Bernhardt believes that there should not be any VOCs around her because that is the way she personally chooses to live her life. (Dkt. #140 at 22:3-14)

RESPONSE: Plaintiffs do not dispute that Ms. Bernhardt believes that VOC contamination from Kipp should not be on her property or in her house.

REPLY: The Finding is undisputed. Plaintiffs' response does not contest the evidence or provide any different evidence.

390. Class Member Bernhardt improved her home at 249 Waubesa Street after learning of the potential contamination issues by remodeling the kitchen and bathroom. (Dkt. #140 at 25:5-14)

RESPONSE: Disputed. Ms. Bernhardt's deposition testimony was inaccurate on the date of her kitchen and bath remodel. Those remodeling jobs took place in July 2010 before she learned of the contamination on her property.

REPLY: The Finding is undisputed. Plaintiffs do not provide any evidence to support their response. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

391. The home at 249 Waubesa Street was purchased by Class Member Bernhardt in 2002 for $135,000. (Bianchi Dec. ¶ 37, Ex. 35 at 4)

RESPONSE: Not disputed.

392. For 2012, the property value at 245 Waubesa Street was assessed to be $137,000 by the City of Madison. (Dkt. #138 at 12:13-13:8; Bianchi Dec. ¶ 38, Ex. 36 at 2-3)

RESPONSE: Plaintiffs do not dispute that the uncontaminated value of the property for 2012 was assessed at $137,000 by the City Assessor.

REPLY: The Finding is undisputed.

393. Class member George Gilbertsen purchased the home at 245 Waubesa Street in 1955. (Dkt. #138 at 8:10-11)

RESPONSE: Not disputed.

394. Previous to the current lawsuit, Class Member Gilbertsen never had any problems with Madison-Kipp. (Dkt. #138 at 9:17-25)

RESPONSE: Disputed. Mr. Gilbertsen had problems with flash floods through his backyard from blockage at Kipp. (Doc. 138 at p. 9:22-25)

REPLY: The cited document supports the proposed finding. (*See* dkt. #138 at 9:22-25 ("Q. Any problems with Madison-Kipp in general? A. No. not really. Oh, a couple of times we had a couple flash floods down through the back yard there from blockage, but nothing else.").) Plaintiffs' response does not contest the evidence or provide any different evidence. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

395. Class Member Gilbertsen did not know what the market value of his home would be currently. (Dkt. #138 at 14:24-15:1)

RESPONSE: Plaintiffs agree that Mr. Gilbertsen did not know what the exact current market value of his home would be with the contamination on it, but that he believes it has lost value and is below market value. (Doc. 138 at p. 14:21-23).

REPLY: The Finding is undisputed. Plaintiffs' response cites Mr. Gilbertsen's "belief"; however a Plaintiffs' personal belief is not admissible evidence. As a result the Finding is undisputed.

396. For, 2012, the property value at 128 S. Marquette Street was assessed to be $134,000 by the City of Madison. (Dkt. #124 at 7:9-17; Bianchi Dec. ¶ 39, Ex. 37 at 2-3)

RESPONSE: Plaintiffs do not dispute the uncontaminated value of the property for 2012 was assessed at $134,000 by the City Assessor.

REPLY: The Finding is undisputed.

397. Class Member Patrick Hannon noted that the city assessment was correct. (Dkt. #124 at 7:18-25)

RESPONSE: Disputed. Mr. Hannon believes that his property has lost value due to the contamination from Kipp. (Doc. 124 at p. 36:3-15).

REPLY: Plaintiffs have not contested the evidence cited. Mr. Hannon's personal belief does not change his admission that the city's assessment was correct. As a result the Finding is undisputed.

398. Although no one told Class Member Hannon to reduce using his basement in 2011, he reduced his use of his basement because of the possibility of contamination in the subsoil. (Dkt. #124 at 19:5-15; 36:16-22)

RESPONSE: Plaintiffs do not dispute that Mr. Hannon and his wife have changed the use of their basement and home due to the contamination found at their property.

REPLY: The Finding is undisputed.

399. Class Member Hannon has not personally had his home appraised. (Dkt. #124 at 37:9-10)

RESPONSE: Disputed. Class counsel has retained a property valuation damages expert who, according to the Court's schedule, will be submitting a report that includes an analysis of the property's value. (Doc. 194)

REPLY: Plaintiffs have not contested the evidence cited. The fact that Plaintiffs' counsel has retained a property valuation damages expert is irrelevant because Plaintiffs have failed to put forth specific facts demonstrating that Mr. Hannon has suffered actual damage. (*See* Madison-Kipp Reply Br. at 30-36.) The Plaintiffs' response

does not contest the evidence or provide any different evidence. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

400. For 2012, the property value at 166 S. Marquette Street was assessed to be $144,300 by the City of Madison. (Dkt. #125 at 11:20-12:8; Bianchi Dec. ¶ 40, Ex. 38 at 2-3)

RESPONSE: Plaintiffs do not dispute that the uncontaminated value of the property for 2012 was assessed at $144,300 by the City Assessor.

REPLY: The Finding is undisputed.

401. Class Member Sharon Helmus has not done anything to investigate what the value of her home at 166 S. Marquette is currently. (Dkt. #125 at 21:9-11)

RESPONSE: Disputed. Class counsel, on behalf of the Class, has retained a property valuation damages expert. (Doc. 194)

REPLY: Plaintiffs have not contested the evidence cited. The fact that Plaintiffs' counsel has retained a property valuation damages expert is irrelevant because Plaintiffs have failed to put forth specific facts demonstrating that Ms. Helmus has suffered actual damage. (*See* Madison-Kipp Reply Br. at 30-36.) The Plaintiffs' response does not contest the evidence or provide any different evidence. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

402. Ms. Helmus did not hire an appraiser or real estate agent to determine the value of her home. (Dkt. #125 at 21:12-15)

RESPONSE: Disputed. Class counsel, on behalf of the Class, has retained a property valuation damages expert who, according to the Court's schedule, will be submitting a report that includes an analysis of property values. (Doc. 194)

REPLY: Plaintiffs have not contested the evidence cited. See Madison-Kipp's reply to Plaintiffs' response to M-KPFOF ¶ 400, above.

403. For 2012, the property value at 142 S. Marquette Street was assessed to be $121,000 by the City of Madison. (Dkt. #137 at 8:13-18; Bianchi Dec. ¶ 41, Ex. 39 at 2-3)

RESPONSE: Plaintiffs do not dispute that the uncontaminated value of the property for 2012 was assessed at $121,000 by the City Assessor.

REPLY: The Finding is undisputed.

404. Class member Kenneth Hennrick noted that the city's assessment was correct. (Dkt. #137 at 8:24-9:3)

RESPONSE: Disputed. Mr. Hennrick believes that his property has lost value due to the contamination from Kipp. (Doc. 162 – 10)

REPLY: Plaintiffs have not contested the evidence cited. Mr. Hennrick's personal belief does not change his admission that the city's assessment was correct. As a result the Finding is undisputed.

405. Class Member Kenneth Hennrick has rented out the upper unit at 142 S. Marquette Street to Megan Otto since August 2010, with a year lease having been renewed twice. (Dkt. #137 at 5:17-6:17)

RESPONSE: Not disputed.

406. For the initial two lease terms Class Member Hennrick charged $700 in rent for the upper unit and in the most recent, 2012, lease the rent was raised to $720. (Dkt. #137 at 6:18-21)

RESPONSE: Not disputed.

407. Class Member Hennrick purchased the home at 142 S. Marquette Street for $99,000 in 2010. (Bianchi Dec. ¶ 41, Ex. 39 at 4)

RESPONSE: Not disputed.

408. Class Member Hennrick was able to refinance his mortgage on the home at 142 S. Marquette Street in 2012. (Dkt. #137 at 11:8-12, 12:6-7)

RESPONSE: Plaintiffs do not dispute that Mr. Hennrick refinanced his home and that the refinance did not take into consideration the environmental contamination.

(Doc. 137 at pp. 11:19-12:5).

REPLY: The Finding is undisputed.

409. Class Member Hennrick believes that the $720 a month rent he is currently obtaining for the upper unit is a fair rental value for that unit. (Dkt. #137 at 14:9-13)

RESPONSE: Plaintiffs do not dispute that this is Mr. Hennrick's belief.

REPLY: The Finding is undisputed.

410. When Ms. Otto resigned her most recent lease, in which her rent was increased, she was aware of the alleged contamination issues. (Dkt. #137 at 18:23-19:18)

RESPONSE: Plaintiffs dispute the extent of Ms. Otto's knowledge. Prior to signing her most recent lease, Mr. Hennrick had only a brief discussion with Ms. Otto during which he told her that there was a problem with contamination on the property but that he did not known the extent of the contamination or the chemicals involved, and in response to this information, she expressed concern. (Doc. 137 at pp. 18:23-20:16)

REPLY: The cited document supports the proposed finding and plaintiffs' response does not present a genuine dispute. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered

411. Ms. Otto was not forced into signing the new, more expensive lease. (Dkt. #137 at 40:15-21)

RESPONSE: Not disputed.

412. Class Member Hennrick is not a real estate professional and does not know what a reasonable offer to purchase his home at 142 S. Marquette would be. (Dkt. #137 at 30:3-7)

RESPONSE: Disputed. Mr. Hennrick estimated that the uncontaminated value of his property was $140,000. (Doc. 137 at p. 30:3-7)

REPLY: The cited document supports the proposed finding. (*See* Dkt. #137at 30:3-7 ("Q. What do you think would be a reasonable offer for your current house right

now. A. Let me think. $140,000. That's off the top of my head. I'm not a real estate professional. I don't know.").) Plaintiffs' response is not supported by the testimony because Mr. Hennrick's estimate regarding a reasonable offer was "right now" and not the "uncontaminated value" as Plaintiffs' response implies. Further, Mr. Hennrick testified that he is "not a real estate professional" and "does not know" what a reasonable offer would be, as stated in M-KPFOF ¶ 412. Therefore, Plaintiffs' response does not present a genuine dispute. The proposed finding is not disputed with any evidence and, as a result, should be entered.

413. For 2012, the property value at 118 S. Marquette Street was assessed to be $206,500 by the City of Madison. (Dkt. #130 at 8:2-8; Bianchi Dec. ¶ 42, Ex. 40 at 2-3)

RESPONSE: Plaintiffs do not dispute that the uncontaminated value of the property for 2012 was assessed at $190,000 by the City Assessor. (Doc. 163 – 3 at pp. 2, 3)

REPLY: The Finding is undisputed.

414. Class member Judith James did not believe that the city's assessment was incorrect. (Dkt. #130 at 8:9-18)

RESPONSE: Disputed. Ms. James believes that the property has lost value due to the contamination from Kipp. (Doc. 130 at pp. 22:14-23:3; 24:5-7)

REPLY: Plaintiffs have not contested the evidence cited. Ms. James' personal belief does not change her admission that the city's assessment was correct. As a result the Finding is undisputed.

415. Class Member James never challenged the city's 2012 assessment regarding the value of her home at 118 S. Marquette. Street. (Dkt. #130 at 8:19-22)

RESPONSE: Plaintiffs do not dispute that Ms. James has not contacted the assessor, but do dispute that this fact has any relevance to the damage she has sustained.

REPLY: The Finding is undisputed.

416. Although Class Member James does not believe that her property at 118 S. Marquette has any value she has not contacted the city to attempt to lower her assessed tax value. (Dkt. #130 at 23:25-24:10)

RESPONSE: Plaintiffs do not dispute that Ms. James has not contacted the assessor, but do dispute that this fact has any relevance to the damage she has sustained.

REPLY: The Finding is undisputed.

417. Although no one from WDNR or the City Department of Health told Ms. James that she should use her basement less, she decided, on her own to reduce her use. (Dkt. #130 at 10:5-20)

RESPONSE: Plaintiffs do not dispute that Ms. James uses her basement less as a result of the contamination found in her home.

REPLY: The Finding is undisputed.

418. For 2012, the property value at 253 Waubesa Street was assessed to be $139,600 by the City of Madison. (Dkt. #128 at 8:24-9:7; Bianchi Dec. ¶ 43, Ex. 41 at 2-3)

RESPONSE: Plaintiffs do not dispute that the uncontaminated value of the property for 2012 was assessed at $139,600 by the City Assessor.

REPLY: The Finding is undisputed.

419. The home at 253 Waubesa Street was purchased in 2002 for $115,000. (Bianchi Dec. ¶ 43, Ex. 41 at 4)

RESPONSE: Not disputed.

420. The home at 253 Waubesa Street was appraised at $170,000 in September 2012. (Bianchi Dec. ¶ 43, Ex. 41 at 128-129)

RESPONSE: Not disputed.

421. The September 2012 appraisal of the 253 Waubesa Street property was part of a refinancing of the mortgage on the property, which was completed in October. (Dkt. #128 at 23:2-14)

RESPONSE: Plaintiffs do not dispute that the house was refinanced in 2012 and that the refinance did not consider environmental conditions at the property. (Doc. 128 at pp. 23:17, 24:5)

REPLY: The Finding is undisputed.

422. For 2012, the property value at 126 S. Marquette Street was assessed to be $209,400 by the City of Madison. (Dkt. #123 at 7:19-8:8; Bianchi Dec. ¶ 44, Ex. 42 at 2-3)

RESPONSE: Plaintiffs do not dispute that the uncontaminated value of the property for 2012 was assessed at $209,400 by the City Assessor.

REPLY: The Finding is undisputed.

423. Class Member Elizabeth Reynolds did not find that the city's assessment was incorrect. (Dkt. #123 at 8:9-16)

RESPONSE: Disputed. Ms. Reynolds believes that the property has lost value due to the contamination from Kipp. (Doc. 123 at pp. 19:19-20:10)

REPLY: Plaintiffs have not contested the evidence cited. Ms. Reynolds' personal belief does not change her admission that the city's assessment was correct. As a result the Finding is undisputed.

424. The home at 253 Waubesa Street was purchased in 2009 for $210,500. (Bianchi Dec. ¶ 44, Ex. 42 at 4)

RESPONSE: Not disputed.

425. Class Member Reynolds believes that her property has lost its value because she believes no one would purchase her home. (Dkt. #123 at 19:19-20:10)

RESPONSE: Not disputed.

426. Class Member Reynolds has not tried to sell her home or contact a realtor about trying to sell her home. (Dkt. #123 at 24:15-25)

RESPONSE: Plaintiffs do not dispute that Ms. Reynolds has not attempted to sell her home because she does not believe anyone would want to buy it. (Doc. 123 p. 25:8-15)

REPLY: The Finding is undisputed. The cited document supports the proposed finding and plaintiffs' response does not present a genuine dispute. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

427. For 2012, the property value at 202 S. Marquette Street was assessed to be $217,900 by the City of Madison. (Dkt. #134 at 7:15-8:4; Bianchi Dec. ¶ 45, Ex. 43 at 2-3)

RESPONSE: Plaintiffs do not dispute that the uncontaminated value of the property for 2012 was assessed at $217,900 by the City Assessor.

REPLY: The Finding is undisputed.

428. Class Member Brandi Rogers has never challenged the city's tax assessment value of her home at 202 S. Marquette Street. (Dkt. #134 at 20:7-9)

RESPONSE: Disputed. Ms. Rogers believes that the property has lost value due to the contamination from Kipp. (Doc. 134 at pp. 23:10 – 24:9)

REPLY: Plaintiffs have not contested the evidence cited. Ms. Rogers' personal belief does not change her admission that the city's assessment was correct. As a result the Finding is undisputed.

429. The home at 202 S. Marquette Street was purchased in 2010 for $217,900. (Bianchi Dec. ¶ 45, Ex. 43 at 4)

RESPONSE: Not disputed.

430. Class Member Rogers has not done anything to ascertain he present market value of her home. (Dkt. #134 at 27:8-10)

RESPONSE: Disputed. Class counsel, on behalf of the Class, has retained a property valuation damages expert. (Doc. 194)

REPLY: Plaintiffs have not contested the evidence cited. The fact that Plaintiffs' counsel has retained a property valuation damages expert is irrelevant because Plaintiffs have failed to put forth specific facts demonstrating that Ms. Rogers has suffered actual damage. (*See* Madison-Kipp Reply Br. at 30-36.) The Plaintiffs' response does not contest the evidence or provide any different evidence. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

431. Class Member Rogers has not done anything to ascertain the mortgage eligibility of her home. (Dkt. #134 at 30:12-15)

RESPONSE: Disputed. Ms. Rogers has spoken neighbors who tried to sell their home after learning of the contamination, but were unable to do so. (Doc. 134 at p. 30:12-22)

REPLY: The cited document supports the proposed finding. (*See* dkt. #234 at 30:12-15 ("Q. Have you done anything to ascertain the bankability or mortgage eligibility of your home? A. No, we haven't done that.").) Thus, plaintiffs' response does not present a genuine dispute. The fact that Ms. Rogers spoke to neighbors who tried to sell their home is irrelevant as to whether Ms. Rogers' home would be eligible for a mortgage. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered .

432. For 2012, the property value at 206 S. Marquette Street was assessed to be $191,100 by the City of Madison. (Dkt. #132 at 4:21-5:8; Bianchi Dec. ¶ 46, Ex. 44 at 2-3)

RESPONSE: Plaintiffs do not dispute that the uncontaminated value of the property for 2012 was assessed at $191,100 by the City Assessor.

REPLY: The Finding is undisputed.

433. Class Member Karsten Schilling noted that the city's assessment was in the "right ballpark. (Dkt. #132 at 14:5-7, 15:6-8)

RESPONSE: Plaintiffs do not dispute that Mr. Schilling believes that the City's assessment of the uncontaminated value of his property is in the right ballpark.

REPLY: The Finding is undisputed.

434. The home at 206 S. Marquette Street was purchased in 1994 for $78,725. (Bianchi Dec. ¶ 46, Ex. 44 at 4)

RESPONSE: Not disputed.

435. For 2012, the property value at 257 Waubesa Street was assessed to be $151,900 by the City of Madison. (Dkt. #126 at 8:15-9:4; Bianchi Dec. ¶ 47, Ex. 45 at 2-3)

RESPONSE: Plaintiffs do not dispute that the uncontaminated value of the property for 2012 was assessed at $151,900 by the City Assessor.

REPLY: The Finding is undisputed.

436. Class Member Julie Sheahan noted that the city's assessment was correct. (Dkt. #126 at 9:5-18)

RESPONSE: Disputed. Ms. Sheahan believes her property has lost value due to the contamination from Kipp. (Doc. 126 at pp. 25:24-26:14)

REPLY: Plaintiffs have not contested the evidence cited. Ms. Sheahan's personal belief does not change her admission that the city's assessment was correct. As a result the Finding is undisputed.

437. Class Member Sheahan has not attempted to reduce the property tax assessment for her home. (Dkt. #126 at 27:5-7)

RESPONSE: Plaintiffs do not dispute that Ms. Sheahan has not contacted the assessor to reduce her tax assessment, but do dispute that this fact has any relevance to the damage she sustained.

REPLY: The Finding is undisputed.

438. The home at 257 Waubesa Street was purchased in 2008 for $155,000. (Bianchi Dec. ¶ 47, Ex. 45 at 4)

RESPONSE: Not disputed.

439. For 2012, the property value at 230 S. Marquette Street was assessed to be $164,500 by the City of Madison. (Dkt. #129 at 12:23-13:6; Bianchi Dec. ¶ 48, Ex. 46 at 2-3)

RESPONSE: Plaintiffs do not dispute that the uncontaminated value of the property for 2012 was assessed at $164,500 by the City Assessor.

REPLY: The Finding is undisputed.

440. Although Class Member Daniel Stevens has challenged and reduced a tax assessment on another property, he has not tried to reduce the tax assessment of the 230 S. Marquette Street property. (Dkt. #129 at 14:5-11)

RESPONSE: Plaintiffs do not dispute that Mr. Stevens has not contacted the assessor to reduce his tax assessment, but do dispute that this fact has any relevance to the damage he has sustained.

REPLY: The Finding is undisputed.

441. Class Member Daniel Stevens purchased the home at 230 S. Marquette Street in 1973 as a rental property. (Dkt. #129 at 9:5-8)

RESPONSE: Not disputed.

442. The tenant living in the upper unit has been renting from Mr. Stevens for over 25 years. (Dkt. #129 at 9:25-10:2)

RESPONSE: Not disputed.

443. The current tenant living in the lower unit entered into a year lease in August 2012. (Dkt. #129 at 9:17-24)

RESPONSE: Not disputed.

444. The current tenant living in the lower unit pays $900 a month in rent, which is $25 more than the previous tenant who rented the lower unit the year before. (Dkt. #129 10:19-21)

RESPONSE: Not disputed.

445. Class Member Stevens believes the rent he obtains for the lower unit might be a little under fair rental value. (Dkt. #129 at 10:22-24)

RESPONSE: Plaintiffs do not dispute that is what Mr. Stevens believes.

REPLY: The Finding is undisputed.

446. Class Member Stevens informed the current tenants in the lower unit of the alleged contamination but they still decided to rent the unit and they did not request, and were not given, and reduction in rent. (Dkt. #129 at 21:7-15)

RESPONSE: Plaintiffs dispute the extent of the tenants' knowledge because in August of 2012, Mr. Stevens did not yet know that his property was contaminated because he had not yet received test results. (Doc. 129 at p. 20:5-16)

REPLY: The cited document supports the proposed finding. Dkt. #129 at 21:7-15. ("Q. So after disclosing to the current tenants these kind of general issues, was there any further conversation about the contamination? A. Yes, they decided they needed to think it over whether they were going to rent or not. Q. And they eventually decided to? A. They eventually did. Q. Was there any reduction in rent? A. No.) Further, plaintiffs' response does not present a genuine dispute. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

447. Since Class member Stevens began owning the property at 230 S. Marquette Street he has not had any problems with Madison-Kipp. (Dkt. #129 at 17:18-20)

RESPONSE: Disputed. At one point, water from Kipp's property was running onto Mr. Steven's property. (Doc. 129 at p. 18:2-13)

REPLY: The cited document supports the proposed finding. (*See* dkt. #129 at 18:2-13. ("Q. So after disclosing to the current tenants these kind of general issues, was there any further conversation about the contamination? A. Yes, they decided they

needed to think it over whether they were going to rent or not. Q. And they eventually decided to? A. They eventually did. Q. Was there any reduction in rent? A. No.").) Further, plaintiffs' response does not present a genuine dispute. Mr. Stevens testified that after he spoke with Madison-Kipp about the water runoff, Madison-Kipp addressed the matter. (*See* M-KPFOF ¶ 448 and dkt. #129 at 18:9-22 ("Q. What exactly did they do? A. Built a pretty good size curb around the edge of the parking lot area and diverted it out to the street. Q. And did that resolve the property? A. It did.").) Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

448. At one point, when Madison-Kipp converted a parcel of property abutting 230 S. Marquette Street to a parking lot it resulting in water running down into Mr. Stevens' property, but Mr. Stevens spoke with Reid Coleman of Madison-Kipp and Madison-Kipp resolved the problem. (Dkt. #129 at 18:5-22)

RESPONSE: Plaintiffs do not dispute this fact, but do dispute that this event has any relevance to the issues in this case.

REPLY: The Finding is undisputed.

449. For 2012, the property value at 241 Waubesa Street was assessed to be $158,000 by the City of Madison. (Dkt. #139 at 7:2-9; Bianchi Dec. ¶ 49, Ex. 47 at 2-3)

RESPONSE: Plaintiffs do not dispute that the uncontaminated value of the property for 2012 was assessed at $158,000 by the City Assessor.

REPLY: The Finding is undisputed.

450. Class Member Kate Thompson did not find the city's assessment to be incorrect. (Dkt. #139 at 8:3-13)

RESPONSE: Disputed. Ms. Thompson believes her property has lost value due to the contamination from Kipp. (Doc. 139 at pp. 20:7-19; 21:2-14)

REPLY: Plaintiffs have not contested the evidence cited. Ms. Thompson's personal belief does not change her admission that the city's assessment was correct. As a result the Finding is undisputed.

451. Class Member Thompson did not contact the city regarding her 2012 tax assessment. (Dkt. #139 8:14-17)

RESPONSE: Plaintiffs do not dispute that Ms. Thompson did not contact the City regarding her assessment, but do dispute that this fact has any relevance to the issues in this case.

REPLY: The Finding is undisputed.

452. The home at 241 Waubesa Street was purchased in 1985 for $42,000. (Bianchi Dec. ¶ 49, Ex. 47 at 4)

RESPONSE: Not disputed.

453. At some point after 1985, Ms. Thompson had her property flooded as a result of heavy runoff from Madison-Kipp's property during heavy rains. (Dkt. #139 at 14:24-15:5)

RESPONSE: Not disputed.

454. Class Member Thompson contacted Madison-Kipp about the flooding and they arranged to pay to have someone come and repair any damage done by the flooding. (Dkt. #139 at 15:8-19)

RESPONSE: Not disputed.

455. Class Member Thompson was satisfied with the action Madison-Kipp took in response to her contact. (Dkt. #139 at 15:20-21)

RESPONSE: Plaintiffs do not dispute this fact, but do dispute its relevance to the issues in this case.

REPLY: The Finding is undisputed.

456. Class Member Thompson has not had any realtors even attempt to determine what the market value of 241 Waubesa could be. (Dkt. #139 at 20:24-21:1)

RESPONSE: Plaintiffs do not dispute that Ms. Thompson has not contacted any realtors because she currently has no plans to move. (Doc. 139 at pp. 20:20-21:1)

REPLY: The Finding is undisputed.

457. For 2012, the property value at 162 S. Marquette Street was assessed to be $136,000 by the City of Madison (Dkt. #131 at 8:24-9:8; Bianchi Dec. ¶ 50, Ex. 48 at 2-3)

RESPONSE: Plaintiffs do not dispute that the uncontaminated value of the property for 2012 was assessed at $136,000 by the City Assessor.

REPLY: The Finding is undisputed.

458. Class Member Peter Uttech purchased the property at 162 S. Marquette Street in 1977 to serve as a rental property. (Dkt. #131 at 9:9-19)

RESPONSE: Not disputed.

459. Class Member Uttech currently rents the property for $910 a month, which is higher than the rent he charged back in 2010. (Dkt. #131 11:6-11)

RESPONSE: Plaintiffs do not dispute that the current rent is higher than the rent he charged to his son who was living in the property in 2010. (Doc. 131 at p. 11:6-13)

REPLY: The Finding is undisputed.

460. The $910 rent defrays the total expense of the property for Mr. Uttech and provides him with some additional income. (Dkt. #131 12:7-11)

RESPONSE: Plaintiffs do not dispute that Mr. Uttech is covering his costs, and that he is currently renting the property because a sale of the property fell through due to the contamination issues. (Doc. 131 at p. 33:8-25)

REPLY: The cited document supports the proposed finding. (*See* Dkt. #131 at 12:7-11 ("Q. Does the $910 defray the total expense [carrying costs]? A. Yes. Q. And on top of it you receive some incremental income? A. Yes.").) Further, plaintiffs'

response does not present a genuine dispute. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

461. For 2012, the property value at 233 Waubesa Street was assessed to be $163,500 by the City of Madison. (Dkt. #122 at 5:14-20; Bianchi Dec. ¶ 51, Ex. 49 at 2-3)

RESPONSE: Plaintiffs do not dispute that the uncontaminated value of the property for 2012 was assessed at $163,500 by the City Assessor.

REPLY: The Finding is undisputed.

462. The home at 233 Waubesa Street was purchased in 1999 for $89,000. (Bianchi Dec. ¶ 51, Ex. 49 at 4)

RESPONSE: Not disputed.

463. For 2012, the property value at 210 S. Marquette Street was assessed to be $152,800 by the City of Madison. (Dkt. #121 at 6:6-17; Bianchi Dec. ¶52, Ex. 50 at 2-3)

RESPONSE: Plaintiffs do not dispute that the uncontaminated value of the property for 2012 was assessed at $152,800 by the City Assessor.

REPLY: The Finding is undisputed.

464. The home at 210 S. Marquette Street was purchased in May 2011 for $142,500 as an investment property. (Bianchi Dec. ¶ 52, Ex. 50 at 4; Dkt. #121 at 5:16-6:1)

RESPONSE: Not disputed.

465. Both units at the property are rented through July 31, 2013 under leases entered into on August 1, 2012. (Dkt. #121 at 24:14-25:17)

RESPONSE: Plaintiffs do not dispute that the property is rented, but he believes the property is worth nothing now. (Doc. 121 at pp. 23:20-24:8)

REPLY: The Finding is undisputed.

466. Class Member Brent Wilder is deriving income through the rental of the home at 233 Waubesa Street by obtaining what he believes to be a fair rental value for the home. (Dkt. #121 at 24:9-13)

RESPONSE: Disputed. Mr. Wilder owns the property at 210 S. Marquette. (Doc. 163-13)

REPLY: Plaintiffs correctly indicate that Mr. Wilder's address is 210 S. Marquette.

467. Historically, PCE has been used widely in metal degreasing operations at industrial facilities, and continues to be used in numerous industrial, commercial, and household cleaning products, as well as in dry cleaning products. (Dkt. #145 at 2)

RESPONSE: Not disputed. Objections: Legal conclusion; immaterial to the issues raised by the motion.

REPLY: The proposed finding is supported by the evidence cited. Plaintiff's response does not dispute the proposed finding.

468. Madison-Kipp's use of PCE as a solvent for degreasing was a common and accepted industrial practice up to and including the late 1980s, when its use at Madison-Kipp ceased. (Dkt. #145 at 2-3; Bianchi Dec. ¶ 53, Ex. 51; Bianchi Dec. ¶ 54, Ex. 52)

RESPONSE: Disputed. As Dr. Everett has testified Madison-Kipp's "use" included reckless dumping of wastes including pure product which was not a common and acceptable practice. (Doc. 185 at pp. 19-25; Doc. 188 at pp. 32, 48, 60-62, 76-78, 114-116, 37-138, 150-151)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, Plaintiffs rely on the expert report and 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' 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 the Supplemental, Oral Opinions of Lorne G. Everett, which were filed concurrently herewith, and incorporated herein by reference. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

469. Madison-Kipp's use of PCE to clean die machines through sometime in the 1980s was entirely consistent with industry practice at the time. (Dkt. #145 at 2-3)

RESPONSE: Disputed. As Dr. Everett has testified Madison-Kipp's "use" included reckless dumping of wastes including pure product which was not a common and acceptable practice. (Doc. 185 at pp. 19-25; Doc. 188 at pp. 32, 48, 60-62, 76-78, 114-116, 37-138, 150-151)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, Plaintiffs rely on the expert report and 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' 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 the Supplemental, Oral Opinions of Lorne G. Everett, which were filed concurrently herewith, and incorporated herein by reference. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

470. Madison-Kipp's use of PCE solvent for degreasing meets the standard of care recognized in the industry at the time. (Dkt. #145 at 2-3)

RESPONSE: Disputed. As Dr. Everett has testified Madison-Kipp's "use" included reckless dumping of wastes including pure product which was not a common and acceptable practice. (Doc. 185 at pp. 19-25; Doc. 188 at pp. 32, 48, 60-62, 76-78, 114-116, 37-138, 150-151)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, Plaintiffs rely on the expert report and 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' 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 the Supplemental, Oral Opinions of Lorne G. Everett, which were filed concurrently herewith, and incorporated herein by reference. Further, Plaintiffs have not challenged

the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

471. 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. (Dkt. #145 at 3-4; Bianchi Dec. ¶ 53, Ex. 51; Bianchi Dec. ¶ 54, Ex. 52)

RESPONSE: Disputed. As Dr. Everett has testified Madison-Kipp's "use" included reckless dumping of wastes including pure product which was not a common and acceptable practice. (Doc. 185 at pp. 19-25; Doc. 188 at pp. 32, 48, 60-62, 76-78, 114-116, 37-138, 150-151).

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, Plaintiffs rely on the expert report and 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' 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 the Supplemental, Oral Opinions of Lorne G. Everett, which were filed concurrently herewith, and incorporated herein by reference. Further, Plaintiffs have not challenged

the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

472. After removing used PCE from a degreaser for reclamation, the remaining waste would consist of a semi-solid sludge comprised of oils, metal particles, dirt, and PCE residue. (Dkt. #145 at 4; Bianchi Dec. ¶ 53, Ex. 51; Bianchi Dec. ¶ 54, Ex. 52)

RESPONSE: Plaintiffs do not dispute that the PCE sludge could contain oils, metal particles, dirt and PCE but dispute that waste PCE was properly disposed of. (Doc. 185 at p. 11; Doc. 195 – 2)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, Plaintiffs rely on the expert report and 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' 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. Plaintiffs also rely on the inadmissible testimony of Mr. James Lenz. (*See* Madison-Kipp Reply Br. at 6-12.) First, Mr. Lenz does not have any personal knowledge or a sufficient foundation to testify about the facts at issue. (Dkt. #187 at p. 58 ("Q. … Was PCE ever spilled? Did it ever make its way onto the ground in that operation? A. I have no firsthand knowledge.").) Further,

his testimony is inadmissible hearsay because it purportedly summarizes second and even third hand out-of-court statements. Those that do have personal knowledge refute Mr. Lenz's testimony and have signed affidavits regarding the same. (*See* dkt. #148 (Affidavit of Marvin Jellings) and dkt. #149 (Affidavit of George Schluter).) Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

473. Between the 1940s and 1970s, industry guidance with regards to the disposal of chlorinated solvent waste, i.e., waste sludge, recommended that such waste be poured on the ground. ("Dkt. #145 at 4; Bianchi Dec. ¶ 53, Ex. 51; Bianchi Dec. ¶ 54, Ex. 52; Bianchi Dec. ¶ 56, Ex. 54; Bianchi Dec. ¶ 55, Ex. 53)

RESPONSE: Disputed. As Dr. Everett has testified Madison-Kipp's "use" included reckless dumping of wastes including pure product which was not a common and acceptable practice. (Doc. 185 at pp. 19-25; Doc. 188 at pp. 32, 48, 60-62, 76-78, 114-116, 37-138, 150-151)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, Plaintiffs rely on the expert report and 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' 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 the Supplemental, Oral Opinions of Lorne G. Everett, which were filed concurrently herewith, and incorporated herein by reference. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

474. Madison-Kipp's use of hydraulic oils that may have contained PCBs into the 1970s was consistent with industry standards at the time. (Dkt. #145 4-5)

RESPONSE: Disputed. As Dr. Everett has testified Madison-Kipp's "use" included reckless dumping of wastes including pure product which was not a common and acceptable practice. (Doc. 185 at pp. 19-25; Doc. 188 at pp. 32, 48, 60-62, 76-78, 114-116, 37-138, 150-151)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, Plaintiffs rely on the expert report and 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' 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 the Supplemental, Oral Opinions of Lorne G. Everett, which were filed concurrently herewith, and incorporated herein by reference. Further, Plaintiffs have not challenged

the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

475. The use of waste oils for dust control and use of oils and tar on roadways for dust suppression has been common place for decades throughout the United States. (Dkt. #145 at 6; Bianchi Dec. ¶ 147; Bianchi Dec. ¶ 60, Ex. 58; Bianchi Dec. ¶ 61, Ex. 59; Bianchi Dec. ¶ 62, Ex. 60)

RESPONSE: Disputed. As Dr. Everett has testified Madison-Kipp's "use" included reckless dumping of wastes including pure product which was not a common and acceptable practice. Plaintiffs further dispute the materiality of the proposed statement to the summary judgment motion. (Doc. 185 at pp. 19-25; Doc. 188 at pp. 32, 48, 60-62, 76-78, 114-116, 37-138, 150-151)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, Plaintiffs rely on the expert report and 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' 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 the Supplemental, Oral Opinions of Lorne G. Everett, which were filed concurrently herewith, and incorporated herein by reference. Further, Plaintiffs have not challenged

the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

476. Such waste oils usually contained many contaminants, including heavy metals, organic solvents, and PCBs. (Dkt. #145 at 6; Bianchi Dec. ¶ 62, Ex. 60)

RESPONSE: Plaintiffs do not dispute that contaminants including heavy metals, organic solvents like PCE, PCBs and PAHs were released at the MKC property.

REPLY: The Finding is undisputed. The Finding relates to waste oil generally, not the waste oils used at the Madison-Kipp facility. Plaintiffs' response does not relate to the Finding, does not contest the evidence and does not provide any different evidence. Therefore, the proposed finding should be entered.

477. Studies by the USEPA, U.S. Department of Energy, and others indicated that waste oils used for road oiling typically contained high concentrations of PCBs, as high as 3,800 parts per million. (Dkt. #145 at 6; Bianchi Dec. ¶ 60, Ex. 58; Bianchi Dec. ¶ 61, Ex. 59; Bianchi Dec. ¶ 62, Ex. 60)

RESPONSE: Plaintiffs don't dispute the fact that studies were performed but dispute that they are material to the MKC property and the pending summary judgment motion.

REPLY: The Finding is undisputed.

478. In 1982, USEPA estimated that approximately 50 to 80 million gallons of waste oils were being used in the United States for dust suppression on unpaved roads. (Dkt. #145 at 6; Bianchi Dec. ¶ 62, Ex. 60)

RESPONSE: Plaintiffs do not dispute that USEPA may have estimated the approximate number of gallons of waste oil used in the U.S. but dispute its materiality to the summary judgment motion.

REPLY: The Finding is undisputed.

479. Wisconsin was one of the states that used the largest quantities of waste oil on roads for dust suppression. (Dkt. #145 at 6; Bianchi Dec. ¶ 60, Ex. 58; Bianchi Dec. ¶ 62, Ex. 60)

RESPONSE: Plaintiffs do not dispute waste oils may have been used on roads for dust suppression, but dispute its materiality to the summary judgment motion.

REPLY: The Finding is undisputed.

480. In Wisconsin in the 1980s, large quantities of waste oil was used on unpaved roads (road oils) for dust suppression at the Badger Army Ammunition Plant in Baraboo, Wisconsin. (Dkt. #145 at 6; Bianchi Dec. ¶ 147)

RESPONSE: Plaintiffs do not dispute that waste oil may have been used on unpaved roads at the Badger Army Ammunition Plant in Baraboo but dispute its materiality to the summary judgment motion.

REPLY: The Finding is undisputed.

481. It was not until 1992 that USEPA banned the use of road oils for dust suppression, due to the possible presence of hazardous substances. (Dkt. #145 at 6; Bianchi Dec. ¶ 147)

RESPONSE: Disputed. USEPA banned the use of PCB containing oils for dust control in 1979. (EPA website http://www.epa.gov/history/topics/pcbs/01.html).

REPLY: The Finding is undisputed. Not only does the cited document support the proposed finding but the document cited in Plaintiffs' response does not relate to the proposed finding of fact and does not support the premise that Plaintiffs assert. The webpage relied on by Plaintiffs relates to USEPA's ban of the *manufacture* of PCBs – not the use of road oils for dust suppression (note, the title of the webpage is "EPA Bans PCB Manufacture; Phases Out Uses"). Further, it was not until September 1992 that USEPA's final rule banning the use of road oils for dust suppression was promulgated. *See* Ziemba Decl., ¶ 6, Ex. 6.

To further refute Plaintiffs' response, the September 10, 1992 final rule provides:

> "On November 29, 1985 (50 FR 49239), EPA proposed to ban the use of used oil as a dust suppressant (road oiling). The September 23, 1991, Supplemental Notice (56 FR 48041) stated that regardless of whether EPA lists used oils as a hazardous

> waste, EPA was still considering the ban of all used oils used for dust suppression."

Moreover, with respect to the ban, the September 10, 1992 final rule provides:

> "Although the Agency has determined that used oils need not be listed as hazardous wastes, EPA still believes that used oils should not be used for road oiling or as dust suppressants due to the tendency for used oils to contain hazardous wastes or be contaminated with hazardous or toxic constituents. There was overwhelming support from commenters for a ban on the use of used oil for road application and dust suppression. Direct application of used oil to the land allows for direct exposure of used oils and all potential contaminants to the environment. *Therefore, in today's final rule, EPA is banning the use of all used oils for road or land application.*" (emphasis added).

Thus, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact and Plaintiffs' response does not refute the proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

482. Although the use of waste oil for unpaved roads has declined since the 1990s, as recently as 2006, Wisconsin regulations permitted the use of used oil for dust suppression. (Dkt. #145 at 6; Bianchi Dec. ¶ 86, Ex. 84)

RESPONSE: Disputed. USEPA banned the use of PCB containing oils for dust control in 1979. (EPA website http://www.epa.gov/history/topics/pcbs/01.html).

REPLY: The Finding is undisputed. Not only does the cited document support the proposed finding but the document cited in Plaintiffs' response does not relate to the proposed finding of fact and does not support the premise that Plaintiffs assert. See Madison-Kipp's reply to Plaintiffs' response to M-KPFOF ¶ 481.

483. Madison-Kipp's use of waste oils, which may have contained PCBs or PCE, as a dust suppressant in its parking areas until 1976 or 1977 was consistent with industry practices and met with the standard of care at the time. (Dkt. #145 at 6)

RESPONSE: Disputed. As Dr. Everett has testified Madison-Kipp's "use" included reckless dumping of wastes including pure product which was not a common and acceptable practice. (Doc. 185 at pp. 19-25; Doc. 188 at pp. 32, 48, 60-62, 76-78, 114-116, 37-138, 150-151)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, Plaintiffs rely on the expert report and 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' 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 the Supplemental, Oral Opinions of Lorne G. Everett, which were filed concurrently herewith, and incorporated herein by reference. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

484. 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. (Dkt. #145 at 2-6)

RESPONSE: Disputed. As Dr. Everett has testified Madison-Kipp's "use" included reckless dumping of wastes including pure product which was not a common and acceptable practice. (Doc. 185 at pp. 19-25; Doc. 188 at pp. 32, 48, 60-62, 76-78, 114-116, 37-138, 150-151)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, Plaintiffs rely on the expert report and 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' 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 the Supplemental, Oral Opinions of Lorne G. Everett, which were filed concurrently herewith, and incorporated herein by reference. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

485. Each of the multiple investigation phases of the site taken by Madison-Kipp since 1994 has provided the information needed at the time, regarding the soil and groundwater conditions and extent of contamination in the area of investigation, to make decisions regarding further investigation and remedial actions. (Dkt. #145 at 7;Dkt. #117 at 56-57)

RESPONSE: Disputed. Dr. Everett has testified that Madison-Kipp delayed and denied investigation and has not performed sufficient investigation. (Doc. 185 at pp. 25-59)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, 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. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

486. Madison-Kipp's investigation done in a phased or step-wise fashion was and is the standard in the industry. (Dkt. #145 at 7-8)

RESPONSE: Disputed. Dr. Everett has testified that Madison-Kipp delayed and denied investigation and has not performed sufficient investigation. (Doc. 185 at pp. 25-59)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, 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. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

487. Site investigations and remedial actions taken by Madison-Kipp at the site since 1994 were appropriate and adequate at the time they were conducted. (Dkt. #117 at 56:7-57:10)

RESPONSE: Disputed. Dr. Everett has testified that Madison-Kipp delayed and denied investigation and has not performed sufficient investigation. (Doc. 185 at pp. 25-59)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, 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. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

488. Further investigations and evolving technical knowledge over time have resulted in increased awareness of the significance and impacts of contamination at the Madison-Kipp site and surrounding area. (Dkt. #145 at 7-8)

RESPONSE: Not disputed.

489. For example, the vapor intrusion issue was not understood at the time of the initial investigations conducted at the Madison-Kipp site. (Dkt. #117 at 61-62)

RESPONSE: Disputed. Dr. Everett has testified to an awareness of vapor threats from the early 90's. (Doc. 185 at p. 26)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, Plaintiffs rely on the expert report and 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' 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. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

490. Since 1994, Madison-Kipp has maintained continuous communications and interaction with WDNR throughout the site investigation process, including submittal of required reports of site investigation and remediation activities, routine status reports and regular meetings, correspondence, and telephone communications with the WDNR project manager and other agency representatives. (Dkt. #145 at 8, Appendix A)

RESPONSE: Disputed. Madison Kipp has frequently failed to keep DNR properly informed of activities at its' property and have not been consistent with the standard of care for responsible parties in environmental cleanup matters. (Doc. 195 – 4, 8, 9, 10, 11)

REPLY: Plaintiffs do not properly dispute this Finding. The documents cited by Plaintiffs do not dispute the Finding. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of the Finding. As a result, the proposed finding of fact is not disputed and should be entered.

491. Madison-Kipp's communications and interaction with WDNR throughout the site investigation process have been consistent with the standard of care for potentially responsible parties in environmental cleanup matters. (Dkt. #145 at 7-8)

RESPONSE: Disputed. Madison Kipp has frequently failed to keep DNR properly informed of activities at its' property and have not been consistent with the standard of care for responsible parties in environmental cleanup matters. Objection: calls for a legal conclusion.

REPLY: Plaintiffs do not properly dispute this Finding because Plaintiffs have not cited evidence to support their response. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of the Finding. As a result, the proposed finding of fact is not disputed and should be entered.

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

RESPONSE: Disputed. Madison Kipp has frequently failed to keep DNR properly informed of activities at its' property and have not been consistent with the standard of care for responsible parties in environmental cleanup matters. Objection: calls for a legal conclusion.

REPLY: Plaintiffs do not properly dispute this Finding because Plaintiffs have not cited evidence to support their response. Further, Plaintiffs have not challenged the

evidence cited by Madison-Kipp in support of the Finding. As a result, the proposed finding of fact is not disputed and should be entered.

493. Site investigations at the Madison-Kipp facility and surrounding area have defined the extent of PCE, PCBs, and other site-related contaminants in soil, soil vapor, and groundwater for the purposes of selecting remedial actions. (Dkt. #145 at 8-14)

RESPONSE: Disputed. Dr. Everett has testified that Madison-Kipp has failed to define the nature and extent of contamination. Ms. Trask, Madison-Kipp's project manager has agreed. (Doc. 185 at pp. 25-28; Doc. 190 at pp. 119-121, 137, 140; Doc. 188 at pp. 3, 51, 71, 84-86, 88)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, Plaintiffs rely on the expert report and 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' 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 the Supplemental, Oral Opinions of Lorne G. Everett, which were filed concurrently herewith, and incorporated herein by reference.

Plaintiffs' attempted reliance on the deposition of Ms. Trask also fails. Ms. Trask does not testify that Madison-Kipp has failed to define the nature and extent of contamination. (*See* Dkt. # 190 at 120:17-23 ("Q. …Shallow groundwater contamination emanating from the Madison-Kipp facility, you believe that the extent of that shallow

groundwater contamination has been determined? A. Yes.").) Therefore, Plaintiffs have not cited evidence to support its response. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

494. Based on the locations and timing of contaminant sources that have been identified at the site, the distance to adjacent properties, the shallow depth to groundwater, and the extent and magnitude of PCE and other contaminants that have been found in the subsurface, PCE, PCBs, PAHs, and other contaminants were already present in soil and/or shallow groundwater beneath the Madison-Kipp site and immediately adjacent surrounding properties well before 1994, and have not materially increased in lateral extent or magnitude since that time. (Dkt. #145 at 8-12)

RESPONSE: Disputed. The lateral and vertical extent of the contamination at the Madison-Kipp site has increased in extent and magnitude over time. (Doc. 185 at p. 44; Doc. 188 at pp. 27, 28, 69-71, 168)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, Plaintiffs rely on the expert report and 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' 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 the Supplemental, Oral Opinions of Lorne G. Everett, which were filed concurrently herewith, and incorporated herein by reference.

Therefore, Plaintiffs have not cited evidence to support their response. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

495. The extent of PCE and other VOCs in the soil vapor in the off-site area, which includes the Class Member properties, has been defined, and there is an adequate understanding of the site conceptual model at this time regarding VOC occurrence and migration in soil vapor. (Dkt. #145 at 9-10; Dkt. #117 at 33:3-13; Dkt. #118 at 240:14-24)

RESPONSE: Disputed. The extent of PCE and other VOCs in soil vapor off-site has not been defined. (Doc. 188 at pp. 37, 83; Doc. 190 at pp. 135-136)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, 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' 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 the Supplemental, Oral Opinions of Lorne G. Everett, which were filed concurrently herewith, and incorporated herein by reference. Plaintiffs' attempted reliance on the deposition of Ms. Trask also fails. The cited testimony does not support Plaintiffs' response in any respect. Therefore, Plaintiffs have not cited evidence to support its

response. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

496. Deeper groundwater is not a source of VOCs to soil vapor in the vadose zone. (Dkt. #145 at 9; Dkt. #117 at 102)

RESPONSE: Disputed. Deeper groundwater is a source of VOCs to soil vapor in the vadose zone. (Doc. 188 at pp. 70-71)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, Plaintiffs rely on 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' 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 the Supplemental, Oral Opinions of Lorne G. Everett, which were filed concurrently herewith, and incorporated herein by reference. Plaintiffs have not cited evidence to support its response. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

497. The current soil vapor extraction system, installed in 2012, is controlling the off-site migration of soil vapor containing VOCs. (Dkt. #145 at 8-9; Dkt. #117 at 76)

RESPONSE: Disputed. The current soil vapor extraction system, installed in 2012, is not controlling the off-site migration of soil vapor containing VOCs. (Doc. 185 at pp. 53-56)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, 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.

Therefore, Plaintiffs have not cited evidence to support its response. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

498. Further investigation of VOCs in soil vapor is not needed because there is no migration pathway, and shallow groundwater beyond the area immediately adjacent to Madison-Kipp does not contain VOCs. (Dkt. #145 at 9; Dkt. #117 at 88)

RESPONSE: Disputed. A migration pathway exists for VOCs in soil vapor and the shallow groundwater beyond the Class Area is contaminated with VOCs. (Doc. 185 at pp. 53-56; Doc. 195 – 2)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. See Madison-Kipp's response to M-KPFOF ¶ 497. Plaintiffs have not cited evidence to support its response. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

499. PAHs and PCBs have correctly not been identified as a source of contamination in soil vapor. (Dkt. #145 at 10)

RESPONSE: Not disputed. Objection: Immaterial to the issues raised by the motion.

REPLY: The Finding is undisputed.

500. Through the multiple phases of investigation on and off-site at Madison-Kipp's Facility, the magnitude and lateral extent of soil contamination at the site and surrounding area has been defined and will not materially change in the future, even if no further remediation occurs. (Dkt. #145 at 10)

RESPONSE: Disputed. The magnitude and lateral extent of soil contamination on and off-site has not been defined and will change in the future. (Doc. 188 at pp. 25-30, 37, 51, 168; Doc. 190 at p. 140)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, 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' 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 the Supplemental, Oral Opinions of Lorne G. Everett, which were filed concurrently herewith, and incorporated herein by reference. Plaintiffs' attempted reliance on the deposition of Ms. Trask also fails. Ms. Trask's testimony, as cited by Plaintiffs', does not support Plaintiffs' response. Therefore, Plaintiffs have not cited evidence to support its response. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

501. There is a good understanding of shallow soil contamination (at depths to 4 feet below ground surface) from the more than 100 soil boring that have been completed at the site. (Dkt. #145 at 10; Dkt. #117 at 73)

RESPONSE: Disputed. The investigation of shallow soil contamination is incomplete, requiring additional investigation to define its extent. (Doc. 185 at 50-53; Doc. 188 at pp. 40-41, 45-47, 62)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, Plaintiffs rely on the expert report and 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' 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 the Supplemental, Oral Opinions of Lorne G. Everett, which were filed concurrently herewith, and incorporated herein by reference. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

502. Chemical analyses for PCBs have been conducted on more than 300 samples from on-site and off-site areas and these samples define the extent of PCB contamination in the soil for the purposes of selecting remedial actions to address PCB impacts to soil. (Dkt. #145 at 10)

RESPONSE: Disputed. The investigation of PCBs both on and off-site is incomplete and the extent of the contamination has not been adequately defined for purposes of relating relevant actions to address PCB impacts. (Doc. 185 at pp. 50-53; Doc. 188 at pp. 39-41)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, Plaintiffs rely on the expert report and testimony of Dr. Lorne Everett and have failed to submit any independent admissible evidence to support Dr. Everett's opinion testimony. *See* Madison-Kipp's response to M-KPFOF ¶ 501, above. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

503. The magnitude and lateral extent of PCE in shallow groundwater has not materially changed since a time well before it was first discovered in 1994, and will not materially change in the future, even if no further remediation occurs. (Dkt. #145 at 11)

RESPONSE: Disputed. The full magnitude and lateral extent of PCE in shallow groundwater has not yet been defined, has been allowed to continue to expand and will continue to get worse without remediation. (Doc. 185 at pp. 25-40)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, 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. See Madison-Kipp's response to M-KPFOF ¶ 501, above. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

504. There is not a significant lateral movement of shallow groundwater containing VOCs in the site vicinity, as hydraulic gradients are strongly downward. (Dkt. #145 at 11; Dkt. #117 at 39-40)

RESPONSE: Disputed. There is significant lateral movement of shallow groundwater containing VOCs in the site vicinity. (Doc. 185 at pp. 25-40; Doc. 193-2)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, 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, including his declaration, 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 the Supplemental, Oral Opinions of Lorne G. Everett, which were filed concurrently herewith, and incorporated herein by reference. Further, Plaintiffs

have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

505. Shallow groundwater containing PCE is not continuing to migrate or expand onto neighboring properties and the extent of PCE in shallow groundwater is essentially the same as that found in 1994 or before. (Dkt. #145 at 11)

RESPONSE: Disputed. PCE in shallow groundwater continues to migrate from the MKC site onto neighboring properties and continues to increase in magnitude over time. (Doc. 185 at pp. 25-40; Doc. 193-2)

REPLY: The Finding is undisputed. See Madison-Kipp's response to M-KPFOF ¶ 504, above.

506. Deeper groundwater containing PCE would have migrated no more than approximately 540 ft. in a northerly or southerly and downward direction since it was first discovered in 1994. (Dkt. #145 at 12)

RESPONSE: Disputed. PCE in deeper groundwater has migrated beyond 540 feet since it was first discovered. (Doc. 185 at pp. 25-40; Doc. 193-1)

REPLY: The Finding is undisputed. See Madison-Kipp's response to M-KPFOF ¶ 504, above.

507. Deeper groundwater containing PCE has had no impact on neighboring properties, as there is no use of that deeper groundwater at the site or in the immediate residential area surrounding Madison-Kipp, and VOC-impacted deeper groundwater is not a source of vapor intrusion. (Dkt. #145 at 12)

RESPONSE: Disputed. The PCE impacts to groundwater have destroyed the groundwater supply to residents of Madison, including the Class and VOC impacted deeper groundwater is a source of vapor intrusion. (Doc. 188 at pp. 28-30; Doc. 193)

REPLY: The Finding is undisputed. See Madison-Kipp's response to M-KPFOF ¶ 504, above.

508. Multiple technologies and approaches are available to remediate PCE and other VOCs in subsurface soil and groundwater, including in-situ chemical oxidation

(ISCO), in-situ bioremediation, thermal treatment, surfactant/co-solvent flushing, groundwater extraction and treatment, and natural attenuation. ("Dkt. #145 at 12; Bianchi Dec. ¶ 69, Ex. 67; Bianchi Dec. ¶ 70, Ex. 68; Bianchi Dec. ¶ 73, Ex. 71; Bianchi Dec. ¶ 145, Ex. 143; Bianchi Dec. ¶ 69, Ex. 67; Bianchi Dec. ¶ 71, Ex. 69)

RESPONSE: Not Disputed. Objection: Immaterial to the issues raised by the motion.

REPLY: The Finding is undisputed.

509. A comprehensive 2007 study of more than 100 PCE-contamination sites by the State Coalition for Remediation of Dry Cleaners indicated that soil vapor extraction was the most widely used remedial technology for soils, and that ISCO and in-situ bioremediation were the most widely used groundwater remedial technologies. (Dkt. #145 at 12; Bianchi Dec. ¶ 145, Ex. 143)

RESPONSE: Not Disputed. Objection: Immaterial to the issues raised by the motion.

REPLY: The Finding is undisputed.

510. Further site investigations are not needed to make decisions about shallow groundwater remediation at the site. (Dkt. #145 at 13; Dkt. #117 at 76)

RESPONSE: Disputed. The lateral and vertical extent of the contamination has not yet been defined and further investigation is required to develop a remedial plan that will work. (Doc. 185 at pp. 48-50; Doc. 185 at pp. 52-53)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, 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 the Supplemental, Oral Opinions of Lorne G. Everett, which were filed concurrently herewith, and incorporated herein by reference. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

511. At the site ISCO was successful in reducing substantial quantities of VOC concentrations in soils at multiple locations, and the soil vapor extraction systems has effectively removed substantial quantities of VOCs from soil and shallow groundwater. (Dkt. #145 at 13; Dkt. #117 at 76)

RESPONSE: Disputed. ISCO has removed a very small percentage of the VOCs on the site and the most recent sampling results demonstrate the continued presence of high concentrations of VOCs in soil and groundwater, requiring more investigation and remediation. (Doc. 185 at pp. 48-50; Doc. 195-26)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, 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. Additional, the other evidence cited by Plaintiffs does not support their response or dispute the proposed Finding. Although Plaintiffs cite to Dkt. #195-26 (a consumer factsheet about PCE),

Plaintiffs may have intended to cite to Dkt. #195-26 (Exhibit 26 to the Hayes Declaration). This document, a February 14, 2013 ARCADIS letter report summarizing Madison-Kipp's investigation under the facility building does relate to the success of the ISCO remediation. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

512. In-situ treatment of groundwater contaminants using ISCO is a proven technology that is much more efficient and effective than groundwater extraction and treatment in remediating VOC-impacted groundwater. (Dkt. #145 at 13; Bianchi Dec. ¶ 69, Ex. 67; Bianchi Dec. ¶ 70, Ex. 68; Bianchi Dec. ¶ 72, Ex. 70)

RESPONSE: Not Disputed. Objection: Immaterial to the issues raised by the motion.

REPLY: The Finding is undisputed.

513. Ongoing remedial actions at the site involving soil vapor extraction, ISCO, and ongoing natural attenuation will continue to reduce dissolved-phase VOC concentrations. (Dkt. #145 at 14)

RESPONSE: Disputed. ISCO has removed a very small percentage of the VOCs on the site and the most recent sampling results demonstrate the continued presence of high concentrations of VOCs in soil and groundwater, requiring more investigation and remediation. (Doc. 185 at pp. 48-50; Doc. 195-26)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. See Reply to M-KPFOF ¶ 511, above. As a result, the proposed finding of fact is not disputed and should be entered.

514. Remedial actions at the site will continue until WDNR-approved remedial action objectives are achieved. (Dkt. #145 at 14)

RESPONSE: Disputed. Based upon Madison-Kipp's history of "foot dragging" and its failures to take appropriate actions necessary to investigate and restore the environment to minimize the harmful effects it has caused, Plaintiffs must dispute this

statement. Additionally, the statement calls for speculation and is not material to the summary judgment motion. (Doc. 117 at pp. 209-210; Doc. 195 – 4, 5, 8, 9, 10, 11)

REPLY: The cited document supports the proposed finding. Plaintiffs' response does not contest the evidence or provide any different evidence. (*See also* dkt. #203-2 at ARCADIS027703 – ARCADIS027704.) Further, Plaintiffs' characterization of "foot dragging" is not only inaccurate but also immaterial to Madison-Kipp's summary judgment motion. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

515. Releases of PCE and other constituents from the Madison-Kipp facility do not present or threaten an imminent and substantial endangerment to health or the environment. (Dkt. #145 at 14-17)

RESPONSE: Disputed. Releases of PCE and other contaminants from Madison-Kipp do present an imminent and substantial endangerment to health and the environment. (Doc. 185 at pp. 40-46; Doc. 188 at pp. 22, 28-30, 37, 82-86, 90-94, 99-100; Doc. 186 at p. 2)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, Plaintiffs rely on the expert report and 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' 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 the Supplemental, Oral Opinions of Lorne G. Everett, which were filed concurrently herewith, and incorporated herein by reference.

Additionally, Plaintiffs' response relies on the expert report of Dr. David Ozonoff but, like with Dr. Everett, Plaintiffs have failed to submit any independent admissible evidence to support Dr. Ozonoff's opinion testimony. (*See* Madison-Kipp Reply Br. at 14-15 (citing *In re James Wilson Assocs.*, 965 F.2d 160, 173 (7th Cir. 1992).) Moreover, 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. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

516. The extent of contamination in soil, soil vapor, and shallow groundwater has been defined, is limited, and appropriate remedial actions have been or will be implemented to address this contamination. (Dkt. #145 at 15)

RESPONSE: Disputed. The vertical and lateral extent of contamination in soil, soil vapor, shallow groundwater and deep groundwater has not been defined, is not limited and appropriate remedial actions have not been implemented. (Doc. 185 at p. 25-40; Doc. 195-4)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, 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.

Additionally, Plaintiffs' response cites to the State of Wisconsin's complaint against Madison-Kipp. The complaint contains *allegations* – which Madison-Kipp has denied. (*See* Ziemba Decl., ¶1, Ex. 1.) Therefore, Plaintiffs' cannot point to the State of Wisconsin's complaint to demonstrate a factual dispute when Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

517. There is no groundwater use in the residential area and immediate site vicinity. (Dkt. #145 at 16)

RESPONSE: Disputed. As Dr. Everett has testified, the City of Madison and members of the Class rely on groundwater for their domestic water supply and Madison-Kipp has destroyed that groundwater. (Doc. 188 at pp. 28-30)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, 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' 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 the Supplemental, Oral Opinions of Lorne G. Everett, which were filed concurrently herewith, and incorporated herein by reference. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

518. The deep groundwater is not a source of sub-slab soil vapors. (Dkt. #145 at 16; Dkt. #117 at 102:6-13)

RESPONSE: Disputed. Deeper groundwater is a source of VOCs to soil vapor in the vadose zone. (Doc. 188 at pp. 70-71) Additionally, Plaintiffs object to the extent this statement is not material to the summary judgment motion.

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. See Madison-Kipp's reply to M-KPFOF ¶ 517, above. The proposed finding of fact is not disputed and should be entered.

519. PCE has not been detected in City of Madison Unit Well 8, the closest water supply well, located approximately 1,500 ft. southeast of the site. (Dkt. #145 at 16; Bianchi Dec. ¶ 144, Ex. 142; Bianchi Dec. ¶ 142, Ex. 140)

RESPONSE: Plaintiffs do not dispute that PCE has not yet been found in Well 8 however, Cis 1, 2 DCE a daughter product of PCE has been found in Well 8 and on the Madison-Kipp site.

REPLY: The Finding is undisputed.

520. Unit Well 8 is only used seasonally and has a protective casing an annular seal extending from the surface through the Eau Clair Aquitard. (Dkt. #145 at 16)

RESPONSE: Disputed. Dr. Everett has testified that Well 8 has been taken out of service due to the contamination. (Doc. 188 at pp. 28-29, 41-42) Objection: Immaterial to the issues raised by the motion.

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, 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' 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. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

521. Routine groundwater monitoring of Unit Well 8 conducted by the City of Madison provides the city an early warning of possible contamination impacts to that well by any contaminant, from any source. (Dkt. #145 at 16; Bianchi Dec. ¶ 144, Ex. 142; Bianchi Dec. ¶ 142, Ex. 140)

RESPONSE: Disputed. Dr. Everett has testified that Well 8 has been taken out of service due to the contamination. (Doc. 188 at pp. 28-29, 41-42) Objection: Immaterial to the issues raised by the motion.

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, 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' 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 Lorne G. Everett's Supplemental, Oral Opinions, which were filed concurrently herewith, and incorporated herein by reference. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

522. Even if PCE were to be detected in Unit Well 8, in my experience such detections (which would be at extremely low levels) would provide sufficient time (i.e., at least several years) in which appropriate remedial actions could be taken, if warranted, before actionable levels were present in the well. (Dkt. #145 at 16-17)

RESPONSE: Disputed. Dr. Everett has testified that Well 8 has been taken out of service due to the contamination. (Doc. 188 at pp. 28-29, 41-42) Objection: Speculative and immaterial to the issues raised by the motion.

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, 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' 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 Lorne

G. Everett's Supplemental, Oral Opinions, which were filed concurrently herewith, and incorporated herein by reference. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

523. 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. (Dkt. #145 at 17)

RESPONSE: Disputed. Dr. Everett has testified that Well 8 has been taken out of service due to the contamination. (Doc. 188 at pp. 28-29, 41-42) Objection: Speculative and immaterial to the issues raised by the motion.

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, 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' 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 Lorne G. Everett's Supplemental, Oral Opinions, which were filed concurrently herewith, and incorporated herein by reference. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

524. The 1949 article by Lyne and McLachlan cited by Dr. Everett received very little notice at the time, as the authors were conducting a very limited study for local authorities and, as such, it was unlikely that TCE would have become an emerging issue in the United Kingdom or elsewhere. (Dkt. #145 at 17; Bianchi Dec. ¶ 58, Ex. 56)

RESPONSE: Disputed. The statement is an opinion of Dr. Johnson concerning an opinion by another author, not a statement of fact material to the issues raised by the motion. (Doc. 185 at p. 23)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Plaintiffs' wrongly criticize the finding of fact as relying only on the opinion of Dr. Johnson. This is incorrect, as the finding cites to the underlying evidence. (*See* dkt. #145 at 17; dkt. #163-19.) Tellingly, Plaintiffs dispute the finding of fact and referenced documents with only their expert's opinion testimony. As previously noted, Plaintiffs' continue to rely on the testimony of Dr. Lorne Everett without the submission of 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. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

525. Thus, the 1949 article by Lyne and McLachlan did not trigger any general recognition of the problem of TCE or other chlorinated solvents in groundwater by the scientific, engineering, or regulatory community. (Dkt. #145 at 17-18; Bianchi Dec. ¶ 58, Ex. 56)

RESPONSE: Disputed. Since the 1950's there has been a general recognition in the scientific community of the problems created when VOCs contaminated groundwater supplies. (Doc. 185 at pp. 20-24)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. See Madison-Kipp's reply to M-KPFOF ¶ 524, above. Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

526. Regulatory agencies typically do not require sampling and definition to non-detect levels. (Dkt. #145 at 18)

RESPONSE: Disputed. The statement made is one of opinion and without any support from the "regulatory agencies" referenced. Additionally it is immaterial to the summary judgment motion. (Doc. 185 at pp. 40-46)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, 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' 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. In addition, Plaintiffs' response is unsupported by the document they cite to. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. The Finding is supported by the referenced document, which is based (appropriately) on the expert's 37 years of experience on hundreds of sites. (*See* dkt. #148 at 18.) As a result, the proposed finding of fact is not disputed and should be entered.

527. There is no evidence that preferential pathways, such as utility corridors, sanitary sewers, and storm drains, have influenced contaminant migration in the site vicinity. (Dkt. #145 at 18)

RESPONSE: Disputed. Madison-Kipp has not investigated preferential pathways and that failure has been pointed out by Dr. Everett in his report (Doc. 185 at p. 39) and WDNR's Schmoller. (Doc. 117 at p. 69; Doc. 118 at pp. 284-285)

REPLY: The cited document supports the proposed finding. Plaintiffs' response focuses on the deposition transcripts of the WDNR's project manager, Michael Schmoller, but the cited testimony does not support Plaintiffs' response. Michael Schmoller testified that WDNR has not investigated certain preferential pathways because the data does not support such an investigation. (*See* dkt. #117 at 69 ("…the data we have generated so far, and we have gotten almost 50 data points now, doesn't indicate [a preferential pathway]").) Plaintiffs' response also cites additional Schmoller testimony regarding the investigation of potential sources under Madison-Kipp's facility. (*See* dkt. #118 at 284-285.) In fact, this investigation has been completed and documented. (*See* dkt. # 155-39.) Therefore, not only does Plaintiffs' response not contest the cited document that supports the proposed finding, but it also relies on

testimony that does not support Plaintiffs' response. As such, Plaintiffs' response does not contest the evidence or provide any different evidence. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

528. There is no direct evidence of dense non-aqueous phase liquid in subsurface soil or groundwater at the site, as dense non-aqueous phase liquid has not been encountered from any of the more than 100 soil borings and monitoring wells at Madison-Kipp. (Dkt. #145 at 19-20)

RESPONSE: Disputed. Dr. Everett has opined in his report about the data at the Site confirming the presence of dense non-aqueous phase liquid (Doc. 185 at pp. 47-48.) and testified at length that the recent groundwater data confirms its presence in the bedrock on-site and off-site. (Doc. 188 at pp. 33, 61, 77, 169)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, 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' 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 Lorne G. Everett's Supplemental, Oral Opinions, which were filed concurrently herewith, and incorporated herein by reference. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. (*See also* dkt # 203-2 at ARCADIS027693-027694; Schmoller Dep., dkt. # 117, at 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.").) As a result, the proposed finding of fact is not disputed and should be entered.

529. The remediation program suggested by Dr. Everett is not supported by the facts and extensive date from the site area. (Dkt. #145 at 20-21)

RESPONSE: Disputed. The investigations and remediation program offered by Dr. Everett is supported by the facts and data developed thus far. (Doc. 185 at pp. 46-59)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, 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' 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. In addition, Plaintiffs' response is unsupported by the document they cite to. As a result, the proposed finding of fact is not disputed and should be entered.

530. Industrial facility managers and employees have generally been facilities specialists, not trained environmental engineers. (Dkt. #145 at 21)

RESPONSE: Disputed. The proposed statement is not material to the summary judgment motion. (Doc. 185 at pp. 11-19)

REPLY: The cited document supports the proposed finding. Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, 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. See Madison-Kipp's reply to M-KPFOF ¶ 529, above.

531. The interactive process between WDNR and responsible parties involves submittal of work plans and reports by the responsible party, such as Madison-Kipp, for review and approval by the WDNR. (Dkt. #145 at 21)

RESPONSE: Plaintiffs do not dispute that DNR requires the submission of work plans and reports but do dispute that Madison-Kipp has timely and appropriately addressed the contamination it has created. (Doc. 195 – 4, 5, 8, 9, 10, 11; Doc. 117 at pp. 209-10)

REPLY: The cited document supports the proposed finding. Plaintiffs' response does not relate to the Finding and therefore, the proposed finding of fact is not disputed and should be entered.

532. The vapor intrusion pathway only recently became a required part of remedial activities. (Dkt. #146 at 2-9)

RESPONSE: Disputed. The vapor intrusion pathway has been well understood since the early 1990s including US EPA guidance. (Doc. 185 at p. 26)

REPLY: The cited document supports the proposed finding. Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, 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' 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. In addition, Plaintiffs' response is unsupported by the document they cite to. As a result, the proposed finding of fact is not disputed and should be entered.

533. The WDNR vapor intrusion guidance identifies Vapor Action Levels and Vapor Risk Screening Levels. (Dkt. #146 at 6; Bianchi Dec. ¶ 64, Ex. 62)

RESPONSE: Not disputed.

534. A Vapor Action Level is defined as the indoor air concentration that corresponds to a cancer risk of 1 x 10-5 or a noncancer hazard of 1. (Dkt. #146 at 6; Bianchi Dec. ¶ 64, Ex. 62)

RESPONSE: Disputed. Madison-Kipp's risk analysis is improper and additionally Plaintiffs dispute the materiality of this statement to the summary judgment motion. (Doc. 188 at pp. 30, 37, 42, 46-47, 63, 69-71, 82-86, 91-93, 99, 100, 118)

REPLY: The cited document supports the proposed finding. (*See* dkt. # 163-25 at 13 ("A Vapor Action Level (VAL) is equal to the lesser concentration of the following: a hazard index (HI) of 1.0 or a 1-in-100,000 (1 x 10-5) excess lifetime cancer risk.").) Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, 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. 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. In addition, the testimony cited by Plaintiffs does not establish a dispute with the proposed finding and does not support their response. As a result, the proposed finding of fact is not disputed and should be entered.

535. The Vapor Risk Screening Level is defined as the soil gas, sub-slab soil gas, or groundwater concentration that is protective of indoor air at the risk levels of cancer risk of 1 x 10-5 or a noncancer hazard of 1. (Dkt. #146 at 6; Bianchi Dec. ¶ 64, Ex. 62)

RESPONSE: Disputed. Madison-Kipp's risk analysis is improper and additionally Plaintiffs dispute the materiality of this statement to the summary judgment motion. (Doc. 188 at pp. 30, 37, 42, 46-47, 63, 69-71, 82-86, 91-93, 99, 100, 118)

REPLY: The cited document supports the proposed finding. See Madison-Kipp's Reply to M-KPFOF ¶ 534, above. As a result, the proposed finding of fact is not disputed and should be entered.

536. The Vapor Risk Screening Level is calculated using attenuation factors. (Dkt. #146 at 6; Bianchi Dec. ¶ 64, Ex. 62)

RESPONSE: Disputed. Madison-Kipp's risk analysis is improper and additionally Plaintiffs dispute the materiality of this statement to the summary judgment motion. (Doc. 188 at pp. 30, 37, 42, 46-47, 63, 69-71, 82-86, 91-93, 99, 100, 118)

REPLY: The cited document supports the proposed finding. See Madison-Kipp's Reply to M-KPFOF ¶ 534, above. As a result, the proposed finding of fact is not disputed and should be entered.

537. The attenuation factor is the ratio of indoor air to soil gas or groundwater and describes the decrease in concentration moving from a subsurface concentration to indoor air. ("Dkt. #146 at 6; Bianchi Dec. ¶ 64, Ex. 62)

RESPONSE: Disputed. Madison-Kipp's risk analysis is improper and additionally Plaintiffs dispute the materiality of this statement to the summary judgment motion. (Doc. 188 at pp. 30, 37, 42, 46-47, 63, 69-71, 82-86, 91-93, 99, 100, 118)

REPLY: The cited document supports the proposed finding. See Madison-Kipp's Reply to M-KPFOF ¶ 534, above. As a result, the proposed finding of fact is not disputed and should be entered.

538. The WDNR guidance defines the following attenuation factors: 0.1 (sub-slab soil gas); 0.1 (shallow soil gas, less than 5 ft. below foundation); 0.01 (deep soil gas, greater than 5 ft. below foundation); and 0.001 (groundwater). ("Dkt. #146 at 6; Bianchi Dec. ¶ 64, Ex. 62)

RESPONSE: Disputed. Madison-Kipp's risk analysis is improper and additionally Plaintiffs dispute the materiality of this statement to the summary judgment motion. (Doc. 188 at pp. 30, 37, 42, 46-47, 63, 69-71, 82-86, 91-93, 99, 100, 118)

REPLY: The cited document supports the proposed finding. See Madison-Kipp's Reply to M-KPFOF ¶ 534, above. As a result, the proposed finding of fact is not disputed and should be entered.

539. For PCE, the Vapor Action Level prior to February 2012 was 0.6 parts per billion by volume (ppbv) for a residential exposure scenario (i.e., indoor air). (Dkt. #146 at 6)

RESPONSE: Disputed. Madison-Kipp's risk analysis is improper and additionally Plaintiffs dispute the materiality of this statement to the summary judgment motion. (Doc. 188 at pp. 30, 37, 42, 46-47, 63, 69-71, 82-86, 91-93, 99, 100, 118)

REPLY: The cited document support the proposed finding. Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, 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. 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. In addition, the testimony cited by Plaintiffs does not establish a dispute with the proposed finding and does not support their response. As a result, the proposed finding of fact is not disputed and should be entered.

540. USEPA completed a final Toxicological Assessment for Tetrachloroethylene (Perchloroethylene) in February 2012. (Dkt. #146 at 6; Bianchi Dec. ¶ 57, Ex. 55)

RESPONSE: Disputed. Madison-Kipp's risk analysis is improper and additionally Plaintiffs dispute the materiality of this statement to the summary judgment motion. (Doc. 188 at pp. 30, 37, 42, 46-47, 63, 69-71, 82-86, 91-93, 99, 100, 118)

REPLY: The cited document support the proposed finding. Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, 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. 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. In addition, the testimony cited by Plaintiffs does not establish a dispute with the proposed finding and does not support their response. As a result, the proposed finding of fact is not disputed and should be entered.

541. The PCE Vapor Action Level changed in February 2012 to 6.2 ppbv for a residential exposure scenario (i.e., indoor air) based on the final toxicological assessment. ("Dkt. #146 at 6; Bianchi Dec. ¶ 57, Ex. 55)

RESPONSE: Plaintiffs do not dispute the action level used by DNR changed but do dispute any inference that the levels found in the Class Area are not a threat to Class members. Plaintiffs do dispute the materiality of the statement to the summary judgment motion. (Doc. 186; Doc. 195 – 1 at p. 3, 25, 28, 31, 32, 34; Doc. 188 at pp. 30, 37, 42, 46-47, 63, 69-71, 82-86, 91-93, 99-100, 118)

REPLY: The Finding is undisputed.

542. Using the attenuation factors defined by the WDNR yields PCE Vapor Risk Screening Levels sub-slab soil gas of 6 ppbv prior to February 2012 and 62 ppbv after February 2012. (Dkt. #146 at 6; Bianchi Dec. ¶ 141, Ex. 139)

RESPONSE: Plaintiffs do not dispute the various PCE Vapor Risk Screening Levels but do dispute any reference that the levels found in the Class Area are not a threat to Class members. Plaintiffs do dispute the materiality of the statement to the summary judgment motion. (Doc. 186; Doc. 195 – 1 at p. 3, 25, 28, 31, 32, 34; Doc. 188 at pp. 30, 37, 42, 46-47, 63, 69-71, 82-86, 91-93, 99-100, 118)

REPLY: The Finding is undisputed.

543. The calculation of PCE Vapor Risk Screening Level for sub-slab soil gas is based on using a conservative attenuation factor of 0.1, which means that the sub-slab soil gas concentration can be 10 times greater than the indoor air Action Level. (Dkt. #146 at 6)

RESPONSE: Disputed. The risk screening levels for sub-slab gas are not an assurance of safety. Plaintiffs do dispute the materiality of the statement to the summary judgment motion. (Doc. 186; Doc. 195 – 1 at p. 3, 25, 28, 31, 32, 34; Doc. 188 at pp. 30, 37, 42, 46-47, 63, 69-71, 82-86, 91-93, 99-100, 118)

REPLY: The cited document support the proposed finding. Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, Plaintiffs rely on the expert report of Dr. David Ozonoff and the testimony of Dr. Lorne Everett and have failed to submit any independent admissible evidence to support either Dr. Ozonoff's or Dr. Everett's opinion testimony. Although Plaintiffs cite to Dkt. #195-1 (the WDNR website regarding Madison-Kipp) to support their response, they may have intended to cite to Dkt. #185, the expert report of Dr. Everett. Like Dr. Ozonoff's report and Dr. Everett's testimony, Dr. Everett's expert report is equally void of references to admissible evidence. Moreover, both Dr. Ozonoff's and 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 Motions to Exclude Plaintiffs' Experts Lorne G. Everett and Dr. David Ozonoff and Motion to Strike the Supplemental, Oral Opinions of Lorne G. Everett, which were filed concurrently herewith, and incorporated herein by reference. In addition, the testimony cited by Plaintiffs does not establish a dispute with the proposed finding and does not support their response. As a result, the proposed finding of fact is not disputed and should be entered.

544. The USEPA recently provided a more robust analysis of attenuation factor data for sub-slab to indoor air and determined that a value of 0.03 was representative and protective of 95% of homes. (Dkt. #146 at 6; Bianchi Dec. ¶ 57, Ex. 55)

RESPONSE: Plaintiffs do not dispute there was a recent review of the dangers of PCE which concluded that PCE is a likely human carcinogen and which supports Plaintiffs' position that the levels found in the Class Area are a threat to Class members. Plaintiffs do dispute the materiality of the statement to the summary judgment motion. (Doc. 163 - 18)

REPLY: The Finding is undisputed.

545. If an attenuation factor of 0.03 were used, the PCE Vapor Risk Screening Level would be 207 ppbv for sub-slab soil gas. (Dkt. #146 at 6)

RESPONSE: Disputed. The proposed statement does not identify the risk odds used in the calculation and additionally the statement is not material to the summary judgment motion. (Doc. 146 at p. 6)

REPLY: The cited document support the proposed finding. (*See* dkt. #146 at 6 ("USEPA (2012c) recently provided a more robust analysis of AF [attenuation factor] data for sub-slab to indoor air and determined that a value of 0.03 was representative and protective of 95% of homes. Using an AF of 0.03 results in a PCE Vapor Risk Screening Level of 1,400 µg/m3 or 207 ppbv for sub-slab soil gas.").) Plaintiffs do not

properly dispute this finding of fact with any admissible evidence. As a result, the proposed finding of fact is not disputed and should be entered.

546. The conservative calculations used for both Action Levels (indoor air) and Vapor Risk Screening Levels (sub-slab soil gas) for PCE confirm that any detection of PCE in sub-slab soil gas or indoor air above "non-detect" is not sufficient grounds to require on-going monitoring or to determine that the vapor intrusion pathway is complete. (Dkt. #146 at 7)

RESPONSE: Disputed. The detection of PCE in sub-slabs and indoor air in Class Area homes is evidence of a completed pathway, establishing a threat to these families and necessitating mitigation systems to address the threat. (Doc. 195 – 1 at p. 3, 2, 16, 31, 32, 34; Doc. 185 at p. 11; Doc. 186 at pp. 2, 138)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, Plaintiffs rely on the expert reports of Dr. Lorne Everett and Dr. David Ozonoff and have failed to submit any independent admissible evidence to support either of their opinion testimony. Plaintiffs cannot backdoor inadmissible evidence into facts for summary judgment through the opinion testimony of Dr. Everett and Dr. Ozonoff. (*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 and Dr. Ozonoff's expert reports and testimony, and Plaintiffs' response to this finding of fact, should be stricken and disregarded, as fully set out in Madison-Kipp's Motions to Exclude Plaintiffs' Expert Lorne G. Everett and David M. Ozonoff, which were filed concurrently herewith, and incorporated herein by reference. Although it appears that the Plaintiffs have cited to several pages of Dkt. #195-1 that do not exist, they may have intended to cite to individual exhibits to the Hayes Declaration. These exhibits (Dkt. #s 195-1, 195-2, 195-3, 195-16, 195-31, 195-32 and 195-34) do not dispute the Finding. Plaintiffs cannot

point to WDNR's willingness to install in-home vapor mitigation systems as factual evidence for the scientific basis for doing so. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

547. If the Vapor Risk Screening Level is not exceeded, then there is no risk to human health from vapor intrusion. (Dkt. #146 at 7)

RESPONSE: Disputed. The detection of PCE in sub-slabs and indoor air in Class Area homes is evidence of a completed pathway, establishing a threat to these families and necessitating mitigation systems to address the threat. (Doc. 195 – 1 at p. 3, 2, 16, 31, 32, 34; Doc. 185 at p. 11; Doc. 186 at pp. 2, 138)

REPLY: See Madison-Kipp's reply to M-KPFOF ¶ 546, above. Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

548. 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. (Dkt. #146 at 9-11)

RESPONSE: Disputed. Madison-Kipp has violated applicable standards of care in its failure to promptly and thoroughly investigate and remediate its contamination. (Doc. 185 at pp. 25-28, 44-45; Doc. 188 at pp. 62-63, 69-70, 83-84, 99-100, 104; Doc. 195 – 4, 5, 8, 9, 10, 11)

REPLY: The cited document support the proposed finding. Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, Plaintiffs rely on the expert report and testimony of Dr. Lorne Everett and have failed to submit any independent admissible evidence to support Dr. Everett's opinion

testimony. 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 the Supplemental, Oral Opinions of Lorne G. Everett, which were filed concurrently herewith, and incorporated herein by reference. Plaintiffs' response also cites a number of exhibits to the Hayes declaration, none of which establish a factual dispute regarding the Finding. As a result, the proposed finding of fact is not disputed and should be entered.

549. Throughout the investigation of the vapor intrusion pathway, Madison-Kipp followed a standard and recommended approach for investigating the vapor intrusion pathway. (Dkt. #146 at 9; Bianchi Dec. ¶ 66, Ex. 64)

RESPONSE: Disputed. Madison-Kipp has violated applicable standards of care in its failure to promptly and thoroughly investigate and remediate its contamination. (Doc. 185 at pp. 25-28, 44-45; Doc. 188 at pp. 62-63, 69-70, 83-84, 99-100, 104; Doc. 195 – 4, 5, 8, 9, 10, 11)

REPLY: See Madison-Kipp's Reply to M-KPFOF ¶ 548, above. The cited documents support the proposed finding. Further, unlike Plaintiffs, Madison-Kipp actually cites to independent admissible evidence to support its Finding. (*See* dkt. #163-27 (USEPA OSWER Draft Guidance for Evaluating the Vapor Intrusion to Indoor Air Pathway from Groundwater and Soils (Subsurface Vapor Intrusion Guidance), November 2002).) Plaintiffs do not properly dispute this finding of fact with any admissible evidence. As a result, the proposed finding of fact is not disputed and should be entered.

550. After initiating a vapor intrusion investigation, Madison Kipp appropriately conducted a step-wise sampling program following standard sampling and analytical procedures for that period. (Dkt. #146 at 10)

RESPONSE: Disputed. Madison-Kipp has violated applicable standards of care in its failure to promptly and thoroughly investigate and remediate its contamination. (Doc. 185 at pp. 25-28, 44-45; Doc. 188 at pp. 62-63, 69-70, 83-84, 99-100, 104; Doc. 195 – 4, 5, 8, 9, 10, 11)

REPLY: See Madison-Kipp's Reply to M-KPFOF ¶ 548, above. Plaintiffs do not properly dispute this finding of fact with any admissible evidence. As a result, the proposed finding of fact is not disputed and should be entered.

551. Madison-Kipp's step-wise sampling program was carried out under the direction and oversight of the WDNR, despite the lack of any regulatory guidance or standard protocols to guide the investigation and evaluation process throughout much of the sampling and data analysis. (Dkt. #146 at 10)

RESPONSE: Disputed. Madison-Kipp has violated applicable standards of care in its failure to promptly and thoroughly investigate and remediate its contamination. (Doc. 185 at pp. 25-28, 44-45; Doc. 188 at pp. 62-63, 69-70, 83-84, 99-100, 104; Doc. 195 – 4, 5, 8, 9, 10, 11)

REPLY: See Madison-Kipp's Reply to M-KPFOF ¶ 548, above. Plaintiffs do not properly dispute this finding of fact with any admissible evidence. As a result, the proposed finding of fact is not disputed and should be entered.

552. The vapor intrusion pathway from Madison-Kipp to off-site properties, including the Class Members' properties, in incomplete. (Dkt. #146 at 11-16)

RESPONSE: Disputed. The vapor intrusion pathway from Madison-Kipp to the Class Member's properties is complete. (Doc. 185 at pp. 11-12; Doc. 195 – 2, 16)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, 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).) 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. Further, Plaintiffs' citation to Dkt. #195-2 and #195-16 do not dispute the Finding. Plaintiffs' Dkt. #195-2 relates to soil impacts – not a vapor intrusion pathway. Plaintiffs' Dkt. #195-16 does not relate to sub-slab or indoor air testing but instead addresses soil vapor results. According to WDNR's own guidance, soil vapor results do not, by themselves, demonstrate a completed pathway. (*See* Dkt. #163-25 ("measured vapor concentrations in the sub-slab that are less than the applicable screening levels (considering the appropriate risk exposure and AF) indicate there is not a risk to human health due to vapor intrusion. In this scenario, the vapor intrusion pathway will be considered adequately addressed".) Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

553. WDNR guidance for vapor intrusion states that "measured vapor concentrations in the sub-slab that are less than the applicable screening levels (considering the appropriate risk exposure and [attenuation factor]) indicate there is no a risk to human health due to vapor intrusion. In this scenario, the vapor intrusion pathway will be considered adequately addressed." (Dkt. #146 at 11; Bianchi Dec. ¶ 64, Ex. 62 at 15)

RESPONSE: Disputed. The measured concentrations of PCE in the sub-slabs and indoor air of Class Members homes present a risk to their health. (Doc. 186; Doc. 195 – 1, at p. 3, 4, 12, 25, 28, 31, 32, 34)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, Plaintiffs rely on the expert report of Dr. David Ozonoff and have failed to submit any independent admissible evidence to support Dr. Ozonoff's opinion testimony. Plaintiffs cannot backdoor inadmissible evidence into facts for summary judgment through the opinion testimony of Dr. Ozonoff. (*See* Madison-Kipp Reply Br. at 14-15 (citing *In re James Wilson Assocs.*, 965 F.2d 160, 173 (7th Cir. 1992).) Moreover, 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. Further, Plaintiffs' response is not even supported by the inadmissible report by Dr. Ozonoff. Dr. Ozonoff did not even opine about the "measured concentrations of PCE in the sub-slabs and indoor air of Class Members" presenting a "risk to their health" – he opined that *any* amount would be harmful to class members. Although it appears that the Plaintiffs have cited to several pages of Dkt. #195-1 that do not exist, they may have intended to cite to individual exhibits to the Hayes Declaration. These exhibits (Dkt. #s 195-1, 195-2, 195-3, 195-16, 195-31, 195-32 and 195-34) do not dispute the Finding. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

554. The WDNR Vapor Risk Screening Level for PCE in sub-slab soil gas is 62 ppbv. (Dkt. #146 at 11; Bianchi Dec. ¶ 139, Ex. 137)

RESPONSE: Plaintiffs do not dispute the current WDNR Vapor Risk Screen Level for sub-slab PCE but do dispute any inference that the levels found in the Class Area are not a threat to Class Members. Plaintiffs do dispute the materiality of the statement to the summary judgment motion. (Doc. 186; Doc. 195 – 1, at p. 3, 4, 12, 25, 28, 31, 32, 34; Doc. 188 at pp. 30, 37, 42, 46-47, 63, 69-71, 82-86, 91-93, 99-100, 118)

REPLY: The Finding is undisputed.

555. With the exception of the 2011 samples taken at 162, 154, and 150 South Marquette Street, all sub-slab soil gas concentrations for PCE are well below the Vapor Risk Screening Levels. (Dkt. #146 at 11; Figure 1)

RESPONSE: Plaintiffs do not dispute that concentrations of PCE have been found in the Class Area that are below current Vapor Risk Screening levels but do dispute any inference that those levels will not change and that the levels found in the Class Area are not a threat to Class Members. Plaintiffs also dispute the materiality of the statement to the summary judgment motion. (Doc. 186; Doc. 195 – 1, at p. 3, 4, 12, 25, 28, 31, 32, 34; Doc. 188 at pp. 30, 37, 42, 46-47, 63, 69-71, 82-86, 91-93, 99-100, 118)

REPLY: The Finding is undisputed. Further, Plaintiffs' argument regarding "any inference" is without any support and is entirely meaningless as it does not contest the proposed finding.

556. At 162, 154 and 150 South Marquette sub-slab soil gas concentrations exceeded 60 ppbv in sampling conducted in 2011 and sub-slab depressurization systems were installed by Madison Kipp. (Dkt. #146 at 11-16)

RESPONSE: Not disputed.

557. All indoor air concentrations for PCE were below the Action Level of 6.2 ppbv. (Dkt. #146 at 11, Figure 2)

RESPONSE: Plaintiffs do not dispute indoor air concentrations of PCE were found inside Class Member homes but do dispute any inference that the concentrations found are not a threat. (Doc. 186; Doc. 195 – 1, at p. 3, 4, 12, 25, 28, 31, 32, 34; Doc. 188 at pp. 30, 37, 42, 46-47, 63, 69-71, 82-86, 91-93, 99-100, 118)

REPLY: The Finding is undisputed.

558. The WDNR Vapor Risk Screening Level for TCE is 3.8 ppbv using an attenuation factor of 0.1 to convert from indoor air Action Level of 0.38 ppbv. (Dkt. #146 at 12)

RESPONSE: Not disputed but the materiality of the statement is disputed. See, Dr. Everett Report and testimony cited above.

REPLY: The Finding is undisputed.

559. TCE was not detected in sub-slab soil gas above the Vapor Risk Screening Level from any homes sampled. (Dkt. #146 at 12)

RESPONSE: Plaintiffs do not dispute that concentrations of TCE have been found in the Class Area that are below current Vapor Risk Screening levels but do dispute any inference that those levels will not change and that the levels found in the Class Area are not a threat to Class Members. Plaintiffs also dispute the materiality of the statement to the summary judgment motion. (Doc. 186; Doc. 195 – 1, at p. 3, 4, 12, 25, 28, 31, 32, 34; Doc. 188 at pp. 30, 37, 42, 46-47, 63, 69-71, 82-86, 91-93, 99-100, 118)

REPLY: The Finding is undisputed.

560. TCE was also not detected above the Action Level 0.38 ppbv in any indoor air sample. (Dkt. #146 at 12)

RESPONSE: Plaintiffs do not dispute that concentrations of TCE have been found in the Class Area that are below current Vapor Risk Screening levels but do dispute any inference that those levels will not change and that the levels found in the Class Area are not a threat to Class Members. Plaintiffs also dispute the materiality of the statement to the summary judgment motion. (Doc. 186; Doc. 195 – 1, at p. 3, 4, 12, 25, 28, 31, 32, 34; Doc. 188 at pp. 30, 37, 42, 46-47, 63, 69-71, 82-86, 91-93, 99-100, 118)

REPLY: The Finding is undisputed.

561. PCE and TCE are not present in sub-slab soil gas at levels that could be of concern for vapor intrusion. (Dkt. #146 at 12)

RESPONSE: Disputed. The measured concentrations of PCE & TCE in the sub-slabs and indoor air of Class Members homes present a risk to their health. (Doc. 186; Doc. 195 – 1, at p. 3, 4, 12, 25, 28, 31, 32, 34; Doc. 188 at pp. 30, 37, 42, 46-47, 63, 69-71, 82-86, 91-93, 99-100, 118)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, Plaintiffs rely on the expert report of Dr. David Ozonoff and the deposition testimony of Dr. Lorne Everett and have failed to submit any

independent admissible evidence to support either Dr. Ozonoff's or Dr. Everett's opinion testimony. Plaintiffs cannot backdoor inadmissible evidence into facts for summary judgment through the opinion testimony of Drs. Ozonoff and 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. Ozonoff's expert report, Dr. Everett's testimony, and Plaintiffs' response to this finding of fact, should all be stricken and disregarded, as fully set out in Madison-Kipp's Motion to Exclude Plaintiffs' Experts Lorne G. Everett and David M. Ozonoff and Motion to Strike the Supplemental, Oral Opinions of Lorne G. Everett, which were filed concurrently herewith, and are incorporated herein by reference. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. Although it appears that the Plaintiffs have cited to several pages of Dkt. #195-1 that do not exist, they may have intended to cite to individual exhibits to the Hayes Declaration. These exhibits (Dkt. #s 195-1, 195-3, 195-4, 195-12, 195-25, 195-28, 195-31, 195-32 and 195-34) do not dispute the Finding with independent admissible evidence. As a result, the proposed finding of fact is not disputed and should be entered.

562. In total, 27 homes were sampled in the Class Area and most homes were sampled two or more times, yielding over 100 data points by which vapor intrusion may be valued. (Dkt. #146 at 12)

RESPONSE: Disputed. In total, 30 homes were sampled in the Class Area. (Doc. 195 – 22, 23, 24)

REPLY: The Finding is undisputed. The cited document establishes 27 homes were sampled in the Class Area for vapor intrusion. The Plaintiffs' cited documents do

not refute the proposed finding regarding the number of Class Area homes sampled for vapor intrusion. Further, Plaintiffs' cited documents do not dispute that over 100 data points were collected by which vapor intrusion was evaluated. The proposed finding is not disputed with any evidence and, therefore, should be entered.

563. Not only is the vapor intrusion pathway incomplete but the extent of PCE in soil gas has been defined. (Dkt. #146 at 12)

RESPONSE: Disputed. The vapor intrusion pathway is complete and the extent of PCE in soil gas has not been defined. (Doc. 185 at pp. 11-12, 43-46; Doc. 188 at p. 69; Doc. 195-16)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, Plaintiffs rely on the expert report and 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).) 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 the Supplemental, Oral Opinions of Lorne G. Everett, which were filed concurrently herewith, and incorporated herein by reference. Further, Plaintiffs' citation to Dkt. #195-16 does not dispute the Finding because it does not relate to current sub-slab or indoor air testing but instead addresses historic soil vapor results. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support

of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

564. Not only are the data below Vapor Risk Screening Levels, but sufficient data points are available both temporally and spatially to allow for a full assessment. (Dkt. #146 at 13)

RESPONSE: Disputed. Madison-Kipp has not adequately characterized the nature and extent of the contamination. (Doc. at 185 at pp. 43-46, 53-55; Doc. 195 – 4)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, 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).) 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 Motions to Exclude Plaintiffs' Expert Lorne G. Everett, which was filed concurrently herewith, and incorporated herein by reference.

Additionally, Plaintiffs' response cites to the State of Wisconsin's complaint against Madison-Kipp. The complaint contains *allegations* – which Madison-Kipp has denied. (*See* Ziemba Decl., ¶1, Ex. 1.) Obviously, the complaint does not qualify as a fact, let alone an undisputed fact, particularly when the allegation was denied by Madison-Kipp. Therefore, Plaintiffs have failed to cite documents that dispute the Finding. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in

support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

565. Often far less data than that collected on and off-site at Madison-Kipp are collected at sites to evaluate the vapor intrusion risk potential. (Dkt. #146 at 13)

RESPONSE: Disputed. Madison-Kipp has not adequately characterized the nature and extent of the contamination. (Doc. at 185 at pp. 43-46, 53-55; Doc. 195 - 4)

REPLY: See Madison-Kipp's reply to M-KPFOF ¶ 564. Plaintiffs do not properly dispute this finding of fact with any admissible evidence.

566. The extensive data collection from Madison-Kipp's site clearly demonstrate that the PCE is not currently migrating off of the Madison-Kipp property and under residential homes at unacceptable levels. (Dkt. #146 at 13)

RESPONSE: Disputed. PCE is migrating off-site from Madison-Kipp and under residential homes at unacceptable levels. (Doc. 195 – 2, 4; Doc. 185 at pp. 11-12; Doc. 186 at pp. 2, 138; Doc. 193)

REPLY: The Finding is not disputed. Plaintiffs do not properly dispute the finding of fact with any admissible evidence. None of the documents Plaintiffs' cite establish that PCE is currently migrating off the Madison-Kipp property and under residential homes at unacceptable levels. Moreover, Drs. Everett's and Ozonoff's expert report, testimony and declaration, and Plaintiffs' response to this finding of fact, should be stricken and disregarded, as fully set out in Madison-Kipp's Motions to Exclude Plaintiffs' Experts Lorne G. Everett and Dr. David Ozonoff, which were filed concurrently herewith, and incorporated herein by reference. Additionally, Plaintiffs' response cites to the State of Wisconsin's complaint against Madison-Kipp. The complaint contains *allegations* – which Madison-Kipp has denied. (*See* Ziemba Decl., ¶1, Ex. 1.) Obviously, the complaint does not qualify as a fact, let alone an undisputed fact,

particularly when the allegation was denied by Madison-Kipp. Therefore, Plaintiffs have failed to cite documents that dispute the Finding. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

567. Sufficient data have been collected over time and at all homes to allow for a complete determination of the vapor intrusion pathway. (Dkt. #146 at 13)

RESPONSE: Disputed. Madison-Kipp has not adequately characterized the nature and extent of the contamination. (Doc. 185 at pp. 43-46, 53-55; Doc. 195 - 4)

REPLY: The Finding is not disputed. Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, 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).) 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.

Additionally, Plaintiffs' response cites to the State of Wisconsin's complaint against Madison-Kipp. The complaint contains *allegations* – which Madison-Kipp has denied. (*See* Ziemba Decl., ¶1, Ex. 1.) Obviously, the complaint does not qualify as a fact, let alone an undisputed fact, particularly when the allegation was denied by Madison-Kipp. Therefore, Plaintiffs have failed to cite documents that dispute the

Finding. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

568. There were no detections in the Class Members homes above the 6.2 ppbv Action Levels for indoor air. (Dkt. #146 at 14)

RESPONSE: Plaintiffs do not dispute indoor air concentrations of PCE were found inside Class Member homes but do dispute any inference that the concentration found are not a threat. (Doc. 186; Doc. 195 – 1, at p. 3, 4, 12, 25, 28, 31, 32, 34; Doc. 188 at pp. 30, 37, 42, 46-47, 63, 69-71, 82-86, 91-93, 99-100, 118)

REPLY: The Finding is undisputed.

569. At 249 Waubesa, PCE was detected in indoor air in one out of four samples, with the one detection being less than the Action Level, but greater than 0.6 ppbv. (Dkt. #146 at 14)

RESPONSE: Not disputed.

570. The single detection of PCE in the indoor air at 249 Waubesa is not representative of indoor air concentrations at 249 Waubesa given other data results including recent sampling conducted on January 11, 2013. (Dkt. #146 at 14)

RESPONSE: Disputed. The recent sampling referenced to was conducted after the installation of a mitigation system. (Doc. 140 at pp. 34:6-18: p. 40:7-12)

REPLY: The Finding is not disputed. Plaintiffs fail to properly dispute this finding of fact and, thus, Plaintiffs' response does not indicate a genuine dispute. The cited testimony does not address that the single detection of PCE in the indoor air at 249 Waubesa is not representative of indoor air concentrations. Therefore, Plaintiffs have failed to cite evidence that disputes the Finding. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

571. The concentrations detected in all but one of the Class Members' homes were less than the average concentration detected in the homes included in the many studies evaluated as part of the USEPA's indoor background study. (Dkt. #146 at 14)

RESPONSE: Disputed. The concentrations measured in Class Member homes demonstrate a pathway from Madison-Kipp to the homes and demonstrate a threat to the families living in these homes. (Doc. 185 at pp. 11-12, 43-46; Doc. 188 at p. 69; Doc. 195-16)

REPLY: The Finding is not disputed. Plaintiffs do not properly dispute the finding of fact, and thus, Plaintiffs' response does not indicate a genuine dispute. None of the documents Plaintiffs cite dispute the Finding but instead at best provide additional irrelevant facts. 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 the Supplemental, Oral Opinions of Lorne G. Everett, which were filed concurrently herewith, and incorporated herein by reference. Therefore, Plaintiffs have failed to cite evidence that disputes the Finding. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

572. Indoor air data collected from all homes within the Class Area are consistent with typical background levels for PCE. (Dkt. #146 at 15; Bianchi Dec. ¶ 68, Ex. 66)

RESPONSE: Disputed. The concentrations of PCE within Class Area homes demonstrate a pathway from Madison-Kipp and create an increased risk of adverse health effects and cancer to Class Members. (Doc. 185 at pp. 11-12, 43-46; Doc. 188 at p. 69; Doc. 195-16; Doc. 195 – 1 at p. 3, 25, 28, 31, 32, 34)

REPLY: The Finding is not disputed. Plaintiffs do not properly dispute the finding of fact, and thus, Plaintiffs' response does not indicate a genuine dispute. None of the documents Plaintiffs cite dispute the Finding but instead at best provide additional irrelevant facts. 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 the Supplemental, Oral Opinions of Lorne G. Everett, which were filed concurrently herewith, and incorporated herein by reference. Additionally, although it appears that the Plaintiffs have cited to several pages of Dkt. #195-1 that do not exist, they may have intended to cite to individual exhibits to the Hayes Declaration. Also, in light of the splitting of exhibits by Plaintiffs to be able to file documents electronically, after Dkt. #195-20, the docket numbers do not correspond to the exhibit number, i.e., Dkt. #195-25 actually refers to exhibit 24. Thus, the exhibits Plaintiffs intended to cite appear to be Dkt. #s 195–1; 195-3; 195-26; 195-29; 195-32; 195-33; and 195-35. Nonetheless, those exhibits do not dispute the Finding with independent admissible evidence. Therefore, Plaintiffs have failed to cite evidence that disputes the Finding. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

573. In a 2011 USEPA evaluation of 13 studies with background data on PCE, PCE is identified in this study as having common indoor and ambient sources. (Dkt. #146 at 15)

RESPONSE: Plaintiffs do not dispute the study was done but do dispute it has any materiality to the summary judgment motion.

REPLY: The Finding is undisputed.

574. Under the Frequently Asked Questions for USEPA 2012a, a sub-slab to indoor air attenuation factor of 0.1 as a conservative screen for vapor intrusion. (Dkt. #146 at 16; Bianchi Dec. ¶ 68, Ex. 66)

RESPONSE: Plaintiffs do not dispute the study was done but do dispute it has any materiality to the summary judgment motion.

REPLY: The Finding is undisputed.

575. The data indicate that sub-slab concentrations should be 10 times to 33 times greater than indoor air for sub-slab vapors to be the likely source for the indoor air detections. (Dkt. #146 at 16)

RESPONSE: Disputed. The DNR June 2011 Vapor Intrusion Publication "What To Expect If Vapors from Soil and Groundwater Contamination Exist on My Property" explains that sub-slab samples are a more reliable indication of a vapor intrusion source. (Doc. 195-31)

REPLY: The cited document supports the proposed finding. Plaintiffs' response does not contest the evidence or provide any different evidence to dispute the Finding. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

576. 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. (Dkt. #146 at 17)

RESPONSE: Disputed. The concentrations of VOCs detected in Class Area sub-slabs and indoor air do present an imminent and substantial endangerment to health or the environment. (Doc. 186; Doc. 195 – 1 at p. 3, 12, 25, 28, 31, 32, 34, 38; Doc. 185 at pp. 57 – 58)

REPLY: The Finding is not disputed. Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Both Dr. Everett's and Dr. Ozonoff's

expert reports 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 Exclude Plaintiffs' Expert Dr. David Ozonoff, which were filed concurrently herewith, and incorporated herein by reference. Additionally, although it appears that the Plaintiffs have cited to several pages of Dkt. #195-1 that do not exist, they may have intended to cite to individual exhibits to the Hayes Declaration. Also, in light of the splitting of exhibits by Plaintiffs to be able to file documents electronically, after Dkt. #195-20, the docket numbers do not correspond to the exhibit number, i.e., Dkt. #195-25 actually refers to exhibit 24. Thus, the exhibits Plaintiffs intended to cite appear to be Dkt. #s 195–1; 195-3; 195-12; 195-26; 195-29; 195-32; 195-33; 195-35; and 195-39. Nonetheless, those exhibits do not dispute the Finding with independent admissible evidence. Therefore, Plaintiffs have failed to cite evidence that disputes the Finding. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

577. Existing mitigation systems, although unnecessary, ensure that VOCs cannot migrate. (Dkt. #146 at 17-19)

RESPONSE: Disputed. The mitigation systems are necessary to protect Class Members and do not ensure that vapors will not migrate into homes. (Doc. 186; Doc. 195 – 1 at p. 3, 12, 25, 28, 31, 32, 34, 38; Doc. 185 at pp. 57 – 58)

REPLY: The Finding is not disputed. The cited document supports the proposed finding. Plaintiffs do not properly dispute this finding of fact with any admissible evidence. None of the documents Plaintiffs cite dispute the Finding but instead at best

provide additional irrelevant facts. Drs. Everett's and Ozonoff's expert reports and testimony, and Plaintiffs' response to this finding of fact, should be stricken and disregarded, as fully set out in Madison-Kipp's Motions to Exclude Plaintiffs' Experts Lorne G. Everett and David M. Ozonoff, which were filed concurrently herewith, and incorporated herein by reference. Additionally, although it appears that the Plaintiffs have cited to several pages of Dkt. #195-1 that do not exist, they may have intended to cite to individual exhibits to the Hayes Declaration. Also, in light of the splitting of exhibits by Plaintiffs to be able to file documents electronically, after Dkt. #195-20, the docket numbers do not correspond to the exhibit number, i.e., Dkt. #195-25 actually refers to exhibit 24. Thus, the exhibits Plaintiffs intended to cite appear to be Dkt. #s 195–1; 195-3; 195-12; 195-26; 195-29; 195-32; 195-33; 195-35; and 195-39. Nonetheless, those exhibits do not dispute the Finding with independent admissible evidence. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

578. If installed properly, a sub-slab depressurization system or radon system (mitigation system) will be effective in preventing VOCs in sub-slab soil gas from entering residential home. (Dkt. #146 at 17)

RESPONSE: Disputed. A sub-slab mitigation system is used for avoidance to the vapor risk, not to remediate the source of the threat. (Doc. 117 at p. 204; Doc. 185 at pp. 57-58; Doc. 192 at pp. 13:9-14:18)

REPLY: The Finding is not disputed. The cited document supports the proposed finding. Plaintiffs do not properly dispute this finding of fact with any admissible evidence. None of the documents Plaintiffs cite dispute the Finding but

instead at best provide additional irrelevant facts. Drs. Everett's and Ozonoff's expert reports and testimony, and Plaintiffs' response to this finding of fact, should be stricken and disregarded, as fully set out in Madison-Kipp's Motions to Exclude Plaintiffs' Experts Lorne G. Everett and David M. Ozonoff, which were filed concurrently herewith, and incorporated herein by reference. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

579. Within the Class Area mitigation systems were installed by WDNR in residential homes if sub-slab PCE concentrations were 10 times below the sub-slab Vapor Risk Screening Level. (Dkt. #146 at 18)

RESPONSE: Not disputed.

580. The WDNR's overly conservative approach to providing mitigation systems is not only technically unjustified but is unprecedented in my experience. (Dkt. #146 at 18)

RESPONSE: Disputed. The installation of mitigation systems is justified by the threat. (Doc. 195-31; Doc; 195 – 1 at p. 3, 12, 25, 28, 31, 32, 34, 38)

REPLY: The Finding is not disputed. The cited document supports the proposed finding. Plaintiffs do not properly dispute this finding of fact with any admissible evidence. None of the documents Plaintiffs cite dispute the Finding but instead at best provide additional irrelevant facts. Additionally, although it appears that the Plaintiffs have cited to several pages of Dkt. #195-1 that do not exist, they may have intended to cite to individual exhibits to the Hayes Declaration. Also, in light of the splitting of exhibits by Plaintiffs to be able to file documents electronically, after Dkt. #195-20, the docket numbers do not correspond to the exhibit number, i.e., Dkt. #195-25

actually refers to exhibit 24. Thus, the exhibits Plaintiffs intended to cite appear to be Dkt. #s 195–1; 195-3; 195-12; 195-26; 195-29; 195-32; 195-33; 195-35; and 195-39. Nonetheless, those exhibits do not dispute the Finding with independent admissible evidence. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

581. These mitigation systems will prevent the movement of PCE in sub-slab soil gas. (Dkt. #146 at 18)

RESPONSE: Disputed. A sub-slab mitigation system is used for avoidance to the vapor risk, not to remediate the source of the threat. (Doc. 117 at p. 204; Doc. 185 at pp. 57-58; Doc. 192 at pp. 13:9-14:18)

REPLY: The Finding is not disputed. The cited document supports the proposed finding. Plaintiffs do not properly dispute this finding of fact with any admissible evidence. None of the documents Plaintiffs cite dispute the Finding but instead at best provide additional irrelevant facts. Additionally, 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 were filed concurrently herewith, and incorporated herein by reference. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

582. As installed and operating, the soil vapor extraction system prevents VOCs from migrating off the site into residential yards. (Dkt. #146 at 19)

RESPONSE: Disputed. The soil vapor extraction system has not prevented the off-site migration of VOCs. (Doc. 195 – 2, 4; Doc. 185 at pp. 46-59)

REPLY: The Finding is not disputed. The cited document supports the proposed finding. Plaintiffs do not properly dispute this finding of fact with any admissible evidence. None of the documents Plaintiffs cite dispute the Finding but instead at best provide additional irrelevant facts. 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 were filed concurrently herewith, and incorporated herein by reference. Additionally, Plaintiffs' response cites to the State of Wisconsin's complaint against Madison-Kipp. The complaint contains *allegations* – which Madison-Kipp has denied. (*See* Ziemba Decl., ¶1, Ex. 1.) Obviously, the complaint does not qualify as a fact, let alone an undisputed fact, particularly when the allegation was denied by Madison-Kipp. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

583. The regulatory community was not rapidly moving towards a realization of vapor intrusion in the 1990s. (Dkt. #146 at 19)

RESPONSE: Disputed. Environmental professionals recognized the vapor intrusion threat in the 1990s. (Doc. 185 at p. 26)

REPLY: The Finding is not disputed. Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, Plaintiffs rely on the expert report and 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' 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. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

584. In the 2003 Folkes and Arell paper Dr. Everett cited, the writers noted that the science of vapor intrusion was still in its infancy (Dkt. #146 at 19; Bianchi Dec. ¶ 59, Ex. 57)

RESPONSE: Disputed. Environmental professionals recognized the vapor intrusion threat in the 1990s. (Doc. 185 at p. 26)

REPLY: See Madison-Kipp's reply to M-KPFOF ¶ 583, above. Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

585. Dr. Everett's own paper appears to support the finding that investigation of the vapor intrusion pathway is a relatively new phenomenon. (Dkt. #146 at 19-20; Bianchi Dec. ¶ 67, Ex. 65 at 60)

RESPONSE: Disputed. Environmental professionals recognized the vapor intrusion threat in the 1990s. (Doc. 185 at p. 26)

REPLY: See Madison-Kipp's reply to M-KPFOF ¶ 583, above. Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

586. Dr. Everett's recent paper "Dynamic Subsurface Explosive Vapor Concentrations: Observations and Implications" focused on soil gas data, which is known to have greater variability than sub-slab data) and not sub-slab soil gas data. (Dkt. #146 at 20)

RESPONSE: Disputed. Dr. Everett's recent paper encompasses the scientific issues involved in sub-slab soil gas environments like that present in the Class Area. (Doc. 185 at pp. 11-12)

REPLY: See Madison-Kipp's reply to M-KPFOF ¶ 583, above. Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

587. Intensive continuous monitoring is highly unlikely to identify different conditions than those that have already been thoroughly demonstrated on and off-site at Madison-Kipp. (Dkt. #146 at 20)

RESPONSE: Disputed. Additional monitoring and testing is necessary to define the full extent of the contamination and to direct proper remedial measures. (Doc. 185 at pp. 46-59)

REPLY: See Madison-Kipp's reply to M-KPFOF ¶ 583, above. Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Further, Plaintiffs

have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

588. Variability in soil gas does not provide similar predications for variability in sub-slab soil gas data. (Dkt. #146 at 21)

RESPONSE: Disputed. Variability in soil gas can provide information on variability in sub-slab soil gas data. (Doc. 185 at pp. 45-59)

REPLY: See Madison-Kipp's reply to M-KPFOF ¶ 583, above. Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

589. The data covering the on-site and off-site soil gas concentrations shows a significant decreasing trend moving from on-site to off-site. (Dkt. #146 at 21)

RESPONSE: Disputed. Some off-site soil gas concentrations are higher than some on-site concentrations. (Compare Doc. 146 Figure 3 for PCE concentrations at 230 S. Marquette with Doc. 195-13)

REPLY: The Finding is not disputed. The cited document supports the proposed finding. Plaintiffs do not properly dispute this finding of fact with any admissible evidence. The document Plaintiffs cite does not dispute the Finding. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

590. The data confirm that PCE has not migrated beyond the Class Area. (Dkt. #146 at 22)

RESPONSE: Disputed. Data confirms PCE has migrated beyond the Class Area. (Doc. 195-2, 22, 27)

REPLY: The Finding is not disputed. The cited document supports the proposed finding. Plaintiffs do not properly dispute this finding of fact with any admissible evidence. None of the documents Plaintiffs cite dispute the Finding but instead at best provide additional irrelevant facts. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

591. 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. (Dkt. #144 at 3)

RESPONSE: Disputed. Exposure to PCE, TCE, PAHs and PCBs in soil via incidental ingestion at Class Member's properties do present an imminent and substantial endangerment to health and the environment. (Doc. 186, Doc. 195 – 12, 33, 41; Doc. 119 at pp. 35-36; Doc. 126 at pp. 36-39; Doc. 191 at pp. 22-23; Doc. 185 at p. 41)

REPLY: The Finding is not disputed. The cited document supports the proposed finding. Plaintiffs do not properly dispute this finding of fact with any admissible evidence. None of the documents Plaintiffs cite dispute the Finding but instead at best provide additional irrelevant facts. The citation to Dr. Ozonoff's report does not dispute the Finding as Dr. Ozonoff did not provide any opinion regarding exposure to chemicals via incidental ingestion. (*See* Ozonoff Dep., dkt. #142, at 11:21-24.) Moreover, Drs. Everett's and Ozonoff's expert reports and testimony, and Plaintiffs' response to this finding of fact, should be stricken and disregarded, as fully set out in Madison-Kipp's Motions to Exclude Plaintiffs' Experts Lorne G. Everett and Dr. David

Ozonoff, which were filed concurrently herewith, and incorporated herein by reference. Additionally, the testimony cited is inadmissible hearsay under Federal Rule of Evidence 802 as it all references statements from non-testifying declarants, *i.e.*, people other than the Class Member being deposed, being offered for the truth of the matter asserted. (*See* Madison-Kipp Reply Br. at 12-13.) Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

592. 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. (Dkt. #144 at 3)

RESPONSE: Disputed. Exposure to PAHs and PCBs in soil via demand contact at Class Member's properties does present an imminent and substantial endangerment to health and the environment. (Doc. 186, Doc. 195 – 12, 33, 41; Doc. 119 at pp. 35-36; Doc. 126 at pp. 36-39; Doc. 191 at pp. 22-23; Doc. 185 at p. 41)

REPLY: The Finding is not disputed. The cited document supports the proposed finding. Plaintiffs do not properly dispute this finding of fact with any admissible evidence. None of the documents Plaintiffs cite dispute the Finding but instead at best provide additional irrelevant facts. The citation to Dr. Ozonoff's report does not dispute the Finding as Dr. Ozonoff did not provide any opinion regarding exposure to chemicals via incidental ingestion. (*See* Ozonoff Dep., dkt. #142, at 11:21-24.) Moreover, Drs. Everett's and Ozonoff's expert reports and testimony, and Plaintiffs' response to this finding of fact, should be stricken and disregarded, as fully set out in Madison-Kipp's Motions to Exclude Plaintiffs' Experts Lorne G. Everett and Dr. David Ozonoff, which were filed concurrently herewith, and incorporated herein by reference.

Additionally, the testimony cited is inadmissible hearsay under Federal Rule of Evidence 802 as it all references statements from non-testifying declarants, *i.e.*, people other than the Class Member being deposed, being offered for the truth of the matter asserted. (*See* Madison-Kipp Reply Br. at 12-13.) Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

593. 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. (Dkt. #144 at 3)

RESPONSE: Disputed. Exposure to PCE, TCE and VC via inhalation of indoor air at Class Member's properties does present an imminent and substantial endangerment to health and the environment. (Doc. 186; Doc. 195-1 at p. 3, 25, 28, 31, 32, 34, 38)

REPLY: The Finding is not disputed. The cited document supports the proposed finding. Plaintiffs do not properly dispute this finding of fact with any admissible evidence. None of the documents Plaintiffs cite dispute the Finding but instead at best provide additional irrelevant facts. Moreover, 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 Dr. David Ozonoff, which was filed concurrently herewith, and incorporated herein by reference. Additionally, although it appears that the Plaintiffs have cited to several pages of Dkt. #195-1 that do not exist, they may have intended to cite to individual exhibits to the Hayes Declaration. Also, in light of the splitting of exhibits by Plaintiffs to be able to file documents electronically, after Dkt. #195-20, the docket numbers do

not correspond to the exhibit number, i.e., Dkt. #195-25 actually refers to exhibit 24. Thus, the exhibits Plaintiffs intended to cite appear to be Dkt. #s 195–1; 195-3; 195-26; 195-29; 195-32; 195-33; 195-35; and 195-39. Nonetheless, those exhibits do not dispute the Finding with independent admissible evidence. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

594. Health-based regulatory criteria and guidelines may provide useful context for evaluating the potential toxicological significance of such an exposure, that is, exposures below appropriate health-based criteria can be considered to not present a toxicological concern. However, exceedance of such criteria is not evidence of adverse health effects. (Dkt. #144 at 3)

RESPONSE: Disputed. The measured concentrations of contaminants found at Class Member's properties present any increased risk of health threats to Class Area families. According to US EPA's MCLG, and exposure above zero for PCE, TCE or VC is a health risk. (Doc. 186, Doc. 195 – 12, 25, 33, 41; Doc. 119 at pp. 35-36; Doc. 126 at pp. 36-39; Doc. 191 at pp. 22-23; Doc. 185 at p. 41)

REPLY: The Finding is not disputed. The cited document supports the proposed finding. Plaintiffs do not properly dispute this finding of fact with any admissible evidence. None of the documents Plaintiffs cite dispute the Finding but instead at best provide additional irrelevant facts. Indeed, the EPA's MCL to which Plaintiffs refer relates to *drinking water*, which is not at issue here. (Dkt. # 195-26). Moreover, Drs. Everett's and Ozonoff's expert reports and testimony, and Plaintiffs' response to this finding of fact, should be stricken and disregarded, as fully set out in Madison-Kipp's Motions to Exclude Plaintiffs' Experts Lorne G. Everett and Dr. David Ozonoff, which was filed concurrently herewith, and incorporated herein by reference. Additionally, the testimony cited is inadmissible hearsay under Federal Rule of

Evidence 802 as it all references statements from non-testifying declarants, *i.e.*, people other than the Class Member being deposed, being offered for the truth of the matter asserted. (*See* Madison-Kipp Reply Br. at 12-13.) Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

595. Screening levels are conservative by design for several reasons, e.g., screening levels are based on toxicity criteria that are well below health effect levels and exposure factors that tend to represent high-end exposure, like exposure for 23 hours/ day for 30 years. (Dkt. #144 at 3-4)

RESPONSE: Disputed. The measured concentrations of contaminants found at Class Member's properties present any increased risk of health threats to Class Area families. According to US EPA's MCLG, and exposure above zero for PCE, TCE or VC is a health risk. (Doc. 186, Doc. 195 – 12, 25, 33, 41; Doc. 119 at pp. 35-36; Doc. 126 at pp. 36-39; Doc. 191 at pp. 22-23; Doc. 185 at p. 41)

REPLY: The Finding is not disputed. The cited document supports the proposed finding. Plaintiffs do not properly dispute this finding of fact with any admissible evidence. None of the documents Plaintiffs cite dispute the Finding but instead at best provide additional irrelevant facts. Indeed, the EPA's MCL to which Plaintiffs refer relates to *drinking water*, which is not at issue here. (Dkt. # 195-26). Moreover, Drs. Everett's and Ozonoff's expert reports and testimony, and Plaintiffs' response to this finding of fact, should be stricken and disregarded, as fully set out in Madison-Kipp's Motions to Exclude Plaintiffs' Experts Lorne G. Everett and Dr. David Ozonoff, which was filed concurrently herewith, and incorporated herein by reference. Additionally, the testimony cited is inadmissible hearsay under Federal Rule of Evidence 802 as it all references statements from non-testifying declarants, *i.e.*, people

other than the Class Member being deposed, being offered for the truth of the matter asserted. (*See* Madison-Kipp Reply Br. at 12-13.) Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

596. In her assessment of the risks posed Class Members by an alleged contamination. Dr. Barbara Beck performed a quantitative risk assessment for an adult and a child resident at each plaintiff property to evaluate exposures to PCE, TCE and VC in indoor air via inhalation and exposes to PCE, TCE, VC, PAHs, and PCBs in soil via incidental ingestion and dermal contact. (Dkt. #144 at 4)

RESPONSE: Disputed. Dr. Everett testified that Dr. Beck's approach to risk was inappropriate because it ignores the Site and relied upon incomplete and unreliable data. (Doc. 188 at pp. 30, 37, 42, 46, 47, 63, 69-71, 82-86, 91-31, 99-100, 118)

REPLY: The Finding is not disputed. The cited document supports the proposed finding. Plaintiffs do not properly dispute this finding of fact with any admissible evidence. 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 the Supplemental Oral Opinions of Lorne G. Everett, which were filed concurrently herewith, and incorporated herein by reference. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

597. The site-specific risk assessment, conducted using USEPA methodology and site-specific data, shows that the total hypothetical cancer risks are within the acceptable limits from US EPA. (Dkt. #144 at 4)

RESPONSE: Disputed. Dr. Beck's approach to risk was inappropriate because it ignored data including at the Madison-Kipp facility and relied upon incomplete and unreliable data and according to Dr. Ozonoff the concentrations of VOCs create an

increased risk of cancer and no increased cancer risk should be acceptable to Class Members. (Doc. 188 at pp. 30, 37, 42, 46, 47, 63, 69-71, 82-86, 91-93, 99-100, 118; Doc. 186 at pp. 2, 138)

REPLY: The Finding is not disputed. The cited document supports the proposed finding. Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Drs. Everett's and Ozonoff's expert reports and testimony, and Plaintiffs' response to this finding of fact, should be stricken and disregarded, as fully set out in Madison-Kipp's Motions to Exclude Plaintiffs' Experts Lorne G. Everett and Dr. David Ozonoff and Motion to Strike the Supplemental Oral Opinions of Lorne G. Everett, which was filed concurrently herewith, and incorporated herein by reference. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

598. Dr. Ozonoff's conclusion that an increased and unacceptable risk of cancer exists to Class Area residents is scientifically invalid absent any risk evaluation. (Dkt. #144 at 5)

RESPONSE: Disputed. Dr. Ozonoff's report provides extensive detail on the bases for his opinions including his use of the "weight of the evidence" methodology which is the same methodology used by US EPA. (Doc. 186 at pp. 7-138)

REPLY: The Finding is not disputed. The cited document supports the proposed finding. Plaintiffs do not properly dispute this finding of fact with any admissible evidence. 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 Dr. David Ozonoff, which was filed concurrently herewith, and incorporated herein by reference. Further, Plaintiffs

have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

599. The aim of the USEPA and other public health agencies is not to precisely define which effects are expected to occur, but to defined the level at which health effects are unlikely to occur (i.e., effects may in fact occur only at a much higher concentration, but it is uncertain how to describe where the "safe" level begins). Thus, regulatory criteria are designed to 'protect the health of everyone in general and no one in particular.' Screening levels are conservative by design for several reasons. For example, screening levels are based on toxicity criteria that are well below health effect levels and exposure factors that tend to represent high-end exposures (e.g., exposure for 24 hours/day for 30 years). Thus, exceedance of a screening level is not an indication that an adverse health effect will occur. (Dkt. #144 at 11-12)

RESPONSE: Disputed. For Class Members, who have had their homes invaded by Madison-Kipp's environmental contamination, their aim is on the safety of their families which has been threatened by the contamination present on their properties. (Doc. 186, Doc. 195 – 12, 33, 41; Doc. 119 at pp. 35-36; Doc. 126 at pp. 36-39; Doc. 191 at pp. 22-23; Doc. 185 at p. 41)

REPLY: The Finding is not disputed. The cited document supports the proposed finding. Plaintiffs do not properly dispute this finding of fact with any admissible evidence. None of the documents Plaintiffs cite dispute the Finding but instead at best provide additional irrelevant facts. Moreover, Drs. Everett's and Ozonoff's expert reports and testimony, and Plaintiffs' response to this finding of fact, should be stricken and disregarded, as fully set out in Madison-Kipp's Motions to Exclude Plaintiffs' Experts Lorne G. Everett and Dr. David Ozonoff, which was filed concurrently herewith, and incorporated herein by reference. Additionally, the testimony cited is inadmissible hearsay under Federal Rule of Evidence 802 as it all references statements from non-testifying declarants, *i.e.*, people other than the Class Member being deposed,

being offered for the truth of the matter asserted. (*See* Madison-Kipp Reply Br. at 12-13.) Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

600. All PCE and TCE concentrations were below their respective US EPA RSLs. VC was not detected in the soil sample. (Dkt. #144 at 33)

RESPONSE: Disputed. PCE, TCE and other contaminants have been routinely found in excess of regulatory guidelines. (Doc. 188 – 10, 17, 18, 19, 20, 21; Doc. 195 – 27)

REPLY: The cited document supports the proposed finding. Plaintiffs' response cites to a February 14, 2013 ARCADIS letter report to WDNR regarding the building subsurface investigation summary. The Plaintiffs' cited document does not address nor refute the proposed finding regarding PCE and TCE concentrations on Class Members' residences being below their respective US EPA RSLs for residential soil and does not address nor refute the fact that VC was not detected in soil samples from the Class Members' residences. The Plaintiffs' response also cites to deposition testimony of Dr. Lorne Everett but Plaintiffs have failed to submit any independent admissible evidence to support Dr. Everett's opinion testimony. 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 the Supplemental Oral Opinions of Lorne G. Everett, which were filed concurrently herewith, and incorporated herein by reference. Because the Plaintiffs' response does not contest the evidence or provide any different

evidence, the proposed finding is not disputed with any evidence and, therefore, should be entered.

601. Carcinogenic risk represents the incremental hypothetical probability that an individual will develop cancer during his or her lifetime. (Dkt. #144 at 37)

RESPONSE: Plaintiffs do not dispute, this can be used as a definition of carcinogenic risk but dispute it is material to the summary judgment motion.

REPLY: The Finding is undisputed.

602. The hypothetical total cancer risk for all the properties were within US EPA's acceptable equity. (Dkt. #144 at 39)

RESPONSE: Disputed. Dr. Beck's approach to risk was inappropriate because it ignored data including at the Madison-Kipp facility and relied upon incomplete and unreliable data and according to Dr. Ozonoff the concentrations of VOCs create an increased risk of cancer and no increased cancer risk should be acceptable to Class Members. (Doc. 188 at pp. 30, 37, 42, 46, 47, 63, 69-71, 82-86, 91-93, 99-100; 118; Doc. 186 at pp. 2, 138)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, Plaintiffs rely on the expert report of Dr. David Ozonoff and the deposition testimony of Dr. Lorne Everett and have failed to submit any independent admissible evidence to support either Dr. Ozonoff's or Dr. Everett's opinion testimony. Plaintiffs cannot backdoor inadmissible evidence into facts for summary judgment through the opinion testimony of Drs. Ozonoff and 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. Ozonoff's expert report, Dr. Everett's testimony, and Plaintiffs' response to this finding of fact, should all be stricken and disregarded, as fully set out in Madison-Kipp's Motions to Exclude Plaintiffs' Experts Lorne G. Everett and Dr. David Ozonoff and Motion to Strike the Supplemental Oral Opinions of Lorne

G. Everett, which were filed concurrently herewith, and are incorporated herein by reference. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

603. With the exception of 249 Waubesa, the total hazard index for a child was less than 1 and the index ranged from 0.0001 – 0.6, and thus, residents at these properties do not have an unacceptable non-cancer risk. (Dkt. #144 at 40)

RESPONSE: Disputed. Dr. Beck's approach to risk was inappropriate because it ignored data including at the Madison-Kipp facility and relied upon incomplete and unreliable data and according to Dr. Ozonoff the concentrations of VOCs create an increased risk of cancer and no increased cancer risk should be acceptable to Class Members. (Doc. 188 at pp. 30, 37, 42, 46, 47, 63, 69-71, 82-86, 91-93, 99-100; 118; Doc. 186 at pp. 3, 138)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, Plaintiffs rely on the expert report of Dr. David Ozonoff and the deposition testimony of Dr. Lorne Everett and have failed to submit any independent admissible evidence to support either Dr. Ozonoff's or Dr. Everett's opinion testimony. Plaintiffs cannot backdoor inadmissible evidence into facts for summary judgment through the opinion testimony of Drs. Ozonoff and 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. Ozonoff's expert report, Dr. Everett's testimony, and Plaintiffs' response to this finding of fact, should all be stricken and disregarded, as fully set out in Madison-Kipp's Motions to Exclude Plaintiffs' Experts Lorne G. Everett and Dr. David Ozonoff and Motion to Strike the Supplemental Oral Opinions of Lorne G. Everett, which were filed concurrently herewith, and are incorporated herein by

reference. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

604. The data collected by the WDNR on June 7, 2012 for property at 249 Waubesa showed concentrations of PCE and TCE, but the finding was anomalous as no PCE or TCE was found in a split sample collected by ARCADIS on the same day nor by WDNR in a basement indoor air sample collected on April 25, 2012. (Dkt. #144 at 40)

RESPONSE: Disputed. Vapor concentrations can vary greatly depending upon the conditions and testing method. (Doc. 185 at. p. 45)

REPLY: The cited document supports the proposed finding. Plaintiffs' response does not contest the evidence or provide any different evidence. The Plaintiffs' response cites to deposition testimony of Dr. Lorne Everett but Plaintiffs have failed to submit any independent admissible evidence to support Dr. Everett's opinion testimony. 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. Because the Plaintiffs' response does not contest the evidence or provide any different evidence, the proposed finding is not disputed with any evidence and, therefore, should be entered.

605. The indoor air at 249 Waubesa was resampled on January 11, 2013, and PCE and TCE were not detected in the indoor air. (Dkt. #144 at 41)

RESPONSE: Plaintiffs do not dispute that after a mitigation system was installed, PCE and TCE were not detected in indoor air on January 11, 2013 at 249 Waubesa.

REPLY: The Finding is undisputed.

606. Residents' hypothetical exposures to PCE via incidental ingestion of soil are well below the level that US EPA has associated with an increased risk of liver cancer in laboratory animals. (Dkt. #144 at 42)

RESPONSE: Disputed. Dr. Beck's approach to risk was inappropriate because it ignored data including at the Madison-Kipp facility and relied upon incomplete and unreliable data and according to Dr. Ozonoff the concentrations of VOCs create an increased risk of cancer and no increased cancer risk should be acceptable to Class Members. (Doc. 188 at pp. 30, 37, 42, 46, 47, 63, 69-71, 82-86, 91-93, 99-100, 118; Doc. 186 at pp. 2, 138)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, Plaintiffs rely on the expert report of Dr. David Ozonoff and the deposition testimony of Dr. Lorne Everett and have failed to submit any independent admissible evidence to support either Dr. Ozonoff's or Dr. Everett's opinion testimony. Plaintiffs cannot backdoor inadmissible evidence into facts for summary judgment through the opinion testimony of Drs. Ozonoff and 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. Ozonoff's expert report, Dr. Everett's testimony, and Plaintiffs' response to this finding of fact, should all be stricken and disregarded, as fully set out in Madison-Kipp's Motions to Exclude Plaintiffs' Experts Lorne G. Everett and Dr. David Ozonoff and Motion to Strike the Supplemental Oral Opinions of Lorne G. Everett, which were filed concurrently herewith, and are incorporated herein by reference. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

607. Residents' hypothetical exposures to TCE via incidental ingestion of soil are well below the level of US EPA has associated with an increased cancer risk in humans. (Dkt. #144 at 42)

RESPONSE: Disputed. Dr. Beck's approach to risk was inappropriate because it ignored data including at the Madison-Kipp facility and relied upon incomplete and unreliable data and according to Dr. Ozonoff the concentrations of VOCs create an increased risk of cancer and no increased cancer risk should be acceptable to Class Members. (Doc. 188 at pp. 30, 37, 42, 46, 47, 63, 69-71, 82-86, 91-93, 99-100, 118; Doc. 186 at pp. 2, 138)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. *See* Madison-Kipp's reply to Plaintiffs' response to M-KPFOF ¶ 606. As a result, the proposed finding of fact is not disputed and should be entered.

608. Plaintiffs' hypothetical exposures to Aroclor 1248 via incidental ingestion or dermal contact with soil are well below the level that US EPA has associated with an increased risk of liver tumors in laboratory animals. (Dkt. #144 at 43)

RESPONSE: Disputed. Dr. Beck's approach to risk was inappropriate because it ignored data including at the Madison-Kipp facility and relied upon incomplete and unreliable data and according to Dr. Ozonoff the concentrations of VOCs create an increased risk of cancer and no increased cancer risk should be acceptable to Class Members. (Doc. 188 at pp. 30, 37, 42, 46, 47, 63, 69-71, 82-86, 91-93, 99-100, 118; Doc. 186 at pp. 2, 138)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. *See* Madison-Kipp's reply to Plaintiffs' response to M-KPFOF ¶ 606. As a result, the proposed finding of fact is not disputed and should be entered.

609. Residents exposed to BaP in soil via incidental ingestion and dermal contact, the highest estimated ADD is 4.9 x 10-6 mg/kg-day and such an exposure dose is more than 60,000 times lower than the dose (0.3mg/kg-day) associated with an increased risk of forestomach tumors in mice. (Dkt. #144 at 43)

RESPONSE: Disputed. Dr. Beck's approach to risk was inappropriate because it ignored data including at the Madison-Kipp facility and relied upon incomplete and unreliable data and according to Dr. Ozonoff the concentrations of VOCs create an increased risk of cancer and no increased cancer risk should be acceptable to Class

Members. (Doc. 188 at pp. 30, 37, 42, 46, 47, 63, 69-71, 82-86, 91-93, 99-100, 118; Doc. 186 at pp. 2, 138)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. See Madison-Kipp's reply to Plaintiffs' response to M-KPFOF ¶ 606. As a result, the proposed finding of fact is not disputed and should be entered.

610. Residents' hypothetical exposures to PCE via inhalation of indoor air are well below the concentration associated with an increased risk of liver cancer in laboratory. (Dkt. #144 at 43)

RESPONSE: Disputed. Dr. Beck's approach to risk was inappropriate because it ignored data including at the Madison-Kipp facility and relied upon incomplete and unreliable data and according to Dr. Ozonoff the concentrations of VOCs create an increased risk of cancer and no increased cancer risk should be acceptable to Class Members. (Doc. 188 at pp. 30, 37, 42, 46, 47, 63, 69-71, 82-86, 91-93, 99-100, 118; Doc. 186 at pp. 2, 138)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. See Madison-Kipp's reply to Plaintiffs' response to M-KPFOF ¶ 606. As a result, the proposed finding of fact is not disputed and should be entered.

611. Residents' hypothetical exposures to TCE via inhalation of indoor air are well below the concentration associated with an increased cancer risk in humans. (Dkt. #144 at 43-44)

RESPONSE: Disputed. Dr. Beck's approach to risk was inappropriate because it ignored data including at the Madison-Kipp facility and relied upon incomplete and unreliable data and according to Dr. Ozonoff the concentrations of VOCs create an increased risk of cancer and no increased cancer risk should be acceptable to Class Members. (Doc. 188 at pp. 30, 37, 42, 46, 47, 63, 69-71, 82-86, 91-93, 99-100, 118; Doc. 186 at pp. 2, 138)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. See Madison-Kipp's reply to Plaintiffs' response to M-KPFOF ¶ 606. As a result, the proposed finding of fact is not disputed and should be entered.

612. Residents' exposures to PCE via ingestion of soil are well below the concentrations that USEPA has estimated as the HED for decreased thymus weights and cardiac malformations in laboratory animals, and below the concentration associated with developmental immunotoxicity laboratory animals. (Dkt. #144 at 44)

RESPONSE: Disputed. Dr. Beck's approach to risk was inappropriate because it ignored data including at the Madison-Kipp facility and relied upon incomplete and unreliable data and according to Dr. Ozonoff the concentrations of VOCs create an increased risk of cancer and no increased cancer risk should be acceptable to Class Members. (Doc. 188 at pp. 30, 37, 42, 46, 47, 63, 69-71, 82-86, 91-93, 99-100, 118; Doc. 186 at pp. 2, 138; Doc. 195-28, 33; Doc. 119 at pp. 35-36; Doc. 126 at pp. 37-39; Doc. 191 at pp. 22-23)

REPLY: The Finding is not disputed. The cited document supports the proposed finding. Plaintiffs do not properly dispute this finding of fact with any admissible evidence. None of the documents Plaintiffs cite dispute the Finding but instead at best provide additional irrelevant facts. The citation to Dr. Ozonoff's report does not dispute the Finding as Dr. Ozonoff did not provide any opinion regarding exposure to chemicals via incidental ingestion. (*See* Ozonoff Dep., dkt. #142, at 11:21-24.) Moreover, Dr. Everett's testimony, Dr. Ozonoff's expert report, 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 Dr. David Ozonoff and Motion to Strike the Supplemental Oral Opinions of Lorne G. Everett, which were filed concurrently herewith, and incorporated herein by reference. Additionally, the testimony cited is inadmissible hearsay under Federal Rule of Evidence 802 as it all references statements from non-testifying declarants, *i.e.*, people other than the Class Member being deposed, being offered for the truth of the matter asserted. (*See* Madison-Kipp Reply Br. at 12-13.) Further, Plaintiffs have not challenged the evidence

cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

613. Residents' exposures to PCE via inhalation of indoor air are below the concentration that US EPA has associated with health effects in humans. (Dkt. #144 at 45)

RESPONSE: Disputed. The measured concentrations of contaminants found at Class Member's properties present an increased risk of health threats to Class Area families. According to US EPA's MCLG, and exposure above zero for PCE, TCE or VC is a health risk. (Doc. 186, Doc. 195 – 12, 25, 33, 41; Doc. 119 at pp. 35-36; Doc. 126 at pp. 36-39; Doc. 191 at pp. 22-23; Doc. 185 at p. 41)

REPLY: The Finding is not disputed. The cited document supports the proposed finding. Plaintiffs do not properly dispute this finding of fact with any admissible evidence. None of the documents Plaintiffs cite dispute the Finding but instead at best provide additional irrelevant facts. Indeed, the EPA's MCL to which Plaintiffs refer relates to *drinking water*, which is not at issue here. (Dkt. # 195-26). Moreover, Drs. Everett's and Ozonoff's expert reports and testimony, and Plaintiffs' response to this finding of fact, should be stricken and disregarded, as fully set out in Madison-Kipp's Motions to Exclude Plaintiffs' Experts Lorne G. Everett and Dr. David Ozonoff, which was filed concurrently herewith, and incorporated herein by reference. Additionally, the testimony cited is inadmissible hearsay under Federal Rule of Evidence 802 as it all references statements from non-testifying declarants, *i.e.*, people other than the Class Member being deposed, being offered for the truth of the matter asserted. (*See* Madison-Kipp Reply Br. at 12-13.) Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

614. Residents' exposure to TCE via inhalation of indoor air are below the concentrations that US EPA has estimated as the human equivalent concentrations for health effects in laboratory animals. (Dkt. #144 at 45)

RESPONSE: Disputed. The measured concentrations of contaminants found at Class Member's properties present an increased risk of health threats to Class Area families. According to US EPA's MCLG, and exposure above zero for PCE, TCE or VC is a health risk. (Doc. 186, Doc. 195 – 12, 25, 33, 41; Doc. 119 at pp. 35-36; Doc. 126 at pp. 36-39; Doc. 191 at pp. 22-23; Doc. 185 at p. 41)

REPLY: The Finding is not disputed. The cited document supports the proposed finding. Plaintiffs do not properly dispute this finding of fact with any admissible evidence. None of the documents Plaintiffs cite dispute the Finding but instead at best provide additional irrelevant facts. Indeed, the EPA's MCL to which Plaintiffs refer relates to *drinking water*, which is not at issue here. (Dkt. # 195-26). Moreover, Drs. Everett's and Ozonoff's expert reports and testimony, and Plaintiffs' response to this finding of fact, should be stricken and disregarded, as fully set out in Madison-Kipp's Motions to Exclude Plaintiffs' Experts Lorne G. Everett and Dr. David Ozonoff, which was filed concurrently herewith, and incorporated herein by reference. Additionally, the testimony cited is inadmissible hearsay under Federal Rule of Evidence 802 as it all references statements from non-testifying declarants, *i.e.*, people other than the Class Member being deposed, being offered for the truth of the matter asserted. (*See* Madison-Kipp Reply Br. at 12-13.) Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

615. With an excess cancer risk of 1 x 104 the risk of cancer increases from a background risk of about 0.4000 to a risk of 0.4001 as a result of the Site exposures. (Dkt. #144 at 45)

RESPONSE: Disputed. Dr. Beck's approach to risk was inappropriate because it ignored data including at the Madison-Kipp facility and relied upon incomplete and unreliable data and according to Dr. Ozonoff the concentrations of VOCs create an increased risk of cancer and no increased cancer risk should be acceptable to Class Members. (Doc. 188 at pp. 30, 37, 42, 46, 47, 63, 69-71, 82-86, 91-93, 99-100, 118; Doc. 186 at pp. 2, 138)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, Plaintiffs rely on the expert report of Dr. David Ozonoff and the deposition testimony of Dr. Lorne Everett and have failed to submit any independent admissible evidence to support either Dr. Ozonoff's or Dr. Everett's opinion testimony. Plaintiffs cannot backdoor inadmissible evidence into facts for summary judgment through the opinion testimony of Drs. Ozonoff and 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 testimony, Dr. Ozonoff's expert report, 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 Dr. David Ozonoff and Motion to Strike the Supplemental Oral Opinions of Lorne G. Everett, which were filed concurrently herewith, and incorporated herein by reference. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

616. The PCE concentrations in all but one of the homes in the Class, using data from 2011 and 2012, were within or below the range of 95th percentile concentrations measured in various studies of residential indoor air in the US (4.1-9.5 µg/m3) as reported by US EPA. (Dkt. #144 at 45-46; Bianchi Dec. ¶ 65, Ex. 63)

RESPONSE: Disputed. Dr. Beck's approach to risk was inappropriate because it ignored data including at the Madison-Kipp facility and relied upon incomplete and

unreliable data and according to Dr. Ozonoff the concentrations of VOCs create an increased risk of cancer and no increased cancer risk should be acceptable to Class Members. (Doc. 188 at pp. 30, 37, 42, 46, 47, 63, 69-71, 82-86, 91-93, 99-100, 118; Doc. 186 at pp. 2, 138)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. See Madison-Kipp's reply to Plaintiffs' response to M-KPFOF ¶ 615. As a result, the proposed finding of fact is not disputed and should be entered.

617. Even if one accepts the premise that PCE is a human carcinogen, there still exists a level of exposure below which there would not be any appreciable human cancer concern because background levels of PCE are nearly ubiquitous in various media. (Dkt. #144 at 47)

RESPONSE: Disputed. The measured concentrations of contaminants found at Class Member's properties present an increased risk of health threats to Class Area families. According to US EPA's MCLG, and exposure above zero for PCE, TCE or VC is a health risk. (Doc. 186; Doc. 195 – 12, 25, 33, 41; Doc. 119 at pp. 35-36; Doc. 126 at pp. 36-39; Doc. 191 at pp. 22-23; Doc. 185 at p. 41)

REPLY: The Finding is not disputed. The cited document supports the proposed finding. Plaintiffs do not properly dispute this finding of fact with any admissible evidence. None of the documents Plaintiffs cite dispute the Finding but instead at best provide additional irrelevant facts. Indeed, the EPA's MCL to which Plaintiffs refer relates to *drinking water*, which is not at issue here. (Dkt. # 195-26). Moreover, Drs. Everett's and Ozonoff's expert reports and testimony, and Plaintiffs' response to this finding of fact, should be stricken and disregarded, as fully set out in Madison-Kipp's Motions to Exclude Plaintiffs' Experts Lorne G. Everett and Dr. David Ozonoff, which was filed concurrently herewith, and incorporated herein by reference. Additionally, the testimony cited is inadmissible hearsay under Federal Rule of Evidence 802 as it all references statements from non-testifying declarants, *i.e.*, people

other than the Class Member being deposed, being offered for the truth of the matter asserted. (*See* Madison-Kipp Reply Br. at 12-13.) Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

618. It is scientifically invalid for Dr. Ozonoff to reach a conclusion that an increased and unacceptable risk of cancer exists to Class Area residents without performing any kind of site-specific risk evaluation. (Dkt. #144 at 47)

RESPONSE: Disputed. Dr. Ozonoff did perform a scientifically valid, site specific risk evaluation. (Doc. 186 pp. 7-138)

REPLY: The Finding is not disputed. The cited document supports the proposed finding. Plaintiffs do not properly dispute this finding of fact with any admissible evidence. 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 Dr. David Ozonoff, which was filed concurrently herewith, and incorporated herein by reference. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

619. Based on the widespread belief that PCE had low toxicity under conditions of normal use as a liquid solvent PCE was widely used in medicine, industry, and consumer products. (Dkt. #144 at 53; Bianchi Dec. ¶ 74, Ex. 72; Bianchi Dec. ¶ 75, Ex. 73; Bianchi Dec. ¶ 82, Ex. 80)

RESPONSE: Plaintiffs do not dispute PCE was widely used until it was discovered to be highly toxic and dangerous to human health.

REPLY: The Finding is undisputed.

620. PCE was first used in dry cleaning in the late 1930s and gradually replaced carbon tetrachloride and petroleum solvents due to its relative lack of flammability. (Dkt. #144 at 53; Bianchi Dec. ¶ 77, Ex. 75)

RESPONSE: Plaintiffs do not dispute the statement is contained in the cited reference but dispute its materiality to the summary judgment motion.

REPLY: The Finding is undisputed.

621. PCE's low flammability, and lower toxicity compared to chloroform, led to research on its potential use as an anesthetic. (Dkt. #144 at 53; Bianchi Dec. ¶ 78, Ex. 76; Bianchi Dec. ¶ 81, Ex. 79)

RESPONSE: Plaintiffs do not dispute the statement is contained in the cited reference but dispute its materiality to the summary judgment motion.

REPLY: The Finding is undisputed.

622. PCE was ultimately rejected for this use after investigators reported that it took too long to deepen narcosis and good surgical relaxation was not obtained. (Dkt. #144 at 53)

RESPONSE: Plaintiffs do not dispute the statement is contained in the cited reference but dispute its materiality to the summary judgment motion.

REPLY: The Finding is undisputed.

623. In these anesthetic trials in humans, however, no complications were reported and recovery was good. (Dkt. #144 at 53; Bianchi Dec. ¶ 76, Ex. 74)

RESPONSE: Plaintiffs do not dispute the statement is contained in the cited reference but dispute its materiality to the summary judgment motion.

REPLY: The Finding is undisputed.

624. Beginning in the early 1930s, hookworms and nematode infestations in humans were treated with PCE, but, after the late 1960s, PCE was replaced by other drugs. (Dkt. #144 at 53; Bianchi Dec. ¶ 81, Ex. 79)

RESPONSE: Plaintiffs do not dispute the statement is contained in the cited reference but dispute its materiality to the summary judgment motion.

REPLY: The Finding is undisputed.

625. Prior to the 1960s, PCE was the most effective available treatment for hookworm, and many investigators reported that no deaths or "untoward" symptoms arose from its use. (Dkt. #144 at 53; Bianchi Dec. ¶ 79, Ex. 77)

RESPONSE: Plaintiffs do not dispute the statement is contained in the cited reference but dispute its materiality to the summary judgment motion.

REPLY: The Finding is undisputed.

626. While it is no longer used in medicine, PCE is still used in a number of consumer products. PCE has been used in paint removers, printing inks, aerosol automotive cleaners, solvent soaps, water repellants, adhesives, paper coatings, leather treatments, and as a carrier solvent for silicones. (Dkt. #144 at 53; Bianchi Dec. ¶ 84, Ex. 82)

RESPONSE: Plaintiffs do not dispute the statement is contained in the cited reference but dispute its materiality to the summary judgment motion.

REPLY: The Finding is undisputed.

627. Rug and upholstery cleaners and stain, spot, and rust removers often contain PCE. ("Dkt. #144 at 53; Bianchi Dec. ¶ 83, Ex. 81)

RESPONSE: Plaintiffs do not dispute the statement is contained in the cited reference but dispute its materiality to the summary judgment motion.

REPLY: The Finding is undisputed.

628. The National Library of Medicine publishes a consumer database that currently lists 30 different products that contain PCE with concentrations in these products ranging from < 1 to over 90% and include automobile products, arts and crafts materials, and home maintenance products. (Dkt. #144 at 53)

RESPONSE: Plaintiffs do not dispute the statement is contained in the cited reference but dispute its materiality to the summary judgment motion.

REPLY: The Finding is undisputed.

629. PCE continues to be a common cleaning solvent in the dry cleaning industry. (Dkt. #144 at 53; Bianchi Dec. ¶ 80, Ex. 78)

RESPONSE: Plaintiffs do not dispute the statement is contained in the cited reference but dispute its materiality to the summary judgment motion.

REPLY: The Finding is undisputed.

630. Sub-slab depressurization systems have been installed in 17 of the Class Members' residences. (Dkt. #144 at Figure 2)

RESPONSE: Disputed. Sub-slab depressurization systems have currently been installed in at least 19 Class Members' homes to mitigate the threats presented by the contamination coming from Madison-Kipp. Installation of additional mitigation systems will take place in 2013. (Doc. 195-27)

REPLY: The cited document supports the proposed finding. Plaintiffs' response relates to a November 30, 2012 WDNR map that demonstrates eighteen (18) sub-slab depressurization systems have been installed within the Class Area, but only seventeen (17) of those residences are owned by Class Members. (Dkt. #195-28, Exhibit 27. (218 S. Marquette opted out of the Class, *See* Dkt. #88).) Thus, Plaintiffs' response supports the proposed finding of fact. Therefore, the proposed finding is not disputed with any evidence and, as a result, should be entered.

631. Polynuclear aromatic hydrocarbons (PAHs) found in the yards surrounding the Madison-Kipp facility are part of the normal background concentration of PAHs found in Madison, Wisconsin and other urban areas in the United States. (Dkt. #143 at vi-41)

RESPONSE: Disputed. DNR and Dr. Everett have concluded that the PAHs found in the Class Area are from Madison-Kipp. (Doc. 195-2; Doc. 185 at pp. 40-46; Doc. 188 at pp. 8, 11, 73, 76, 93, 116-118)

REPLY: The Finding is not disputed. The cited document supports the proposed finding. Plaintiffs do not properly dispute this finding of fact with any admissible evidence. None of the documents Plaintiffs cite dispute the Finding. At best, the cited DNR letter requested that Madison-Kipp investigate and provide a report regarding whether it was the source of PAHs, which Madison-Kipp did; and the report,

as noted, established that Madison-Kipp was not the source. Further, neither Dr. Everett's report nor his testimony provides admissible evidence to dispute that Madison-Kipp is not the source of PAHs found in the yards surrounding Madison-Kipp's facility or that the PAHs found in those yards are part of the normal background concentration of PAHs. 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' 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 were filed concurrently herewith, and incorporated herein by reference. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

632. The source of PAHs found in the yards surrounding Madison-Kipp's facility are not from Madison-Kipp. (Dkt. #143 at vi-41)

RESPONSE: Disputed. DNR and Dr. Everett have concluded that the PAHs found in the Class Area are from Madison-Kipp. (Doc. 195-2; Doc. 185 at pp. 40-46; Doc. 188 at pp. 8, 11, 73, 76, 93, 116-118)

REPLY: The Finding is not disputed. The cited document supports the proposed finding. Plaintiffs do not properly dispute this finding of fact with any

admissible evidence. None of the documents Plaintiffs cite dispute the Finding. At best, the cited DNR letter requested that Madison-Kipp investigate and provide a report regarding whether it was the source of PAHs, which Madison-Kipp did; and the report, as noted, established that Madison-Kipp was not the source. Further, neither Dr. Everett's report nor his testimony provides admissible evidence to dispute that Madison-Kipp is not the source of PAHs found in the yards surrounding Madison-Kipp's facility or that the PAHs found in those yards are part of the normal background concentration of PAHs. 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' 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 were filed concurrently herewith, and incorporated herein by reference. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

633. The known potential sources of PAHs that were historically used at Madison-Kipp's facility were petroleum-based products, and the only PAHs associated with such products were lower molecular weight PAHs. (Dkt. #143 at viii, 10-25)

RESPONSE: Disputed. DNR and Dr. Everett have concluded that the PAHs found in the Class Area are from Madison-Kipp. (Doc. 195-2; Doc. 185 at pp. 40-46; Doc. 188 at pp. 8, 11, 73, 76, 93, 116-118)

REPLY: The Finding is not disputed. The cited document supports the proposed finding. Plaintiffs do not properly dispute this finding of fact with any admissible evidence. None of the documents Plaintiffs cite dispute the Finding. At best, the cited DNR letter requested that Madison-Kipp investigate and provide a report regarding whether it was the source of PAHs, which Madison-Kipp did; and the report, as noted, established that Madison-Kipp was not the source. Further, neither Dr. Everett's report nor his testimony provides admissible evidence to dispute that Madison-Kipp is not the source of PAHs found in the yards surrounding Madison-Kipp's facility or that the PAHs found in those yards are part of the normal background concentration of PAHs. 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' 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 were filed concurrently herewith, and incorporated herein by reference. Further, Plaintiffs have not challenged the evidence

cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

634. While evidence of lower molecular weight PAHS was indicated in the on-site samples, there was no evidence of these compounds in the off-site samples. (Dkt. #143 at viii, 10-25)

RESPONSE: Disputed. DNR and Dr. Everett have concluded that the PAHs found in the Class Area are from Madison-Kipp. (Doc. 195-2; Doc. 185 at pp. 40-46; Doc. 188 at pp. 8, 11, 73, 76, 93, 116-118)

REPLY: The Finding is not disputed. The cited document supports the proposed finding. Plaintiffs do not properly dispute this finding of fact with any admissible evidence. None of the documents Plaintiffs cite dispute the Finding. At best, the cited DNR letter requested that Madison-Kipp investigate and provide a report regarding whether it was the source of PAHs, which Madison-Kipp did; and the report, as noted, established that Madison-Kipp was not the source. Further, neither Dr. Everett's report nor his testimony provides admissible evidence to dispute that Madison-Kipp is not the source of PAHs found in the yards surrounding Madison-Kipp's facility or that the PAHs found in those yards are part of the normal background concentration of PAHs. 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' 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 were filed concurrently herewith, and incorporated herein by reference. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

635. Forensic analysis showed that the PAHs found off-site on the Class Members' properties were background PAHs. ("Dkt. #143 at 26-35, 41)

RESPONSE: Disputed. DNR and Dr. Everett have concluded that the PAHs found in the Class Area are from Madison-Kipp. (Doc. 195-2; Doc. 185 at pp. 40-46; Doc. 188 at pp. 8, 11, 73, 76, 93, 116-118)

REPLY: The Finding is not disputed. The cited document supports the proposed finding. Plaintiffs do not properly dispute this finding of fact with any admissible evidence. None of the documents Plaintiffs cite dispute the Finding. At best, the cited DNR letter requested that Madison-Kipp investigate and provide a report regarding whether it was the source of PAHs, which Madison-Kipp did; and the report, as noted, established that Madison-Kipp was not the source. Further, neither Dr. Everett's report nor his testimony provides admissible evidence to dispute that Madison-Kipp is not the source of PAHs found in the yards surrounding Madison-Kipp's facility or that the PAHs found in those yards are part of the normal background concentration of PAHs. 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' 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 were filed concurrently herewith, and incorporated herein by reference. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

636. The last recorded purchase of hydraulic oils containing PCBs was in 1971. (Bianchi Dec. ¶ 146, Ex. 144)

RESPONSE: Disputed. According to the document cited, in 1981 Madison-Kipp estimated that it stopped purchasing PCB hydraulic fluids in 1971 but that it had 46 drums of PCB hydraulic waste oils at its property. (Doc. 167-42)

REPLY: The Finding is not disputed. Plaintiffs cite the same document as Madison-Kipp and the document speaks for itself.

637. PCE was used to clean metal parts in the manufacturing process and, on occasion, to clean grease from some of the die cast machines. (Dkt. #148 ¶ 5; Dkt. #149 ¶ 6)

RESPONSE: Not disputed.

638. PCE was used in vapor degreasing operations. (Dkt. #148 ¶ 6; Dkt. #149 ¶ 7)

RESPONSE: Not disputed.

639. The vapor degreaser included a cooling system that produced the vapor cloud that the degreaser used to clean the metal parts. (Dkt. #148 ¶ 7; Dkt. #149 ¶ 9)

RESPONSE: Disputed. Madison-Kipp's former environmental manager testified that there was not such cooling system. (Doc. 187 at p. 77)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, Plaintiffs rely on testimony of Mr. James Lenz who testified that he did not "remember" a "condenser". (Dkt. #187 at p. 77.) Mr. Lenz was not asked about, nor did he testify about, a "cooling system that produced the vapor cloud." Therefore, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

640. Liquid PCE was recovered from the vapor degreaser and recycled for reuse through the use of a still. (Dkt. #148 ¶ 8)

RESPONSE: Disputed. According to James Lenz, PCE was repeatedly dumped and spilled. (Doc 187 at pp. 44-80)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, Plaintiffs rely on inadmissible testimony of Mr. James Lenz. (*See* Madison-Kipp Reply Br. at 6-12.) First, Mr. Lenz does not have any personal knowledge or a sufficient foundation to testify about the facts at issue. (Dkt. #187 at p. 58 ("Q. … Was PCE ever spilled? Did it ever make its way onto the ground in that operation? A. I have no firsthand knowledge.").) Further, his testimony is inadmissible hearsay because it purportedly summarizes second and even third hand out-of-court statements. Those that do have personal knowledge refute Mr. Lenz's testimony and have signed affidavits regarding the same. (*See* dkt. #148 (Affidavit of Marvin Jellings) and dkt. #149 (Affidavit of George Schluter).) Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

641. The still was located in the oil shed. (Dkt. #148 ¶ 8)

RESPONSE: Disputed. According to James Lenz, PCE was repeatedly dumped and spilled. (Doc. 187 at pp. 44-80)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, Plaintiffs rely on inadmissible testimony of Mr. James Lenz. (*See* Madison-Kipp Reply Br. at 6-12.) First, Mr. Lenz does not have any personal knowledge or a sufficient foundation to testify about the facts at issue. (Dkt. #187 at 58 ("Q. … Was PCE ever spilled? Did it ever make its way onto the ground in that operation? A. I have no firsthand knowledge.").) Further, his testimony is inadmissible hearsay because it purportedly summarizes second and even third hand out-of-court statements. Those that do have personal knowledge refute Mr. Lenz's testimony and have signed affidavits regarding the same. (*See* dkt. #148 (Affidavit of Marvin Jellings) and dkt. #149 (Affidavit of George Schluter).) Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

642. The still was used to routinely recycle and recover PCE for reuse in the degreasers. (Dkt. #148 ¶ 8)

RESPONSE: Disputed. According to James Lenz, PCE was repeatedly dumped and spilled. (Doc. 187 at pp. 44-80)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, Plaintiffs rely on inadmissible testimony of Mr. James Lenz. (*See* Madison-Kipp Reply Br. at 6-12.) First, Mr. Lenz does not have any personal knowledge or a sufficient foundation to testify about the facts at issue. (Dkt. #187 at 58

("Q. … Was PCE ever spilled? Did it ever make its way onto the ground in that operation? A. I have no firsthand knowledge.").) Further, his testimony is inadmissible hearsay because it purportedly summarizes second and even third hand out-of-court statements. Those that do have personal knowledge refute Mr. Lenz's testimony and have signed affidavits regarding the same. (*See* dkt. #148 (Affidavit of Marvin Jellings) and dkt. #149 (Affidavit of George Schluter).) Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

643. Neither Schluter nor Jellings saw PCE, solvent or any waste tossed or dumped outside of the facility. (Dkt. #148 ¶ 10; Dkt. #149 ¶ 20)

RESPONSE: Disputed. Lenz testified to the contrary based on his interviews with Jellings, Schluter and other Madison Kipp employees. Further, free product PCE is on and off-site in the bedrock and would only have gotten there through reckless disposal of free product. (Doc. 187 at pp. 44-80)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, Plaintiffs rely on inadmissible testimony of Mr. James Lenz. (*See* Madison-Kipp Reply Br. at 6-12.) First, Mr. Lenz does not have any personal knowledge or a sufficient foundation to testify about the facts at issue. Additionally, Mr. Lenz never testified to conducting "interviews" with any employee and Plaintiffs' response does not cite to testimony that would support Plaintiffs' response. Plaintiffs' response (and broad assumptions based on Plaintiffs' own opinion) regarding "free product" are not supported by Mr. Lenz's testimony, are inadmissible, and are not supported by independent admissible evidence. Further, Mr. Lenz's testimony is inadmissible hearsay because it purportedly summarizes second and even third hand

out-of-court statements. Those that do have personal knowledge refute Mr. Lenz's testimony and have signed affidavits regarding the same. (*See* dkt. #148 (Affidavit of Marvin Jellings) and dkt. #149 (Affidavit of George Schluter).) Moreover, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

644. Neither Schluter nor Jellings ever threw or poured buckets of PCE, solvent or any waste onto the parking lot or driveway. (Dkt. #148 ¶ 9; Dkt. #149 ¶ 19)

RESPONSE: Disputed. Lenz testified to the contrary based on his interviews with Jellings, Schluter and other Madison Kipp employees. Further, free product PCE is on and off-site in the bedrock and would only have gotten there through reckless disposal of free product. (Doc. 187 at pp. 44-80)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, Plaintiffs rely on inadmissible testimony of Mr. James Lenz. (*See* Madison-Kipp Reply Br. at 6-12.) First, Mr. Lenz does not have any personal knowledge or a sufficient foundation to testify about the facts at issue. Additionally, Mr. Lenz never testified to conducting "interviews" with any employee and Plaintiffs' response does not cite to testimony that would support Plaintiffs' response. Plaintiffs' response (and broad assumptions based on Plaintiffs' own opinion) regarding "free product" are not supported by Mr. Lenz's testimony, are inadmissible, and are not supported by independent admissible evidence. Further, Mr. Lenz's testimony is inadmissible hearsay because it purportedly summarizes second and even third hand out-of-court statements. Those that do have personal knowledge refute Mr. Lenz's testimony and have signed affidavits regarding the same. (*See* dkt. #148 (Affidavit of

Marvin Jellings) and dkt. #149 (Affidavit of George Schluter).) Moreover, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

645. Neither Schluter nor Jellings heard of anyone disposing of PCE, solvent or any waste by having it tossed or dumped outside of the facility. (Dkt. #148 ¶ 10; Dkt. #149 ¶ 20)

RESPONSE: Disputed. Lenz testified to the contrary based on his interviews with Jellings, Schluter and other Madison Kipp employees. Further, free product PCE is on and off-site in the bedrock and would only have gotten there through reckless disposal of free product. (Doc. 187 at pp. 44-80)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, Plaintiffs rely on inadmissible testimony of Mr. James Lenz. *V* First, Mr. Lenz does not have any personal knowledge or a sufficient foundation to testify about the facts at issue. Additionally, Mr. Lenz never testified to conducting "interviews" with any employee and Plaintiffs' response does not cite to testimony that would support Plaintiffs' response. Plaintiffs' response (and broad assumptions based on Plaintiffs' own opinion) regarding "free product" are not supported by Mr. Lenz's testimony, are inadmissible, and are not supported by independent admissible evidence. Further, Mr. Lenz's testimony is inadmissible hearsay because it purportedly summarizes second and even third hand out-of-court statements. Those that do have personal knowledge refute Mr. Lenz's testimony and have signed affidavits regarding the same. (*See* dkt. #148 (Affidavit of Marvin Jellings) and dkt. #149 (Affidavit of George Schluter).) Moreover, Plaintiffs have not challenged

the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

646. Spilled liquids, including those containing PCE, were collected using either an industrial vacuum or swept up with "oil-dri" and transferred into a 500-gallon container or a dumpster for off-site disposal. (Dkt. #148 ¶ 11; Dkt. #149 ¶ 21)

RESPONSE: Disputed. Lenz testified to the contrary based on his interviews with Jellings, Schluter and other Madison Kipp employees. Further, free product PCE is on and off-site in the bedrock and would only have gotten there through reckless disposal of free product. (Doc. 187 at pp. 44-80)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, Plaintiffs rely on inadmissible testimony of Mr. James Lenz. (*See* Madison-Kipp Reply Br. at 6-12.) First, Mr. Lenz does not have any personal knowledge or a sufficient foundation to testify about the facts at issue. Additionally, Mr. Lenz never testified to conducting "interviews" with any employee and Plaintiffs' response does not cite to testimony that would support Plaintiffs' response. Plaintiffs' response (and broad assumptions) regarding "free product" are not supported by Mr. Lenz's testimony, are inadmissible, and are not supported by independent admissible evidence. Further, Mr. Lenz's testimony is inadmissible hearsay because it purportedly summarizes second and even third hand out-of-court statements. Those that do have personal knowledge refute Mr. Lenz's testimony and have signed affidavits regarding the same. (*See* dkt. #148 (Affidavit of Marvin Jellings) and dkt. #149 (Affidavit of George Schluter).) Moreover, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

647. Hydraulic oils used by Madison-Kipp were delivered by tanker truck and transferred into aboveground storage tanks located in the oil shed through a hose that connected to a coupling outside the shed. (Dkt. #148 ¶ 12; Dkt. #149 ¶ 23)

RESPONSE: Disputed. Lenz testified that oils were routinely dumped and spread all over the Madison-Kipp property. (Doc. 187 at pp. 44-80)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, Plaintiffs rely on inadmissible testimony of Mr. James Lenz. (*See* Madison-Kipp Reply Br. at 6-12.) First, Mr. Lenz does not have any personal knowledge or a sufficient foundation to testify about the facts at issue. (Dkt. #187 at p. 58 ("Q. … Was PCE ever spilled? Did it ever make its way onto the ground in that operation? A. I have no firsthand knowledge.").) Further, his testimony is inadmissible hearsay because it purportedly summarizes second and even third hand out-of-court statements. Those that do have personal knowledge refute Mr. Lenz's testimony and have signed affidavits regarding the same. (*See* dkt. #148 (Affidavit of Marvin Jellings) and dkt. #149 (Affidavit of George Schluter).) Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

648. Spills that occurred on the Madison-Kipp plant floor were suctioned into an industrial vacuum (Seacor machine), transferred to a container, and removed off-site for disposal. (Dkt. #148 ¶ 13)

RESPONSE: Disputed. Lenz testified that oils were routinely dumped and spread all over the Madison-Kipp property. (Doc. 187 at pp. 44-80)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, Plaintiffs rely on inadmissible testimony of Mr. James

Lenz. (*See* Madison-Kipp Reply Br. at 6-12.) First, Mr. Lenz does not have any personal knowledge or a sufficient foundation to testify about the facts at issue. (Dkt. #187 at p. 71 ("Q. … Have you ever heard of such a practice [practice of dust suppression with oils and chemicals]? A. Through hearsay, yes. Q. Okay. So –you have heard through others who worked at the plant that that kind of thing went on? A. Correct. … Q. Tell me what've heard in that regard…A. I can't know for certain because that was before my time.).) Further, his testimony is inadmissible hearsay because it purportedly summarizes second and even third hand out-of-court statements. Those that do have personal knowledge refute Mr. Lenz's testimony and have signed affidavits regarding the same. (*See* dkt. #148 (Affidavit of Marvin Jellings) and dkt. #149 (Affidavit of George Schluter).) Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

649. Spent hydraulic oils were recycled by using filters and a centrifuge, so that the oils could be reused many times over in the facility again. (Dkt. #148 ¶ 14; Dkt. #149 ¶ 24)

RESPONSE: Disputed. Lenz testified that oils were routinely dumped and spread all over the Madison-Kipp property. (Doc. 187 at pp. 44-80)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, Plaintiffs rely on inadmissible testimony of Mr. James Lenz. See Madison-Kipp's Reply Brief pages 6-12 and reply to Plaintiffs' response to M-KPFOF ¶ 648, above.

650. A vapor degreaser was located along the northern portion of the eastern wall of the Atwood building. This vapor degreaser had a vent that discharged to the

outside along the northern portion of the eastern exterior wall of the Atwood building. (Dkt. #149 ¶ 8)

RESPONSE: Not disputed.

651. PCE was stored in an approximately 250-gallon aboveground storage tank located in the storage shed in the parking lot referred to as the oil shed. (Dkt. #149 ¶ 10)

RESPONSE: Not disputed.

652. To fill the vapor degreaser with PCE, the PCE was manually transferred from this aboveground storage tank utilizing pails that were wheeled on a metal cart from the oil shed into the Atwood building. PCE was then poured into the degreaser by the vapor degreaser operator. (Dkt. #149 ¶ 11)

RESPONSE: Not disputed.

653. The oil shed, which had a concrete floor, was located adjacent to the east side of the Atwood Building, to the north. (Dkt. #149 ¶ 12)

RESPONSE: Not disputed.

654. Employees transferred PCE from the aboveground storage tank in the oil shed by using approximately 5-gallon pails placed on a rolling cart. (Dkt. #149 ¶ 13)

RESPONSE: Not disputed.

655. PCE was delivered to Madison-Kipp by a tanker truck that would use a hose system to fill the aboveground storage tank. (Dkt. #149 ¶ 14)

RESPONSE: Not disputed.

656. When the vapor degreaser was in the Waubesa building, it would have vented to the outside, in an area adjacent to the parking lot. (Dkt. #149 ¶ 15)

RESPONSE: Not disputed.

657. I do not recall any floor drains in the vicinity of where the vapor degreaser was located in the Waubesa building. (Dkt. #149 ¶ 16)

RESPONSE: Not disputed.

658. The vapor degreaser would periodically have to be cleaned to remove accumulated degreasing sludge. The machine operators were in charge of cleaning the vapor degreaser. (Dkt. #149 ¶ 17)

RESPONSE: Not disputed.

659. Machine operators shoveled sludge material out of the vapor degreaser into shallow trays or a rolling dumpster for the sludge to be sent off-site for treatment or disposal. (Dkt. #149 ¶ 18)

RESPONSE: Disputed. Lenz testified that the sludges were dumped on-site. (Doc. 187 at pp. 44-80)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, Plaintiffs rely on inadmissible testimony of Mr. James Lenz. (*See* Madison-Kipp Reply Br. at 6-12.) First, Mr. Lenz does not have any personal knowledge or a sufficient foundation to testify about the facts at issue. (Dkt. #187 at p. 58 ("Q. … Was PCE ever spilled? Did it ever make its way onto the ground in that operation? A. I have no firsthand knowledge.").) Further, his testimony is inadmissible hearsay because it purportedly summarizes second and even third hand out-of-court statements. Those that do have personal knowledge refute Mr. Lenz's testimony and have signed affidavits regarding the same. (*See* dkt. #148 (Affidavit of Marvin Jellings) and dkt. #149 (Affidavit of George Schluter).) Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

660. There were no floor drains in the area of the die cast machines. (Dkt. #149 ¶ 22)

RESPONSE: Not disputed.

661. From at least 1971 until the parking lots were paved in 1976 or 1977, spent oils were applied to the parking areas for dust suppression using an industrial vacuum (Seacor machine). (Dkt. #149 ¶ 25)

RESPONSE: Disputed. Lenz testified that the spilling continued into the 80's. (Doc. 187 at p. 58)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, Plaintiffs rely on inadmissible testimony of Mr. James Lenz. (*See* Madison-Kipp Reply Br. at 6-12.) First, Mr. Lenz does not have any personal knowledge or a sufficient foundation to testify about the facts at issue. (Dkt. #187 at p. 58 ("Q. … Was PCE ever spilled? Did it ever make its way onto the ground in that operation? A. I have no firsthand knowledge.").) Further, his testimony is inadmissible hearsay because it purportedly summarizes second and even third hand out-of-court statements. Those that do have personal knowledge refute Mr. Lenz's testimony and have signed affidavits regarding the same. (*See* dkt. #148 (Affidavit of Marvin Jellings) and dkt. #149 (Affidavit of George Schluter).) Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

662. The material used for dust suppression came from facility spills of hydraulic oils, PCE, water, or other liquids. (Dkt. #149 ¶ 25)

RESPONSE: Not disputed.

663. Use of spent oils for dust suppression was very common in the area in the 1960s and 1970s. In fact, Schluter applied spent oils to local roads for dust suppression when he worked for a gas station a few miles from Madison-Kipp in the City of Monona from about 1966 or 1967 to 1970. (Dkt. #149 ¶ 26)

RESPONSE: Disputed. Dr. Everett testified that it was not common to dump harmful industrial chemicals on the ground in close proximity to homes. (Doc. 185 at pp. 19-25; Doc. 188 at p. 78)

REPLY: Plaintiffs do not properly dispute this finding of fact with any admissible evidence. Instead, Plaintiffs rely on the expert report and 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' 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. Further, Plaintiffs have not challenged the evidence cited by Madison-Kipp in support of its proposed finding of fact. As a result, the proposed finding of fact is not disputed and should be entered.

Dated this 4th day of April, 2013.

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