IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF TENNESSEE

NATURAL RESOURCES DEFENSE COUNCIL, INC., BEATRICE HOLT, and SHEILA HOLT-ORSTED, Plaintiffs, v. COUNTY OF DICKSON, TENNESSEE, CITY OF DICKSON, TENNESSEE, ALP LIGHTING AND CEILING PRODUCTS, INC., NEMAK USA, INC., and INTERSTATE PACKAGING COMPANY, Defendants.	)	No. 3:08-cv-00229 Chief Judge Campbell Magistrate Judge Bryant

PLAINTIFFS' JOINT RESPONSE TO THE COUNTY AND CITY'S MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND REGULATIONS

Federal Regulations

OTHER AUTHORITIES

INTRODUCTION

Section 7002(a)(1)(B) of the Resource Conservation and Recovery Act allows citizens to seek judicial relief "to the extent necessary to eliminate *any* risk posed by toxic wastes." *Davis v. Sun Oil Co.*, 148 F.3d 606, 609 (6th Cir. 1998). Under this statute, "[a]n 'imminent hazard' may be declared at any point in a chain of events which may ultimately result in harm to the public." *Id.* at 610 (internal quotation marks omitted). "[I]f an error is to be made in applying the endangerment standard, the error must be made in favor of protecting public health, welfare, and the environment." *Interfaith Cmty. Org. v. Honeywell Int'l , Inc.*, 399 F.3d 248, 259 (3d Cir. 2005) (internal quotation marks and citation omitted).

What is striking about the contamination emanating from the Dickson Landfill is how many of the potential risks against which RCRA guards have already come to pass. Wells and springs have become unsafe; water supplies have been abandoned. PSF 155, 157-159, 161-162, 164-167, 169. Concentrations of trichloroethylene (TCE) and related chemicals are increasing at two wells, PSF 133, 228, 230, 297-298, and other, unmonitored wells may become contaminated, PSF 232, 280-284, 297; PSAF 509-510. Landfill waste "may present an imminent and substantial endangerment to health or the environment," 42 U.S.C. § 6972(a)(1)(B), because it will, absent judicial intervention, condemn the aquifer to perpetual pollution, PSF 262, 264, and may pose a serious threat to human health, PSAF 499-500, 508, 513.

The crux of the County and City's contrary argument—that the County's actions preclude human exposure—is contradicted by testimony of both Defendants' and Plaintiffs' experts, as well as other evidence. This argument also ignores that RCRA protects against not only endangerments to health but also to the environment. "The mere fact that clean up efforts have begun . . . does not in itself indicate that the risk of endangerment has been alleviated." *Organic Chems. Site PRP Group v. Total Petroleum, Inc.*, 6 F. Supp. 2d 660, 665 (W.D. Mich. 1998). Here, no cleanup has occurred. PSF 176, 249, 259-260, 264, 270-272.

The County and City invoke abstention doctrines but give no reason for this Court to reconsider its earlier order refusing to apply those same doctrines. Dkt. 253, 254. The County and City's assertion that the Environmental Protection Agency has found no imminent and substantial endangerment at or around the Landfill has been explicitly rejected by EPA itself. *See infra* pp. 31-33. As for Defendants' plea to defer to TDEC's remedial judgments, those judgments were made to implement state standards. Section 7002(a)(1)(B) establishes a more stringent federal safeguard that TDEC does not implement. Dkt. 253 at 6. "An agency is not entitled to deference simply because it is an agency." *Meister v. U.S. Dep't of Agric.*, No. 09-1712, __ F.3d __, 2010 WL 3766646, at *1 (6th Cir. Sept. 29, 2010).

Defendants' summary judgment motion should be denied.

STATEMENT OF FACTS

A credulous and uncritical reading of the County and City's summary judgment brief might leave the impression that the County has diligently cleaned up the Dickson Landfill, fully complied with orders issued by TDEC, met federal legal standards under section 7002(a)(1)(B) of RCRA, and been closely and approvingly overseen by the Environmental Protection Agency. None of these impressions would be correct.

I. Landfill Compliance Record

The Dickson Landfill has never exemplified environmental compliance. Between 1977 and 1992, the state cited the Landfill repeatedly for insufficient cover, soil erosion, poor drainage, leachate outbreaks, and burning of wastes. PSF 101. State inspectors continued to find leachate and erosion problems at the Landfill through at least 1994. PSF 102. After TCE was discovered in Sullivan Spring that year, PSF 154, TDEC cited the Landfill for violating state groundwater protection standards and required the County to complete "corrective measures" within a "reasonable amount of time." PSAF 483.

Corrective measures were never completed. Seven years later, in February 2001, TDEC again cited the County, this time for "fail[ing] to maintain the facility/site in such a manner as to minimize the generation of leachate and . . . allow[ing] the release of solid waste/hazardous substance

constituents into the groundwater." PSF 246. Then, in October 2001, TDEC's Commissioner issued an Order that required the County to develop and implement, among other things, a plan to "remediate any groundwater contamination." PSF 247.

By March 2003, no plan to remediate groundwater contamination had been submitted. So TDEC cited the County yet again, now for violating the Commissioner's Order and, in particular, for failing even to submit a remedy proposal to "arrest[] the migration of ground water contamination from the facility." PSF 249. In May of that year, TDEC issued still another violation notice. PSF 250. TDEC now also threatened formal enforcement action. *Id.*

In March 2004, an EPA contractor issued a "reassessment report" on the Landfill. PSAF 501. The report concluded:

> The county has a long history of noncompliance related to groundwater and leachate violations since at least 1983. These violations have resulted in fines, Commissioner's Orders, and NOVs [Notices of Violation]. These violations were related to such issues as major and minor leachate seeps and flows, failure to provide intermediate cover, failure to provide erosion control, exceedance of groundwater standards for cadmium and TCE, discharge of leachate from the property without a permit, failure to maintain a storm water pollution prevention plan, and implementation of required corrective actions.

PSAF 505. Of particular relevance here, the report found that, based on available information, "the county has not met the DSWM [TDEC Division of Solid Waste Management] requirements for fully assessing the extent of groundwater contamination or for applying corrective actions relative to groundwater and leachate control." PSAF 502.

Six years later, little has changed.

II. Groundwater Investigation

Soil and groundwater beneath the Landfill are known to be contaminated with PCE and TCE in concentrations that exceed—sometimes by orders of magnitude—EPA's maximum contaminant levels and EPA's risk- and water quality-based soil screening levels. PSF 10, 29-130, 135, 139, 146. Yet the County has not effectively monitored the migration of these contaminants away from the Landfill.

The County and City parade a list of impressive-sounding steps the County has undertaken, County & City Mem. at 12-13, but they do not claim that they have determined where all the contamination is moving or that they have prevented its spread. Despite the impressive-sounding parade, the County never prepared a plan to determine the rate and extent of contaminant migration, PSF 350, and has not contained contamination at the Landfill site. PSF 107, 110-111, 122, 258, 260, 263. The County has not even placed wells deep enough to detect contaminants leaving the Landfill, according to Todd Hughes, a former lead geologist in Tennessee's Superfund program who later worked as a consultant to both the County and the state in connection with Landfill-related contamination. PSAF 485, 486, 495; PSF 218. The full extent of contamination remains unknown. PSF 209-210, PSAF 488, 537-538, 540.

The County trumpets in particular a study of groundwater contamination in Dickson County that sampled "over 200 locations." *See* County & City Mem. at 13; *see also id.* at 4 & n.4. This study was conducted

by EME Environmental Solutions in 2003-2004 and led by Mr. Hughes. PSAF 489, 495. During the course of the study, TCE was discovered in two samples from the West Piney River and cis-1,2,DCE (a TCE breakdown product) was detected in a ditch just south of the Landfill. PSAF 492. TCE and/or PCE were also detected by EME in five water wells and in Bruce Spring. PSAF 493. This list did not include wells and springs already known to be contaminated, such as Sullivan Spring, the Harry Holt well, the Roy Holt well, and former municipal supply well DK-21, which EME did not sample. PSAF 494.

While the City and County imply that EME's study would have found any contamination that exists, County & City Mem. at 13, EME itself describes its investigation in more limited terms. Some wells within one mile of the Landfill may not have been sampled, and wells beyond one mile were sampled only if the owner requested sampling. PSF 193. Todd Hughes, who conducted the study, testified that some wells that should have been sampled were not. PSF 194; PSAF 495. He also testified that the sampling method EME used—generally drawing a single sample, often from in-place plumbing—was "quick and dirty." PSAF 491. And he agreed that this method was "inadequate to determine whether people using water from that sink [from which the test water was sampled] are being exposed to contaminants like TCE." PSAF 491. However, after a meeting with the County, EME was

instructed in 2004 not to complete its planned investigation of the extent of the contamination. PSF 199.

As part of its study, EME drew a map of what it called a "potential corridor of impact." PSF 225. This "corridor" is a partially rectangular area extending generally southwest from the Landfill toward the West Piney River. PSF 251. EME's report on its investigation noted that the corridor was "preliminary in nature and should not be considered as a complete delineation of the nature and extent of groundwater contamination within the study area." PSF 252. At deposition, Todd Hughes described the area as a "rough outline" because "it's ridiculous to draw straight lines and—and we certainly haven't sampled enough." PSAF 496.

Wells that did not test positive in EME's investigation may be contaminated today. PSF 197. Indeed, both Todd Hughes and Alan Spear, the TDEC geologist assigned to the site from 1992 to 2003, believe that contamination may extend outside the EME-delineated corridor and be traveling under the West Piney River. PSF 235-236, 351. TDEC itself does not know whether contamination has migrated outside this area. PSF 214.

The March 2004 "reassessment report" prepared for EPA described and identified deficiencies with the County's groundwater investigations. PSAF 501, 503. The report found that "the [Landfill] wells may not monitor the first water-bearing zone"; "at least one [Landfill] well . . . may not be installed correctly"; "the county and its consultant . . . recognize the

inadequacy of the monitoring system in determining the groundwater quality and the direction of flow"; "groundwater monitoring reports have been routinely submitted . . . without determining the direction of groundwater flow from the landfill areas, and without monitoring background conditions"; and "further investigations . . . [are] needed to establish the geographic distribution of contaminants." PSAF 503. Because "previous site investigations at the landfill have been too limited in scope or did not fully account for the hydrogeologic setting," the report recommended "a comprehensive and well planned hydrogeologic investigation for the Dickson County Landfill." PSAF 504.

In 2004, however, EPA suspended its Landfill work. PSAF 547. EPA has not conducted any response activities at the Landfill since that time. *Id.* The new "comprehensive" hydrogeologic investigation recommended by the EPA contractor's report was never begun.

III. Two "Options"

TDEC did not carry out its May 2003 threat to take formal enforcement action against the County for violating the Commissioner's Order. PSF 200, 250. Instead, on May 5, 2004, TDEC staff offered the County two "options." PSF 200. The first "option" would oblige the County to "fully assess both vertically and horizontally the rate and extent of the contaminant plume, which currently exists at the Dickson County Landfill, and then evaluate remedial options." PSF 200. This "option" encompassed much of the

action that the Commissioner's Order already required. *Compare* PSF 200 *with* PSF 247.

TDEC now gave the County a second "option," however. This second "option" required neither assessment nor remediation of the contaminant plume. Instead, the County would provide water filtration systems or alternative water supplies to "the affected households," which TDEC's letter defined to include "households that are in the risk area defined by EME and are not currently hooked up to public water supply." PSAF 497; PSF 200. The County chose this second option. PSF 201. As a result, the County never determined the "rate and extent of the contaminant plume," PSF 200, 203, and the contaminants at the Landfill were never contained, PSF 258. Alan Spear, the TDEC geologist, concedes that TDEC has not required action that improved groundwater quality around the Landfill. PSF 259.

The County never completed the second option. Although the County claims to have provided "access" to public water in the EME-delineated area, what it did was to lay pipes. County & City Mem. at 13. Laying pipes is not the same as providing water connections; residents must pay for connections and not all can afford to. *See United States v. Price*, 688 F.2d 204, 210 (3d Cir. 1982). The County once understood this. In 2007, it reported to the state:

> [M]any homes in the area use the groundwater as their supply of water for domestic uses, drinking, food preparation, cooking, washing, bathing, etc. Many of these residences either do not have access to public water lines *or have not connected to the service because it was cost prohibitive*.

PSF 256 (emphasis added). The factual record reveals no improvement in this circumstance. While the precise number of residents still relying on groundwater in the EME-delineated area is unknown, the County and City's testifying expert, David Langseth, states that more than one-in-ten improved parcels in the environmental risk area may lack public water connections. PSF 288. The County's Landfill environmental consultant confirms that not all homes are connected. PSAF 498.

The County in 2007 also adopted "Rules and Regulations of Water Wells and Use of Springs in Dickson County, Tennessee." PSF 255. This regulation does not restrict use of any of the hundreds of existing wells and springs near the Landfill.[1] PSF 255, 288, 302; PSAF 507. It instead limits the use of new wells and of springs that were not previously used, where another source of water is available. PSF 255. The regulation also provides that, before a new well is put into service, a water sample must be found to meet applicable drinking water criteria (or the owner informed that treatment is required). PSF 255. Under this regulation's terms, a new well in which TCE was detected, albeit below the maximum contaminant level for drinking water, could be brought into service without any further testing.

Bruce Spring, Sullivan Spring and numerous wells around the Landfill remain contaminated. PSF 155, 161, 166. Although the County and City's

[1] EPA's 2004 reassessment report states that the TDEC Division of Water Supply has identified 334 wells in the USGS Dickson, TN, topographical quadrangle, of which 274 were listed for residential use—and that this listing is incomplete. PSAF 507.

brief claims that contamination levels are stable, *see* County & City Mem. at 21, contaminant concentrations are in fact increasing in certain locations, including in one of the offsite residential wells that the County regularly monitors. PSF 133, 228, 230, 298. What is happening to contaminant levels at the other, unmonitored wells around the Landfill is of course not known. But the County's expert, David Langseth, agrees that presently unmonitored wells could become contaminated, even if TCE has not previously been detected in those wells. PSAF 509-510.

SUMMARY JUDGMENT STANDARD

Plaintiffs incorporate the statement of the summary judgment standard set forth in their Joint Memorandum in Support of Motion for Partial Summary Judgment, at 12-13 (Dkt. 390).

ARGUMENT

I. This Court Has Appropriately Asserted Jurisdiction

A. This Citizen Suit Is Not Precluded by Federal or State Enforcement

RCRA section 7002(b)(2) enumerates seven specific federal and state actions that, if taken, bar a citizen suit to abate contamination that may present an imminent and substantial endangerment to health or the environment. 42 U.S.C. § 6972(b)(2)(B)-(C). Defendants concede that neither EPA nor TDEC has taken any of the seven preclusive actions. *See* County & City Mem. at 22 ("[T]he precise factual scenario and procedural posture found in this case is not explicitly addressed in the statute . . . ."). This Court, like

Judge Haynes in a parallel case with identical facts, already has rejected Defendants' claims that the actions TDEC has taken bar this suit. *See* Dkt. 253 at 3-6; *Holt-Orsted, et al. v. City of Dickson, et al.*, Nos. 3:07-0727, 3:07-0732, 3:08-0321, slip op. at 55-65 (M.D. Tenn. Mar. 25, 2009). No cause exists to revisit that determination.

RCRA unambiguously describes which governmental enforcement actions are preclusive; the time period during which preclusion applies; and the diligence with which the enforcement must be undertaken for there to be any preclusive effect. *See* 42 U.S.C. § 6972(b)(2)(B)-(C). "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Jones v. City of Lakeland*, 224 F.3d 518, 522 (6th Cir. 2000) (en banc) (considering language of Clean Water Act citizen suit bar); *cf. Williams v. Great Lakes Dredge & Dock Co.*, 726 F.2d 278, 282 (6th Cir. 1984) ("[W]hen a statute makes exceptions, it is assumed that, absent clear evidence of intent to the contrary, those exceptions are exclusive.").

Defendants point to no evidence that Congress intended citizen suits to be barred by governmental actions that RCRA does not identify. To the contrary, Congress adopted section 7002(a)(1)(B) as an antidote to what Congress viewed as ineffectual and reluctant governmental enforcement. *See Cox v. City of Dallas*, 256 F.3d 281, 295 n.24 (5th Cir. 2001) ("Congress believed that by giving citizens themselves the power to enforce [RCRA] provisions by suing violators directly, they could speed compliance with

environmental laws, as well as put pressure upon a government that was unable or unwilling to enforce such laws itself."). The House committee report, for example, pointed to a "distressing" lack of governmental enforcement caused by both "insufficient personnel resources" and a lack of "diligen[ce] in vigorously pursuing a tough enforcement program." H.R. Rep. No. 98-198, pt. 1 at 20 (1983), *reprinted in* 1984 U.S.C.C.A.N. 5576, 5578-79. To fully empower citizens to protect themselves, Congress modeled section 7002(a)(1)(B) on EPA's own parallel section 7003 endangerment authority. *See Me. People's Alliance v. Mallinckrodt, Inc.*, 471 F.3d 277, 287-88 (1st Cir. 2006); *Interfaith*, 399 F.3d at 267. *Compare* 42 U.S.C. § 6972(a)(1)(B) *with id.* § 6973. And in doing so, Congress carefully considered the preclusion provisions that it adopted. *See* Sen. Rep. 98-284 at 55-57 (1983); H.R. Conf. Rep. No. 98-1133, at 38-39 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5649, 5688-89. This history offers no reason to depart from RCRA's plain meaning.

The County and City's heavy reliance on *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49 (1987), is puzzling, as that case has nothing to do with the issue here. The question in *Gwaltney* was whether the Clean Water Act's authorization of citizen suits against persons "alleged to be in violation" allows citizens to sue to recover civil monetary penalties for "wholly past" violations. *See id.* at 57 & n.2 (noting that Clean Water Act has no provision parallel to RCRA section 7002(a)(1)(B)). That Clean Water Act question is irrelevant here. The County and City's other cases are equally

unpersuasive.[2] Because neither TDEC nor EPA has taken action that RCRA makes preclusive, Plaintiffs' claim is not barred.

B. This Court Should Not Abstain

This Court has already held that abstention is inappropriate under either *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), or the primary jurisdiction doctrine. Dkt. 253 at 11-14. Defendants do not acknowledge that decision. They offer no reason for its reconsideration.

The primary jurisdiction doctrine, on which the County and City now primarily rely, comes into play when "enforcement of [a] claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." *United States v. Haun*, 124 F.3d 745, 750 (6th Cir. 1997) (quoting *United States v. W. Pac. R.R.*, 352 U.S. 59, 63-64 (1956)). When the primary jurisdiction doctrine is triggered, "the judicial process is suspended pending referral of such issues to the administrative body for its views." *Haun*, 124 F.3d at 750. "If no

---

[2] Neither *City of Heath v. Ashland Oil, Inc.*, 834 F. Supp. 971 (S.D. Ohio 1993), nor *McGregor v. Industrial Excess Landfill, Inc.*, 709 F. Supp. 1401 (N.D. Ohio 1987), supports a judicial expansion of RCRA's statutory bar language. Both cases concluded that the government had taken actions that were preclusive under a specific RCRA provision. *See City of Heath*, 834 F. Supp. at 974, 982-83 (concluding state action requiring "site investigation and remedial work in accordance with the [CERCLA] National Contingency Plan" and "in accordance with CERCLA requirements for remedial investigation and feasibility study" barred action); *McGregor*, 709 F. Supp. at 1407 (concluding EPA and State had incurred costs to initiate a Remedial Investigation and Feasibility Study under section 104 of CERCLA), *aff'd on other grounds*, 856 F.2d 39 (6th Cir. 1988).

administrative forum is available . . . a court should . . . retain its jurisdiction." *Id.*

Primary jurisdiction is a prudential doctrine developed by the courts. In RCRA, Congress expressly empowered the district courts to adjudicate citizen suits to abate conditions that "may present an imminent and substantial endangerment." 42 U.S.C. § 6972(a)(1)(B). Congress also specified the circumstances in which a citizen suit would be barred by federal or state action. 42 U.S.C. § 6972(b)(2)(B)-(C). These provisions provide an "overriding reason for the court to hear RCRA cases" where the statutory grounds for preclusion are not met. *Coll. Park Holdings, LLC v. Racetrac Petroleum, Inc.*, 239 F. Supp. 2d 1322, 1328-29 (N.D. Ga. 2002). Most courts asked to apply primary jurisdiction in a RCRA citizen suit have found the doctrine inapposite.[3] As the Seventh Circuit has explained, because "Congress has *specified* the conditions under which the pendency of other proceedings bars" citizen suits, it "would be an end run around RCRA" to abstain from such actions on the basis of decidedly more "tentative" or "informal" state administrative action. *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 619 (7th Cir. 1998).

---

[3] *See, e.g.*, *Little Hocking Water Ass'n, Inc. v. E.I. Dupont De Nemours & Co.*, No.2:09-CV-1081, 2010 WL 3447632, at *3-5 (S.D. Ohio Aug. 30, 2010); *DMJ Assocs. LLC v. Capasso*, 228 F. Supp. 2d 223, 229-30 (E.D.N.Y. 2002); *Williams v. Ala. Dep't of Transp.*, 119 F. Supp. 2d 1249, 1256 (M.D. Ala. 2000); *Craig Lyle Ltd. P'ship v. Land O'Lakes, Inc.*, 877 F. Supp. 476, 483 (D. Minn. 1995); *Sierra Club v. U.S. Dep't of Energy*, 734 F. Supp. 946, 951 (D. Colo. 1990); *United States (EPA) v. Envtl. Waste Control, Inc.*, 710 F. Supp. 1172, 1194-95 (N.D. Ind. 1989).

Reference to an administrative body under the primary jurisdiction doctrine is not appropriate here because Plaintiffs' claim has not been "placed within the special competence" of any such body. *Haun*, 124 F.3d at 750; Dkt. 253 at 13-14. Plaintiffs' claim arises under a federal statute that, as this Court has recognized, TDEC does not administer. Dkt. 253 at 5-6; *cf. Williams*, 119 F. Supp. 2d at 1257 (declining to apply primary jurisdiction to a RCRA citizen suit because "[a] determination of whether Defendants are complying with federal law is not an issue within the [state agency's] unique domain"). EPA, for its part, has abjured further involvement at the site. PSAF 547. And Congress has made clear that a citizen suit under section 7002(a)(1)(B) may be brought unless EPA actually brings—and is "diligently prosecuting"—an action of its own. 42 U.S.C. § 6972(b)(2)(B)(i); *see also* H.R. Rep. No. 98-198, pt. 1, at 34, *reprinted in* 1984 U.S.C.C.A.N. 5576, 5612. EPA has not done that here.

Defendants' contrary argument rests on three district court decisions that relied on a set of primary jurisdiction "factors" that have never been adopted by the Sixth Circuit. *Compare Haun*, 124 F.3d at 750 ("No ready formula controls . . . application" of the primary jurisdiction doctrine.") *with* Defs.' Br. at 28 (citing *Raritan Baykeeper, Inc. v. NL Indus., Inc.*, 713 F. Supp. 2d 448, 455 (D.N.J. 2010); *Davies v. Nat'l Coop. Refinery Ass'n*, 963 F. Supp. 990, 997-98 (D. Kan. 1997); *Friends of Santa Fe County v. LAC Minerals, Inc.*, 892 F. Supp. 1333 (D.N.M. 1995)). Moreover, even if these

"factors" applied, they would not counsel abstention. This Court is competent to decide the issues presented in this case, for federal courts routinely address scientific or technical matters, including matters concerning pollution, and have been doing so for at least a century. *See, e.g., Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 238-39 (1907); *Me. People's Alliance v. Mallinckrodt, Inc.*, 471 F.3d at 286-87, 293-94; *Coll. Park*, 239 F. Supp. 2d at 1328. TDEC is given no special authority under section 7002(a)(1)(B). Dkt. 253 at 6. Nor is there any reason to fear inconsistent rulings, as this Court has ample discretion to craft an equitable remedy that supplements but does not displace the work TDEC has already ordered. *See Me. People's Alliance v. Holtrachem Mfg. Co.*, No. Civ. 00-69-B-C, 2001 WL 1602046, at *8 (D. Me. Dec. 14, 2001) (holding court order requiring additional investigation, stricter cleanup standards, or greater remediation does not constitute a conflict, because "additional obligation is not incompatible" with the state-ordered remedy). Lastly, TDEC issued its Commissioner's Order in 2001, has declined to compel its implementation, and does not expect to require any new work as part of the Landfill corrective action. PSF 200-201, 247; PSAF 545. There is no pending TDEC proceeding that could address Plaintiffs' claim. Primary jurisdiction is inapplicable.[4]

[4] The cases on the primary jurisdiction doctrine cited by the County and City are also factually distinguishable. In *Davies*, the plaintiffs sought a court order to halt a remedy the state had ordered. *Davies*, 963 F. Supp. at 998. Here, Plaintiffs have no wish to prevent the County from carrying out the relief TDEC has ordered. In *Baykeeper*, the state had initiated

Defendants relegate their *Burford* abstention argument to footnotes. *See* County & City Mem. at 28-29 nn.12 & 13. What this footnote ignores is that abstention under *Burford* represents "an extraordinary and narrow exception to the duty of the District Court to adjudicate a controversy properly before it." *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976). This Court should not abstain for reasons it has already articulated. *See* Dkt. 253 at 11-13.

II. Solvents Disposed at the Dickson Landfill May Present an Imminent and Substantial Endangerment to Health or the Environment

The County and City's summary judgment motion mentions the relevant standard of liability, but then applies a different standard to a misleading, incomplete, and sometimes false description of the facts. The motion should be denied.

A. Section 7002(a)(1)(B) Establishes Expansive Liability to Remove "Any Risk" Posed by Contamination

Section 7002(a)(1)(B)'s liability standards have been considered, and settled, in an extensive body of appellate precedent. Citizens may seek judicial relief "to the extent necessary to eliminate *any risk* posed by toxic wastes." *Davis v. Sun Oil Co.*, 148 F.3d at 609 (internal quotation marks omitted); *accord* S. Rep. No. 98-284, at 59 (1983). Plaintiffs can prevail by

---

proceedings to coordinate remediation of the site with remediation of upstream sites not before the court. *Baykeeper*, 713 F. Supp. 2d at 456-57. The Court invoked the primary jurisdiction doctrine to allow this coordinated approach to a regional contamination problem. *Id.* No such circumstance exists here.

showing that "there *may* be" an imminent "risk" of a "serious" harm. *Burlington N. & Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1020-21 (10th Cir. 2007); *see also, e.g.*, *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1015 (11th Cir. 2004) ("The operative word in the statute is 'may.'"). "[A]ctual harm" is not required. *Burlington N.*, 505 F.3d at 1021. And "[a]n 'imminent hazard' may be declared at any point in a chain of events which may ultimately result in harm to the public." *Davis*, 148 F.3d at 610 (internal quotation marks omitted).

The cases that Defendants cite adopt, rather than refute, these standards. For example, *Cordiano v. Metacon Gun Club, Inc.*, like *Davis*, held that "an 'imminent hazard' may be declared *at any point* in a chain of events which *may* ultimately result in harm to the public." 575 F.3d 199, 210 (2d Cir. 2009) (emphasis added) (internal quotation marks omitted). Similarly, *Crandall v. City of Denver*, held that the liability standard can be "satisfied . . . so long as the defendant's current or past actions create a present *risk* that the harm will *eventually* come to pass." 594 F.3d 1231, 1237 (10th Cir. 2010) (emphasis added). And *Maine People's Alliance*, emphasized that RCRA does impose a requirement "that the harm necessarily will occur."471 F.3d at 288.

Under these standards, liability exists.

B. The Toxic Waste Emanating from the Dickson Landfill May Pose a Threat of Serious Harm to Water Resources and to the Health of Dickson's Residents

Contamination from the Dickson Landfill has accumulated in the underlying soil and groundwater at concentrations many orders of magnitude above EPA's maximum contaminant levels and soil screening levels. PSF 8-10, 129-130, 135, 146. This contamination is migrating offsite, sometimes for miles. PSF 48, 64, 147, 149, 168, 242-244; PSAF 450, 539-540. It will continue to pollute the surrounding aquifer indefinitely unless contained, PSF 143, 262, 264. While the full extent and rate of the contaminants' migration has not been determined, a portion of the Landfill's waste is discharging to the West Piney River. PSF 168, 242, 350. The fate of contaminants in the deeper horizons of the aquifer below the Landfill—and the extent of the contaminated areas—remains unknown. PSAF 537.

The Harry Holt well has been tainted with TCE since at least 1988 and is still contaminated. PSF 150-151, 158-159, 361. When TCE was detected in Sullivan Spring in 1994, a replacement well was drilled, but that well was also contaminated. PSF 154, 157. Well DK-21, a major former source of municipal water supply, was taken out of service after becoming contaminated with TCE. PSF 162, 164. TCE has in later years been found in a number of other wells, springs, and waterways, including Bruce Spring and the West Piney River. PSF 161-162, 166, 230, 231; PSAF 492, 493.

Alan Spear, the TDEC geologist, believes it could be unsafe to drink from *any* unmonitored downgradient well, including those in which TCE has

never before been detected. PSF 284. Todd Hughes, the former County consultant, acknowledged that some wells in which EME found no contamination could today be contaminated. PSAF 486, 499. Even David Langseth, the County and City's expert, conceded at deposition that presently unmonitored wells could become contaminated. PSF 509-510.

In February 2004, the County applied for a grant to address what it candidly called the "imminent threat" posed by TCE contamination. PSF 254. The County's application stated:

> Dickson County has been economically and environmentally impacted as a result of groundwater contamination from industrial waste disposal in the County. . . . Investigation activities have identified groundwater monitoring wells, a now abandoned public drinking water well, numerous private water wells and springs that have been contaminated with Trichloroethylene (TCE) and other volatile organic compounds (VOCs) . . . .

PSF 254. This problem was "critical," the County emphasized, because "[m]any parts of the County remain . . . dependent on groundwater as a drinking water source." PSF 254. Plaintiffs do not sue over the "mere presence of contamination," as Defendants contend, *see* County & City Mem. at 18, but over the insidious and potentially deadly pollution of a community's traditional water supply.[5]

---

[5] Although the County and City contend otherwise, the County's work at the Dickson Landfill has not been consistent with EPA's "Presumptive Remedy for CERCLA Municipal Landfill Sites." *See* Memorandum, *Holt-Orsted, et al. v. City of Dickson, et al.*, Nos. 3:07-0727, 3:07-732, 3:08-321, slip op. at 64 (M.D. Tenn. Mar. 25, 2009) (Haynes, J.); *see also* PSAF 541-42. EPA's Guidance establishes "containment" as the "presumptive" remedy for on-site contamination at municipal landfills, but the County has not

There is also an unresolved concern that vapor intrusion—the release of volatile organic compound gasses from contaminated groundwater into overlying homes—could pose a serious risk to health. PSAF 511, 514-516. For example, David Langseth, the County and City's expert, testified that there are parts of Dickson County in which he believes a quantitative evaluation of vapor intrusion is necessary to determine whether risks to human health are significant. PSAF 515. No such study has yet been conducted. PSAF 516.

Landfill contamination may also endanger species that live in the karst environment underneath and surrounding the site.[6] PSAF 533. Dr. Julian Lewis, an expert in cave biology and subterranean aquatic species, opines that a subterranean fauna exists in Dickson County and identifies five species he would expect to occur there. PSAF 517, 524. Dr. Lewis specifically expects that some subterranean organisms within this community live in groundwater in and around the Landfill. PSAF 528-532. (Defendants' focus on a single, extremely rare species that has only been found in a cave in Dickson County, *see* County & City Mem. at 20, ignores the other species described in Dr. Lewis' report.) Some of these species are crustaceans, which may be particularly susceptible to PCE. PSAF 529, 535. Dr. Lewis believes

---

"contained" the Landfill's contamination. PSF 258-263, 267-269. Nor has the County complied with EPA's regulations for CERCLA groundwater response actions, which generally require contamination to be reduced to a point that the water can again be put to beneficial use, and if that is not possible, that contamination be contained. *See* 40 C.F.R. § 300.430(a)(1)(iii)(F).

[6] "Karst" is "[a]n area of irregular limestone in which erosion has produced fissures, sinkholes, underground streams, and caverns." *The American Heritage Dictionary Second College Edition* 698 (1982).

that the high concentration of contaminants in groundwater at and near the Landfill presents or may present an imminent and substantial endangerment to these karst species. PSAF 533. He has therefore recommended sampling the karst groundwater fauna in springs, wells, and caves near the Landfill to determine the chemicals' effects. PSAF 534. Such studies can be ordered in section 7002(a)(1)(B) litigation to address uncertainty concerning the impacts of contamination. *See, e.g.*, *Me. People's Alliance*, 471 F.3d at 281-82, 296-97; *United States v. Apex Oil Co.*, No. 05-CV-242, 2008 WL 2945402, at *84 (W.D. Ill. July 28, 2008).

Section 7002(a)(1)(B) does not demand proof of "actual harm," *Burlington N.*, 505 F.3d at 1021, but proof that there "may" be a serious "endangerment." Plaintiffs have carried that burden. Defendants' attempt to impose a tougher burden is contrary to law and should be rejected.

C. An Endangerment to the Environment May Exist Even If No Living Population Is Exposed

It is undisputed that a broad expanse of groundwater in Dickson County has been contaminated with TCE. Such contamination violates section 7002(a)(1)(B), which protects against "endangerments to the environment, including water in and of itself." *Interfaith*, 399 F.3d at 263. *See generally* Pls.' J. Mem. in Supp. of Mot. for Partial Summ. J. at 22 (Dkt. 390 at 30 of 48).

Defendants' contrary argument—that "there is no imminent and substantial endangerment" absent a "substantial likelihood that anyone will be exposed," *see* County & City Mem. at 18—disregards RCRA's language. Section 7002(a)(1)(B) prohibits endangerments to "health *or* the environment." 42 U.S.C. § 6972(a)(1)(B) (emphasis added); *cf. United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (holding that Courts should "give effect, if possible, to every . . . word" of a statute (internal quotation marks omitted)). No human exposure is required to establish environmental harm.

While "environment" is not defined in RCRA, its normal meaning reaches beyond toxic effects on human beings. For example, the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") defines "environment" to include "surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States." 42 U.S.C. § 9601(8); *cf. United States v. Ferrin*, 994 F.2d 658, 664 (9th Cir. 1993) (relying on CERCLA definition of "environment" in RCRA prosecution). *See generally* 40 C.F.R. § 1508.14 (defining "human environment" under National Environmental Policy Act "comprehensively to include the natural and physical environment"). This breadth of meaning is confirmed by statutory context. For example, the first of RCRA's several congressional findings concerning "environment and health" is that "land is too valuable a national resource to be needlessly polluted by discarded materials." 42 U.S.C. § 6901(b)(1). This finding reflects

a view of "environment" that encompasses natural resources and seeks to prevent them from being rendered unusable by pollution. Similarly, RCRA's definition of "disposal" includes leakage of waste that may be "discharged into any waters, including ground waters." *Id.* § 6903(3). Even RCRA's name—the "*Resource* Conservation and *Recovery* Act"—indicates Congress's intention to "recover" the nation's groundwater and other resources "to their former wholesome condition." *United States v. Waste Indus., Inc.*, 734 F.2d 159, 165 (4th Cir. 1984); *cf.* H.R. Rep. No. 98-198, pt. 1, at 31 (1983), *reprinted in* 1984 U.S.C.C.A.N. 5576, 5589-90 (finding that liquid hazardous wastes disposed in landfills present a "substantial threat to groundwater resources").

Waste Industries illustrates that section 7002(a)(1)(B) does not require a plaintiff to show that a person is drinking contaminated groundwater. 734 F.2d at 162-63. There, wastes disposed at a landfill in North Carolina had leaked into groundwater and contaminated several residential wells with PCE, TCE, and other toxins. *Id.* at 162. Even after a new water system was built, providing a permanent replacement water supply, the United States pursued an imminent-and-substantial-endangerment claim to compel those responsible for the landfill waste "to develop and implement a plan to prevent further contamination"; "to restore the groundwater"; and "to monitor the area for further contamination." *Id.* at 163. The district court dismissed, finding no emergency in view of the new, replacement water supply. *Id.*;

United States v. Waste Indus., Inc., 556 F. Supp. 1301, 1317-19 (E.D.N.C. 1982). But the Fourth Circuit reversed, observing that "[t]he new water system . . . has not solved the problem of escaping waste," and explaining that RCRA's language authorizes equitable relief where there is "but a risk of harm." 734 F.2d at 163, 165.

PMC, Inc. v. Sherwin-Williams Co., 151 F.3d 610, is similar. There, the Seventh Court found that "buried wastes" satisfied RCRA's imminent-and-substantial endangerment standard because the waste presented "a constant danger to the groundwater." *Id.* at 618. This was so even though the groundwater did not flow into any source of drinking water. *See PMC, Inc. v. Sherwin-Williams Co.*, No. 93-C-1379, 1997 WL 223060, at *1 (N.D. Ill. Apr. 29, 1997). Likewise, *Voggenthaler v. Maryland Square, LLC*, found an endangerment from PCE in groundwater even though the contamination was "isolated from any potable water source" and no domestic wells were in use near the contamination. No. 2:08-cv-1618-RCJ-GWF, 2010 WL 2947296, at *9-*10 (D. Nev. July 22, 2010). In *United States v. Ottati & Goss*, the court found an endangerment despite a dearth of evidence "that any resident . . . has or is in danger of having their drinking water contaminated." 630 F. Supp. 1361, 1372-73, 1384-85, 1388, 1394 (D.N.H. 1985). And in *87th St. Owners Corp. v. Carnegie Hill-87th St. Corp.*, 251 F. Supp. 2d 1215, 1218 (S.D.N.Y. 2002), the Court denied summary judgment because, although the plaintiff had "not produced an expert witness regarding toxicological damage

to human health, flora, fauna, or natural resources," "[e]vidence of ground water contamination by oil, . . . present in the record . . . could itself support a finding of environmental harm." Similar cases are common.[7]

In arguing that an endangerment "will not be found" if water "is not being consumed," County & City Mem. at 11, the County and City ignore this precedent and misread even the cases on which their motion relies. For example, while *Davies v. National Cooperative Refinery Ass'n*, No. 96-1124-WEB, 1996 WL 529208 (D. Kan. July 12, 1996), recognized that a present or future "risk" of exposure is "part of the equation" in evaluating an endangerment to health, *id.*, at *3, it also recognized that "[g]roundwater would have to be considered part of the 'environment'" and that "a threat to fresh groundwater being contaminated with hazardous or solid waste could constitute an endangerment to the environment." *Id.* The same court's later decision in *Davies v. National Cooperative Refinery Ass'n*, 963 F. Supp. 990,

[7] *See*, *e.g.*, *Burlington N.*, 505 F.3d at 1021 (reversing a district court for "limiting its consideration to only injury to persons"); *Interfaith*, 399 F.3d at 263 (holding that section 7002(a)(1)(B) "'imposes liability for endangerments to the environment, including water in and of itself.'"); *Raymond K. Hoxsie Real Estate Trust v. Exxon Educ. Found.*, 81 F. Supp. 2d 359, 367 (D.R.I. 2000) ("The statute clearly speaks of endangerment to the 'environment.' Groundwater, potable or not, and soil are a part of the environment."); *Paper Recycling, Inc. v. Amoco Oil Co.*, 856 F. Supp. 671, 675, 678 (N.D. Ga. 1993) (denying the defendants' summary judgment motion where plaintiffs' evidence showed that thousands of gallons of petroleum "free product" remained in the water table under the plaintiff's property);*Lincoln Props., Ltd. v. Higgins*, No. S-91-760, 1993 W.L. 217429, at *13 (E.D. Cal. Jan. 21, 1993) ("The term 'environment' appears to include air, soil, and water.").

was resolved on abstention grounds and did not reach the meaning of section 7002(a)(1)(B) at all. 963 F. Supp. at 999, 1000.

The holding of *Two Rivers Terminal, L.P. v. Chevron USA, Inc.*, 96 F. Supp. 2d 432 (M.D. Pa. 2000)—if it survives *Interfaith*, 399 F.3d at 258—was only that the site contamination at issue there "pose[d] no danger of imminent harm." *See* 96 F. Supp. 2d at 446. In reaching this conclusion, *Two Rivers* explicitly distinguished cases, such as this one, in which contamination has migrated offsite. *See id.* at 446 & n.8. Finally, *Avondale Federal Savings Bank v. Amoco Oil Co.*, 170 F.3d 692 (7th Cir. 1999), found the plaintiff's suit "premature," *id.* at 695, which was hardly surprising given that the plaintiff itself admitted that no further cleanup was yet required. *Avondale Fed. Sav. Bank v. Amoco Oil Co.*, 997 F. Supp. 1073, 1074, 1079, 1080 (N.D. Ill. 1998). The Seventh Circuit's contemporaneous decision in *PMC*, discussed above, makes clear that Circuit's view that an imminent and substantial endangerment can exist where groundwater that no one is drinking becomes contaminated.[8] *See PMC,* 151 F.3d at 618, *aff'g PMC,* 1997 WL 223060, at *1.

[8] The several cases cited by the County and City in a footnote do not support their argument either. *See* County & City Mem. at 11 n.9. In *Grace Christian Fellowship v. KJG Investments Inc.*, the court denied a preliminary injunction as unnecessary because no harm would occur in the interim period before the court could render a final decision. No. 07-C-0348, 2009 WL 2460990, at *12 (E.D. Wis. Aug. 7, 2009). In *Scotchtown Holdings LLC v. Town of Goshen*, there was "no allegation of actual or threatened damage to human health or the environment." No. 08-CV-4720, 2009 WL 27445, at *2-*3 (S.D.N.Y. Jan. 5, 2009). The companion decisions in *West Coast Home*

Contamination that forces the abandonment of a community's aquifer presents—and certainly "may" present—a palpable and serious threat to that groundwater and thus to the environment. No human exposure is required to establish liability.

D. Plaintiffs Need Not Prove that Any Person Is Presently Drinking Contaminated Water to Establish a Potential Endangerment to Health

In deciding when waste "may present an imminent or substantial endangerment" to health, "the operative word . . . [is] 'may.'" *Interfaith*, 399 F.3d at 258; *accord, e.g.*, *Burlington N.*, 505 F.3d at 1020; *Parker*, 386 F.3d at 1015; *Cox*, 256 F.3d at 299. Section 7002(a)(1)(B) requires proof, not of actual harm, but that the contamination at issue is located along "*any point* in a chain of events which *may* ultimately result in harm to the public." *Davis*, 148 F.3d at 610 (emphasis added) (internal quotation marks omitted); *accord, e.g.*, *Burlington N.*, 505 F.3d at 1020-21; *Cox*, 256 F.3d at 299; *Price v. U.S. Navy*, 39 F.3d 1011, 1019 (9th Cir. 1994); *Dague v. City of Burlington*, 935 F.2d 1343, 1356 (2d Cir. 1991), *rev'd in part on other grounds*, 505 U.S. 557

Builders, Inc. v. Aventis Cropscience USA Inc., Nos. C 04-2225, C 04-2648, 2009 WL 2612380 (N.D. Cal. Aug. 21, 2009), and *SPPI-Somersville, Inc. v. TRC Cos.*, Nos. C 04-2648, C 07-5824, 2009 WL 2612227 (N.D. Cal. Aug. 21, 2009), were decided on the identical bases that (a) the plaintiffs sought relief "already obtain[ed] outside of this lawsuit" and (b) the plaintiffs did "not contend that there is any current danger." *W. Coast Home Builders*, 2009 WL 2612380, at *4-*5*; SPPI-Somersville*, 2009 WL 2612227, at *15-*16. The plaintiff's own consultant concluded in *Foster v. United States*, that any risks were "small and manageable," rather than imminent and substantial. 922 F. Supp. 642, 661-62 (D.D.C. 1996). And in *Price v. United States Navy*, the district court was "not convinced" following trial "that the levels of contaminants are hazardous." 818 F. Supp. 1323, 1324, 1326 (S.D. Cal. 1992).

(1992). "[C]ertainty and exactitude are not required." *United States v. Apex Oil Co.*, 2008 WL 2945402, at *79.

Indeed, the legislative history reflects Congress's intention that courts determine whether waste *may* present an imminent and substantial risk "from suspected, but not completely substantiated, relationships between facts, from trends among facts, from theoretical projections, from imperfect data, or from probative preliminary data not yet certifiable as 'fact.'" S. Rep. No. 98-284, at 59 (internal quotation marks omitted). The County and City's insistence that Plaintiffs must prove an actual, present human exposure disregards this standard.

In particular, the County and City's demand for more certain proof of a current harm to health discounts abundant evidence that waste migrating from the Landfill may contaminate the water supply wells of unsuspecting residents at any time. As Plaintiffs have shown, the summary judgment evidence is replete with uncontroverted testimony—from a TDEC geologist, from a former consultant to the County, and even from the County and City's testifying expert—that wells in which TCE has not yet been detected may become contaminated as the waste migrates. PSF 284; PSAF 499-500, 510; *see also* PSAF 536-538, 543. And because the County is not monitoring all of these wells, the contamination could occur without detection.

Although the County and City try to construct a shield out of the information gaps left by the County's partial investigation of the extent of

contamination, RCRA provides no such shield. If Congress had intended to require plaintiffs to prove exactly when particular people would become exposed—or even that people would necessarily become exposed—Congress would have left the word "may" out of the statute. But the word "may" is important and means that courts can find liability even when exposure is uncertain. *See, e.g., Burlington N.*, 505 F.3d at 1020-21; *Me. People's Alliance*, 471 F.3d at 283-284, 296-297.

E. EPA Has Not Determined That an Imminent and Substantial Endangerment Does Not Exist

Perhaps the County and City's most often repeated error is its claim that EPA has "concluded specifically that the Landfill does not pose an imminent and substantial endangerment." County & City Mem. at 18; *see also id.* at 17, 21, 22, 25. EPA has expressly disavowed such a finding.

Plaintiffs predicted that Defendants would make this argument and therefore sought to depose EPA in this case in an effort to understand the basis for the letters that the County and City now cite. In moving to quash Plaintiffs' subpoena, EPA informed the U.S. District Court for the Northern District of Georgia, which issued the subpoena, that "EPA has not made a finding of whether or not contamination at DCL [the Dickson County Landfill] constitutes an imminent and substantial endangerment to health or the environment." EPA Reply to Pls.' Opp'n to United States' Emergency Mot. to Quash 3d Party Subpoena, Dkt. 5 at 7, in *Natural Resources Defense Council, et al. v. County of Dickson, Tenn., et al.*, No. 1:10-MI-00144 (N.D.

Ga.) (filed July 14, 2010); PSAF 551. EPA's rejection of the County and City's claim could not be more clear.

Moreover, EPA has been at pains to explain that its letters do not reflect an independent investigation of the Landfill. Rather, EPA relied exclusively on the information provided to EPA by the County, a defendant here, and by TDEC, a defendant in related litigation.[9] PSAF 548, 553-554 (describing EPA's role as "tangential" and explaining that EPA itself had not produced the information that informed its letters). Thus, in moving to quash, the United States represented that the signatory of one of these letters, whom Plaintiffs sought to depose, "ha[d] no personal knowledge of the basis of the letters," aside from what was in documents received from TDEC and the County.[10] PSAF 553-554.

EPA has also specifically rejected a contention that its letters show that EPA thinks the contamination is innocuous. In moving to quash, EPA explained that a large body of monitoring data "speaks for itself, and provides ample evidence of groundwater contamination." PSAF 552. EPA then warned

---

[9] TDEC is a defendant in a federal civil rights suit filed by members of the Holt family. Their suit, previously consolidated with this case, alleges that TDEC failed to notify the Holts, who are black, that their well water was unsafe while it notified other, white families of similar contamination. *Beatrice Holt, et al. v. Scovill, Inc., et al.*, No. 3:07-0727 (M.D. Tenn.), Dkt. 202 (Complaint) ¶ 97.

[10] The information that the County and TDEC provided to EPA was apparently incorrect. For example, EPA assumed in its letter that "the County had adopted a resolution in 2007 which *prohibits* the drilling of water wells or the use of springs within the identified environmental risk areas." PSAF 548 (emphasis added). As discussed above, the County's 2007 resolution does no such thing. *See supra* p. 10.

against precisely the inferences that the County and City now asks this Court to draw:

> There is no implication that EPA believes the contamination is not significant, or that the exposure would not cause harm, or that there is no risk of exposure at all, or adheres to some other theory regarding the risk to human health.

PSAF 555 (internal quotation marks omitted).

EPA's explanation of its own letters is revealing, beyond what it says about the County and City's use of evidence. When EPA states that the lack of a known, current human exposure does not equate to a finding that no imminent and substantial endangerment exists, EPA is rejecting the County and City's theory of this case. EPA's letters do not address the section 7002(a)(1)(B) endangerment standard because they do not address whether Landfill contamination "may ultimately result in harm to the public," *Davis*, 148 F.3d at 610, and do not address endangerment to groundwater at all. Much the same thing could be said of the County and City's motion, which misunderstands RCRA's liability standard, and then misapplies that misunderstanding to a partial and misleading characterization of the record.

CONCLUSION

The County and City have provided no reason for this Court to revisit its assertion of jurisdiction. The factual record establishes that waste from the Dickson Landfill may present an imminent and substantial endangerment to health or the environment. The material facts that prove this are not genuinely at issue and support summary judgment for Plaintiffs. The County and City's summary judgment motion should be denied.

November 18, 2010

Respectfully submitted,

/s/ Michael E. Wall
Michael E. Wall (CA Bar #170238), *pro hac vice*
Selena Kyle (CA Bar # 246069), *pro hac vice*
Natural Resources Defense Council
111 Sutter Street, 20th Floor
San Francisco, California 94104-4540
(415) 875-6100
mwall@nrdc.org; skyle@nrdc.org

Rebecca J. Riley (IL Bar #6284356), *pro hac vice*
Natural Resources Defense Council
2 N. Riverside Plaza, Suite 2250
Chicago, IL 60606
(312) 651-7913
rriley@nrdc.org

Attorneys for Plaintiffs

George E. Barrett (TN BPR No. 002672)
Douglas S. Johnston, Jr. (TN BPR No. 005782)
BARRETT, JOHNSTON & PARSLEY
217 Second Avenue North
Nashville, Tennessee 37201
(615) 244-2202
gbarrett@barrettjohnston.com

Joe R. Whatley, Jr.
Whatley, Drake & Kallas, LLC
1540 Broadway, 37th Floor
New York, NY 10036
jwhatley@wdklaw.com

Attorneys for Plaintiffs Beatrice Holt and Sheila Holt-Orsted

Joe W. McCaleb (TN BPR No. 003505)
7910 Hilton Hollow Lane
Primm Springs, TN 38476
(615) 799-5706
mccalebjw@gmail.com

Charles J. Ha (WA Bar #34430), *pro hac vice*
Ranjit Narayanan (WA Bar #40952), *pro hac vice*
Orrick, Herrington & Sutcliffe, LLP
701 5th Avenue, Suite 5700
Seattle, WA 98104
(206) 839-4343
charlesha@orrick.com; rnarayanan@orrick.com

Attorneys for Plaintiff Natural Resources Defense Council, Inc.

CERTIFICATE OF SERVICE

I, Michael E. Wall, hereby certify that on November 18, 2010, I caused the foregoing document:

PLAINTIFFS' JOINT RESPONSE TO THE COUNTY AND CITY'S MOTION FOR SUMMARY JUDGMENT

To be served via the Court's electronic filing system on the following counsel of record:

Joe W. McCaleb & Associates
7910 Hilton Hollow Lane
Primm Springs, TN 38476
mccalebjw@gmail.com

Joe R. Whatley, Jr.
Whatley, Drake & Kallas, LLC
1540 Broadway, 37th Floor
New York, NY 10036
jwhatley@wdklaw.com

Charles J. Ha
Ranjit Narayanan
Orrick, Herrington & Sutcliffe, LLP
701 5th Avenue, Suite 5700
Seattle, WA 98104
charlesha@orrick.com; rnarayanan@orrick.com

George E. Barrett
Douglas S. Johnston, Jr.
Tim Miles
Barrett Johnston, LLC
217 Second Avenue, N
Nashville, TN 37201
gbarrett@barrettjohnston.com; djohnston@barrettjohnston.com;
tmiles@barrettjohnston.com;

Rebecca Riley
Natural Resources Defense Council, Inc.
2 N Riverside Plaza, Suite 2250
Chicago, IL 60606
rriley@nrdc.org

Mitchell S. Bernard
Natural Resources Defense Council, Inc.
40 W 20th Street
11th Floor
New York, NY 10011
mbernard@nrdc.org

Susan L. Kay
131 21st Ave., So.
Nashville, TN 37203
susan.kay@vanderbilt.edu

Kirk Vandivort
Timothy V. Potter
Hilary Hiland Duke
Patrick Brian Ragan
Reynolds, Potter, Ragan & Vandivort, PLC
210 E College Street
Dickson, TN 37055
kirk_vandivort@bellsouth.net; tim_potter@bellsouth.net;
hilary_duke@bellsouth.net; brian_ragan@bellsouth.net

William H. Farmer
Jones Hawkins & Farmer, PLC
One Nashville Place
150 Fourth Avenue, N
Suite 1820
Nashville, TN 37219
bfarmer@joneshawkinsfarmer.com

Keith C. Dennen
Sharon Orenstein Jacobs
Johnny C. Garrett, IV
William J. Haynes, III
Bone, McAllester & Norton, PLLC
Nashville City Center, Suite 1600
511 Union Street
Nashville, TN 37219
kdennen@bonelaw.com; sjacobs@bonelaw.com; jgarrett@bonelaw.com;
whaynes@bonelaw.com

Jennifer L. Brundige
Luna Law Group, PLLC
333 Union Street, Suite 300
Nashville, TN 37201
jbrundige@lunalawnashville.com

Frank J. Scanlon
Watkins, McGugin, McNeilly & Rowan
Samuel P. Helmbrecht
Watkins & McNeily, PLLC
214 Second Avenue, N, Suite 300
Nashville, TN 37201
frank@watkinsmcneilly.com; sam@watkinsmcneilly.com

Michael K. Stagg
Robert J. Martineau, Jr.
Paul G. Summers
Edward M. Callaway
Waller, Lansden, Dortch & Davis, LLP
Nashville City Center
511 Union Street, Suite 2700
Nashville, TN 37219
michael.stagg@wallerlaw.com; bob.martineau@wallerlaw.com;
paul.summers@wallerlaw.com; ed.callaway@wallerlaw.com

Thomas M. Donnell, Jr.
Kerry M. Ewald
Dickinson Wright, PLLC
Fifth Third Center, Suite 1401
424 Church Street
Nashville, TN 37219-2392
tdonnelljr@dickinsonwright.com; kewald@dickinsonwright.com

Sharon R. Newlon
Tammy L. Helminski
Dickinson Wright, PLLC
500 Woodward Avenue, Suite 4000
Detroit, MI 48226-3425
snewlon@dickinsonwright.com; thelminski@dickinsonwright.com

Anne E. Viner
Tzaivia Masliansky
Jonathan D. Sherman
Much Shelist Denenberg Ament and Rubenstein, P.C.
191 North Wacker Drive, Suite 1800
Chicago, IL 60606
aviner@muchshelist.com; tmasliansky@muchshelist.com;
jsherman@muchshelist.com

November 18, 2010

/s/ Michael E. Wall
Michael E. Wall