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,	)	No. 3:08-cv-00229 Chief Judge Campbell Magistrate Judge Bryant
Defendants.	)	

PLAINTIFFS' JOINT RESPONSE TO ALP LIGHTING AND CEILING PRODUCTS, INC., NEMAK USA, INC., AND INTERSTATE PACKAGING COMPANY'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Defendants ALP Lighting & Ceiling Products, Nemak USA, and Interstate Packaging Company's motion does not question whether wastes disposed at the Dickson Landfill may present an imminent and substantial endangerment to health or the environment. It argues only that Defendants' wastes have not contributed to the problem, and alternatively that one of the Plaintiffs, NRDC, lacks standing to sue Defendants as contributors.

These contentions are factually unsupported and contrary to established precedent that provides for broad contribution liability under section 7002(a)(1)(B) of RCRA. Extensive evidence, including testimony by multiple employee witnesses, shows that Interstate sent TCE and PCE to the Landfill. ALP's Rule 30(b)(6) testimony and discovery responses show that it sent TCE and PCE to the Landfill. Nemak does not dispute that it disposed PCE at the Landfill. Expert testimony uncontroverted by Defendants shows that each has contributed to the mass of PCE and TCE contamination at the site that endangers health and the environment. Nemak is liable as a contributor, *see* Dkt. 390 at 27-35, and there is at least a material dispute as to Interstate's and ALP's liability. NRDC, like the Holts, has standing to sue and seek to compel Defendants to remedy the problem they helped create. Defendants' motion should be denied.

SUMMARY JUDGMENT STANDARD

Defendants mistakenly suggest that, to avoid summary judgment, Plaintiffs must proffer expert testimony that each Defendant contributed to disposal of PCE and/or TCE that may present an imminent and substantial endangerment to health or the environment.[1] Dkt. 363 at 10. Nothing in the Federal or Local Rules or in RCRA section 7002 limits Plaintiffs to expert proof. *See* 42 U.S.C. § 6972(a)(1)(B); Fed. R. Civ. P. 56(e)(2); Local Civ. R. 56(c)-(f). The Court should consider all relevant and admissible evidence before it—including lay witness testimony and documentary evidence—and, in deciding Defendants' motion, construe that evidence in the light most favorable to Plaintiffs. *SEC v. Blavin*, 760 F.2d 706, 710 (6th Cir. 1985).

ARGUMENT

Summary judgment should be denied because Defendants are all liable under RCRA section 7002(a)(1)(B) for contributing to the disposal of PCE and/or TCE wastes at the Landfill that may present an imminent and substantial endangerment and because NRDC has standing to abate that endangerment. In the alternative, the motion should be denied because facts material to Defendants' motion remain in dispute.

[1] Defendants cite to non-RCRA cases in which the plaintiffs relied largely or exclusively on expert testimony to oppose summary judgment*. See Turpin v. Merrell Dow Pharm.*, 959 F.2d 1349, 1351 (6th Cir. 1992); *Williams v. Ford Motor Co.*, 187 F.3d 533, 543-44 (6th Cir. 1991); *Monks v. Gen. Elec. Co.*, 919 F.2d 1189, 1193-94 (6th Cir. 1990); *Robinson v. Union Carbide Corp.*, 805 F. Supp. 514, 521 (E.D. Tenn. 1991). These cases do not suggest that plaintiffs must rely on expert testimony.

I. Defendants Have Contributed to the Disposal of PCE and TCE that May Present an Imminent and Substantial Endangerment

Because Interstate, ALP and Nemak each contributed to the mass of PCE and/or TCE contaminated wastes disposed at the Landfill, they are jointly liable, with the City and County, for contributing to the potential endangerment that now exists. *See also* PSF 27-35. The evidence presented here and in Plaintiffs' fact statements establishes Nemak's contribution and at least a material dispute as to Interstate's and ALP's contributions.

A. Defendants' Disposal of PCE and TCE Wastes at the Landfill

1. Interstate

a. Generation of TCE and PCE Wastes

Interstate has operated a packaging plant in the City of White Bluff, in Dickson County, since 1969. Pls.' Stmt. of Add'l Facts in Resp. to Defs.' Mots. for Summ. J. ("PSAF") 1. Since at least 1970, Interstate's operations have included printing. *Id.* 3. In October 1978, Interstate purchased equipment to allow it to make photopolymer printing plates. *Id.* 6-11.

Edna Goodwin was Interstate's principal plate maker and the first employee to work with the plate-making equipment. *Id.* 26-27. From the time she was assigned to plate making, Ms. Goodwin made plates her entire eight-hour shift and was on call to replace plates that broke after hours. *Id.* 28-29. The plate maker Ms. Goodwin used included a "wash-out" unit filled with solvent that was used to rinse excess photopolymer material from freshly made plates. *Id.* 30, 34. The first solvent she recalls using in the wash-out

unit was a mixture of PCE and TCE. *Id.* 32. Interstate used both PCE and TCE in its plate-making process for some period, and used PCE until at least 1992. *Id.* 32, 116, 123, 129-130. Every morning that Ms. Goodwin worked at plate making, she dipped approximately twenty to twenty-five gallons of spent solvent from the wash-out unit into used five-gallon ink buckets and left those buckets for others to remove from her work area. *Id.* 37, 39. The volume of solvent waste increased over time.[2] *Id.* 38.

Interstate also used some alcohol-based solvents in its printing operation. *Id.* 152, 154, 162, 225. Before 1984, Interstate did not segregate alcohol-based printing waste solvents from its plate making waste solvents, which contained PCE. *Id.* 138, 242-243. For some period of time through at least 1984, Interstate allowed some waste solvents including PCE to accumulate in 55-gallon drums behind its facility. *Id.* 161, 163.

In May 1984, the State of Tennessee conducted an environmental inspection at Interstate and found 112 drums of waste solvent stored behind the plant. *Id.* 163. The drums contained a mixture of plate-making solvent, including PCE, and alcohol-based ink solvents. *Id.* 152, 161-162. Interstate hired a consultant, Paul Lynes, to help address the backlog. *Id.* 151. At Mr. Lynes's recommendation, Interstate bought a still to reduce the backlog and

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[2] Some employees and former employees have testified that PCE was used to wipe off printing plates and wipe ink stains off clothing. *Id.* 123, 125-126, 129-130. There is also testimony that waste solvent from the plate-making operation was used to clean floors at the plant. *Id.* 131.

to reclaim solvent for reuse in Interstate's operations. *Id.* 222-223. The still operation generated residues known as "still bottoms." *Id.* 223.

Interstate processed backlogged solvent that contained a mixture of PCE and other solvents through the still, generating still bottoms. *Id.* 222-223, 225. In October 1984, the state approved Interstate's disposal of still bottoms generated "from the processing of the waste solvent backlog" at the Landfill. *Id.* 282-283. Michael Doochin, Interstate's co-President, testified that bottoms generated from distillation of Interstate's mixed solvent waste were sent to a landfill that he assumes was the Dickson County Landfill. *Id.* 14, 224. Interstate disposed of still bottoms at the Dickson Landfill until at least October 1986. *Id.* 285.

Michael Doochin testified that, by December 1985, Interstate was "having a very hard time keeping up with our backlog" through the still in addition to ongoing solvent wastes that Interstate was continuously generating. *Id.* 276. He recalled that employees were feeling "overwhelmed" because "[w]e were cooking, as they say, all the time." *Id.* 277. That month, Mr. Doochin met with Mr. Lynes to discuss buying a second still to keep PCE and alcohol segregated and to prevent used solvents from accumulating. *Id.* 275. Interstate never bought a second still. *Id.* 278.

Interstate offers no facts to dispute that it generated PCE and TCE wastes in its plate-making operation beginning in the late 1970s. Dkt. 363 at 16-23. Interstate asserts that it "did not purchase PCE and/or TCE until the

early 1980s," Dkt. 363 at 20, but cites no evidence to support that assertion. Interstate does not dispute that it purchased plate making equipment in October 1978; that the first solvents used in that equipment were PCE and TCE; that it began using the equipment (and generating PCE and TCE wastes) soon after purchase; or that it was using the equipment on most days by the end of 1980. Dkt. 363 at 16-23; PSAF 6-8, 15-16, 18, 22-23, 32-33.

Interstate's contention that solvent wastes including PCE were removed from its plate making equipment only "[e]very few days" is also unsupported. Ms. Goodwin, the first person to use the plate making equipment, testified that she removed spent solvent and excess polymer from the wash-out tank "every morning" when she began plate making. *Id.* 26, 35-37. The only facts Interstate cites in response are from the affidavits of Kenny Gray and Carlton Bellar. Interstate fails to refute Ms. Goodwin's testimony.[3] Dkt. 363 at 18; Pls.' Resp. to Corp. Defs. Stmt. of Facts ("PRF") 97. Mr. Bellar's affidavit states that "[t]he plate-maker typically removed polymer from the wash-out unit every morning, placing the polymer into empty ink buckets, and an Interstate employee brought fresh solvent to the

[3] Because Interstate never disclosed Mr. Gray as a witness or justified its failure to do so, the Court should disregard the Gray affidavit. PRF 97; Fed. R. Civ. P. 37(c) ("If a party fails to . . . identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that . . . witness to supply evidence on a motion . . . unless the failure was substantially justified or is harmless."). The affidavit also does not support Interstate's contention. Mr. Gray does not claim *any* involvement with plate making before 1982—four years after Interstate acquired equipment and at least two years after it was used on most days, *id.*; PSAF 6-8, 11, 15-16—and is silent on whether other employees may have changed the solvent on days when Mr. Gray did not.

plate room to be added to the holding tank." PRF 97. This corroborates the testimony of Ms. Goodwin, who explained that the wash-out unit had to be refilled with fresh solvent each morning because the solvent was designed to rinse excess polymer from new printing plates and became less effective for this purpose as excess polymer built up within the unit. *Id.*; PSAF 34, 36.

Interstate used PCE and TCE and generated PCE and TCE wastes no later than the late 1970s. The volume of this waste was significant. These facts are not genuinely at issue.[4]

b. Interstate's Disposal of PCE and TCE at the Landfill

Interstate admits it disposed wastes at the Landfill but implies—without ever quite stating—that those wastes did not include PCE or TCE. Interstate's factual presentation is inaccurate and incomplete.

i. Disposal of Free Liquid TCE and PCE

Odell Sanders, who worked at Interstate for many years, testified that he picked up five-gallon buckets of liquid from the plate-making area at Interstate where Ms. Goodwin worked and carried them to Interstate's

[4] Interstate takes issue with Plaintiffs' citation to a state form it prepared that indicates Interstate began generating PCE waste in "1969." Dkt. 363 at 20; PSAF 296. Interstate's claim that it could not have generated PCE waste that long ago rests on the testimony of Mr. Lynes, who has no personal knowledge of the wastes Interstate generated before May 1984 and who when asked about the form testified it did appear to indicate generation beginning in 1969, and the affidavit of a second undisclosed witness, Wayne Gregory. *See* Dkt. 363 at 18; PRF 104. The Court should disregard the affidavit. PRF 104; Fed. R. Civ. P. 37(c). The affidavit is of limited relevance, in any event, because Mr. Gregory also does not purport to know what wastes Interstate generated in 1969. PRF 104.

loading area, where they were put onto trucks Mr. Sanders understood were bound for the Landfill. PSAF 43-46, 51-53, 60-61. Mr. Sanders also loaded drums on Landfill-bound trucks. *Id.* 56-57. He recalls that, even after Interstate began shipping some drums of wastes elsewhere, he sometimes loaded a 55-gallon drum of liquid onto a truck bound for the Landfill "whenever it was getting in the way and we needed to get rid of it." *Id.* 55-56.

Both Farris Brown and Gary Warf have testified that they picked up five-gallon buckets of liquid from Interstate and dumped that liquid waste at the Landfill. *Id.* 66, 74, 78-79, 82, 88, 104-108. Mr. Brown hauled trash to the Landfill from Interstate beginning in the early to mid 1970s, first as part of a regular trash route and later by special arrangement with Ray Russell, an Interstate employee. *Id.* 60, 64-68, 78-79. Mr. Brown recalls that Mr. Russell hired him to haul liquids to the Landfill after the town of White Bluff discovered that Interstate was illicitly pouring liquids into the local sewer. *Id.* 67. Mr. Brown hauled liquids from Interstate to the Landfill beginning by at least the summer of 1977. *Id.* 78-88, 93. Mr. Brown took at least occasional loads of trash from Interstate as late as May 1984. *Id.* 94.

Interstate contends that all of the solvent wastes it generated until the mid-1980s were accumulated in 55-gallon drums and eventually shipped offsite for disposal at a licensed hazardous waste facility. Dkt. 363 at 19. It is undisputed that Interstate had *some* waste solvents, including PCE, stored in drums behind its plant in May 1984. PSAF 151, 161-163. But that does not

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prove that some PCE and/or TCE wastes from Interstate were not sent to the Landfill. Interstate cites to the affidavits of Mr. Bellar and Mr. Gray, Dkt. 363 at 19. But the Bellar affidavit is silent on this issue and the Gray affidavit—assuming it is admitted, *see supra* n. 3—indicates only that Mr. Gray personally emptied buckets of spent PCE from the plate making operation into 55-gallon drums. PRF 97. This has no bearing on Interstate's disposal of PCE and TCE before 1982, the year Mr. Gray claims that he first became involved with plate making. Nor does Mr. Gray's declaration address whether, even after 1982, other employees loaded spent plate-making solvent onto Landfill-bound trucks. Mr. Sanders's testimony that he did just that remains uncontroverted. *Id.*; PSAF 57.

Interstate is also wrong to claim that Sam Russell, Larry Robertson and Landfill foreman Jim Lunn "are the only eye-witnesses to Interstate's trash disposal at the Landfill." Dkt. 363 at 21-23. Both Mr. Brown and Mr. Warf—also a former Interstate employee—have testified that they collected liquid wastes from Interstate in five-gallon buckets and dumped those wastes on open ground at the Landfill. PRF 121; PSAF 66, 74, 78-79, 82, 88, 104-108. Interstate does not mention Mr. Warf's testimony on this point and relegates Mr. Brown's to a footnote that inaccurately suggests that Mr. Brown hauled

Interstate trash to the Landfill only before 1980 and knew that the trash "did not contain perc."[5] Dkt. 363 at 18 n.5.

Interstate similarly mischaracterizes the testimony of Mr. Sanders, who said he could not identify PCE and called liquids he picked up from the plate-making area (where PCE and TCE were the only solvents used at the time) and loaded onto Landfill-bound trucks "alcohol" and "ink" because he did not know what the liquids were. PRF 132; PSAF 58.

The Robertson, Russell, and Lunn testimony also does not support Interstate's theory that all wastes it sent to the Landfill were inspected and liquid-free. Mr. Robertson did not begin working at Interstate until May 1984, half a decade after Interstate purchased its plate maker and at least four years after the equipment was in use on most days. PRF 121; PSAF 113. Sam Russell's affidavit does not indicate during what years he hauled waste from Interstate to the Landfill. PRF 121. Neither affiant rebuts the evidence that other people, including Messrs. Brown and Warf, also hauled Interstate trash to the Landfill. PSAF 113. Neither affiant denies taking 55-gallon drums to the Landfill, despite Interstate's claim in its brief. Dkt. 363 at 22. Interstate's own records show Interstate reimbursed Mr. Robertson for hauling "[d]rums" to the Landfill at least once, in October 1984, PSAF 114-

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[5] At deposition, Mr. Brown could not recall exactly when he stopped hauling for Interstate but did not dispute the accuracy of a check Interstate produced that shows Interstate reimbursed Mr. Brown for hauling four loads of trash to the Landfill in May 1984. PSAF 94. Mr. Brown also testified that he could not identify the liquids in the five-gallon buckets he took from Interstate to the Landfill. PSAF 68-70.

115, soon after the state cited Interstate for storing spent solvent including PCE on site (and within the same timeframe that Mr. Sanders remembers loading 55-gallon drums on Landfill-bound trucks). PSAF 43, 55, 163.

This evidence does not establish that Interstate never disposed liquid or hazardous wastes at the Landfill. The County admits that it inspected no more than ten percent of the loads sent to the Landfill, and that even those inspections were mostly conducted many years after Interstate began generating PCE and TCE waste and Mr. Brown dumped Interstate liquid waste at the Landfill. PRF 121; PSAF 432, 435-436. Mr. Lunn did not start work at the Landfill until August 1992, more than a decade after Interstate began using PCE.[6] PRF 121; Dkt. 363 at 21; PSAF 433. There is ample evidence that in earlier years, there were few if any constraints on the dumping of hazardous liquids at the site. PSAF 65, 108-111; PSF 87-90.

ii. Disposal of PCE and/or TCE-Contaminated Still Bottoms

Interstate's assertion that it distilled some "separate batches" of PCE and n-propyl alcohol solvents sidesteps the extensive evidence—including testimony of its own co-president— that Interstate also distilled backlogged solvent that contained a *mixture* of PCE and alcohol through at least the end of 1985. PRF 108; PSAF 221-223, 242-244, 265-266, 268, 274-277. The Robertson and Russell affidavits are silent on what happened to the residues

[6] Mr. Lunn's claim that there were "no liquids involved" referred just to his own occasional inspections (beginning no earlier than 1992), not inspections by other employees. PSAF 310, 433, 436; PRF 121.

from Interstate's admitted distillation of solvent waste that contained PCE. Mr. Doochin testified, and a state letter indicates, that mixed solvent still bottoms containing PCE were sent to the Landfill. PSAF 224-227, 274.[7]

c. Disposal of Hazardous Wastes at Other Locations

Interstate also suggests it could not have disposed PCE or TCE at the Landfill because "hazardous" and "liquid" wastes were shipped from Interstate to Tennessee Oil and Refining in 1982 and 1983 and a "backlog of hazardous waste" including "solvents" was sent to Allworth, Inc. in 1986. Dkt. 363 at 16-17, 20-21. The vagueness in these descriptions is telling. There is no evidence that earlier shipments included any PCE and nothing in the shipment records disproves disposal of some PCE and TCE at the Landfill.

Hazardous wastes transported offsite must be accompanied by a manifest. *See* 42 U.S.C. §§ 6922(a)(5), 6923(a)(3); 40 C.F.R. §§ 262.20-262.27, 262.40. Interstate provided no manifest for any 1982 solvent shipment. However, the manifest Interstate provided for the 1983 shipments describes the wastes shipped by code "UN-1993." PSAF 196. Interstate's purchasing records for 1983 distinguish purchases of a "Wash-Up Solvent," identified with code UN-1993, from purchases of "Perchloroethylene," identified with code "UN-1987." *Id.* 195. The manifest Interstate produced for the 1983

[7] Interstate also asserts that it must have segregated PCE and alcohol waste solvents for some period before December 1985 because the state described the drums it found behind Interstate's plant in 1984 as "labeled." Dkt. 363 at 17. This is a non-sequitur. That the drums were labeled does not mean that each drum contained just one kind of solvent. Unrebutted testimony by Michael Doochin and Mr. Lynes indicates that some or all of the drums contained mixed PCE and alcohol solvents. PSAF 161-162.

shipment indicates it was comprised of waste with a code UN-1993 and lists no waste with a code UN-1987. Both Mr. Lynes and Interstate's trial expert testified that, based on descriptions of the 1982 and 1983 shipments reflected in Interstate's internal records, the shipments likely did not contain PCE.[8] *Id.* 196-198, 200-201, 203-212. Interstate's own documents and the testimony of its own witnesses indicate that the 1983 shipment was comprised of solvents other than PCE.

The manifests for the 1986 shipments to Allworth describe three shipments of a total of 160 drums of a "Waste Solvent, N.O.S., Flammable UN1993" waste with hazard codes "D001/F002." *Id.* 181, 194. Code F002 applies to PCE and TCE, but also to other chemicals. *Id.* 192. The manifests show, at most, that Interstate may have sent some PCE and/or TCE waste offsite in 1986. They do not show what amount (if any) was sent. *Id.* 181, 194.

The evidence strongly suggests these 1986 shipments did not include all the PCE and TCE waste Interstate generated and failed to recycle. Interstate produced no records of its solvent purchases before some point in 1983. *Id.* 195. However, Edna Goodwin testified that Interstate was generating twenty to twenty-five gallons of waste solvent on most days—or enough to fill multiple 55-gallon drums a week—in the early phases of its plate-making operation, which began soon after the plate making equipment

[8] The documents indicate that the wastes shipped in 1982 and 1983 had a density of 8 pounds per gallon. PSAF 209. This is the same density that Interstate used when describing its non-PCE based wash up solvent waste stream. *Id.* 208. PCE has a density of about 14 pounds per gallon. *Id.* 207.

was purchased in 1978. *Id.* 37; *see also id.* 11, 16, 26-36, 38. Consistent with this testimony, TDEC described the 112 drums it found behind Interstate's plant in May 1984 as representing about one year's accumulation. *Id.* 163. If the drums TDEC found in 1984 were indeed part of (and generally representative of) Interstate's 160-drum 1986 shipment to Allworth, the Allworth drums contained at most between one and two years' accumulation of mixed solvent waste. None of this is inconsistent with testimony that Interstate had already disposed some PCE and/or TCE at the Landfill.

B. ALP

ALP owns a plant in Dickson that manufactures components for lighting fixtures. *Id.* 314, 315. Since opening in 1985, the plant has used products containing TCE and/or PCE, including aerosol cans used to clean and protect the molds used to make lighting fixtures and to maintain forklift brakes. *Id.* 315, 317-320, 323-361. The purchase records ALP produced do not cover most of the PCE- and/or TCE-containing products used at ALP's Dickson plant, or provide any purchase information for the years 1985-1992. *Id.* 321-322. The few available records show that, between 1993 and 1996 alone, ALP purchased at least 600 aerosol cans of just two of the many TCE and/or PCE-containing aerosol products used at the plant. *Id.* 323-335.

Aerosol cans at the ALP plant were ordinarily disposed when the cans stopped spraying. *Id.* 362. Some of those cans still contained PCE and/or TCE. *Id.* 317-318, 323, 363-364. ALP's Rule 30(b)(6) representative, James Ennis, testified that spent aerosol cans used at the plant were disposed in

general plant trash.[9] *Id.* 372; *see also id.* 370. Latex gloves and plastic bottles used to apply PCE and/or TCE containing products would also have been disposed in the general trash. *Id.* 382-385. Rags used to wipe excess PCE and/or TCE off equipment may also have been thrown in the trash once dry to the touch. *Id.* 377-381.

ALP's general plant trash was picked up by BFI, a commercial waste hauler, and taken to the Landfill. *Id.* 387-389. The trash was buried at the Landfill until fall 1996, when the Landfill began transferring Class I trash to another site for burial. *Id.* 387-391; PSF 42. ALP's Rule 30(b)(6) representative testified that spent aerosol cans were thrown in the general trash at ALP both before and after ALP purchased a device designed to puncture and drain aerosol cans. PSAF 372, 375; *see also id.* 386. ALP produced no records of when this device was purchased, and former ALP employee Scott Walker testified it was not purchased until the last year general trash from ALP was buried at the Landfill.[10] *Id.* 365-366; PSF 42. No regulation required the plant to dispose all spent TCE- and PCE-contaminated aerosols in hazardous waste drums. PSAF 386.

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[9] RCRA regulations define as "empty" any container that (a) was emptied by the means commonly employed for that container and (b) contains no more than one inch of residue or (c) contains less than three percent by weight of its original contents. 40 C.F.R. § 261.7(b)(1). The state provided analogous written guidance to the Landfill in 1986, shortly after ALP began sending trash there. PSF 77. ALP's Rule 30(b)(6) representative testified that "by state regulations you're allowed to have residual paints or fluids in a can for dumpster removal." *Id.* 370.

[10] Aerosol cans that have been punctured may still contain some residues, according to ALP's Rule 30(b)(6) representative. *Id.* 370; *see also id.* 442-443.

ALP tries to impeach its own Rule 30(b)(6) testimony with the testimony of a former employee, Mr. Walker, that in 1995 he formalized a "policy" of disposing spent aerosols used on the manufacturing floor as hazardous waste.[11] *Id.* 396-397. Even if credited, Mr. Walker's testimony does not foreclose ALP's liability. Mr. Walker did not work at ALP before July 1992 and was not responsible for waste management until January 1995—a decade after the plant began using aerosols containing TCE and/or PCE, and within the last two years that general plant trash was buried at the Landfill. *Id.* 317-318, 320, 386, 396, 413; PSF 42. Walker has no personal knowledge of how aerosols were disposed before he arrived at the plant in July 1992 and limited knowledge of how they were disposed between July 1992 and January 1995, when he was not responsible for waste management. *Id.* 396, 398, 413.

Mr. Walker's testimony concerning the period between January 1995 and fall 1996 should not be credited for several reasons, including these:

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[11] Mr. Walker did not claim this "policy" covered disposal of the PCE and/or TCE-aerosols used in plant bathrooms from at least 1985 through 1993. *Id.* 338-340, 376. The evidence that ALP sent at least some PCE and/or TCE-containing aerosols to the Landfill is undisputed.

ALP's argument that Mr. Ennis is not based in Dickson and must have been speculating about local practices ignores that ALP was required to familiarize Mr. Ennis with ALP's relevant knowledge including knowledge held by former employees, in response to Plaintiffs' Rule 30(b)(6) notice. *See* PSAF 425-26; *Rainey v. Am. Forest & Paper Ass'n, Inc.*, 26 F. Supp. 2d 82, 94 (D.D.C. 1998) (Rule 30(b)(6) designee "presents the corporation's 'position' on the topic" and "is not simply testifying about matters within his or her own personal knowledge, but rather is 'speaking for the corporation' about matters to which the corporation has reasonable access" (citations omitted)). A trier of fact could surely presume that ALP complied with its duty to prepare its Rule 30(b)(6) corporate representative on duly noticed topics.

First, ALP was required to identify wastes that it managed as hazardous waste on annual hazardous waste stream reports submitted to TDEC. PSAF 411-416; *see also* Tenn Comp. R. & Regs. 1200-01-11-.03(5)(b). For the years when ALP sent general trash to be buried at the Landfill, ALP's hazardous waste stream reports list a number of wastes that were handled as hazardous waste rather than as general trash, but do not list TCE, PCE, aerosol cans, or aerosol can residues as among those hazardous waste. *Id.* 403-410, 417-419, 422-423. Indeed, none of ALP's hazardous waste stream reports shows PCE and TCE residues in spent aerosols being managed as hazardous waste until 2003. *Id.* 424. ALP's documentary record thus strongly suggests that Walker may misremember when ALP began disposing spent aerosols as hazardous waste rather than as general trash.

Second, Mr. Walker testified that the disposal policy he purportedly formalized was committed to writing. *Id.* 397, 399. If so, that writing is the best evidence of what the policy provided. PRF 67; Fed. R. Evid. 1002. ALP produced no writing that reflects adoption of a written policy for aerosol can disposal at the plant during the relevant timeframe. PSAF 400. The only such policy ALP identified is dated July 2004—more than seven years after ALP's general trash was last disposed at the Landfill. *Id.*

Third, Mr. Walker provided no credible reason why ALP would have chosen to dispose of all spent aerosols from its manufacturing floor as hazardous waste. Hazardous waste disposal was costly for ALP. *Id.* 368, 373.

Given that RCRA and state regulations did not at that time preclude disposal of spent cans containing less than one inch of residue at Landfill, *see supra* n.9, it is unclear why ALP would have incurred that cost.

C. Nemak

Nemak does not dispute that it may have disposed PCE-contaminated waste from its Dickson foundry at the Landfill.[12] Dkt. 363 at 23-25; PRF 137.

D. The Environmental Fate of the TCE and PCE Wastes Defendants Disposed at the Landfill

Undisputed evidence establishes that wastes disposed by Interstate, ALP, and Nemak entered the environment. Mr. Brown and Mr. Warf watched some of the liquid wastes Interstate sent to the Landfill spill onto the ground at the Landfill as they were being dumped. PSAF 104-106. Wastes buried in closed containers were subject to crushing by the heavy equipment used to cover and compact waste at the Landfill. *Id.* 439. Dr. Kirk Wye Brown, one of Plaintiffs' experts, concluded that buried metal containers would have corroded within about three to six months in the Landfill environment. *Id.* 440-441. This conclusion is undisputed by Defendants, whose experts do not address the physical fate of containers buried at the site. *Id.* 453-454, 465.

Today, landfills generally must be constructed with polyethylene liners that retard the downward migration of waste. Tenn. Comp. R. & Regs. § 1200-01-07-.04(4)(a)(i)-(ii). The Defendants' wastes, however, were disposed

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[12] Plaintiffs' opening summary judgment brief and supporting statement of facts summarize the evidence that Nemak sent PCE wastes to the Landfill. *See* Dkt. 390 at 33-35; PSF 66-84.

in parts of the Landfill that lack a modern liner. PSAF 447. The parts of the Landfill at which wastes were disposed until 1988 were unlined. PSF 91, 93. Beginning in 1988, wastes were disposed in a "Balefill" area that had at most a clay liner. *Id.* 42, 91, 94-96. Dr. Brown, who has done extensive fieldwork on the fate and transport of organic solvents at landfills, testified that clay liners do not stop the downward migration of solvents like PCE and TCE. PSAF 447; *see also* PSF 96. Defendants' experts did not dispute this. PSAF 454-455, 464.

Dr. Stavros Papadopulos, another of Plaintiffs' experts, found that the presence of PCE and TCE in deep monitoring wells at the Landfill indicates that both chemicals were disposed at the site and that PCE disposed there will degrade to TCE, and ultimately to daughter products of TCE, in the environment. *Id.* 448-450. These conclusions are undisputed. *Id.* 455, 465. Interstate's expert formed no opinions about disposal at the Landfill or fate and transport of TCE and/or PCE at the Landfill. *Id.* 451-54. ALP and Nemak's expert, Henry He, calculated that, assuming each Defendant disposed PCE and (for ALP) TCE at the Landfill, contamination from those chemicals will travel downwards and reach the groundwater at the site. *Id.* 457-60. Mr. He also did modeling that predicts that PCE disposed by ALP and Nemak would degrade to TCE in groundwater. *Id.* 462.

E. Defendants' Contributions to the Endangerment Posed by Disposal of PCE and TCE Wastes at the Landfill

Defendants suggest that even if they disposed PCE and/or TCE at the Landfill, they cannot be held liable for contributing to any potential endangerment posed by PCE and TCE wastes unless Plaintiffs first "confirm" that PCE and TCE wastes they individually disposed already have been detected in the soil and groundwater. *See* Dkt. 363 at 26. This theory mischaracterizes the legal standard for contribution under section 7002 and would undermine the precautionary principles enshrined in that standard.

1. Contribution Liability Under Section 7002(a)(1)(B)

Defendants first suggest that contribution under section 7002 is analogous to common-law proximate causation. Dkt. 363 at 11-12, 31-32. They identify no RCRA case that supports that narrow reading.[13] Courts that have considered the scope of contribution liability under RCRA's imminent

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[13] *See Corrigan v. E.W. Bohren Transport Co.* is a pre-RCRA wrongful death case decided on state common-law grounds. 408 F.2d 301, 302 (6th Cir. 1968). *Zands v. Nelson* and *Voggenthaler v. Maryland Square LLC* underscore the difference between common-law proximate cause and RCRA's contribution standard, as discussed below. The causation problem in *In re Voluntary Purchasing Groups, Inc. Litigation,* No. Civ. 3:94-CV-2477-H, 2002 WL 31431652 (N.D. Tex. Oct. 22, 2002), was that the plaintiffs provided "no . . . evidence" that the defendants had sent *any* wastes to the relevant site. *See id.* at *6-*7 (discussing Ridgeway site). The decision distinguished cases in which evidence connecting each defendant's wastes to a disposal site that may present an endangerment. *Id.* at *6 & n.2. *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 210 (2d Cir. 2009), discussed in Plaintiffs' concurrently filed opposition to the City and County's summary judgment motion, addresses only the facts necessary to establish whether a disposal site as a whole may present an endangerment and is factually distinguishable. *See* Pls.' Joint. Resp. to City and County's Mot. for Summ. J. Argument II.A.

and substantial endangerment provisions have recognized that Congress's intent in enacting those provisions was to "incorporat[e] *and expand[]* upon the common law." *United States v. Waste Indus., Inc.*, 734 F.2d 159, 168 (4th Cir. 1984) (emphasis added) (discussing section 7003); *accord United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 199 (W.D. Mo. 1985).

Although RCRA does not define contribution, "[t]he relevant legislative history supports a broad, rather than a narrow, construction of the phrase 'contributed to.'" *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1383 (8th Cir. 1989) (discussing section 7003). The Sixth Circuit has joined several others in holding that for purposes of citizen enforcement under section 7002(a)(1)(B), "'[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 v. Sun Oil Co.*, 148 F.3d 606, 610 (6th Cir. 1998) (emphasis added) (quoting *Dague v. City of Burlington*, 935 F.2d 1343, 1356 (2d Cir. 1991), *rev'd in part on other grounds*, 505 U.S. 557 (1992)).[14]

Zands v. Nelson and *Voggenthaler v. Maryland Square LLC*, relied on by Defendants, illustrate the breadth of the contribution standard. Both held that defendant companies that never used the chemicals at issue may be found liable under RCRA section 7002(a)(1)(B) for contributing to a potential endangerment created when chemicals used by other businesses leaked on

[14] *See also Cordiano*, 575 F.3d at 210; *Burlington N. & Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1021-22 (10th Cir. 2007); *Cox v. City of Dallas*, 256 F.3d 281, 299 (5th Cir. 2001).

lands owned by the defendants. *Zands*, 779 F. Supp. at 1257, 1264; *Voggenthaler*, No. 08-CV-1618, 2010 WL 2947296, at *5-*8. The "causal relationship between a defendant and an imminent and substantial endangerment" needed in both cases, *see* Dkt. 363 at 12, did not include any showing that the defendants were the final link in the casual chain leading to environmental contamination and risk of harm.

Defendants make too much of the disputed issue of whether MW-DD and MW-DS, the only two monitor wells in the waste disposal areas of the Landfill, monitor areas where their wastes were disposed. *See* PRF 7, PSF 125. Defendants' premise—that Plaintiffs must show that their waste has already contaminated the groundwater—is inconsistent with the "may" language of section 7002(a)(1)(B) and judicial precedent. *See Davis*, 148 F.3d at 610 (endangerment may be declared anywhere in the chain of events that gives rise to harm); *Me. People's Alliance v. Holtrachem Mfg. Co.*, 211 F. Supp. 2d 237, 255-56 (D. Me. 2002), *aff'd*, 471 F.3d 277 (1st Cir. 2006) (holding defendant liable under section 7002(a)(1)(B) for disposing wastes that may present an endangerment and ordering a study to determine the extent of harm and evaluate the need for remediation); *Petropoulos v. Columbia Gas of Ohio, Inc.*, 840 F. Supp. 511, 516 (S.D. Ohio 1993) (denying defendant's summary judgment motion on the existence of a potential endangerment because insufficient measures had been taken to prevent leaks

from underground tank).[15] Defendants cite no evidence that the wastes disposed in parts of the Landfill used from the late 1970s onwards will not migrate into the subsurface. Dr. Papadopulos testified that wastes in locations *not* monitored by wells MW-DD and DS are likely sources of contamination to the Harry Holt well, for example. PSAF 540.

Defendants also suggest that Plaintiffs must somehow tag every molecule of PCE and/or TCE waste they disposed at the Landfill and trace those molecules into the groundwater before holding them accountable as contributors. Dkt. 363 at 25-31. Defendants fail to cite any authority that supports this proposition either. Precedent is clear that, to establish contribution under RCRA's imminent and substantial endangerment provisions, one need only show that a defendant's "waste (*or at least waste of the same type where the wastes have been commingled*) 'has contributed or . . . is contributing' to a situation which may present an imminent and substantial endangerment to health or the environment."[16] *Conservation Chem. Co.*, 619 F. Supp. at 199 (emphasis added) (discussing RCRA section 7003); *accord United States v. Valentine*, 856 F. Supp. 627, 633-34 (D. Wyo. 1994). Defendants cite no contrary authority.

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[15] *See generally Interfaith Cmty. Org. v. Honeywell Int'l , Inc.*, 399 F.3d 248 (3d Cir. 2005) (courts applying the endangerment standard must err "in favor of protecting public health, welfare and the environment" (internal quotation marks omitted)).

[16] RCRA sections 7002 and 7003 are interpreted interchangeably because of their materially identical language. *See* Dkt. 390 at 24 n.10 (citing cases).

Lincoln Properties Ltd. v. Higgins is instructive. No. S-91-760, 1993 WL 217429 (E.D. Cal. Jan 21, 1993). The defendants were dry cleaners who used PCE and disposed PCE at the site. *Id.* at *2. PCE and its daughter products had been found in the soil and groundwater. *Id.* at *5-6. The plaintiff's expert had concluded that it would be "'scientifically impossible to determine which portion of the groundwater has been contaminated with PCE by particular sources of PCE.'" *Id.* at *6. All the expert could say was that some PCE in groundwater would migrate away from the site and contaminate an offsite well to above the MCL within two decades or less. *Id.* at *6. Defendants' expert contended it would take thirty to seventy years for contamination in the well to reach the MCL. *Id.* at *7. The court found the dry cleaners jointly and severally liable for contributing to PCE disposal that may present an imminent and substantial endangerment. *Id.* at *15.

Courts enforcing CERCLA have likewise declined to require plaintiffs to pinpoint which parts of a mass of contamination that endangers the environment are attributable to individual defendants, emphasizing this requirement would undermine Congress's intent to establish a "relaxed standard of causation" that (like RCRA section 7002's) expands upon common-law notions of proximate cause. *United States v. Bliss*, 667 F. Supp. 1298, 1309-10 (E.D. Mo. 1987). In *United States v. Bliss*, still bottom residues from the defendants' plant were stored in tanks and com-mingled with wastes from other manufacturers. *Id.* at 1303, 1311. Wastes from those tanks

were later sprayed at four sites as a dust control measure. *Id.* at 1303. The defendants argued that they could not be held liable because the government had shown that dioxin and other chemicals present in their wastes were present at the sites, but had not conclusively proven that any of those chemicals came from the defendants' wastes. *Id.* at 1309. The court rejected this argument, noting that "the co-mingling and migration of wastes at a disposal site makes identification of sources scientifically difficult" and that to require a plaintiff to "'fingerprint' wastes is to eviscerate the statute" by requiring a level of proof that could be far costlier than actual cleanup. *Id.* at 1309-10 (internal quotations omitted).

The same policy rationales and concerns apply here. Congress intended the imminent and substantial endangerment provisions of RCRA to expand upon common-law notions of proximate cause and to establish more relaxed, precautionary standards of proof for actions to abate threats to health or the environment. *Aceto,* 872 F.2d at 1383; *Davis*, 148 F.3d at 610; *Waste Indus.*, 734 F.2d at 168. Plaintiffs have shown that groundwater and soil under the Landfill are contaminated with PCE and TCE and that TCE and its daughter products have already escaped the site and ruined wells and springs. Dkt. 390 at 23-27; PSF 297-298, 384; PSAF 449, 450, 534. Drs. Papadopulos and Brown testified that PCE- and TCE- contaminated wastes disposed at the Landfill have polluted and will continue to pollute groundwater beneath the site. PSAF 449, 450, 534. Dr. Brown expressly concluded that Interstate, ALP

and Nemak's wastes are part of the mass of wastes that over time will continue to leach PCE and TCE into the environment. *Id.* 313, 427, 431. These findings are uncontroverted by Interstate's expert, who offered no opinions about who disposed PCE and TCE at the Landfill, and largely corroborated by Nemak and ALP's, who found that, if these Defendants disposed aerosol cans containing one or both chemicals at the Landfill, then those chemicals would add to the contamination in the groundwater. *Id.* 457-460.

In short, Interstate, ALP and Nemak have added PCE and (for Interstate and ALP) TCE to the mass of wastes at the Landfill that may present an imminent and substantial endangerment at the Landfill. Nothing more is required to establish their liability as contributors to that endangerment. *Conservation Chem. Co.*, 619 F. Supp. at 199.

2. ALP and Nemak's Contributions

ALP and Nemak offer three additional arguments concerning contribution liability, none availing. The first is that they cannot be contributing to any potential endangerment because Dr. Papadopulos testified that PCE wastes disposed by Nemak would not degrade to pure DNAPL *TCE* contamination under the Landfill.[17] This proves nothing. PCE

[17] Defendants also do not support their premise that wastes buried at the Landfill before 1972 are the source of DNAPL TCE beneath the Landfill. Dkt. 363 at 24. The cited testimony lacks foundation, as the State did not regulate the Landfill until September 1972 and has never investigated or required an investigation of the sources of TCE and PCE contamination detected in soil and groundwater at the Landfill. PRF 8.

and TCE also move through and contaminate soil and groundwater in solution, and PCE degrades to TCE only when in solution, not as a DNAPL. PSF 84, 123, 139, 161. None of Plaintiffs' or Defendants' experts in this matter has suggested that PCE and TCE—highly toxic chemicals that cannot lawfully exceed five parts per *billion* in public drinking water or state waters designated as aquatic habitat—endanger health or the environment only as pure, undissolved chemicals. *Id.* 4-14, 255; PSAF 466, 535; *see* Tenn. Comp. R. & Regs. § 1200-04-03-.03(1)(j). The drinking water standard of five parts per billion is a dissolved concentration. That ALP and Nemak may not be contributing to DNAPL TCE contamination beneath the Landfill does not mean they are not contributing to PCE and TCE contamination in groundwater beneath the Landfill. Their own expert, Mr. He, has concluded that any PCE or TCE these companies disposed at the Landfill would travel through the soil beneath the Landfill in dissolved form and ultimately add to groundwater contamination. PSAF 457-460, 462.

ALP and Nemak also suggest they should not be held liable as contributors because the concentrations of TCE and PCE Mr. He has predicted would reach the groundwater from their wastes are too low. Dkt. 363 at 29-31. But Mr. He's calculations present each defendant's (assumed) contribution in isolation, rather than in conjunction with PCE and TCE disposed by others. PRF 183; PSAF 464. These artificial calculations do not

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characterize the actual threat posed by the collective mass of PCE and TCE wastes disposed by all contributors at the Landfill.

ALP and Nemak cite no authority that would require a section 7002 plaintiff at a site with multiple sources of contamination to prove that each individual defendant's wastes, taken in isolation, would cause an endangerment. This would make little practical sense, particularly given the statute's precautionary thrust and its emphasis on abating threats to the environment before they materialize.[18] *Cf. Bliss,* 667 F. Supp. at 1309-10 (discussing analogous CERCLA causation standards); *Dague*, 935 F.2d at 1356 (stating that section 7002(a)(1)(B) "does not require a showing that actual harm will occur immediately so long as the risk of threatened harm is present").[19] Defendants' theory is also in tension with the many RCRA cases that emphasize that there is no set floor on the concentration of contamination that must result from disposal of *all* wastes at a site before a

[18] These principles are discussed at greater length in Plaintiffs' opening summary judgment brief and concurrently filed response to the City and County's summary judgment motion. Dkt. 390 at 20-23; Pls.' Joint Opp'n. to City and County's Mot. for Summ. J. Argument II.A & II.C-II.D.

[19] *See also Voggenthaler*, 2010 WL 2947296, at *9-*10 (holding PCE plume endangered environment and potentially health, despite uncontroverted evidence that no domestic water supply wells were in use near plume and expert dispute as to whether the plume could result in harmful vapor intrusion); *Fairway Shoppes Joint Venture v. Dryclean U.S.A. of Fla., Inc.*, No. 95-8521, 1996 WL 924705, at *5-*9 (S.D. Fla. Mar. 7, 1996) (holding PCE that had contaminated soil and groundwater under property, but not yet migrated offsite, had endangered environment); *Petropoulos*, 840 F. Supp. at 516; *EPA*, *Guidance on the Use of Section 7003 of RCRA* (Oct. 1997), Dkt 374-1 at 10 (stating that if "wastes, in place, may present an imminent and substantial endangerment," no proof of offsite migration is required).

plaintiff can establish that the site may present an imminent and substantial endangerment. *See Conservation Chem. Co.*, 619 F. Supp. at 194 (finding RCRA does not "require quantification of the endangerment," such as "proof . . . that a water supply will be contaminated to a specific degree"); *accord Voggenthaler*, 2010 WL 2947296, at *8 (applying same standard in section 7002 action involving multiple contributors); *Lincoln Props.*, 1993 WL 217429, at *13 (same).

ALP and Nemak's last claim is that because their expert, Mr. He, predicted that PCE and (for ALP) TCE from these companies' wastes would reach the groundwater in dissolved concentrations below the maximum contaminant level, their disposal "would dilute, not increase," the contamination in the groundwater. Dkt. 363 at 26. This is nonsense. One cannot dilute concentrations of TCE and PCE by *adding* these chemicals to water that would be present at the Landfill anyway. ALP and Nemak did not send water to the Landfill. They sent solvent wastes contaminated with PCE and (for ALP) TCE. If ALP and Nemak had not sent those wastes to the Landfill, the precipitation that leached through the Landfill would have lower concentrations of PCE and TCE in it, and the concentrations of PCE and TCE below the Landfill would likewise be lower.

ALP and Nemak do not dispute that there is a mass of PCE and TCE contamination at the Landfill, that waste disposed at the Landfill has leached into the groundwater, that PCE and TCE are present in groundwater

under the Landfill, that the PCE and TCE contamination in the groundwater beneath the Landfill is uncontained, that PCE degrades into TCE, and that that offsite drinking wells are already contaminated with TCE in concentrations that are unsafe. Dkt. 363 at 13-16, 25-33. Their own expert calculated that over time, the PCE and TCE these companies disposed will reach and add to soil and groundwater contamination at the site.

These facts are more than sufficient to establish that Nemak is liable for contributing to the waste that is causing an endangerment and to establish at least a material factual dispute as to ALP and Interstate's liability under section 7002(a)(1)(B).

II. NRDC Has Article III Standing

NRDC has standing based on the evidence submitted and the reasons set forth in this Court's previous order.[20] Dkt. 253 at 8-9 & n.3.

An organization has standing if one of its "members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000). An individual has standing to sue in her own right if she has an

[20] This Court need not decide whether NRDC has standing, since the standing of Beatrice Holt and Sheila Holt-Orsted is uncontested. *See Massachusetts v. EPA*, 549 U.S. 497, 518, 526 (2007) (finding that all petitioners had standing because one plaintiff met the requirements of Article III); *but see Fednav Ltd. v. Chester*, 547 F.3d 607, 614 (6th Cir. 2008) (considering standing on a plaintiff-by-plaintiff basis).

"injury in fact" that is "fairly traceable" to the defendants' conduct and that would likely be "redressed" by a favorable decision. *Id.* at 180-81. These prerequisites are met here.

A. Joyce Tucker Is a Member of NRDC

Defendants' standing challenge rests in part on their mistaken premise that Joyce Tucker is no longer a member of NRDC. Dkt. 363 at 34-35. An individual is an NRDC member if she donates to NRDC at least once every fifteen months. PSAF 556-557. Ms. Tucker has donated to NRDC at least once every fifteen months since 2003. *Id.* Ms. Tucker is a member of NRDC, and was a member when this lawsuit was filed. *Id.* 557.

B. Joyce Tucker Suffers an Injury in Fact

1. Ms. Tucker's Increased Risk of Harm from Contamination of Her Well and Public Water Is an Injury In Fact

Defendants' claim that Ms. Tucker suffers no injury in fact because her well water is not presently contaminated ignores that, because of the Landfill contamination, she faces an increased risk that her well water and public water supplies will become contaminated.

The standard for relief on the merits in this case is a showing that contamination "may" present an imminent and substantial endangerment. In *Laidlaw*, the Supreme Court held that the standing bar should not be raised "higher than the necessary showing for success on the merits." 528 U.S. at 181; *see also Interfaith*, 399 F.3d at 257; Dkt. 253 at 7-8. A showing that contamination "may" affect Ms. Tucker is enough for standing.

Article III jurisprudence has long recognized that an increased risk of harm is an injury in fact, even if the harm is uncertain. *See Laidlaw*, 528 U.S. at 182-185; *Me. People's Alliance v. Mallinckrodt*, 471 F.3d 277, 283-86 (1st Cir. 2006); *Interfaith*, 399 F.3d at 257; *Baur v. Veneman*, 352 F.3d 625, 633-35, 639-42 (2d Cir. 2003); *N.Y. Pub. Interest Research Grp. v. Whitman*, 321 F.3d 316, 324-26 (2d Cir. 2003); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 160 (4th Cir. 2000); *see also Cent. & Sw. Water Servs., Inc. v. EPA*, 220 F.3d 683, 700-701 (5th Cir. 2000) (rejecting standing because plaintiff "ha[d] not established *the possibility* that PCB bulk product wastes disposed of in his town's landfill could contaminate the aquifer that supplies his drinking water" (emphasis added)). "[E]ven a small probability of injury is sufficient to create a case or controversy." *Vill. of Elk Grove Vill. v. Evans*, 997 F.2d 328, 329 (7th Cir. 1993). The Supreme Court has found standing based on a possible future release of radiation due to "generalized concern about exposure to radiation and . . . apprehension flowing from the uncertainty about the health and genetic consequences [of radiation]." *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 74 (1978).

TCE and PCE are harmful to human health. PSF 4, 6, 7, 11, 12. In this case, evidence demonstrates that TCE or PCE from the Landfill could contaminate Ms. Tucker's well water. PSAF 508-510, 537-539. Landfill contamination has migrated in the direction of Ms. Tucker's well. PSAF 384-

385. The contamination could migrate underneath the West Piney River, if it has not done so already.[21] PSF 133, 235-36, 297-98, 384-85. Ms. Tucker uses well water for drinking water and other household uses. *Id.* 374. The contamination therefore could affect Ms. Tucker and she suffers an injury in fact based on this increased risk.

That Ms. Tucker's well water was not contaminated when last tested does not show that her well could not become contaminated in the future. Dr. Strauss's testimony, cited by Defendants, confirms that a well that tested negative for contamination on four occasions could have a foreseeable risk of future contamination.[22] PSAF 559. Ms. Tucker's testimony that she is "satisfied with [her] well water because of the testing *at this time*" does not speak to whether Ms. Tucker's well will become contaminated in the future. *Id.* 562. Ms. Tucker testified that she had not connected to public water due to the cost and the current state of her water. *Id.* 563. This testimony describes Ms. Tucker's opinion about her well water at present; it does not

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[21] Because there is abundant expert evidence that contamination could travel under the River, PSF 170, 225-26, 235-36, 252, 351, Ms. Tucker's concern about the potential contamination of her well water is both reasonable and sufficient for standing. *See, e.g.*, *Laidlaw,* 528 U.S. at 184; *Robertson v. Monsanto Co.*, 287 Fed. Appx. 354, 360, 2008 WL 2787478, at *5 (5th Cir. 2008); *Mallinckrodt*, 471 F.3d at 286; *Baur*, 352 F.3d at 630, 633-35; *N.Y. Pub. Interest Research Grp.*, 321 F.3d at 325.

[22] Dr. Strauss stated that she would need more information, including information about the movement of the contaminant plume, to respond to questions about the future risk to a hypothetical well six miles from the Landfill. PSAF 560. Defendants' counsel did not provide this information. *Id.* Nor did counsel ask Dr. Strauss about the risk of contamination to Ms. Tucker's well, which is about five miles from the Landfill and only one mile from the River, where TCE has been detected. PSAF 561; PSF 372, 378.

show that no risk of future contamination exists. Nor does it disprove her concern about future contamination. PSF 373.

Evidence also demonstrates that TCE or PCE from the Landfill could contaminate public water in Dickson County. Ms. Tucker is concerned about this risk. *Id.* 375. There is evidence of contamination in the West Piney River and in a spring that feeds the West Piney River. *Id.* 166, 168, 378. The River is a significant source of public water in Dickson County. *Id.* 377. On at least one occasion in the past, TCE was detected in water at the City of Dickson's water treatment plant. *Id.* 171. Ms. Tucker drinks public water in homes and restaurants. *Id.* 376. The increased risk of contamination of public drinking water constitutes a cognizable injury in fact.

2. Ms. Tucker's Decreased Recreational and Aesthetic Enjoyment of the West Piney River Is an Injury In Fact

Ms. Tucker suffers an injury in fact based on her decreased aesthetic and recreational enjoyment of the West Piney River. "[E]nvironmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Laidlaw*, 528 U.S. at 183; *see also Am. Canoe Ass'n v. City of Louisa Water & Sewer Comm'n*, 389 F.3d 536, 542 (6th Cir. 2004). Decreased use of an area injures a plaintiff's aesthetic interests in the beauty of an area. *See Meister v. USDA*, No. 09-1712 2010 WL 3766646 at *3 (6th Cir. Sept. 29, 2010); *Mallinckrodt*, 471 F.3d at 284-85; *Laidlaw*, 528 U.S. at 184.

Ms. Tucker uses the West Piney River area, but her use and enjoyment of the area have declined due to the contamination. PSF 380-382, PSAF 564-565. TCE has been found in the River, PSF 378, and although Ms. Tucker would like to take her grandchildren wading there, she does not do so because of her concerns about contamination. *Id.* 382. Ms. Tucker also walks near the River. PSAF 564. She would walk near the River more, and enjoy it more, if TCE were not discharged to its waters. *Id.* 565. These recreational and aesthetic injuries are injuries to Ms. Tucker herself. Direct exposure to contamination is not necessary to establish a recreational or aesthetic injury. *Interfaith*, 399 F.3d at 256-57; *see also Laidlaw*, 528 U.S. at 182 (finding injury based on desire to picnic and walk *near* contaminated river). Ms. Tucker has lost the recreational and aesthetic enjoyment she would experience while taking her grandchildren wading. Her use and enjoyment of the river has also declined during her walks near the river. These are cognizable injuries for purposes of Article III. *Laidlaw*, 528 U.S. at 182-83; *Interfaith*, 399 F.3d at 256-57.

CONCLUSION

For the reasons above, the Court should deny Interstate, ALP and Nemak's joint motion for summary judgment.

November 18, 2010 Respectfully submitted,

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CERTIFICATE OF SERVICE

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

PLAINTIFFS' JOINT RESPONSE TO ALP LIGHTING AND CEILING PRODUCTS, INC., NEMAK USA, INC., AND INTERSTATE PACKAGING COMPANY'S MOTION FOR SUMMARY JUDGMENT

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