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 REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

Defendants attempt to create the illusion of a genuine issue over Plaintiffs' motion for partial summary judgment by conjuring facts from thin air—they invent, for example, an EPA determination that no endangerment exists—and by denying their own experts' testimony and the import of their own and TDEC's documents. But the facts that establish this Court's jurisdiction, that show that Landfill waste "may present" an endangerment within the meaning of RCRA, and that demonstrate that Nemak, the County, and the City contributed to this potential endangerment are not genuinely disputed. Defendants' arguments as to the legal significance of those facts ignore RCRA's plain meaning and a quarter century of controlling appellate precedent.

Plaintiffs' motion for partial summary judgment should be granted.

ARGUMENT

I. This Court Has Properly Asserted Jurisdiction

Defendants' briefs do not dispute that Beatrice Holt and Sheila Holt-Orsted have standing; that Plaintiffs gave notice of their intent to sue; or that EPA and TDEC have taken no action that bars suit under RCRA section 7002(b)(2)(B)-(C), 42 U.S.C. § 6972(b)(2)(B)-(C). This Court has jurisdiction.

The standing of NRDC is established by injuries to its member, Joyce

Tucker.[1] Defendants express doubt that Ms. Tucker is really an NRDC member, but her declarations on this are uncontroverted. Dkt. 371-3 ¶ 2; Dkt. 69 ¶ 2. Defendants' insinuation that Ms. Tucker's membership has lapsed because her last contribution to NRDC was in 2004, Dkt. 394 at 15-16, is both unsupported and expressly contradicted by NRDC's membership director. Dkt. 371-4 ¶ 8; Dkt. 413 & 413-1. Defendants respond by citing a deposition transcript in which they did not ask Ms. Tucker about her post-2004 donations. *See* Dkt. 414-16 at 12:18-13:12; Dkt. 394 at 16. Genuine issues are not created by a failure to examine a witness.

Ms. Tucker has suffered cognizable injuries because the Landfill contamination decreases her use and enjoyment of the West Piney River and may threaten her drinking water. *See* Dkt. 390 at 18-20, Dkt. 408 at 31-35. Defendants concede that these injuries "mimic . . . Supreme Court holdings" in which standing was found, Dkt. 394 at 16-17, and standing precedent certainly recognizes such injuries as sufficient, *see* Dkt. 408 at 31-35. The fact that Ms. Tucker's injuries are widely shared, as Defendants attest, Dkt. 394 at 17, does not make those injuries non-justiciable "generalized grievances." *See FEC v. Akins*, 524 U.S. 11, 24-25 (1998).

NRDC has standing.

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[1] Standing law does not require NRDC to identify multiple members. NRDC declined to identify other members to protect their First Amendment associational rights, *see NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-64 (1958), to avoid burdening them with immaterial depositions, and to limit the potential for harassment in this high-profile case.

II. Undisputed Evidence Establishes an Actionable Endangerment

Section 7002(a)(1)(B) of RCRA empowers citizens to seek equitable 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) (internal quotation marks omitted). This right extends to potential harms that have not been and may never be realized. *Id.* at 610. Liability may attach "at any point in a chain of events which may ultimately result in harm to the public." *Id.* (internal quotation marks omitted).

Defendants do not genuinely dispute that TCE is regularly detected in springs and on- and off-site wells;[2] that the Landfill is a likely source of the off-site contamination in some locations, including Bruce and Sullivan Springs;[3] that pockets of dense, non-aqueous phase liquid TCE likely exist under the Landfill and that these likely pockets will contaminate the aquifer indefinitely;[4] that TCE levels are increasing in some locations within the County-designated environmental risk area;[5] that the contamination may spread to wells in which TCE has not previously been detected;[6] that TCE

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[2] Dkt. 406 & 396 ¶¶ 126, 130, 150-151, 154-156, 159, 161-163, 167-168, 169, 186, 258. The "dispute" with PSF 169 is not genuine, as the evidence cited shows that contaminated wells and springs were taken out of service.

[3] Dkt. 406 & 396 ¶¶ 172, 242, 243-244. The "dispute" with PSF 243-244 is not real. Both facts quote Defendants' expert's testimony.

[4] Dkt. 406 & 396 ¶¶ 142-143, 261-262. The "dispute" as to PSF 143 is not genuine, in light of Defendants' admission in PSF 142.

[5] Dkt. 406 & 396 ¶ 228.

[6] Dkt. 406 & 396 ¶ 280. Defendants admit that 6-10 wells could still become contaminated. The evidence they cite does not support their claim of downward trends at all wells.

above EPA's drinking water limit has recently been detected in a residential well that in July 2005 showed no TCE;[7] that the County's regular offsite monitoring program includes only seven wells, even though there are at least sixty-three wells in the County-designated environmental risk area;[8] and that at least nineteen residential wells within the risk area are still in household use.[9] These admitted conditions—including the indefinite condemnation of an aquifer to toxic pollution and the real risk that TCE will infiltrate active, unmonitored wells—"may" present a serious risk to health or the environment. *See* Dkt. 390 at 2-12, 20-27; Dkt. 405 at 9-11, 18-31.

The only real difference between the undisputed facts here and the endangerment allegations found sufficient in *United States v. Waste Industries*, 734 F.2d 159 (4th Cir. 1984), is that not all homes in the Dickson "risk area" have been connected to replacement water—making the risk here more severe than in *Waste Industries*. *Id.* at 163; Dkt. 406 & 396 ¶¶ 288-289 (responses). Contrary to Defendants' refrain, *see, e.g.*, Dkt. 397 at 12-13, 15, 20, EPA "has not made a finding of whether or not contamination at [the Landfill] constitutes an imminent and substantial endangerment to health or the environment." Dkt. 405 at 31 (quoting EPA brief); Dkt. 409 ¶ 551. TDEC, for its part, has no role under RCRA section 7002(a)(1)(B) and no particular

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[7] Dkt. 406 & 396 ¶ 297 (sentences 2-4).

[8] Dkt. 406 & 396 ¶¶ 288 (response), 296.

[9] Dkt. 406 & 396 ¶¶ 288-289 (responses). None of these 19 wells is part of the County's regular monitoring program. *Compare* Dkt. 400-6 (County list of 19 wells) *with* Dkt. 406 ¶ 296 (wells in regular monitoring program).

expertise in that federal provision's meaning.[10] That the *Waste Industries* site's geology differs from Dickson County's, *see* Dkt. 397 at 19, does not diminish liability. On the contrary, the Dickson site's "karst terrain" and "unpredictable" groundwater flow, *id.*, may speed contaminant migration, Dkt. 406 ¶ 97, 99, and increase risk.

Defendants mischaracterize *Davis v. Sun Oil Co.* as requiring "large and unmitigated hazards" that, Defendants say, do not exist here. Dkt. 397 at 12 (citing *Davis*, 148 F.3d at 610). But *Davis* denied summary judgment because no water contamination had occurred and drinking water standards did not apply to soil contamination. 148 F.3d at 609. Similarly, in *Cordiano v. Metacon Gun Club, Inc.*, the court declined to find liability on the basis of equivocal evidence that contamination exceeded unenforceable state guidelines. 575 F.3d 199, 203-04, 211-13 (2d Cir. 2009).

This case is different: It is undisputed that TCE has rendered a major part of Dickson County's groundwater unfit for human consumption. Community members have lost the use of springs and wells once relied on for drinking water due to TCE contamination above the MCL, an enforceable, federal drinking water standard, *see Int'l Fabricare Inst. v. EPA*, 972 F.2d 384, 387 (D.C. Cir. 1992) (per curiam). EPA's National Contingency Plan and CERCLA guidance typically require contaminated groundwater to be

[10] Defendants' brief relies extensively on inadmissible opinion testimony of Paul Sloan, a TDEC official, whose declaration sets out no relevant technical expertise, no personal knowledge, and no foundation. Dkt. 397 at 3-4; Dkt. 399 ¶ 1. Plaintiffs concurrently move to strike Mr. Sloan's declaration.

remediated to MCLs.[11] *See 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); 40 C.F.R. § 300.430(e)(2)(i)(C); *see also* 40 C.F.R. § 300.430(a)(1)(iii)(F); *Int'l Fabricare Inst.*, 972 F.2d at 390 (noting EPA may require cleanup to stricter MCLGs). Defendants admit this. *See* Dkt. 406 & 396 ¶¶ 316-317, 321-322; Dkt. 363 at 29 (calling 5 ppb PCE MCL "the recognized cleanup standard").[12]

Plaintiffs do not, as Defendants suggest, argue that an endangerment exists wherever scientific uncertainty exists. Here, harm has already occurred and is continuing. Groundwater has been rendered unusable. The prospect that contamination may reach wells in which earlier samples were uncontaminated is not hypothetical. It has already happened.[13] Dkt. 406 & 396 ¶ 297.

This case does not test the "limit[s] to how far the tentativeness of the word *may* can carry a plaintiff." *Crandall v. City of Denver*, 594 F.3d 1231, 1237 (10th Cir. 2010). In *Crandall*, the practice over which the plaintiffs sued—full-plane deicing—had been stopped and no contamination remained.

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[11] Defendants use *ipse dixit* and a web site to downplay the MCLs' significance. Dkt. 397 at 24 & n.10. Such argumentation is not evidence.

[12] *Sanchez v. Esso Standard Oil de Puerto Rico, Inc.*, considered contamination that would not travel more than 400 feet and would never reach drinking water or any ecological receptor. No. 08-2151, 2010 WL 3809990, at *9 & n.12 (D.P.R. Sept. 29, 2010). The *Sanchez* court did not consider EPA's reliance on MCLs as a cleanup standard.

[13] For these reasons, cases that find no endangerment because all contamination remains on site, or falls below MCLs, are inapposite. *See State of New York v. Solvent Chemical Co.*, No. 83-CV-1401C, 2006 WL 1582383, at *8 (W.D.N.Y. June 5, 2006); *Potter v. ASARCO, Inc.*, No. 8:96-CV-555, 1999 WL 33524234, at *6 (D. Neb. June 29, 1999).

Id. at 1235, 1238-40. But *Crandall* made clear that buried waste "may present an endangerment" if it would eventually seep into the groundwater and be consumed. *Id.* at 1238. "The essential point," *Crandall* explained, "is that the solid waste presents an endangerment if harm may result absent further remedial measures." *Id.* Such harm may result here.[14]

III. Nemak USA Contributed to the Potential Endangerment

Nemak admits that it used PCE spray cans and disposed of those cans, containing residual liquid, with its general trash at the Landfill. Dkt. 396 ¶¶ 69-70, 72-74, 78, 80-82. Nemak's expert has concluded that, assuming Nemak disposed of residual PCE at the Landfill (which Nemak admits doing), PCE is seeping down through the soil and will, in time, reach groundwater. Dkt. 409 ¶¶ 459-60. Nemak is "contributing" to the endangerment.

Defendants' theory that Nemak did not contribute *enough* solvent to cause the problem all by itself perverts the meaning of "contribut[e]." *See* 42 U.S.C. § 6972(a)(1)(B). As Defendants concede, "contribute" means "to have a *part* or *share* in producing an effect." Dkt. 394 at 5 (quoting *Cox v. City of Dallas*, 256 F.3d 281, 295 (5th Cir. 2001)) (emphasis added) (internal quotation marks omitted)). It does not mean that the contributor must have a large part or be a principal contributor. If it did, then RCRA would not allow abatement where several companies disposed waste that presents an endangerment, but no one company contributed enough waste to have caused

[14] *Avondale Federal Savings Bank v. Amoco Oil Co.*, 170 F.3d 692 (7th Cir. 1999), and other cases Defendants cite, are discussed at Dkt. 405 at 26-29.

the endangerment on its own. Nothing in RCRA's language, history, or precedent supports such a result.[15]

Nemak's alternative argument—that the existing monitoring wells are not detecting Nemak's waste because those wells were drilled in a different area of the Landfill—misapprehends the endangerment over which Plaintiffs sue. The relevant question is whether Nemak contributed to the risks posed by solvents disposed at the Landfill, not whether Nemak's wastes have migrated to the precise point between the Old City Dump and the Old County Landfill at which the two monitoring wells, MW-DS and MW-DD, were drilled.[16] Plaintiffs' expert has opined without contradiction that some offsite contamination "originate[s] from an area of the Landfill other than the immediate vicinity of MW-DS or MW-DD," Dkt. 382-1 at 18 n.23, and that chlorinated solvents disposed in the areas of the Landfill used by Nemak would migrate to the groundwater.[17] Dkt. 414-11 at 418:12-16. Even Nemak's expert concedes that, if Nemak disposed of residual PCE at the Landfill, some

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[15] The so-called "one molecule rule" decried by Defendants is a straw man, as Plaintiffs do not propose such a rule and Nemak's years of waste disposal relieve the Court of any need to reach the issue.

[16] Defendants never identify the location of the 1977 expansion landfill at which Nemak claims to have disposed waste until 1989. Parts of the Balefill, where Nemak disposed waste from 1989, are closer to wells MW-DS and MW-DD than parts of the Old County Landfill and Old City Dump. *See* Dkt. 391 ¶ 42; Dkt. 375-4 (showing fill areas); Dkt. 376-4 at 15:19-16:12, 68:19-69:18, 85:19-23 (identifying areas 1 and 4 in Dkt. 375-4 as Balefill areas).

[17] Defendants mischaracterize expert testimony about the migration of Nemak's waste. Dkt. 394 at 6 n.4. Dr. Papadopulos testified that: "If material is disposed—waste disposed in the newer portions of the landfill, there's no reason to believe that they are not going also to migrate to the ground water." *See* Dkt. 414-11 at 418:12-16; *see also* Dkt. 411 ¶ 202 (response).

of it will reach groundwater, and that PCE can degrade to TCE. Dkt. 409 ¶¶ 457-460, 462; Dkt. 396 ¶ 84 (response); *cf.* Dkt. 409 ¶ 447, 449-450.

Disagreement about *when* Nemak's waste will reach groundwater is not material to liability, for an endangerment is imminent "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). RCRA does not require a plaintiff to wait to sue until harm occurs. Section 7002(a)(1)(B) was enacted to "eliminate *any* risk" and allows suit "so long as the risk of threatened harm is present." *Id.* at 609-10. Nemak's waste contributes to such a risk.

IV. Plaintiffs' Statement of Undisputed Material Facts Is Proper

Defendants' lead argument, that Plaintiffs' statement of undisputed facts is inadequately "concise," *see* Dkt. 397 at 6-8, mistakenly assumes that every case can be decided on a small number of facts. But the events that gave rise to Plaintiffs' claim span five decades, encompass the operations of two governments and multiple industries, and were developed through depositions of thirty-five witnesses and review of hundreds of thousands of pages of documents. That this case involves a large body of evidence is precisely why as many undisputed facts as possible should be settled now rather than left, inefficiently, for trial. *Cf.* Fed. R. Civ. P. 56(d)(1)-(2).

Plaintiffs submitted 406 statements of fact with their motion. *See* Dkt. 391. Defendants collectively filed 327 alleged facts in support of their non-overlapping motions. *See* Dkt. 364, 366. Plaintiffs' facts were not excessive.

Plaintiffs cannot, within the confines of this reply brief, address each of the specific facts that Defendants attack as immaterial, inadmissible, or unsupported. But these facts are backed by admissible evidence and support or provide context for Plaintiffs' motion, anticipate Defendants' responses, and narrow the issues for trial. For example, the County singles out a fact about its ownership of the Landfill's expansion area as "trivial," Dkt. 397 at 7, but ownership is a basis for liability. 42 U.S.C. § 6972(a)(1)(B). Evidence that Defendants call hearsay includes government records, business records, and/or ancient documents that fall within established hearsay exceptions, *see* Fed. R. Evid. 803(6), (8)(B)-(C), (16); *see, e.g.*, Dkt. 391 ¶¶ 46, 61, 87, and also includes statements by the County, *see id.* ¶ 254, and deponents, *see id.* ¶ 48, which are not hearsay at all. Fed. R. Evid. 801. Defendants admit the truth of some facts that their brief dismisses as "mischaracterizations." *Compare* Dkt. 397 at 7-8 (discussing PSF 26 & 227) *with* Dkt. 406 ¶¶ 26, 227. Facts that Defendants dispute as mischaracterizations accurately summarize—and sometimes almost quote verbatim—the testimony and records cited in support. *See, e.g.*, Dkt. 391 ¶¶ 46, 243. In any event, none of Defendants' "disputes" creates a material issue because, in each instance, other, undisputed facts establish liability. *See supra* pp. 3-4.

CONCLUSION

Plaintiffs' motion for partial summary judgment should be granted.

December 1, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Michael E. Wall, hereby certify that on December 1, 2010, I caused the foregoing document:

PLAINTIFFS' JOINT REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

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