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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 18-1522 & 18-2880

[Filed March 4, 2019]

LAJIM, LLC, *et al.*, *Plaintiffs-Appellants*,	)
v.	)
GENERAL ELECTRIC COMPANY, *Defendant-Appellee*.	)

Appeals from the United States District Court for the Northern District of Illinois, Western Division.
No. 13-cv-50348 — **Iain D. Johnston**, *Magistrate Judge.*

ARGUED JANUARY 15, 2019 —
DECIDED MARCH 4, 2019

Before FLAUM, KANNE, and HAMILTON, *Circuit Judges*.

FLAUM, *Circuit Judge.* Plaintiffs-appellants purchased land near a former General Electric Company manufacturing plant that had operated for

sixty years; the plant leached toxic chemicals that seeped into the groundwater. The Illinois Environmental Protection Agency filed suit under state law against General Electric in 2004 and has been working with the company since then to investigate and develop a plan to address the contamination. In 2013, plaintiffs filed suit under the citizen suit provision of the Resource Conservation and Recovery Act, seeking a mandatory injunction ordering General Electric to conduct additional investigation into the scope of the contamination and ordering the company to remove the contamination. The district court found the company liable for the contamination on summary judgment but denied plaintiffs' request for injunctive relief because, despite the many opportunities the court provided, plaintiffs did not offer evidence establishing a need for injunctive relief beyond what the company had already done in the state action. For the following reasons, we affirm.

I. Background

A. Statutory Scheme

The Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901, *et seq.*, "is a comprehensive environmental statute that governs the treatment, storage, and disposal of solid and hazardous waste." *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 483 (1996). The RCRA "is not principally designed to effectuate the cleanup of toxic waste sites or to compensate those who have attended to the remediation of environmental hazards." *Id.* Rather, the primary purpose of the RCRA "is to reduce the generation of hazardous waste and to ensure the proper treatment … of that waste which is

nonetheless generated, 'so as to minimize the present and future threat to human health and the environment.'" *Id.* (quoting 42 U.S.C. § 6902(b)).

The RCRA contains a citizen suit provision, which provides that "any person may commence a civil action" against "any person" who has allegedly violated "any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter," or "who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1). Once the violation or potential endangerment is shown, a district court "shall have jurisdiction … to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste" and "to order such person to take such other action as may be necessary." *Id.* § 6972(a).

B. Factual Background

1. General Electric Plant in Morrison, Illinois

Defendant-appellee General Electric Company ("GE") operated a manufacturing plant in Morrison, Illinois from 1949 to 2010. To remove oil from the automotive and appliance parts it manufactured, the plant used chlorinated organic solvents, including trichloroethylene ("TCE"), perchloroethene ("PCE"), and trichloroethane ("TCA"). These solvents are toxic and are regulated by federal and state environmental

agencies. GE used these solvents and stored them in degreasers located at the plant until 1994, when it switched to a soap-like solution to clean the parts.

In 1986, chlorinated solvents were detected in three municipal supply wells that provided water to the City of Morrison, located several thousand feet southeast of the GE plant. Shortly thereafter, the Illinois Environmental Protection Agency ("IEPA") installed monitoring wells to analyze the groundwater around the GE plant, which uncovered additional contamination. The IEPA completed a Phase I Remedial Investigation in 1987, which included sampling and analysis of soil, water, and sediment. Based on the investigation, the IEPA identified the GE plant as the source of the solvent contamination.

In 1988, GE installed additional monitoring wells and an air stripper to treat water pumped from one of Morrison's municipal wells to a level of contamination below the maximum contaminant level ("MCL") so the city could continue to use the well as a source of drinking water; the other two municipal supply wells were sealed. GE also conducted a Phase II Remedial Investigation, which identified elevated concentrations of solvents beneath the plant's former degreasing operations. Under the IEPA's supervision, GE continued to sample and monitor the groundwater in the monitoring wells and submitted reports of the results to the IEPA.

In 1994, the IEPA required GE to conduct a Phase III Remedial Investigation of the groundwater at and downgradient from the plant. GE reported the results of the investigation in 2001. According to the report,

the solvents in the groundwater had decreased significantly by 2001, and the report modeled that the contaminants would naturally attenuate (*i.e.*, reduce) to concentrations below the MCL. Additionally, the report stated that Rock Creek was a natural groundwater divide that would prevent the contaminating solvents from migrating south from the GE plant across the creek. The report concluded that the contamination did not pose a risk to the public because a City of Morrison ordinance prohibited the use of groundwater as a source of drinking water and because GE's air stripper at the remaining municipal supply well provided safe drinking water.

In response, however, the IEPA did not approve GE's proposal for natural attenuation of the contamination; instead, the IEPA concluded that active remediation of the site would be appropriate. The Illinois Attorney General commenced suit against GE in 2004 under the Illinois Environmental Protection Act: for cost recovery (Count I), *see* 415 Ill. Comp. Stat. 5/22.2(f); to enjoin water pollution (Count II), *see* 415 Ill. Comp. Stat. 5/42(d)–(e); and to enjoin a water pollution hazard (Count III), *see* 415 Ill. Comp. Stat. 5/12(d). The state sought to recover costs it had incurred as well as an injunction requiring that GE investigate the nature and extent of the contamination and then perform remediation. In 2010, GE and Illinois entered into a Consent Order in which GE agreed to submit to the IEPA a series of reports, including: (1) "a work plan to survey private wells, install additional monitoring wells, and complete additional soil borings"; (2) "a Focused Site Investigation Report ('FSI') summarizing the results of the work plan"; (3) "a

Remedial Objectives Report to address the impact of the soil and groundwater contamination"; and (4) "a Remedial Action Plan to meet the remediation objectives within six years of the entry of the Consent Order." Also in 2010, the City of Morrison passed an ordinance prohibiting groundwater as a source of potable water and prohibiting the installation of wells "to limit threats to human health from groundwater contamination."

After approval of a work plan, GE installed monitoring wells along Rock Creek. Then, in 2013, GE submitted its FSI detailing the data obtained from the various monitoring wells; the report explained that the solvents had migrated south of the plant and that the monitoring wells along Rock Creek tested positive for contamination at levels above the MCL. Tests from wells on the other side of Rock Creek (and further from the plant) either did not detect chlorinated solvents or detected TCE at a level below the MCL. Following discussions between GE and the IEPA on the work plan and FSI, the IEPA conditionally approved the FSI in March 2015. It determined that GE "adequately defined the nature and extent of the contamination." The IEPA conditionally approved GE's revised Remedial Objectives Report in August 2016, after a number of additional submissions and a meeting between the technical representatives from GE and the IEPA.

In March 2017, GE submitted its Remedial Action Plan ("RAP") to the IEPA, proposing to achieve the remediation objectives through a "combination of institutional controls and monitored natural

attenuation." The IEPA denied GE's proposal in June 2017, posing several questions about the plan, and specifically noting that it did not accept "an open-ended period of monitored natural attenuation as a remediation technology." GE submitted a revised RAP to the IEPA in October 2017, responding to the IEPA's questions and comments and proposing to address the remaining contamination through institutional controls. The IEPA approved GE's revised Remedial Action Plan in March 2018.

2. Plaintiffs' Interest in the Land

Plaintiff-appellant Lowell Beggs[1] purchased land near the site of the shuttered GE plant in 2007. He conveyed the property to plaintiff-appellant Prairie Ridge Golf Course, LLC, which plaintiff-appellant LAJIM, LLC operated. Beggs moved into a home next to the golf course with his companion, plaintiff-appellant Martha Kai Conway (the "Conway home"). The golf course and Conway home are located south of the former GE plant and downgradient from the plant.

When Beggs considered purchasing the golf course in April 2007, the seller advised him: "the golf course has contamination on the first hole. This was caused by General Electric. If you go to the EPA web site, GE is listed as a superfund site. No further remediation was needed according to what I can find." Beggs did not inquire further about the environmental condition of the golf course before completing the purchase in May

[1] Beggs passed away during the course of this litigation. His interest is now represented by the executor of his estate, plaintiff-appellant First National Bank of Amboy.

2007. The purchase agreement noted, "[S]eller [] has disclosed to Purchaser that there is contamination on the first hole of the Real Estate, such contamination having been caused by General Electric, as which contamination is part of the Superfund Site that apparently does not require any further remediation." Additionally, Beggs walked the golf course prior to completing the purchase and noticed a monitoring well head protruding above the ground. After purchasing the property, Beggs contacted GE to fix a leak from the fixture, which he knew monitored "how much stuff was coming out of GE."

C. Procedural Background

Plaintiffs filed suit in the Northern District of Illinois on November 1, 2013 seeking: (1) a mandatory injunction requiring GE to remediate the contamination under the RCRA, *see* 42 U.S.C. § 6972(a)(1)(B) (Count I); (2) cost recovery (Count II) and a declaratory judgment (Count III) under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), *see* 42 U.S.C. §§ 9607(a), 9613(g)(3); and (3) recovery under state law for nuisance (Count IV), trespass (Count V), and negligence (Count VI).

After what the district court characterized as "extensive discovery," the court considered the parties' cross-motions for partial summary judgment. Plaintiffs moved for summary judgment on their RCRA claim. GE did not dispute that plaintiffs satisfied the first two elements of the claim—(1) defendant has generated solid or hazardous waste, and (2) defendant has contributed to the handling of the waste. *See Albany*

Bank & Tr. Co. v. Exxon Mobil Corp., 310 F.3d 969, 972 (7th Cir. 2002). On the sole remaining question—whether plaintiffs established that the contamination "may present an imminent and substantial danger to health or the environment," *id.*—the district court found for plaintiffs and granted summary judgment as to GE's liability under the RCRA. At plaintiffs' request, the court deferred consideration as to whether plaintiffs were entitled to injunctive relief. On GE's cross-motion for summary judgment on the state law claims, the district court found the continuing tort doctrine did not apply and found the claims time-barred because plaintiffs had knowledge of the claims more than five years before they filed suit.

Over the next two years, the district court considered plaintiffs' request for a mandatory injunction in a number of hearings and a series of opinions. On October 4, 2016, the court held that the plain language of the RCRA permitted, but did not require, the court to grant injunctive relief despite the ongoing state proceeding; thus, the question before the court was not whether it *could* grant relief but whether it *should*. On this point, the court concluded plaintiffs had not yet provided the court with facts supporting their assertion that the Consent Order in the state action was deficient and ineffective. The court ordered an evidentiary hearing and invited the IEPA and the Illinois Attorney General to provide their views on the progress under the Consent Order and whether the court should order injunctive relief under the RCRA. The Illinois Attorney General's Office submitted an amicus brief explaining that the State did not believe

the court should impose injunctive relief because any court-ordered injunctive relief would overlap with the work currently being done—*i.e.*, "site investigation, monitoring and payment of costs as well as an order barring further endangerment … [and] some type of remedial effort." The State asserted that all such actions were already underway and were "being done with diligence and rigorous oversight by the Illinois EPA," and that injunctive relief "may result in a clean-up that is inconsistent with clean ups of other contaminated sites in Illinois."

After two days of evidentiary hearing on June 1 and 2, 2017, the court issued an opinion on September 7, 2017 denying the requested injunctive relief. Both parties had presented expert testimony at the hearing; the district court credited GE's expert as having "provided reasonable, rational and credible bases explaining why certain actions were taken and others were not," whereas it found plaintiffs' expert did not provide conclusions but merely "testified that additional investigation and testing was necessary to opine on the proper scope of remediation for the site." Notably, when asked by the district court judge what specific cleanup he recommended, plaintiffs' expert declined to make a recommendation. The district court thus concluded that plaintiffs had not met their burden of showing harm not already addressed sufficiently by the IEPA proceeding. The court denied plaintiffs' motion to reconsider the denial of injunctive relief on November 7, 2017. Plaintiffs voluntarily dismissed the remaining count under the CERCLA with prejudice and filed a notice of appeal on March 6, 2018.

Then, on March 23, 2018, plaintiffs filed a motion for an indicative ruling under Rule 62.1 and motion to reconsider based on newly discovered evidence. Plaintiffs pointed to the IEPA's March 2, 2018 approval of GE's Remedial Action Plan, which relies solely on institutional controls to address the remaining contamination. The district court denied plaintiffs' motion on August 14, 2018, and plaintiffs appealed. That appeal was consolidated with plaintiffs' original appeal; both are jointly before us now.

II. Discussion

A. Injunctive Relief

Plaintiffs raise several issues related to the district court's denial of injunctive relief: they assert (1) the district court did not have discretion to deny injunctive relief once it found GE liable under the RCRA; (2) the district court erred in conducting the traditional balancing of equitable factors for injunctive relief; and (3) the district court erred in finding plaintiffs failed to establish irreparable harm. Plaintiffs' arguments on each issue fail to carry the day. We note that the denial of injunctive relief after a district court has found a risk of imminent and substantial danger to public health or to the environment should be rare. Here, however, plaintiffs failed to provide the district court with any evidence that injunctive relief, in addition to what the IEPA had already ordered in the state action, would improve the environment and not cause additional harm.

1. Discretion to Deny Relief

On summary judgment, the district court found GE liable for contaminating groundwater in a manner that "may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B). This finding has not been challenged on appeal. After finding GE liable, the district court then considered whether plaintiffs were entitled to injunctive relief as a remedy for the violation. Plaintiffs assert, however, that once the district court made a finding of liability, the RCRA required the court to order injunctive relief.

In analyzing whether the RCRA mandates the imposition of injunctive relief upon a finding of liability, we first look to the plain language of the statute. *See United States v. Marcotte*, 835 F.3d 652, 656 (7th Cir. 2016). The RCRA provides, in relevant part:

> [A]ny person may commence a civil action on his own behalf— …
>
> > (1)(B) against any person, … including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment; ….

> *The district court shall have jurisdiction … to restrain any person* who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), [or] *to order such person to take such other action as may be necessary ….*

42 U.S.C. § 6972(a) (emphasis added). As plaintiffs acknowledge, this language *authorizes* injunctive relief—it provides the district court with jurisdiction to restrain a violator or to order other necessary action. But nothing in the language *mandates* injunctive relief; "shall" pertains only to the grant of jurisdiction and not to the relief the district court may order.

Nor do our past comments on the RCRA indicate injunctive relief is mandatory upon a finding of liability. In *Adkins v. VIM Recycling, Inc.*, we considered whether the prohibitions in the RCRA or several abstention doctrines precluded the plaintiffs from bringing a citizen suit under the RCRA after the state had already filed enforcement actions against the same alleged violators. 644 F.3d 483, 487 (7th Cir. 2011). We concluded that neither the statutory language nor the abstention doctrines prevented the *Adkins* plaintiffs from pursuing their citizen suit. *Id.* Critically, we made clear that "[w]e [did] not suggest, of course, that once a citizen suit has cleared RCRA's statutory hurdles it is immune from all other constitutional and preclusive doctrines, such as standing, mootness, and claim or issue preclusion." *Id.* at 503. In so stating, we advised courts to consider these doctrines before awarding relief, thus evidencing

that plaintiffs are not presumptively entitled to injunctive relief once they have "cleared RCRA's statutory hurdles."

Furthermore, the Supreme Court applies traditional equitable principles to environmental statutes. For example, in a Federal Water Pollution Control Act case, the Supreme Court explained that the statute did not require courts to immediately enjoin all statutory violations; instead, the Court highlighted that long-established principles of equity applied:

> It goes without saying that an injunction is an equitable remedy. It is not a remedy which issues as of course or to restrain an act the injurious consequences of which are merely trifling. An injunction should issue only where the intervention of a court of equity is essential in order effectually to protect property rights against injuries otherwise irremediable.

Weinberger v. Romero-Barcelo, 456 U.S. 305, 311–12 (1982) (citations and internal quotation marks omitted); *see also Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008) ("An injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course.") (reversing and vacating grant of injunction under National Environmental Policy Act); *Town of Huntington v. Marsh*, 884 F.2d 648, 651 (2d Cir. 1989) ("In applying these general equitable standards for the issuance of injunctions in the area of environmental statutes, the Supreme Court has explicitly rejected the notion that an injunction follows as a matter of course upon a finding of statutory violation."). The same principles

apply to the RCRA; the remedy of an injunction does not issue as a matter of course upon a finding of liability but only as necessary to protect against otherwise irremediable harm.

Thus, the district court correctly held that it has discretion to award injunctive relief under the RCRA and is not required to order relief after a finding of liability.

2. Traditional Balancing of Equitable Factors

In a similar but distinct argument, plaintiffs assert that the district court erred in applying the traditional equitable factors when considering whether to award injunctive relief. To merit injunctive relief, a plaintiff must demonstrate:

> (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006).

Plaintiffs base their argument on their role in this citizen suit as private attorneys general, acting on behalf of the public. They argue that it is common in environmental protection cases for courts to order injunctive relief without the traditional balancing of equitable factors where the only statutory relief

available is injunctive relief and where the plaintiff is a sovereign or private attorney general. However, commenting directly on the RCRA, we have reasoned that "[o]rdinarily, a court is obligated to conduct an equitable balancing of harms before awarding injunctive relief, even under an environmental statute which specifically authorizes such relief (as does RCRA section 3008(a))." *United States v. Bethlehem Steel Corp.*, 38 F.3d 862, 867 (7th Cir. 1994).

True, once a court finds a defendant liable for creating a risk of imminent and substantial danger, it will usually be the case that injunctive relief is warranted. *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987) ("Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable.… [T]herefore, the balance of harms will usually favor the issuance of an injunction to protect the environment."). But that is not always the case. Courts must consider the traditional equitable factors, which appears to be what the district court did here. *eBay*, 547 U.S. at 391. One aspect of the district court's reasoning does, however, give us pause. Despite the previous finding that GE created a risk of imminent and substantial harm, the district court stated at the relief stage that irreparable harm is an "essential requirement" for injunctive relief and defined irreparable harm as "both certain and great, not merely serious or substantial." To the extent that language might be interpreted as requiring RCRA plaintiffs to demonstrate harm above and beyond that shown at the merits stage, the district court erred.

Multiple circuits have held that RCRA plaintiffs need only show "a risk of harm," not "the traditional requirement of threatened irreparable harm," to justify an injunction. *United States v. Price*, 688 F.2d 201, 211 (3d Cir. 1982); *see also Attorney Gen. of Oklahoma v. Tyson Foods, Inc.*, 565 F.3d 769, 777 (10th Cir. 2009) ("Our prior case law indicates that under RCRA a plaintiff need not 'show proof of actual harm to health or the environment' to establish endangerment, but rather injunctive relief is appropriate where there simply *may* be a risk of harm."); *Dague v. City of Burlington*, 935 F.2d 1343, 1356 (2d Cir. 1991) (quoting *Price* for the same proposition); *United States v. Waste Indus., Inc.*, 734 F.2d 159, 165 (4th Cir. 1984) (same).

The standard adopted by our sister circuits makes sense, especially in the permanent injunction context. RCRA authorizes only injunctive relief. *Meghrig*, 516 U.S. at 484. Accordingly, absent a permanent injunction, a prevailing RCRA plaintiff will receive no remedy. The proven harm is, by definition, irreparable absent an injunction. *See generally Walgreen Co. v. Sara Creek Prop. Co., B.V.*, 966 F.2d 273, 275 (7th Cir. 1992). A RCRA plaintiff either demonstrates irreparable harm or fails to prove his or her case on the merits.

We reiterate, however, that a permanent injunction does not automatically follow from success on the merits. *See Me. People's All. & Nat. Res. Def. Council v. Mallinckrodt, Inc.*, 471 F.3d 277, 296–97 (1st Cir. 2006) ("[I]n an environmental case, [the court] should consider the balance of relevant harms before granting injunctive relief, even though the statute itself

authorizes such relief. … [I]t is true that a district court is not commanded, regardless of the circumstances, to issue an injunction after a finding of liability" under the RCRA.); *United States v. Marine Shale Processors*, 81 F.3d 1329, 1360 (5th Cir. 1996) ("We find nothing in RCRA which, 'in so many words, or by necessary and inescapable inference, restricts the court's jurisdiction in equity.'" (quoting *Weinberger*, 456 U.S. at 313)). District courts should apply the traditional equitable factors to determine the necessity of injunctive relief.[2]

3. Necessity of Injunctive Relief

Plaintiffs next claim the district court erred in denying injunctive relief because it found they failed to establish irreparable harm. We review a district court's denial of injunctive relief for an abuse of discretion; we review its factual determinations for clear error and its legal conclusions de novo, and we give deference to the court's balancing of the equitable factors. *Planned*

[2] The unique procedural history of this case may also be a source of plaintiffs' confusion regarding the applicable standard. Here, the court made a liability finding—that the contamination "may present an imminent and substantial endangerment to health or the environment," 42 U.S.C. § 6972(a)—nearly two years before it denied the injunction. In finding GE liable under the RCRA, the district court agreed that there may be a risk of endangerment from the contamination. But in denying the injunction, the district court found that plaintiffs failed to demonstrate harm not already addressed in the state action. We do not see a conflict between the district court's holdings on liability (which acknowledges the risk of harm) and the injunction (which it denied for lack of evidence of unaddressed harm).

Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health, 896 F.3d 809, 816 (7th Cir. 2018).

As an initial matter, we must address GE's contention that plaintiffs abandoned their request for remediation at the evidentiary hearing, instead deferring to a request for additional investigation prior to remediation. According to GE, plaintiffs have thus waived their claim to an injunction ordering remediation. We disagree. GE mischaracterizes plaintiffs' position; although plaintiffs' expert at the evidentiary hearing testified he believed additional investigation was necessary to determine the extent of the contamination and the correspondingly appropriate remedy, at no point did plaintiffs retreat from their request for remediation. They reiterated that request in their complaint, in their initial motion for an injunction, in argument at the evidentiary hearing, and in their motions for reconsideration. Plaintiffs have not waived their request for an injunction requiring GE to remediate the contamination.

Turning to plaintiffs' argument regarding the irreparable harm finding, we note that it is somewhat indirect. Rather than directly challenging the district court's factual findings, plaintiffs repeat their general assertion: There is contamination, therefore there is harm. And because there is harm, there must be an injunction. In oversimplifying the argument, plaintiffs fail to grapple with the thoughtful and nuanced decisions the district court made that led it to deny injunctive relief. In their request for an injunction, plaintiffs claimed action under the RCRA was necessary because the Consent Order and actions in

the state proceeding were insufficient to remedy their injury. For that reason, the district court informed the parties *repeatedly* that it was looking for evidence of harm not already being addressed through the state proceeding and for what exactly plaintiffs wanted the court to order GE to do to address that harm.

At the evidentiary hearing, plaintiffs argued that the extent of the contamination had not been determined and that the IEPA's analysis based on a limited investigation was flawed; as such, their expert testified that additional investigation was necessary before he could opine on the proper remediation. Plaintiffs requested GE perform the following additional investigation: additional and deeper monitoring wells, soil borings penetrating the bedrock, and vapor-intrusion monitoring to the extent necessary to (1) determine if a dense non-aqueous phase liquid ("DNAPL") is present and, relatedly, determine the vertical and horizontal extent of the groundwater contamination; (2) determine whether Rock Creek is a groundwater divide, and if so, explain the presence of contamination in the well across the creek; and (3) determine the source of and monitor the vapors present in the Conway home. Noting that many of these issues are interrelated, the district court considered the competing expert testimony presented on each avenue of investigation.

Although plaintiffs do not directly challenge the district court's factual findings, we review those findings briefly to highlight the court's thoroughness in evaluating the evidence (or lack thereof) supporting plaintiffs' request for injunctive relief. A district court's

finding of an expert witness's credibility is one of fact that we review for clear error. *Madden v. U.S. Dep't of Veterans Affairs*, 873 F.3d 971, 973 (7th Cir. 2017). Clear error is a deferential standard of review that only merits reversal if "after reviewing the entire record, we are left with the firm and definite conviction that a mistake has been made." *United States v. Ranjel*, 872 F.3d 815, 818 (7th Cir. 2017) (quoting *United States v. Marty*, 450 F.3d 687, 689–90 (7th Cir. 2006)). "[I]n a case of dueling experts, as this one was, it is left to the trier of fact, not the reviewing court, to decide how to weigh the competing expert testimony." *Madden*, 873 F.3d at 973–74 (alteration in original) (quoting *Wipf v. Kowalski*, 519 F.3d 380, 385 (7th Cir. 2008)).

i. DNAPL and Groundwater Contamination

Plaintiffs argued that GE's testing was insufficient to determine whether a DNAPL is present. However, plaintiffs did not take any of their own samples or conduct any of their own tests, despite their expert—Dr. Banaszak—testifying that groundwater sampling is not prohibitively expensive. Instead, Dr. Banaszak advocated that GE drill deeper soil borings that penetrate the bedrock and that GE install additional monitoring wells north of the existing wells to determine if the groundwater traveled north and carried contamination north of the plant. Based on his review of GE's testing, Dr. Banaszak concluded that the results did not show that the contamination plume "is stable or shrinking, which leaves the possibility that a DNAPL exists."

GE's expert, Dr. Vagt, who has been the project director of the site since 2008, testified that additional investigation is unnecessary because the evidence demonstrates no DNAPL is present. He explained that the concentration of TCE in the samples has decreased over time, whereas, if a DNAPL were present, the TCE concentrations would have remained constant. As to the need for a north monitoring well, Dr. Vagt testified that soil samples taken north of the plant (near the site of an alleged potential additional source of TCE) detected little to no TCE. Dr. Vagt concluded (and the IEPA agreed), that no additional testing was necessary. And Dr. Vagt conducted site visits, which led him to conclude that the groundwater flowed south, not north, as Dr. Banaszak had hypothesized based on a conceptual site model. Additionally, Dr. Vogt advocated against drilling through the bedrock; he opined that the only conduit for contamination through the bedrock was the preexisting city well, and that any additional drilling could be harmful in that it could provide a new route for contamination to travel through the bedrock.

The district court concluded that GE's investigation into the presence of DNAPL, and the IEPA's approval of the investigation, was not unreasonable. Because plaintiffs "merely offer[ed] different conclusions about the data collected by [GE] and the data they hope[d] to develop with additional investigation and testing," the district court found that plaintiffs had not met their burden to show that any additional testing for DNAPL was necessary. The district court weighed the competing expert testimony and found GE's expert made reasonable conclusions supported by facts; we see

nothing in the court's factual findings that are clearly erroneous.

ii. Rock Creek

As to Rock Creek's status as a groundwater divide, plaintiffs and GE again offered differing interpretations of the same data. Plaintiffs argued that the lone sample from the south well containing trace amounts of TCE evidences that contamination is flowing past Rock Creek. They further contended that the rest of the wells on the south of Rock Creek, which did not detect contamination, are not deep enough to properly measure contamination. GE, on the other hand, maintained that Rock Creek is a groundwater divide. The IEPA required that GE install additional monitoring wells and test the residential wells south of Rock Creek to confirm this proposition. Dr. Vagt contrasted the contaminated samples from the north side of Rock Creek with the lack of contamination from the south side wells; he testified that the single sample from the south well with trace levels of contamination was an outlier when compared with the lack of contamination in the six other monitoring wells and residential wells located in close proximity and at varying depths.

Weighing the competing expert testimony, the district court found that plaintiffs had not offered any additional testing that would "seriously challenge the finding that Rock Creek is a groundwater divide." Again, we cannot conclude this conclusion is clearly erroneous.

iii. Vapor Intrusion

Lastly, the district court considered plaintiffs' request for vapor intrusion monitoring for the Conway home and the surrounding residences. By the time of the evidentiary hearing, plaintiffs had sold the Conway home. They agreed the court did not have the power to force access into the home for testing but asked the court to order GE to obtain consent from the new owners. They based this request on a 2012 test that detected the compound 1,2 DCA in the indoor air in the Conway home at a level above the residential standard. After detecting this compound, however, GE took samples of the groundwater and sub-slab under and around the Conway home, which did not reflect contamination. GE thus maintained that there is no complete pathway between the source of the GE-site contamination and the indoor air in the Conway home, and that 1,2 DCA comes from a variety of sources unrelated to the site contamination (such as household cleaners). The IEPA agreed that, without a complete pathway, no additional testing was necessary.

The district court stated that it was "not in a position to second guess the IEPA's decision based on Plaintiffs' discontent with the decision." Considering that plaintiffs no longer own the Conway home and the court does not have authority to force the new owners to consent to testing, as well as the lack of a complete pathway from the site contamination to the home, we cannot say that the district court clearly erred.

* * *

While an injunction does not follow automatically from a finding of a risk of imminent and substantial endangerment—as this case demonstrates—such a finding usually goes a long way towards justifying an injunction. Here however, despite the district court's admonition that it was looking for evidence of harm requiring relief in addition to the IEPA action, at no point did plaintiffs ever conduct their own investigation to contradict GE's test results. Rather, they continue to insist that irreparable harm is "self-evident" where there is contamination and criticize GE's investigation, which had been conducted subject to the IEPA's oversight and direction. As demonstrated by the two years it spent grappling with the injunctive relief questions, the district court understood it had to "walk a fine line" between supplementing and supplanting the Consent Order. The court focused on the facts before it, commenting repeatedly that "facts matter," and it provided plaintiffs with numerous opportunities to present evidence that the state proceedings were not adequately protecting the public and the environment. *See Trinity Indus., Inc. v. Chicago Bridge & Iron Co.*, 735 F.3d 131, 140 (3d Cir. 2013) (explaining that ongoing remediation in independent proceedings may justify the denial of injunctive relief in the RCRA action); *Adkins*, 644 F.3d 501–02 ("When this case finally addresses the merits, and if the [state environmental] actions have been resolved by then, the federal court will be entitled to insist that plaintiffs show how the resolution of those cases was not sufficient."). In the end, plaintiffs could not present contradictory facts because they did not conduct any of their own investigation. As the district court held, plaintiffs "have not provided the evidence necessary for

this Court to second guess [GE]'s Remedial Action Plan" and order relief in addition to what the IEPA has already required.

Nevertheless, plaintiffs insist they are entitled to relief because they did not get what they wanted; they want more than the IEPA found adequate and will be satisfied with nothing less than a mandatory injunction ordering GE to remove any contamination on their property. We sympathize with plaintiffs' position—TCE is a dangerous contaminant and the current plan leaves the contamination in place (though contained and restricted from access). But, despite plaintiffs' characterization, the RCRA is not a "cleanup" statute. *See Meghrig*, 516 U.S. at 483 ("[The] RCRA is not principally designed to effectuate the cleanup of toxic waste sites ...."). Under the RCRA, the district court may "restrain" the handling of hazardous waste that "may present an imminent and substantial endangerment to health or the environment," or order actions that may be "necessary" to eliminate that danger. 42 U.S.C. § 6972(a).

Here, the district court considered both parties' expert presentations and concluded that plaintiffs had not established any additional actions were "necessary" to eliminate the danger. In spite of the district court's multiple inquiries to plaintiffs' expert as to what remedy he proposed the court order, he did not make a recommendation, leaving the court without guidance. Conversely, the court found GE's explanations for the actions it had taken to investigate and develop its remediation plans "reasonable, rational and credible." The RCRA does not require a court-ordered cleanup

where the court has not found such action necessary to prevent harm to the public or the environment, especially where, as here, an expert the court found credible testified that additional cleanup could cause further harm.

The district court did not abuse its discretion in concluding plaintiffs had not carried their burden to establish mandatory injunctive relief was necessary under the RCRA.

B. Motion for Indicative Ruling and for Reconsideration

Next, plaintiffs contend the district court erred in denying their motion for indicative ruling under Rule 62.1 and for reconsideration under Rule 60(b)(2). Relief under Rule 60(b) is "an extraordinary remedy … granted only in exceptional circumstances." *Davis v. Moroney*, 857 F.3d 748, 751 (7th Cir. 2017) (alteration in original) (quoting *Bakery Mach. & Fabrication, Inc. v. Traditional Baking, Inc.*, 570 F.3d 845, 848 (7th Cir. 2009)). We review the district court's decision for abuse of discretion. *Gleason v. Jansen*, 888 F.3d 847, 851–52 (7th Cir. 2018).

A refresher of the timeline of events is necessary: Prior to the district court's ruling on the motion for injunction, the IEPA had denied GE's initial Remedial Action Plan, which proposed natural attenuation and institutional controls to address the contamination. After the district court denied the injunction in September 2017, plaintiffs dismissed their remaining claim with prejudice and filed a notice of appeal. In October 2017, GE submitted a revised RAP to the

IEPA, in which GE proposed institutional controls as the sole method of remedial action. Then, on March 2, 2018, the IEPA approved GE's revised RAP. Shortly thereafter, plaintiffs filed a motion for indicative ruling under Rule 62.1(a)(3), which provides:

> If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may: … state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.

Fed. R. Civ. P. 62.1(a)(3). In the motion, plaintiffs raised a single basis for their requested relief: the IEPA's approval of GE's revised RAP. Plaintiffs asserted that the IEPA's March 2, 2018 approval was newly discovered evidence supporting reconsideration of the denial of the injunction.[3]

Plaintiffs' arguments fail for two reasons. First, the IEPA's March 2, 2018 approval of GE's RAP is not "newly discovered evidence" under Rule 60(b)(2). *See* Fed. R. Civ. P. 60(b)(2) ("On motion and just terms, the court may relieve a party or its legal representative from a final judgment … for … newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under

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[3] Although plaintiffs did not file a separate motion for relief from judgment and failed to explain that they were seeking relief under Rule 60(b)(2) until their reply brief, the district court excused this omission and treated the Rule 62.1 motion as a joint motion for reconsideration under Rule 60(b)(2).

Rule 59(b)."). Newly discovered evidence must have been in existence at the time of the original judgment or pertain to facts in existence at the time of the judgment. *Peacock v. Bd. of Sch. Comm'rs of City of Indianapolis*, 721 F.2d 210, 214 (7th Cir. 1983) (per curiam). The district court did not abuse its discretion in finding that neither the revised RAP submitted in October 2017 nor the IEPA's March 2, 2018 approval existed at the time of its September 2017 judgment. Rather, they were *new* evidence that did not exist and thus could not have been discovered at the time. Nor did the district court err in concluding that the revised RAP did not pertain to facts in existence at the time of judgment. To the contrary, the revised RAP responded to the IEPA's questions and concerns, contained new information for the IEPA to consider, and included a new proposed remedy.

Second, even if it were "newly discovered" evidence, the district court did not abuse its discretion in holding that the IEPA's approval of the revised RAP would not have changed the outcome. According to plaintiffs, the district court's denial of injunctive relief was predicated on the IEPA's rejection of GE's initial RAP. For that reason, they claim that the IEPA's acceptance of the revised RAP that did not require any additional remedies is a basis upon which the district court should have reconsidered injunctive relief. In support, plaintiffs pointed to the district court's statement that "[t]he IEPA's actions, including the latest [RAP] rejection, is strong evidence that Plaintiffs' injuries are being remedied in the parallel state-court proceeding." In denying the Rule 62.1 motion, however, the district court explained that plaintiffs misunderstood its

ruling: "The [c]ourt merely used the IEPA's most recent rejection to highlight that the IEPA had been making well-reasoned decisions under the Consent Order and had challenged numerous actions [GE] had taken …." Noting that plaintiffs were using the approval of the revised RAP to make the same arguments the court had rejected throughout the case, the district court concluded that plaintiffs had not offered any newly discovered evidence that would necessitate injunctive relief.

The district court did not abuse its discretion in denying the motions for indicative relief and for reconsideration.

C. State Law Tort Claims

Lastly, plaintiffs assert that the district court erred in granting summary judgment to GE on their state law claims of nuisance, trespass, and negligence. We review a grant of summary judgment de novo, viewing the record in a light most favorable to the nonmoving party. *Minerva Dairy, Inc. v. Harsdorf*, 905 F.3d 1047, 1053 (7th Cir. 2018).

In Illinois, the statute of limitations for tort claims for damage to property is five years. 735 Ill. Comp. Stat. 5/13-205. It is undisputed that, here, Lowell Beggs knew about the contamination of the golf course from the GE plant at the time he purchased the property in 2007, but he did not file suit until November 2013, more than five years later. Plaintiffs argue, however, that GE is committing a continuous violation because it "is doing nothing to stop its contamination from migrating," and that, under the

continuing tort doctrine, the five-year statute of limitations does not bar their claims.

"[W]hen 'a tort involves a continuing or repeated injury, the limitations period does not begin to run until the date of the last injury or the date the tortious acts cease.'" *Brooks v. Ross*, 578 F.3d 574, 579 (7th Cir. 2009) (quoting *Belleville Toyota v. Toyota Motor Sales, U.S.A.*, 770 N.E.2d 177, 190 (Ill. 2002)). The problem with plaintiffs' argument is that the "continuing" action they allege is not that GE is continuing to release contaminants, but that the original contamination is continuing to migrate. However, "[a] continuing violation or tort is occasioned by continuing unlawful acts and conduct, not by continual ill effects from an initial violation." *Feltmeier v. Feltmeier*, 798 N.E.2d 75, 85 (Ill. 2003); *see Village of DePue v. Viacom Int'l, Inc.*, 713 F. Supp. 2d 774, 779 (C.D. Ill. 2010) (continuing tort doctrine did not apply where plaintiff's allegations were limited to injury from water flowing from contaminated site because tortious conduct had ceased when manufacturing at site ended years prior); *Soo Line R.R. Co. v. Tang Indus., Inc.*, 998 F.Supp. 889, 896–97 (N.D. Ill. 1998) (continuing tort doctrine did not apply where defendant stopped dumping contaminants years prior, "although the effects from [defendant]'s violations may be persisting"). The continuing migration plaintiffs allege is merely an ill effect from the original violation, not a continuing unlawful act.

Nor does plaintiffs' assertion that GE retains possession of the plant and has mismanaged the remediation suffice as a continuing injury. As the district court explained, application of the continuing

tort doctrine "turns on continuing conduct, not continuing ownership or continuing injury." *Compare Village of DePue*, 713 F. Supp. 2d at 779 ("merely owning the Site" after contamination insufficient for liability under continuing tort doctrine), *with City of Evanston v. Texaco, Inc.*, 19 F. Supp. 3d 817, 827–28 (N.D. Ill. 2014) (continuing tort doctrine applied "at least at the pleadings stage" where defendant's underground tanks allegedly continued leaking contaminants into the environment even though defendant no longer owned the property). That GE retains possession of the plant is of no import where there is a lack of demonstrated continuing unlawful conduct.

Because plaintiffs do not allege a continuing unlawful act necessary to invoke the continuing tort doctrine, we affirm the grant of summary judgment to GE on plaintiffs' state law tort claims.

III. Conclusion

For the foregoing reasons, we AFFIRM the judgment of the district court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS WESTERN DIVISION

Case No. 13 CV 50348
Magistrate Judge Iain D. Johnston

[Filed August 14, 2018]

LAJIM, LLC, *et al.*,	)
	)
Plaintiffs,	)
	)
v.	)
	)
General Electric Co.,	)
	)
Defendant.	)
	)

ORDER

Before the Court is Plaintiffs' motion for an indicative ruling ("Motion"). Dkt. 217. For the reasons stated below, Plaintiffs' Motion is denied.

STATEMENT

On December 18, 2015, this Court granted Plaintiffs' motion for summary judgment on Count I as to liability, finding General Electric liable under the Resource Conservation and Recovery Act ("RCRA"), *see*

42 U.S.C. § 6972(a)(1)(B), because Plaintiffs established that the contamination from the General Electric plant may present an imminent and substantial endangerment. Dkt. 88. On September 7, 2017, this Court denied Plaintiffs' request for a mandatory permanent injunction, finding that Plaintiffs failed to show irreparable harm. Dkt. 181.

On November 7, 2017, this Court denied Plaintiffs' motion to reconsider under Federal Rule of Civil Procedure 54(b). Dkt. 200. Thereafter, Plaintiffs dismissed the remaining counts under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), *see* 42 U.S.C. §§ 9607(a), 9613 (g)(3), and filed a notice of appeal on March 6, 2018.

On March 23, 2018, Plaintiffs filed the instant Motion under Federal Rule of Civil Procedure 62.1, asking that this Court reconsider its decision denying injunctive relief based on new evidence. Dkt. 217. Rule 62.1 provides that:

> If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may:
>
> (1) defer considering the motion;
>
> (2) deny the motion;
>
> (3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises substantial issues.

Fed. R. Civ. P. 62.1(a).

Although no separate motion for relief from judgment was filed, Plaintiffs state in their reply that

they are seeking relief under Federal Rule of Civil Procedure 60(b)(2) based on newly discovered evidence. This was the first mention of the procedural rule upon which the Motion is based. For purposes of this ruling, the court will interpret Plaintiffs' Motion as a joint motion under Rules 62.1 and 60(b)(2). *See* Fed. R. Civ. P. 62.1(a) (requiring that a timely motion be made for relief that the court lacks authority to grant). Relief from a judgment under Rule 60(b) is "an extraordinary remedy and is granted only in exceptional circumstances." *McCormick v. City of Chicago*, 230 F.3d 319, 327 (7th Cir. 2000) (internal quotation marks and citation omitted). The district court has great discretion in ruling on a Rule 60(b) motion. *Id.*

Federal Rule of Civil Procedure 60(b)(2) authorizes a court to set aside a final judgment based upon "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)." The parties agree that Plaintiffs must establish the following eight prerequisites to receive relief under Rule 60(b)(2): (1) the evidence was in existence at the time of trial or pertains to facts in existence at the time of trial; (2) the evidence was discovered following the trial; (3) due diligence on the part of the movant to discover the new evidence is shown or may be inferred; (4) the evidence is admissible; (5) the evidence is credible; (6) the new evidence is material; (7) the evidence is not merely cumulative or impeaching; and (8) the new evidence is likely to change the outcome. *See United States v.*

McGaughey, 977 F.2d 1067, 1075 (7th Cir. 1992).[1] If any one of the prerequisites is not met, the Rule 60(b)(2) motion must fail. *Jones v. Lincoln Electric Co.*, 188 F.3d 709, 732 (7th Cir. 1999) (citing *In re Wildman*, 859 F.2d 553, 558 (7th Cir. 1988)).

In their Motion, Plaintiffs rely on the Illinois Environmental Protection Agency's ("IEPA") approval of General Electric's revised Remedial Action Plan ("RAP") on March 2, 2018, as newly discovered evidence showing that they have established irreparable harm, such that this Court should reconsider its decision denying injunctive relief. A brief overview of the submissions leading up to that approval is as follows.

In March 2017, General Electric submitted its original RAP under the 2010 Consent Order, which proposed institutional controls and monitored natural attenuation as the remedy for the contamination at the site. In June 2017, the IEPA disapproved the proposed remedy in the original RAP and indicated that a different remedial technology needed to be proposed. On September 7, 2017, this Court denied Plaintiffs' request for injunctive relief. Dkt. 181. In October 2017, after consulting with the IEPA, General Electric

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[1] *But see Jones v. Lincoln Electric Co.*, 188 F.3d 709, 732 (7th Cir. 1999) (listing the following as the only five prerequisites for Rule 60(b)(2) relief: (1) the evidence was discovered following trial; (2) due diligence on the part of the movant to discover the new evidence is shown or may be inferred; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that a new trial would probably produce a new result).

responded to the IEPA's comments and submitted a revised RAP. General Electric proposed the use of additional institutional controls as the only proposed remedy. On March 2, 2018, the IEPA approved General Electric's revised RAP and the use of institutional controls to address the remaining contamination at the site.

Plaintiffs now argue that the IEPA's approval of institutional controls as the sole remedial method is "newly discovered evidence" establishing irreparable harm because these measures do not clean up the contamination at the site or otherwise abate the imminent and substantial endangerment this Court previously found.

Accordingly, Plaintiffs seek an injunction from this Court ordering General Electric to actively clean up the site to complement the institutional controls already in place with the Consent Order.[2] This Court is not convinced that such relief is warranted.

I. Is the Evidence Newly Discovered?

Initially, the parties dispute whether the March 2, 2018 approval letter is "newly discovered evidence" within the meaning of Rule 60(b)(2). Plaintiffs argue

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[2] The Court is perplexed by this requested relief because, throughout this litigation, Plaintiffs have repeatedly argued that the scope of any clean-up effort is unknown as the underlying investigation regarding the extent of the plume was insufficient. Therefore, it seems odd that this Court could order a mandatory injunction under Rule 65, with the specificity required by that rule, to clean up the site when Plaintiffs argue that the extent of the contamination remains undetermined.

that such evidence is newly discovered because it "pertains to GE's Remedial Action Plan ("RAP") and Revised RAP, evidence that was before the Court last year for its rulings on injunctive relief." Plaintiffs' Reply at 2, Dkt. 221. General Electric argues that this evidence was not in existence at the time of trial, and therefore, cannot be "newly discovered." This Court agrees that this is not the type of "newly discovered evidence" contemplated by Rule 60(b)(2).

In their motion, Plaintiffs state that "evidence of IEPA's March 2, 2018 approval of GE's proposed, but unimplemented, institutional controls is the type of *new evidence* that this Court should consider in a Motion to Reconsider its September 7, 2017 decision." Plaintiffs' Motion at 5, Dkt. 217 (emphasis added). It is telling that Plaintiffs opening brief refers to the IEPA approval letter as "new evidence." Plaintiffs' Motion at 4-5, Dkt. 217. "Rule 60(b) refers to newly discovered evidence, not new evidence." *Hudson's Bay Co. Fur Sales v. American Legend Cooperative*, 115 F.R.D. 337, 340 (D.N.J. 1987). "New facts cannot justify relitigation. Policy and logic mandate an end to litigation which in most cases prevent the reopening of a case because of after occurring events." *Id.* (denying Rule 60(b)(2) motion where the evidence cited to prove a "fact" before the court at trial actually came into existence after the trial).[3]

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[3] Plaintiffs also cite to two cases where courts revisited their orders granting injunctive relief because "new evidence" became available. Plaintiffs' Motion at 5, Dkt. 217 (citing *Luxottica Group S.p.A. v. Light in the Box Ltd.*, No. 16-cv-05314, 2016 U.S. Dist. LEXIS 144660 (N.D. Ill. Oct. 19, 2016); *Metalcraft of Mayville, Inc.*

It was not until their reply brief that Plaintiffs first pointed to Rule 60(b)(2), explaining that the IEPA letter "according to Fed. R. Civ. P. 60(b) and interpretive case law, *pertains to facts in existence at the time of trial*, and is appropriately the subject of a motion to reconsider." Plaintiffs' Reply at 2, Dkt. 221 (emphasis in original). "Material not in existence until after trial falls within 60(b)(2) only if it pertains to facts in existence at the time of trial." *Peacock v. Board of School Commissioners*, 721 F.2d 210, 214 (7th Cir. 1983).

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v. Toro Co., No. 16-cv-544, 2016 WL 8737777 (E.D. Wis. Nov. 18, 2016)). However, reference to these cases is unhelpful. *Metalcraft* dealt only with the procedural posture of filing a Rule 62.1 motion for indicative ruling while an appeal of the preliminary injunction was pending. *Metalcraft*, No. 16-cv-544, 2016 WL 8737777. The court did not address the discovery of "new prior art" as it related to Rule 60(b)(2) relief. *Id. Luxottica* is similarly unhelpful because it dealt with a court granting injunctive relief and the law allowing the court to modify or vacate that order in light of changed circumstances. *Luxottica*, No. 16-cv-05314, 2016 U.S. Dist. LEXIS 144660, at *20. Even Plaintiffs' reference to a footnote about modifying an injunction based on "new facts" after an appeal is unhelpful because the underlying case cited specifically compared the court's lack of jurisdiction to "modify the injunction in such manner as to finally adjudicate substantial rights directly involved in the appeal" with the court's authority "to continue supervising compliance with the injunction." *Luxottica*, No. 16-cv-05314, 2016 U.S. Dist. LEXIS 144660, at *21 n.5 (citing *A&M Records v. Napster, Inc.*, 284 F.3d 1091, 1099 (9th Cir. 2002) (internal quotation marks and citations omitted)). That is a very different situation from what is before the Court. Plaintiffs are not asking this Court to continue supervising an already existing injunction. Rather, they seek a mandatory injunction based on new evidence that was not before the Court at the time of trial.

Accordingly, the critical question is this: What is the "evidence" that Plaintiffs seek to introduce now? Clearly, Plaintiffs contend that it is the IEPA's acceptance of the revised RAP. Indeed, Plaintiffs argue that the IEPA approval letter "pertains precisely to facts" from the "hearings in 2017," namely to General Electric's RAP and revised RAP. Plaintiffs' Reply at 4, Dkt. 221. Plaintiffs' argument fails for two reasons.

First, Plaintiffs' reference to the "hearings in 2017" attempts to encompass much more than what Plaintiffs are seeking this Court to reconsider. Plaintiffs are specifically asking that this Court reconsider its September 7, 2017 ruling for injunctive relief. Therefore, the evidence that was in existence or pertains to facts in existence "at the time of trial" relates to the evidentiary hearing this Court held on June 1, 2017 and this Court's ultimate ruling on Plaintiffs' request for an injunction on September 7, 2017. General Electric's original RAP and the IPEA's disapproval of it were the only evidence before this Court when it ruled on Plaintiffs' request for injunctive relief. General Electric did not submit its revised RAP until October 19, 2017, well after this Court's denial of injunctive relief (i.e. "the trial"). Although this Court held a hearing and ruled on Plaintiffs' motion to reconsider under Rule 54(b) on November 7, 2017, Plaintiffs are not asking for the Court to reconsider that ruling.

Second, the IEPA approval letter does not pertain to General Electric's original RAP, which was before the Court when it denied injunctive relief. The letter only addresses General Electric's revised RAP submitted in

October 2017. The revised RAP submitted new information for the IEPA to consider about the site and General Electric's new proposed remedy. The new information submitted to the IEPA does not pertain to facts in existence at the time of the hearing. This is very different from the cases Plaintiffs rely on where a report or affidavits prepared after trial clearly related to the facts at trial. *Cf. Nat. Anti-Hunger Coalition v. Exec. Comm. Etc.*, 711 F.2d 1071, 1075 n.3 (D.C. Cir. 1983) (report prepared after trial but based on pre-existing data); *United States v. Walus*, 616 F.2d 283 (7th Cir. 1980) (new affidavits from witnesses who could testify to prior events)). Therefore, this Court finds that the IEPA's approval of the revised RAP is new evidence, not newly discovered evidence contemplated under Rule 60(b)(2). *See Nat. Anti-Hunger Coalition*, 711 F.2d at 1075 n.3 (stating that "evidence falls within [Rule 60(b)(2)] as long as it pertain[s] to facts in existence at the time of the trial, and *not to facts that have occurred subsequently*") (emphasis added) (internal quotations marks and citation omitted).

II. Is the Newly Discovered Evidence Likely to Change the Outcome?

Even assuming the IEPA approval letter is considered newly discovered evidence under Rule 60(b)(2), Plaintiffs' Motion still fails because the evidence does not change this Court's underlying decision. Plaintiffs have not proven how this new evidence shows irreparable harm.

The Court must point out that Plaintiffs have always maintained that the parallel state-court

proceedings and the 2010 Consent Order have been insufficient to remedy their injury. When General Electric submitted their original RAP, Plaintiffs argued that institutional controls and monitored natural attenuation were inadequate to remediate the contamination at the site. However, Plaintiffs provided little evidence about the ineffectiveness of the remedial measures in General Electric's RAP. Instead, at the injunction hearing, Plaintiffs argued that any remedial measures proposed by General Electric would be premature because the extent of the contamination had not been properly investigated and tested. This Court disagreed and ultimately found that Plaintiffs failed to establish irreparable harm.

Plaintiffs still remain unsatisfied with the state-court proceedings, arguing that the use of institutional controls is ineffective to address the contamination at the site. Now that the IEPA has approved General Electric's use of institutional controls as the sole remedial method, Plaintiffs argue this is conclusive evidence that no abatement is being ordered in the state-court proceedings. Plaintiffs believe that the use of institutional controls alone does not comply with RCRA because "they must be used in combination with an actual cleanup." Plaintiffs' Reply at 12, Dkt. 221. To support this claim, Plaintiffs cite to several guidance document issued by the IEPA and the Environmental Protection Agency to highlight the fact that institutional controls leave the contamination in place. Plaintiffs cite to one guide in particular, stating that "[i]nstitutional controls should not be considered a substitute for active or permanent corrective measures (e.g. treatment and/or containment of source material,

removal and restoration of groundwaters to their beneficial uses)." Plaintiffs' Exhibit H at 4, Dkt. 221-8; Plaintiffs' Reply at 10, Dkt. 221. But the remainder of the paragraph in that guide explains that the project manager should evaluate the institutional controls to determine if they provide the best protection among the remedial alternatives. The paragraph further emphasizes the need to "compare the long-term risks and costs associated with leaving contamination in place to the risk reduction and cost of permanent remedies that do not require institutional and engineering controls." Plaintiffs' Exhibit H at 4, Dkt. 221-8. The Court believes this is precisely what the IEPA has done when it approved the revised RAP. General Electric addressed several questions the IEPA had about its original RAP and then provided further support for its proposal to use additional institutional controls at the site.

Moreover, Plaintiffs already made similar arguments about the need for active remediation in their motion to reconsider. Plaintiffs argued that the Consent Order and revised RAP did not propose any abatement of the imminent and substantial endangerment. Plaintiffs found this significant because they believed the Court did not find irreparable harm because General Electric's original RAP was rejected by the IEPA. Plaintiffs misunderstood this Court's ruling.

In the order denying injunctive relief, this Court pointed out that Plaintiffs evidence at the hearing focused on General Electric's investigation of the site, and provided little evidence challenging the remediation proposed by General Electric. In finding

that Plaintiffs failed to establish irreparable harm, the Court found that General Electric's expert witness credibly explained the reasons for the investigation of the site and why a new and expanded investigation of the site was not warranted, and indeed, was contraindicated (such as punching holes through the shale). Memorandum Opinion and Order at 8, 15-16, Dkt. 181. The Court ultimately found that Plaintiffs failed to provide "the evidence necessary for this Court to second guess General Electric's Remedial Action Plan of institutional controls and monitored natural attenuation, even though the IEPA has yet to approve these measures." Memorandum Opinion and Order at 9-10, Dkt. 181.

The Court also pointed out that the IEPA had rejected General Electric's original RAP proposing institutional controls and monitored natural attenuation, which undermined Plaintiffs' claim of irreparable harm. Nevertheless, this Court's finding was not tied to the IEPA's rejection of the original RAP. The Court merely used the IEPA's most recent rejection to highlight that the IEPA had been making well-reasoned decisions under the Consent Order and had challenged numerous actions General Electric had taken relating to the investigation and selected course of remediation for the site.

Plaintiffs have used the IEPA's most recent approval of the revised RAP as a platform to make the same arguments they have been making throughout this case. Plaintiffs have not offered "newly discovered evidence" that would establish irreparable harm or otherwise excuse them from establishing the

traditional elements for injunctive relief. Plaintiffs already argued at the injunction hearing and in their motion to reconsider that the Consent Order by itself did not require abatement of the contamination because it was merely an agreement between the IEPA and General Electric. The Court was not persuaded by this argument. Moreover, in denying Plaintiffs' motion to reconsider, the Court specifically reminded Plaintiffs that a finding of imminent and substantial endangerment did not in itself establish irreparable harm under the elements for injunctive relief. Accordingly, the fact that the IEPA has now approved the use of institutional controls at the site does not change this Court's findings. Plaintiffs have yet to establish irreparable harm.

Therefore, Plaintiffs' Motion and request for relief from judgment (Dkt. 217) is denied pursuant to Federal Rule of Civil Procedure 62.1(a)(2).

Dated: August 14, 2018

By: /s/Iain D. Johnston
Iain D. Johnston
U.S. Magistrate Judge

APPENDIX C

ILND 450 (Rev. 10/13) Judgment in a Civil Action

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINOIS

Case No. 13 CV 50348
Judge Iain D. Johnston

[Filed February 15, 2018]

LAJIM, LLC et al,	)
	)
Plaintiff(s),	)
	)
v.	)
	)
General Electric Company,	)
	)
Defendant(s).	)
	)

JUDGMENT IN A CIVIL CASE

Judgment is hereby entered (check appropriate box):

☐ in favor of plaintiff(s)
and against defendant(s)
in the amount of $,

which ☐ includes pre–judgment interest.
☐ does not include pre–judgment interest.

Post-judgment interest accrues on that amount at the rate provided by law from the date of this judgment.

Plaintiff(s) shall recover costs from defendant(s).

☐ in favor of defendant(s) and against plaintiff(s)

Defendant(s) shall recover costs from plaintiff(s).

☒ other:

Judgment in favor of Plaintiffs on Count I as to liability only [88], but denied as to injunctive relief [181] entered on 12/18/2015 and 9/7/2017.

Judgment of dismissal by stipulation of the parties as to Count II and III [207] entered on 2/15/2018.

Judgment in favor of Defendant on Counts IV, V, and VI [88] entered on 12/18/2015.

Each side to bear their own fees and costs [106],[210].

This action was *(check one)*:

☐ tried by a jury with Judge presiding, and the jury has rendered a verdict.
☐ tried by Judge without a jury and the above decision was reached.
☒ decided by Judge Iain D. Johnston on a motion for summary judgment.

Date: 2/15/2018 Thomas G. Bruton, Clerk of Court

Yvonne Pedroza , Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
– CM/ECF LIVE, VER 6.1.1.2
WESTERN DIVISION

Case No.: 3:13–cv–50348
Honorable Iain D. Johnston

[Filed November 7, 2017]

LAJIM, LLC, et al.	)
Plaintiff,	)
	)
v.	)
	)
General Electric Company	)
Defendant.	)
	)

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Tuesday, November 7, 2017:

MINUTE entry before the Honorable Iain D. Johnston: Status and motion hearing held on 11/7/2017. Plaintiff's motion to reconsider [187] is denied for the reason stated on the record. Telephonic status hearing set for 12/1/2017 at 9:30 AM. By 11/29/2017 counsel shall provide direct–dial numbers to the Court's operations specialist. (yxp,)

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

For scheduled events, motion practices, recent opinions and other information, visit our web site at ***www.ilnd.uscourts.gov***.

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

No. 13 CV 50348
Magistrate Judge Iain D. Johnston

[Filed September 7, 2017]

LAJIM, LLC, *et al.*,	)
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Plaintiffs,	)
	)
v.	)
	)
General Electric Co.,	)
	)
Defendant.	)
	)

MEMORANDUM OPINION AND ORDER

INTRODUCTION

From the moment the parties consented to the undersigned's jurisdiction, the Court has read, re-read, analyzed and re-analyzed the language of the Resource Conservation and Recovery Act ("RCRA"), *see* 42 U.S.C. § 6901 *et seq.*, so that it could precisely comply with a complicated statutory scheme that attempts to balance a host of competing interests involved in the important

function of remediating toxic contaminants. That should be no surprise. A federal court is duty bound to follow Congressional mandates, even when the result reached is different than what the court would have liked. *See Supporters to Oppose Pollution, Inc. v. Heritage Group*, 973 F.2d 1320, 1325 (7th Cir. 1992) ("[C]ourts have no business bending one statute out of shape because litigants (or even the judges) believe that Congress should have written another statute differently."); "A judge who likes every outcome he reaches is very likely a bad judge." Neil Gorsuch, Remarks Upon Being Nominated to the U.S. Supreme Court (Jan. 31, 2017) *in* CHI. TRIB., Jan. 31, 2017, http://www.chicagotribune.com/news/opinion/editorials/ct-neil-gorsuch-trump-supreme-court-nominee-edit-0202-20170201-story.html (last visited Sept. 7, 2017). But, sometimes, Congressional mandates can be a little hazy. RCRA is an example of a foggy statute. So, not surprisingly, the Court looked to controlling Seventh Circuit case law for guidance as well. In this regard, the Court was informed by the Seventh Circuit's excellent and helpful decision in *Adkins v. VIM Recycling, Inc.*, 644 F.3d 483 (7th Cir. 2011). Tellingly, the *Adkins* opinion begins with an explication of RCRA. Again, this Court re-read and re-analyzed *Adkins* to guide it as it proceeded down the murky path of RCRA litigation. Indeed, this Court scrupulously followed *Adkins*' guidance in many ways. For example, as counseled by *Adkins*, this Court coordinated with the Fifteenth Judicial Circuit, Illinois Attorney General's Office and Illinois Environmental Protection Agency ("IEPA"). *Adkins*, 644 F.3d at 506; Dkts. #123, 138 at 10 (soliciting an amicus brief), 142-43. As noted later, this coordination proved invaluable

to obtain the views of the IEPA. Likewise, this Court ensured that it developed a sufficient factual record of all the information it needed to properly evaluate Plaintiffs' request for mandatory permanent injunctive relief. *See Adkins*, 644 F.3d at 496 ("These and other relevant issues may be properly addressed on remand with more information than is available from the limited record on a motion to dismiss for failure to state a claim."); Dkt. #155 at 2 (rescheduling the evidentiary hearing to allow time to review Defendant's Remedial Action Plan and the State's anticipated amicus brief). Again, as noted later, the facts developed at the evidentiary hearing were critical to this Court's determination. And, finally, the Court held an evidentiary hearing to press Plaintiffs to provide evidence why they should be afforded the relief requested. *Adkins*, 644 F.3d at 506 ("If [the state agency] should achieve comprehensive relief in its state court lawsuits, the federal judge will be entitled to press the citizen-plaintiffs as to what more they hope to accomplish in this suit."); Dkt. #138 at 10 (setting an evidentiary hearing to determine whether injunctive relief is appropriate in light of the Consent Order). Only after hearing from the parties' respective experts, viewing the voluminous record as a whole and questioning Plaintiffs' counsel and expert, the Court was able to confidently and comfortably come to the conclusion that, based on the facts presented and in the exercise of its discretion, the Court will not grant a mandatory permanent injunction. Plaintiffs have simply failed to meet their high burden.

MANDATORY INJUNCTIVE RELIEF UNDER RCRA

With exceedingly clunky language, under certain limited circumstances, RCRA empowers federal district courts to enter mandatory permanent injunctions to require companies to remediate their contamination. Because the precise wording of the statute is important, the language is quoted here. But because the Court is not sadistic, only the relevant provisions are quoted:

> [A] person may commence a civil action on his own behalf . . . against any person . . . including any. . . past or present owner or operator of a . . . storage . . . facility, who has contributed. . . to the past or present handling [or] storage . . . of any . . .hazardous waste which may present an imminent and substantial endangerment to health or the environment. . . The district court has jurisdiction . . . to restrain any person who has contributed. . . to the past. . . handling [or] storage . . . of any . . . hazardous waste . . . [or] order[ ] such person to take such other action as may be necessary, or both. . .

42 U.S.C. § 6972(a)(1)(B), (a)(2).

Despite the awkward wording, courts have consistently found that all types of injunctive relief are available. *Interfaith Community Organization v. Honeywell Int'l, Inc.*, 726 F.3d 403, 411 n.3 (3d Cir. 2013); *Litgo New Jersey Inc. v. Commissioner of New Jersey Department of Environmental Protection*, 725 F.3d 369, 393 (3d Cir. 2013); *Voggenthaler v. Maryland*

Square LLC, 724 F.3d 1050, 1056 (9th Cir. 2013) ("RCRA, in 42 U.S.C. § 6972, authorizes citizen suits for two types of injunctive relief – an injunction ordering the responsible parties to clean up the contamination and an injunction ordering them to stop any further violations.").

Before the Court is Plaintiffs' request for a mandatory permanent injunction.[1] To obtain a permanent injunction, a plaintiff must establish the following: (1) it has suffered an irreparable injury; (2) legal remedies, such as damages, are inadequate to compensate for that injury; (3) considering the balance of hardships between the plaintiff and the defendant, an equitable remedy is warranted; and (4) the public interest would not be disserved by a permanent injunction. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

In this case, this Court has already stated that Plaintiffs must establish all these elements. *LAJIM, LLC v. General Electric Co.*, 13 CV 50348, 2016 U.S. Dist. LEXIS 137448, at *14-15 (N.D. Ill. Oct. 4, 2016). The Court reiterates its view that Plaintiffs must

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[1] The Court, and apparently the parties, have operated under the assumption that at this stage of the proceedings the Court is being asked to issue a mandatory permanent injunction. The assumption is based on the fact that Plaintiffs seek to change the status quo, and that this Court has already ruled in Plaintiffs' favor on liability under RCRA. Important differences exist between preliminary and permanent injunctions. *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). One important difference is that the movant must succeed on the merits, not just that it is likely to do so. *Plummer v. American Institute of Certified Public Accountants*, 97 F.3d 220, 229 (7th Cir. 1996).

establish each element. To be sure, some cases hold that a civil plaintiff need not meet all the traditional elements of injunctive relief if a statute authorizes the relief. *See, e.g., Illinois Bell Telephone Co. v. Illinois Commerce Commission*, 740 F.2d 566, 571 (7th Cir. 1984). But those cases have been limited; they apply only when the specific statutory language at issue clearly requires injunctive relief for a particular set of circumstances. *See Bedrossian v. Northwestern Memorial Hospital*, 409 F.3d 840, 843 (7th Cir. 2005). This limitation is consistent with subsequent United States Supreme Court case law. *See, e.g., eBay*, 547 U.S. at 391 ("[A] major departure from the long tradition of equity practice should not be lightly implied."). When a statute merely authorizes a district court to grant injunctive relief, rather than requires the relief, a plaintiff must meet all the traditional elements of injunctive relief. *Daveri Development Group, LLC v. Village of Wheeling*, 934 F. Supp. 2d 987, 1007 (N.D. Ill. 2013). Because RCRA authorizes, but does not require, injunctive relief, Plaintiffs must establish all the traditional elements for a permanent injunction, including irreparable harm.

A showing of irreparable harm is an essential requirement of injunctive relief. *Alabama v. United States Army Corp. of Engineers*, 424 F.3d 1117, 1133 (11th Cir. 2005) (irreparable injury is sine qua non of injunctive relief). Indeed, irreparable harm is the most important requirement. *Kamerling v. Massanari*, 295 F.3d 206, 214 (2d Cir. 2002). For harm to be "irreparable," it must be both certain and great, not merely serious or substantial. *New Mexico Department*

of Game and Fish v. United States Department of Interior, 854 F.3d 1236, 1250 (10th Cir. 2017).

As this Court has previously held, because Plaintiffs seek an order requiring General Electric to investigate and remediate (which might be different than that required by the IEPA under the Consent Order), Plaintiffs must meet an even higher standard for this mandatory injunction. *LAJIM, LLC v. General Electric*, 13 CV 50348, 2016 U.S. Dist. LEXIS 137448, at *16 (N.D. Ill. Oct. 4, 2016) (citing *Schrier v. University of Colorado*, 427 F.3d 1253, 1261 (10th Cir. 2005) and *Cacchillo v. Insmed, Inc.*, 638 F.3d 401, 406 (2d Cir. 2011)). Mandatory injunctions are "cautiously viewed and sparingly issued." *Graham v. Medical Mutual of Ohio*, 130 F.3d 293, 295 (7th Cir. 1997).

ISSUE

Throughout this litigation, General Electric's counsel has passionately argued that this Court should not grant Plaintiffs' requested injunctive relief that would interfere with the Consent Order. General Electric asserted that this Court should deny the request based on the Consent Order reached in the parallel state-court proceedings, regardless of what label is placed on the reasoning for the denial. Dkt. #79 (October 7, 2015 Report of Proceedings, pp. 72, 103) ("This court has a duty to avoid duplication of suits, to avoid conflicting orders. . ."; "whether you call it mootness, diligent prosecution, lack of entitlement to injunctive relief. . ."). The Court understands that parties are usually more interested in judgements than rationales. But this Court must properly analyze the

requested relief, and a more nuanced[2] approach is required.

The issue is not simply that a parallel state-court proceeding exists. If that were the main focus, then *Adkins* would not have scotched any reliance on the various abstention doctrines. *Adkins*, 644 F.3d at 506 ("For the reasons we have explained, we believe the congressional policy choices reflected in the RCRA citizen-suit provisions remove the abstention options from the district court's toolbox.").

Instead, the issue is what remedies are sought and what relief has been granted in those parallel state-court proceedings. Specifically, this Court must focus on whether those parallel state-court proceedings are repairing Plaintiffs' injury. If they are, then a mandatory permanent injunction should not issue.

In conducting the analysis, the facts that courts have considered under a "diligent prosecution" inquiry are relevant to the irreparable harm analysis. Just as the same facts can be used by a plaintiff to plead a variety of claims, the same facts can be used by a defendant to establish a multitude of defenses. The Court disagrees with General Electric's conflation of the various defenses into an amalgam barring Plaintiffs' claims and relief. But the Court agrees with General Electric that when it reviews the record from December 2010 – when the Consent Order was entered – to today, the requested mandatory permanent

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[2] Unlike Modell from *Diner*, the Court is comfortable with the word "nuance" and believes that it is a real word.

injunction under RCRA is not warranted. Dkt. #79 (October 7, 2015 Report of Proceedings, p. 103).

Throughout the litigation, Plaintiffs have strenuously argued that the IEPA's analysis was flawed from the beginning, and, consequently, the horizontal and vertical extent of the contamination has not been properly determined. Dkt. #38 at 20-24, 34-38 (Plaintiffs' memorandum in support of summary judgment). But at the injunction hearing, General Electric's expert witness provided reasonable, rational and credible bases explaining why certain actions were taken and others were not.

Moreover, the IEPA's recent rejection of General Electric's Remedial Action Plan undermines Plaintiffs' requested relief. *See* Dkt. #179 at p. 1 (stating that on June 21, 2017, the IEPA rejected General Electric's Remedial Action Plan). At the injunction hearing, General Electric made a forceful, coherent and non-frivolous argument that natural attenuation in conjunction with institutional controls and monitoring was a sufficient remedy. General Electric made this same pitch to the IEPA. At the injunction hearing, Plaintiffs presented contrary evidence and arguments to General Electric's remedial plan. And, as it turns out, the IEPA agrees with Plaintiffs – at least in part in this regard. The IEPA rejected General Electric's Remedial Action Plan. Dkt. #179, p. 4-5 (rejecting General Electric's proposal of institutional controls and monitored natural attenuation). In short, the IEPA's rejection of General Electric's Remedial Action Plan under the Consent Order remedied – at least in part – Plaintiff's harm.

PLAINTIFFS HAVE FAILED TO MEET THEIR BURDEN ESTABLISHING ENTITLEMENT TO A MANDATORY PERMANENT INJUNCTION

Plaintiffs have maintained that the parallel state-court proceedings, which produced the 2010 Consent Order, are insufficient to remedy their injury. Plaintiffs argue that the measures outlined by General Electric in the Remedial Action Plan, namely institutional controls and monitored natural attenuation, are inadequate to remove the contamination at the site. This is based largely on Plaintiffs' contention that any remedial measures would be premature at this stage because the extent of the contamination has not been properly determined. Therefore, Plaintiffs seek an injunction that would require General Electric to complete a thorough investigation of the site to properly identify the measures required to remove the contamination.

At the evidentiary hearing, Plaintiffs focused on the inadequacy of General Electric's investigation of the site. As a result, Plaintiffs' retained expert provided limited testimony about the effectiveness of the remedial measures outlined by General Electric. Instead, Plaintiffs' expert testified that additional investigation and testing was necessary to opine on the proper scope of remediation for the site. Accordingly, without showing General Electric's investigation into the site was inadequate, Plaintiffs have not provided the evidence necessary for this Court to second guess General Electric's Remedial Action Plan of institutional controls and monitored natural attenuation, even though the IEPA has yet to approve these measures.

Despite several revisions to General Electric's Focused Site Investigation Report and the IEPA's ultimate approval of it, Plaintiffs are requesting that General Electric perform the following investigation of the site to determine the extent of the contamination: (1) determine if dense non-aqueous phase liquid ("DNAPL") containing the trichloroethylene ("TCE") and 1,1,1 trichlorethane ("TCA") solvents previously used by General Electric is present at the General Electric plant; (2) define the horizontal and vertical extent of groundwater contamination at the General Electric plant and all downgradient areas; (3) understand the behavior of Rock Creek and why contamination is present in the south irrigation well; and (4) determine the source of and monitor chlorinated solvent vapors inside the golf course clubhouse, the former home of Lowell Beggs and Martha Kai Conway, and the surrounding residences. *See* Dkt. #111, p. 9-10. As part of this investigation, Plaintiffs propose soil borings that would penetrate the bedrock, installation of additional and deeper monitoring wells ("MW"), additional sampling of the new and existing wells, and implementation of long-term vapor intrusion monitoring for Plaintiffs' properties and the surrounding residences. *Id.* Many of these issues are interrelated, but the Court will address each in turn.

DNAPL and Groundwater Contamination

Plaintiffs, through their retained expert Dr. Konrad Banaszak, argue that the investigation of the site to date has not adequately determined whether DNAPL is present in the geologic materials under the General

Electric plant property and extending under and beyond Rock Creek and how far it has penetrated below the surface. Plaintiffs are concerned that a DNAPL would act as a continuing source of contamination at the site. Plaintiffs argue that without additional testing and remediation efforts, nothing prevents the DNAPL (if one exists) from leaving the General Electric plant and migrating south of Rock Creek.

Plaintiffs admit that they are putting forward an untested theory regarding the extent of the contamination. As General Electric noted at the hearing, Plaintiffs merely offer different conclusions about the data collected by General Electric and the data they hope to develop with additional investigation and testing. At no time before or during this litigation have Plaintiffs or Dr. Banaszak tested the groundwater or soil. Dr. Banaszak visited the site once in 2013, but he did not take any samples.[3] Instead, Plaintiffs have asked the Court "to look at the underlying facts and the data and importantly to take notice of the data that has *not* been gathered…" Dkt. #177 (June 1, 2017 Report of Proceedings, p. 31) (emphasis added). Dr. Banaszak testified that groundwater sampling was not prohibitively expensive;[4] yet, no sampling was

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[3] Dr. Banaszak explained that any single sample he would have collected would not add much to his understanding of the site because samples would need to be taken over a long period of time to show a trend. As it is now 2017 and the case was filed in 2013, had additional testing started when the case was filed, there would at least be four years of data.

[4] Dr. Banaszak testified that it would cost approximately $2,000 to $2,500 to have someone travel out to the site, take a field sample

conducted by Plaintiffs. Not even on the property that Plaintiffs own.

Despite not taking a single sample, Dr. Banaszak opined that the soil borings at the two degreaser locations in the plant's main building did not go deep enough to rule out DNAPL because "the lowest boring still had evidence of contamination at reasonable, substantial levels." Dkt. #177 (June 1, 2017 Report of Proceedings, p. 54). Dr. Banaszak opined that any TCE contamination spilled onto the ground at the degreaser locations would eventually travel into the bedrock through various cracks and fissures. Dr. Banaszak argued that drilling into the bedrock to sample groundwater was possible and not too costly, generally tens of thousands of dollars. Dr. Banaszak testified that he would need additional information to determine if it would be necessary to drill below the bedrock to sample the deep aquifer material for contamination. Dr. Banaszak disagreed with General Electric's determination that it would take 4,000 years for groundwater to penetrate all the way through the Maquoketa Shale. He opined that the Shale near the site was highly fractured and that groundwater could move more quickly through those fractures, but he was unsure how much faster because he did not make any independent calculations. He also opined that despite

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from one of the wells, and submit it to a laboratory to have it analyzed. However, it would only cost $500 to actually take the sample and $150 to pay a laboratory to analyze it.

sealing and closing City Well 1,[5] the investigation to date has not shown that it was the only conduit for contamination to travel below the Maquoketa Shale.[6]

Additionally, Dr. Banaszak was concerned that neither soil borings nor monitoring wells were installed at a possible third degreaser in Building 14. Dr. Banaszak opined that contaminated groundwater under Building 14 would travel north, not south. Accordingly, if groundwater traveled north, the samples taken from soil borings 15 and 41, located south of Building 14 and revealing no significant source of contamination, would not shed light on the extent of any contamination from a third degreaser. Dr. Banaszak opined that additional and deeper soil borings and monitoring wells would need to be installed and sampled to determine if contamination was released from the possible degreaser located in Building 14.

Overall, Dr. Banaszak opined that the data collected throughout the site did not show that the contamination plume is stable or shrinking, which leaves the possibility that a DNAPL exists. He argued that contamination detected in the monitoring and irrigation wells hundreds of feet from the General Electric's plant suggests there is a DNAPL. But Plaintiffs conducted no testing to confirm this "suggestion." He also argued that the north irrigation

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[5] City Well 1 penetrated the Shale because it was over 1,000 feet deep.

[6] The Maquoketa Shale begins approximately 225 feet below the surface and ends approximately 400 feet below the surface.

well was drawing water, and contamination, out of the bedrock. Additionally, Dr. Banaszak noted that the two monitoring wells north of Rock Creek, MW 7 and 8, had been sampled only twice and revealed a wide variability in the contamination level.

In response to Plaintiffs' arguments, General Electric presented the testimony of its retained expert Dr. Peter Vagt, who has been the project director of this site since 2008. Dr. Vagt testified that any additional investigation is unnecessary. Dr. Vagt testified that based on the soil samples taken from the area around the General Electric plant, there was no evidence DNAPL was present. Pursuant to the IEPA's directive, General Electric performed a CSAT[7] analysis on the soil samples collected to determine the concentration for each volatile organic compound. If any of the soil samples were above a threshold CSAT number for any volatile organic compound, the IEPA would find DNAPL present. However, none of the samples General Electric analyzed exceeded the CSAT number.

The IPEA even requested a more detailed explanation from General Electric regarding soil

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[7] "CSAT" or the soil saturation limit means "the contamination concentration at which the absorptive limits of the soil particles, the solubility limits of the available soil moisture, and saturation of soil pore air have been reached. Above the soil saturation concentration, the assumptions regarding vapor transport to air and/or dissolved phase transport to groundwater (for chemicals that are liquid at ambient soil temperatures) do not apply, and alternative modeling approaches are required." 35 Ill. Adm. Code § 742.200.

concentrations near the main building and the two degreasers. In particular, monitoring well G105D was installed near the central degreaser and groundwater samples were taken from 1987 until 2014. *See* Dkt. #166-6 (General Electric's Exhibit V). Dr. Vagt testified that the earlier samples revealed very high concentrations of TCE, which suggested DNAPL may be present. However, the concentrations dropped significantly over time, eventually down to 1/1,000 of the original concentration. Dr. Vagt interpreted this to mean the source of TCE and TCA had dispersed and there was not a continuing source of TCE and TCA underneath the plant feeding a plume of contamination. He opined that if a DNAPL were present, the concentrations would have stayed constant. Ultimately, the IPEA was satisfied that DNAPL was not present and approved General Electric's Focus Site Investigation Report.

As to a potential third degreaser, Dr. Vagt recalled that a General Electric employee testified that there may have been a third degreaser in Building 14 that used TCA or TCE. However, the soil samples taken near Building 14 either detected no TCA/TCE or low levels of it. Based on this evidence, Dr. Vagt opined and the IEPA agreed, that no further testing was necessary to determine if a third degreaser was located in Building 14. Furthermore, Dr. Vagt determined that groundwater was flowing south from Building 14, not north as Dr. Banaszak testified. The conceptual site model Dr. Banaszak relied on was preliminary. After that preliminary model was made, Dr. Vagt revisited the site and discovered that the high point in the groundwater was several hundred feet farther north of

Building 14 than he previously thought, which would cause the groundwater to flow south from Building 14.

Dr. Vagt also maintained his conclusion that City Well 1 was the only conduit for contaminants to travel below the Maquoketa Shale. Once City Well 1 was sealed and closed in 1988, the TCE concentrations dropped significantly in the first two years and continued dropping slowly after that. Dr. Vagt opined that this data revealed that City Well 1 was the conduit and that there were no other natural ways for contamination to get into the deep aquifer below the Maquoketa Shale. Dr. Vagt calculated that it would take 4,000 years for water to travel through to the bottom of the Maquoketa Shale at a rate of 1/20 of a foot per year. Dr. Vagt testified that based on the seepage rate of the Maquoketa Shale even if TCE were present in the ground, it would only have traveled 5 or 6 feet into the Shale. Therefore, Dr. Vagt did not recommend drilling into the Maquoketa Shale because the only contamination of the deep aquifer has been through man-made bore holes or wells, like City Well 1.[8]

Based on the evidence presented at the hearing, the Court finds that General Electric's investigation into the presence of DNAPL and the IEPA's approval of this investigation and ultimate determination that no DNAPL existed was not unreasonable. Therefore, Plaintiffs have not met their burden to show that

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[8] The principle of *primum non nocere* is apparently applicable in environmental studies as well.

additional testing for DNAPL is necessary to determine the proper scope of any remediation for the site.

Rock Creek

The parties dispute whether Rock Creek is a groundwater divide that would prevent contamination from flowing underneath Rock Creek and to the south. Plaintiffs argue that trace amounts of TCE present in the south irrigation well located south of Rock Creek is evidence of this. Plaintiffs believe that the contamination is moving through the competent bedrock under Rock Creek and into the south irrigation well. Plaintiffs further believe that the 6 monitoring wells on the south side of Rock Creek,[9] which did not detect site-related contaminants in the groundwater samples, are not deep enough to reveal any contamination because they are shallower than the level at which groundwater and contamination move through the bedrock.[10]

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[9] Namely MW11, MW11-LS, MW 12, MW12-LS, MW13, MW13-LS.

[10] Similarly, Dr. Banaszak believed that the shallow depth of the monitoring wells skewed the evaluation of potentiometric pressure, which pulls groundwater from a higher pressure in the monitoring well to a lower pressure. Dr. Banaszak opined that the data collected by General Electric revealed that Rock Creek was pulling groundwater into it, which would make it a groundwater divide; however, he believed this data was incomplete. Dr. Banaszak testified that there is evidence from 1999 that Rock Creek was a losing stream (it was losing its water to the aquifers below), which would allow contamination to flow under Rock Creek.

However, Dr. Vagt testified that the gage data collected by the United States Geological Survey on almost a daily basis from 1978 through 1985 about Rock Creek reveals it is predominately a

At the hearing, General Electric maintained that Rock Creek is a groundwater divide. Dr. Vagt relied on the gage data for Rock Creek and the samples taken from the two monitoring wells installed north of Rock Creek, MW 7 and 8, to conclude that Rock Creek was a groundwater divide. General Electric asserted this conclusion in their Focused Site Investigation Report. The IEPA requested additional information and required the installation of monitoring wells and the testing of residential wells to the south of Rock Creek to confirm General Electric's conclusion. Dr. Vagt determined that the lack of site contaminants in these wells confirmed his conclusion that Rock Creek prevented contaminants from moving past it. Dr. Vagt testified that a single sample revealing trace amounts of TCE from the south irrigation well did not overshadow the lack of contamination detected in samples taken from 6 monitoring wells and the residential wells located south of Rock Creek that were at differing depths and in close proximity to the south irrigation well. Dr. Vagt opined that pumping from the south irrigation well, which is beyond the wells that were sampled, was likely pulling TCE from under Rock Creek toward the well. Based on this explanation, the

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gaining stream. A gaining stream would pull groundwater into it from both sides and beneath it, creating a groundwater divide. Dr. Vagt testified that Rock Creek is a gaining stream about 90% of the time and that the data Dr. Banaszak relied on from 1999 indicating it was a losing stream was likely during one of these intermittent changes. Dr. Vagt further testified that even though the daily gage data only went through 1985, it was representative of how Rock Creek would act in 2012, namely that it remained predominately a gaining stream.

IEPA determined that additional investigation and sampling was unnecessary.

Accordingly, the testimony at the hearing reveals that Plaintiffs merely interpreted the data differently than General Electric and the IEPA. However, Plaintiffs have offered no additional testing that would seriously challenge the finding that Rock Creek is a groundwater divide, and have therefore provided no basis for ordering a new, longer-term investigation into the site.

Vapor Intrusion

Plaintiffs seek to determine the extent of the vapor intrusion into the homes and clubhouse. They also seek implementation of long-term vapor intrusion monitoring. At the hearing, Plaintiffs informed the Court that the home once owned by Lowell Beggs and Martha Kai Conway had been sold. Plaintiffs agreed that the Court cannot force access into the home for testing and monitoring. Accordingly, Plaintiffs asked the Court to order General Electric to obtain consent from the new owners to implement the vapor intrusion monitoring not only for this home, but for the surrounding residences as well.

Plaintiffs assert that 1,2-dichloroethane ("1,2-DCA") was detected inside Plaintiffs' former home and is the same compound from the plant contamination. Based on the detection of 1,2 DCA, Plaintiffs argue that General Electric should be required to investigation where the contaminants came from, even if they were not site related.

General Electric maintains that vapor intrusion is not an issue because no site-related contaminates were found in the groundwater and sub-slab samples taken from under and around Plaintiffs' former home, regardless of whether contaminants were detected in the indoor air. The investigation into the indoor inhalation exposure revealed that there was not a complete pathway between the source of site-related contamination around or under the home and the indoor air, noting that 1,2-DCA, which was not detected in the samples taken from the groundwater or the sub-slap vapor, could come from a number of sources unrelated to the site contamination. Without a complete pathway, any additional investigation into the source of 1,2-DCA would be unnecessary. The IEPA agreed with this conclusion and did not require additional testing. This Court is not in a position to second guess the IEPA's decision based on Plaintiffs' discontent with the decision.

* * *

For all the reasons stated above, the Court finds that Plaintiffs have not met their heavy burden to show they are entitled to a mandatory permanent injunction. This Court is not in a position to second guess the well-reasoned decisions of General Electric and the IEPA with respect to the site investigation. The IEPA has consistently pushed back on General Electric's proposals since 2010. And the IEPA's rejection of General Electric's Remedial Action Plan is just the latest example. The IEPA's actions, including the latest rejection, is strong evidence that Plaintiffs' injuries are being remedied in the parallel state-court proceeding.

The Court sympathizes with Plaintiffs about the delay in cleaning up the site, but as Dr. Banaszak indicated, any investigation into the site requires data collection over a long period of time to determine the trends in the contamination and how that is affected by the groundwater flow. The IPEA is satisfied with General Electric's investigation to date and has moved on to evaluating what remedial measures are necessary for this site.[11] Obviously, what has satisfied the IEPA has not satisfied Plaintiffs. But Plaintiffs' lack of satisfaction does not mean that they have met their high burden to obtain a mandatory permanent injunction. The IEPA has even shared Plaintiffs' concerns over the proposed use of institutional controls and monitored natural attenuation. However, this Court will leave it to General Electric to provide additional support for its proposed plan or modify it in accordance with the IEPA's requirements.

CONCLUSION

The Court recognizes that the IEPA is not seeking every aspect of relief Plaintiffs desire and that General Electric may seem like it has been dawdling for decades. Plaintiffs have the Court's sympathies in this

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[11] It is important to remember the issue before the Court. The issue is whether Plaintiffs have met their burden of showing irreparable harm so that a completely new investigation of the site should be ordered, despite the IEPA's approval of the investigation to date. The issue is not whether the Court necessarily agrees with General Electric's proposed remedy of natural attenuation and monitoring with institutional controls. Indeed, the IEPA's rejection of that remedy as proposed is strong evidence that irreparable harm was not established.

regard. But sympathy is not a basis upon which to grant a mandatory permanent injunction that would disrupt the actions taken under the Consent Order. *Holbrook v. University of Virginia*, 706 F. Supp. 2d 652, 653 (W.D. Va. 2010). A reasonable person might disagree with this Court's determination, but that disagreement does not necessarily mean this Court abused its discretion in denying the relief. *United States v. Williams*, 81 F.3d 1434, 1437 (7th Cir. 1996). Moreover, it is important to remember that Plaintiffs' Comprehensive Environmental Response, Compensation, and Liability Act claim remains at this stage of the litigation. Plaintiffs are not currently without a remedy in this case, in addition to the remediation efforts sought by the IEPA and Illinois Attorney General under the Consent Order. Indeed, Plaintiffs' hopes of a more expansive remediation should be buoyed by the IEPA's recent rejection of General Electric's Remediation Action Plan.

Plaintiffs' request for a mandatory permanent injunction is denied. Plaintiffs have failed to establish irreparable harm.

Dated: September 7, 2017

By: /s/Iain D. Johnston
Iain D. Johnston
U.S. Magistrate Judge

APPENDIX F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

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MEMORANDUM OPINION AND ORDER

As beautifully illustrated in the movie *Avalon*, "can" differs from "may." Likewise, in the legal context, whether a court *could* enter mandatory injunctive relief differs from whether a court *should* grant that extraordinary relief. This case exemplifies that critical difference.

I. BACKGROUND

A. Site History[1]

From 1949 through 2010, General Electric ("GE") operated a plant in Morrison, Illinois ("City"). The plant manufactured appliance and automotive controls for products, including refrigerators, air conditioners, and motor vehicles. During the relevant time, the manufacturing process used chlorinated organic solvents to remove oil from parts. These solvents can break down into other matter, such as 1,2-dichloroethane (1,2-DCA), all of which are toxic and regulated by federal and state environmental agencies. GE stored the chlorinated solvents in degreasers located in the plant. The degreasers were decommissioned in 1994.

Beginning 1986, and continuing throughout the remainder of the 1980s and 1990s, various monitoring procedures – most at the order of the Illinois Environment Protection Agency ("IEPA") – detected the presence of solvents in and near the local water supply downgradient of GE's plant. Two of the City's municipal drinking water wells were closed as a result and the third had an air stripper installed by a contractor hired by GE to filter the water used by the

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[1] The site background is set out in abbreviated form. A much more complete history, which this Court incorporates by reference, is included in the Court's order adjudicating the parties' cross motions for summary judgment. *See LAJIM, LLC v. General Elec. Co*, No. 13 CV 50348, 2015 WL 9259918, at *1-4 (N.D. Ill. Dec. 18, 2015).

City. Soil samples taken from around the degreaser sites also confirmed the presence of solvents in the soil.

In 2001, due to an IEPA order, GE hired a different contractor to conduct an extensive survey. Consequently, a report was issued that found that the Rock Creek, which flows through the contaminated area, was a natural divide that would prevent the solvents from migrating further south and that natural attenuation (functionally, allowing the plume of solvents to dissolve naturally over time) would deal with the rest. The IEPA rejected that report and concluded active remediation would be required to clean up the site. In 2004, the IEPA, through the Illinois Attorney General, filed suit against GE on state-law grounds seeking the costs it had expended as a result of the hazardous substance release and an injunction requiring GE to determine the nature and extent of the soil and groundwater contamination, and then to perform remediation. After years of litigation, on December 12, 2010, the suit resulted in a consent order between GE and the IEPA ("Consent Order").

B. The Consent Order

Pursuant to the Consent Order, GE agreed to submit to the IEPA for its approval a series of plans and reports including the following: (1) a work plan to survey private wells, install additional monitoring wells, and complete additional soil borings; (2) a Focused Site Investigation Report ("FSI") summarizing the results of the work plan; (3) a Remedial Objectives Report ("ROR") to address the impact of the soil and groundwater contamination; and (4) a Remedial Action Plan ("RAP") to meet the remediation objectives

identified in the ROR. In short, the process was to investigate the problem (the work plan), report on that investigation (the FSI), identify what goals needed to be met (the ROR), and then develop a plan to reach those goals (the RAP).

Under the terms of the Consent Order, the work plan was to be submitted within sixty days of the adoption of the order, which would be by February 22, 2011. After IEPA approval (which was not limited to a certain time frame), GE had sixty days to implement the work plan. From there, GE had one-hundred-eighty days to complete the work plan and submit the FSI. IEPA again had an indefinite time frame to approve the FSI, after which the ROR time limits became operative. GE was required to present the ROR by the either December 31, 2012, the day the last City well was abandoned, or ninety days after the FSI was approved – whichever was earlier. Following another indefinite approval period by the IEPA, GE was required to propose the RAP within ninety days of the ROR's approval. Assuming the IEPA took approximately ninety days to approve of GE's various plans (in reality, the IEPA took between 30-90 days to approve or reject all filings with one notable exception), the ROR should have been filed on or about May 22, 2012. Under the worst case scenario, pursuant to the Consent Order, the ROR had to be filed by December 31, 2012. It is notable, however, that any of these dates were modifiable by agreement of the parties, although it is unclear that this ever occurred.

GE timely proposed its first work plan on February 18, 2011. The IEPA rejected that work plan on March

28, 2011. GE proposed a revised work plan on April 26, 2011, which was likewise rejected on July 12, 2011. Ultimately, an additional revised work plan was proposed on August 26, 2011 and approved—after additional negotiation—on November 30, 2011. The plan was implemented on December 5, 2011 and initially completed on January 27, 2012. However, supplemental investigatory work extended the work plan out another year, until January 30, 2013. The FSI—some 3,500 pages of data, sampling, and activity—was initially offered on April 26, 2013. But on July 25, 2013, the IEPA rejected the plan and ordered additional testing. On August 23, 2013, GE presented a supplemental work plan to address that additional testing. The IEPA approved this plan on October 11, 2013. On May 15, 2014, GE proposed an addendum to the FSI, which the IEPA rejected (or, more realistically, sought clarification concerning) on August 14, 2014. On October 23, 2014, GE responded to that rejection by letter, and the IEPA gave conditional approval for the FSI on March 18, 2015. That approval was reached after additional back-and-forth correspondence and some additional sampling. Finally, on June 18, 2015, GE provided its ROR. The IEPA rejected that ROR on February 10, 2016, to which GE responded on March 10, 2016. Following a meeting and additional discussions, the IEPA conditionally approved the ROR on August 10, 2016. To date, this Court has not been provided a copy of the approved ROR.

A great deal of investigatory work has been ordered and performed pursuant to the Consent Order. But the entire proceeding appears years off schedule. Moreover, no remediation has been performed anywhere on the

site in the thirty years since the initial discovery of toxic contaminants traceable to GE's degreasers in the downgradient soil and water supplies of the City.

C. This Citizen Suit

Plaintiffs, individuals and an entity that owns a golf course, filed a citizen suit against GE on November 1, 2013. *See* 42 U.S.C. §6972. They seek a mandatory injunction to require GE to remediate the contamination (Count I) under the Resource Conservation and Recovery Act ("RCRA"), *see* 42 U.S.C. § 6972(a)(1)(B); cost recovery (Count II) and a declaratory judgment (Count III) under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), *see* 42 U.S.C. § 9607(a) (cost recovery) and § 613 (g)(3) (declaratory judgment); and allege state law claims of nuisance (Count IV), trespass (Count V), and negligence (Count VI).

Following extensive discovery, on December 18, 2015, this Court granted summary judgment to plaintiffs as to liability on Count I.[2] The Court granted

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[2] In granting plaintiffs summary judgment, this Court found that plaintiffs' citizen suit was not barred because the IEPA's suit was not seeking to enforce §6972(a)(1)(B) of RCRA. *LAJIM*, No. 13 CV 50348, 2015 U.S. Dist. LEXIS 169753 at *19-20. In making that determination, this Court applied the plain meaning of the statute's terms. *Id.* As a result of the most recent briefing and argument, the Court again re-read and analyzed the critical cases affecting its decision as to liability on Count I, including, but not limited to *Adkins v. VIM Recycling, Inc.*, 644 F.3d 483 (7th Cir. 2011) and *Friends of Milwaukee's Rivers v. Milwaukee Metropolitan Sewage Dist.*, 382 F.3d 743 (7th Cir. 2004). Having

summary judgment to defendants on Counts IV-VI.[3] Having made these rulings, the parties then briefed three issues: (1) whether plaintiffs can establish the traditional required elements of injunctive relief; (2) whether plaintiff's injunctive relief request is moot in light of the Consent Order; and (3) whether this Court can contradict determinations made in the state-court proceedings or Consent Order. Dkt. #106. The main thrust of these three issues focuses on the availability and propriety of injunctive relief. The parties again provided helpful submissions.

II. ISSUE

Currently before the Court is the question of what appropriate injunctive remedy, if any, is available to plaintiffs under RCRA. Specifically, plaintiffs seek a

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re-read those cases, the Court is even more convinced that its summary judgment liability determination is correct, despite GE's protestations. In both of those decisions, the Seventh Circuit employed a plain meaning analysis and strictly applied RCRA's language, just as this Court used. Additionally, *Friends of Milwaukee's Rivers* was a Clean Water Act (CWA) case. The CWA has both a similar citizen suit provision as well as a barring provision. Citizen suits brought under the CWA allow for citizens to seek a civil penalty, but a State cannot obtain a civil penalty if it is proceeding under a comparable state statute. Accordingly, this provision evidences that Congress knows how to limit remedies in environmental cases when a State is proceeding under a comparable state law. If Congress wanted to bar RCRA citizen suits because the State was proceeding under a similar state statute, Congress would have said so.

[3] Counts II and III remain pending, and the parties have filed no dispositive motions as to those counts.

mandatory injunction for immediate active remediation, which GE opposes.

III. CONTENTIONS OF THE PARTIES

GE contends that if a state-court proceeding already exists that covers the same scope of the relief sought by the citizen suit, then the plaintiffs are not entitled to injunctive relief in this Court. According to GE, this is true whether the Court considers the issue in the context of mootness or the lack of irreparable harm or however else phrased. Transcript of Report of Proceedings, August 18, 2016 at p. 45. In other words, "if the field is occupied by the state [this Court] cannot supplant that with [its] own judgment." *Id.* at p. 46. GE made a similar argument as to liability. Transcript of Report of Proceedings, October 7, 2015 [Dkt. 79] at p. 72 ("This court has a duty to avoid duplication of suits, to avoid conflicting orders, and to [. . .] give deference to a state agency which has primary authority.").

Plaintiff contends that because it seeks broader injunctive relief, based in part on the IEPA's alleged failure to investigate and address aspects of the contamination, then not only is injunctive relief available, but also that it must be granted. *Id.*

IV. ANALYSIS

A. Whether This Court Could Enter Mandatory Injunctive Relief

Whether this Court *can* enter injunctive relief in a citizen suit, even when a state proceeding is ongoing, is squarely addressed by RCRA. And RCRA answers that question in the affirmative. Initially, any person may

commence a civil action on his own behalf against any person who contributed to past or present handling, storage, treatment, transportation, or disposal of hazardous waste which may present an imminent and substantial endangerment to health or environment. 42 U.S.C. §6972(a)(1)(B). There is no dispute that GE is a "person" that handled or stored hazardous waste. Moreover, this Court has already determined that there may be an imminent and substantial endangerment to health or environment. However, that type of citizen suit is statutorily barred if the IEPA were diligently prosecuting an action under §6972(a)(1)(B). 42 U.S.C. §6972(b)(2)(C). This Court has already determined that because the State of Illinois was not prosecuting a case under §6972(a)(1)(B), the suit is not barred. Consequently, plaintiffs' citizen suit may proceed. And RCRA plainly authorizes injunctive relief in citizen suits. 42 U.S.C. §6972(a). Accordingly, once a court finds that the plaintiff has met the requirements of a citizen suit and the suit is not barred, a court has the power to stop further contamination as well as to remediate past contamination.

Therefore, despite GE's position, the plain language of RCRA gives this Court the power to enjoin GE. The real issue is whether this Court *should* enjoin GE under the particular facts of this case.

Case law supports this conclusion. Indeed, *Adkins v. VIM Recycling, Inc.*, 644 F.3d 483 (7th Cir. 2011) – a case upon which GE heavily relies throughout this case

– supports this Court's finding.[4] In *Adkins*, the Seventh Circuit specifically stated the following: "We do not suggest, of course, that once a citizen suit has cleared RCRA's statutory hurdles it is immune from all other constitutional and preclusive doctrines, such as standing, mootness, and claim or issue preclusion." *Id.* at 503. This statement evidences GE's error. There would be no reason for the Seventh Circuit to make

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[4] The Court is a bit confused by GE's heavy reliance on *Adkins*. This Court views *Adkins* as a bad case for GE on many levels, including, but not limited to, its reliance on the plain language of RCRA as well as its complete rejection of two abstention doctrines, the rationales of which GE repeatedly espouses. While this Court has previously stated and still remains concerned that it should not trample on a parallel state-court proceeding, *Adkins* holds that once Congress has considered those precise concerns and nevertheless authorized federal courts grant injunctions, those concerns are all but eliminated. *Adkins*, 644 F.3d at 506 ("[W]e recognize that the busy district court's decision to abstain in this case was based on a healthy respect for state courts and a desire to avoid duplicating or interfering with their efforts. For the reasons we have explained, we believe the congressional policy choices reflected in the RCRA citizen-suit provisions remove the abstention options from the district court's toolbox."). Having said that, the Court recognizes that the jurisprudential concerns underpinning abstention doctrines (that the *Adkins* decision says do not apply) are kissing cousins to other court created jurisprudential restraints, such as mootness and standing (that the *Adkins* decision says may apply). Additionally, although GE focuses on footnote 2 of *Adkins*, that footnote does not support GE's positions in this case. As noted previously, the Seventh Circuit did not address the citizen suit bar under §6972(b)(2)(C). *LAJIM*, 2015 U.S. Dist. LEXIS 169753 at *26-27. Moreover, the Seventh Circuit explicitly noted that the State of Indiana did not commence its own RCRA "endangerment" action, and as a result, that case could not address the specific bar at issue here which would prevent a citizen suit under §6972(a)(1)(B).

this statement if injunctive relief were not available. Instead, *Adkins* finds that courts should consider these doctrines under the particular facts of a case before granting injunctive relief. This clear statement likewise rejects plaintiffs' assertion that once they meet RCRA's statutory requirements they are presumptively entitled to relief. *See also Phoenix Beverages, Inc. v. Exxon Mobil Corp.,* No. 12 CV 3771, 2015 U.S. Dist. LEXIS 16959, *12 (E.D.N.Y. Feb. 11, 2015) (citing *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545, 542 (1987)).

B. Whether This Court Should Enter Mandatory Injunctive Relief

In determining whether mandatory injunctive relief should be awarded, the Court must consider the nature of the relief (including the traditional elements of injunctive relief) as well as the appropriateness of the relief sought under the facts of the case.

1. Nature of Mandatory Injunctive Relief

As this Court has previously determined, a plaintiff in a citizen suit must meet the traditional elements for injunctive relief. *LAJIM, LLC v. General Electric Co.*, No. 13 CV 50348, 2016 U.S. Dist. LEXIS 19183, *11 (N.D. Ill. Feb. 17, 2016). Nothing plaintiffs have presented in the latest round of filings requires a different determination. Indeed, plaintiffs continue to ignore the important distinction between when a government agency is statutorily authorized to seek and obtain injunctive relief, in which case the elements of injunctive relief are not necessary, and when a citizen brings its own private suit seeking injunctive

relief. *Compare Commodity Futures Trading Comm'n v. Hunt*, 591 F.2d 1211, 1220 (7th Cir. 1979) (where CFTC seeks injunction under authorizing statute, it "need not meet the requirements for an injunction imposed by traditional equity jurisprudence.") *with United States v. Bethlehem Steel Corp.*, 38 F.3d 862, 867 (7th Cir. 1994) ("Ordinarily, a court is obligated to conduct an equitable balancing of harms before awarding injunctive relief, even under an environmental statute which specifically authorizes such relief (as does RCRA section 3008(a)).").

The required elements of injunctive relief are the following: an irreparable injury; an inadequate remedy at law; a balancing of hardships favoring an injunction; and a showing that the public interest weighs in favor of the relief. *LAJIM*, 2016 U.S. Dist. LEXIS 19183 at *11 (citing *Maine People's Alliance & Natural Resources Defense Council v. Mallinckrodt, Inc.*, 471 F.3d 277, 296 (1st Cir. 2006)). Critically, it is important to remember four aspects of injunctive relief. First, injunctive relief is discretionary. *EEOC v. AutoZone*, 707 F.3d 824, 840 (7th Cir. 2013). Second, because the relief is discretionary, two different judges faced with identical facts can exercise their discretion differently, and both still be acting within the scope of their discretion. *See United States v. Williams*, 81 F.3d 1434, 1437 (7th Cir. 1996). Third, the decision to grant or deny an injunction is heavily driven by the particular facts of a case. *Groupe SEB USA, Inc. v. Euro-Pro Operating LLC,* 774 F.3d 191, 205 (3d Cir. 2014) (in determining whether to grant injunctive relief the court must exercise it equitable discretion in a case-by-case, fact specific manner). Fourth, even if an

injunction is warranted, fashioning the scope of the injunction is fact driven. *In re Mirant*, 378 F. 3d 511, 522 (5th Cir. 2004). Additionally, because plaintiffs seek remediation by GE, they seek a mandatory injunction. *See Schrier v. University of Colorado*, 427 F. 3d 1253, 1261 (10th Cir. 2005) (mandatory injunctions require nonmovant to act in a particular manner). Consequently, plaintiffs must meet an even higher burden. *Cacchillo v. Insmed, Inc.*, 638 F.3d 401, 406 (2d Cir. 2011).

2. Determining the Appropriateness of Injunctive Relief

Numerous cases exist regarding the availability and propriety of injunctive relief in citizen suits under the various federal environmental statutes, including RCRA. Each side did an excellent job surveying a vast array of those cases and was able to mine the Federal Reporter, LEXIS and Westlaw and present cases it believed were helpful to their cause. GE cited a particularly relevant Clean Air Act case, involving a requested injunction in a citizens suit and the CAA's "diligent prosecution" bar. *Group Against Smog and Pollution, Inc. v. Shenango Inc.*, 810 F.3d 116 (3d Cir. 2016). *Group Against Smog and Pollution* stands for some helpful propositions for GE, including that merely because the state may not be taking the precise remedial action desired by the citizen plaintiffs or is moving slowly does not mandate injunctive relief. But many of the other cases GE cites are easily distinguishable because they involve situations in which the citizen plaintiffs fail to adequately identify what more they desire by way of remediation or the

citizen plaintiffs seek nearly the identical relief obtained by the state. *Trinity Industries, Inc. v. Chicago Bridge & Iron Co.*, 735 F.3d 131, 140 (3d Cir. 2013) ("Trinity has not contended that the remediation scheme put in place by the Consent Order is deficient or ineffective."); *Center for Biological Diversity, Inc. v. BP America Prod. Co.*, 704 F.3d 413, 431 (5th Cir. 2013) ("The [plaintiff] does not dispute that cleanup efforts are and have been ongoing in the Gulf, and it identifies no deficiency in those efforts."); *Stratford Holding, LLC v. Foot Locker Retail Inc.*, No. CIV 12-772, 2013 U.S. Dist. LEXIS 145120, *13 (W.D. Ok. Oct. 8, 2013) ("A consent order has been entered, which plaintiff does not allege will fail to remedy the contamination."); *Clean Harbors, Inc. v. CBS Corp.*, 875 F. Supp. 2d 1311, 1331, 1332 (D. Kan. 2012) ("Problematically, however, [plaintiff] fails to specify what 'additional obligations' it has in mind." and "[Plaintiff] does not specify how the relief it seeks as against [defendant] would differ from or supplement [its] own obligations under the RCRA permit."); *87th Street Owners Corp. v. Carnegie Hill-87th Street Corp.*, 251 F. Supp. 2d 1215, 1219 (S.D.N.Y. 2002) ("And, despite repeated requests from the Court, plaintiff has been unable to describe a single action that defendant could be ordered to take to reduce or eliminate any risk its past actions may have caused, that is not already being undertaken by DEC.").[5] In those cases, the courts routinely find that they will not exercise their

[5] Additionally, nearly all of GE's cases involve the issue as to which entity is required to pay for clean up costs, which is not an issue under RCRA, and as a result, not a basis for an injunction.

discretion in granting injunctive relief.[6] But even these types of cases recognize that citizen suits under RCRA are routinely allowed to proceed despite parallel state proceedings. *Stratford Holding, LLC v. Foot Locker Retail Inc.*, No. CIV 12-772, 2013 U.S. Dist. LEXIS 145120, *11 (W.D. Ok. Oct. 8, 2013). Indeed, *Phoenix Beverages* rejects GE's overly broad argument that the existence of the Consent Order prevents this Court from enjoining it:

> "Defendants' reliance on cases such as *Rococo Assocs., Inc. v. Award Packaging Corp.,* 803 F. Supp. 2d 184, 192 (E.D.N.Y. 2011) for the proposition that Plaintiffs cannot obtain relief under RCRA because of DEC's ongoing oversight is misplaced. . . In those cases, a remedial scheme already was underway or had concluded, such that there was nothing more that the Court could direct any party to do in furtherance of RCRA's goal of remediating the hazardous waste. . . By contrast, Defendants remedial investigation report was only submitted to the DEC in November 2014, and has not yet resulted in remedial measures. DEC involvement does not by itself divest this Court of jurisdiction to award relief under RCRA.

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[6] Most of the cases cited by the parties are "diligent prosecution" bar cases. This is not surprising. The same type of facts that are important to determine whether a state is diligently prosecuting a case are the type of facts that relate to whether the citizen plaintiffs are seeking injunctive relief of a different scope than the state.

Phoenix Beverages, Inc., 2015 U.S. Dist. LEXIS 16959 at *19, n. 5. And critically, in most (but not all) of the cases by GE, *remediation was occurring*.

But the case before this Court is different. Without doubt, here, much investigation and monitoring has occurred. However, it is uncontested that GE has not taken *any* remediation actions to clean up what this Court has already found to be an imminent risk to the health and environment. Plaintiffs adamantly assert that the scope of the relief they seek is far different that the remediation the IEPA will impose, and plaintiffs have specifically identified the precise mandatory injunction they seek. [Dkt. #121, Ex. 2.] As a result, it is not surprising that plaintiffs rely upon *Interfaith Community Organization v. Honeywell International, Inc.*, 399 F.3d 248 (3d Cir. 2005). In that case, the district court held a bench trial to develop the factual record. In *Interfaith*, the Third Circuit found that the district court did not abuse its discretion in imposing an injunction. *Id.* at 268. After finding recalcitrance and delay, the district court fashioned what it believed was an appropriate injunction under the particular facts. Critically, the district court specifically required injunctive relief that the state agency may have thought was unnecessary. *Id.* at 266. Indeed, the Third Circuit stated the following: "Depending on the particular characteristics of a given RCRA site, as found by a district court on a cases-by-case basis, particular types of injunctive relief may not be circumscribed by arguments as to what an agency might have done." *Id.* at 267-68.

During argument, GE's counsel colorfully described *Interfaith* as "the poster child for a recalcitrant company challenging a federal judge," and claimed that *Interfaith* only authorized a federal court to enter an injunction if the state proceeding was "a train wreck." Transcript of Report of Proceedings, August 18, 2016 at p. 39, 40. In doing so, GE's counsel rightfully attempted to distinguish *Interfaith* on its facts. And GE correctly stated that *Trinity* distinguished *Interfaith*. But importantly, *Trinity* distinguished *Interfaith* on the basis that the plaintiffs in *Trinity* had "not contended that the remediation scheme put in place by the Consent Order [was] deficient or ineffective." *Trinity*, 735 F.3d at 140. That is precisely what plaintiffs in this case have done. Plaintiffs have steadfastly asserted that the Consent Order is deficient and ineffective. Plaintiffs will be required to establish that assertion.

The parties have bickered back and forth about the scope of the IEPA remediation. But the IEPA has not yet authorized the RAP so no remediation has even occurred, and this Court has not been provided the ROR. Consequently, the Court is unable to determine whether the scope of remediation plaintiffs seek is similar to that found to be appropriate by the IEPA, let alone warranted. Facts matter. Courts routinely analyze the precise facts relating to the underlying state consent order to compare those to the relief citizen plaintiffs seek. Indeed, *Group Against Smog and Pollution* provides a good example of a court engaged in that fact intensive inquiry. *Group Against Smog and Pollution*, 810 F.3d at 131-32. Similarly, the court in *Phoenix Beverages* denied the motion for preliminary injunction based on the facts before it;

namely, that the plaintiffs had failed to present evidence that the methane under the concrete slab of the building was likely to ignite or migrated to an enclosed space where ignition might occur so no irreparable injury existed. *Phoenix Beverages,* 2015 U.S. Dist. LEXIS 16959 at *14.

V. ACTION PLAN

Accordingly, this Court finds that it has the authority to enter mandatory injunctive relief. But this Court also finds that before it can determine whether plaintiffs have met their heavy burden to afford them the injunctive relief they seek, the Court needs facts. *See Adkins*, 644 F.3d at 496 (noting that on remand factual record needed to be developed to determine whether there was an overlap between state court suit and federal citizen suit). Additionally, in recognizing the careful balance between the statutory rights authorized by RCRA on one side of the scale, and the jurisprudential concerns behind the mootness doctrine and the need to show irreparable harm on the other side of the scale, the Court will defer for a reasonable period of time to allow the RAP to be developed and considered by the IEPA. This deferral will also allow the Court the opportunity to compare the scope of the remediation in the RAP and compare it to the scope of the relief plaintiffs have already proposed so that it can better determine if plaintiffs seek to supplement or supplant the Consent Order. *See Supporters to Oppose Pollution, Inc. v. Heritage Group*, 973 F.2d 1320, 1324 (7th Cir. 1992). As a result, the Court will take the following actions.

By October 31, 2016, the parties are to file a joint status update regarding the Consent Order. Depending on the status of the implementation of the Consent Order, this Court currently intends to hold a hearing to make factual findings as to the extent of the contamination for which this Court already found GE liable in an effort to determine whether injunctive relief is appropriate. The factual hearing is scheduled for February 23 (and 24, if necessary), 2017, at 10:00 a.m. On February 14, 2017, at 10:00 a.m., the Court will hold a status concerning the scope of and what witnesses will appear at that hearing. Lead counsel must appear in person. The Court also invites the IEPA and the Illinois Attorney General to send representatives to the hearings to inform the Court of the State's position on the IEPA's progress with the Consent Order as well as its view, if any, as to whether this Court should enter mandatory injunctive relief requiring remediation and the scope of remediation. *See Adkins*, 644 F.3d at 487 ("The district court may certainly coordinate its efforts with the state courts, and may use its sound discretion in doing so…."). To be blunt, the Court is inviting an amicus brief or presentation from the State on these issues. The parties are ordered to provide a copy of this order to the IEPA and the Illinois Attorney General's Office. The parties are also ordered to provide a copy of this order to the Office of the Circuit Clerk for the Fifteenth Judicial Circuit, Carroll County and the Honorable Val Gunnarsson, Presiding Judge, Carroll County, Illinois (the "Other Interested Entities"). The Other Interested Entities are not required to take any action in response to this order or to attend the February 14, 2017 status, but are merely invited. Moreover, by providing notice

and inviting the IEPA, the Illinois Attorney General's Office, and the Other Interested Entities, the Court is not signaling what, if any, injunctive relief it might order. At this point, the Court needs facts to determine whether the extraordinary remedy of mandatory injunctive relief is appropriate under the specific facts of this case and if so, what that relief would entail. By January 31, 2017, the parties are also ordered to file with the Court a copy of the ROR as well as the final and approved RAP, if it exists.

Entered: October 4, 2016

By: /s/Iain D. Johnston
U.S. Magistrate Judge
Iain D. Johnston

APPENDIX G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

No. 13 CV 50348
Magistrate Judge Iain D. Johnson

[Filed February 17, 2016]

LAJIM, LLC, PRAIRIE RIDGE GOLF COURSE, LLC, LOWELL BEGGS, and MARTHA KAI CONWAY, Plaintiffs,	)
v.	)
GENERAL ELECTRIC CO., Defendant,	)

MEMORANDUM OPINION AND ORDER

Plaintiffs LAJIM, Prairie Ridge Golf Course, Lowell Beggs, and Martha Conway have sued General Electric for injunctive relief and damages allegedly caused by contaminated groundwater and soil under Beggs's golf course and adjacent home. The Court previously granted General Electric's motion for summary judgment on the state-law claims, denied General Electric's motion for summary judgment under the Resource Conservation and Recovery Act ("RCRA"),

and granted the plaintiffs' motion for summary judgment on that claim, but only as to liability. Dkt. 88. The Court has yet to resolve the plaintiffs' claim for injunctive relief under RCRA. Moreover, plaintiffs' claims based on the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §9601 *et seq.*, were not addressed in this round of summary judgment briefing.

Before the Court are motions filed in response to the Court's summary judgment order. First, General Electric seeks certification to take an interlocutory appeal and for an interim stay of proceedings in this Court. Dkt. 89. Meanwhile, the plaintiffs filed a motion for interim costs and fees. Dkt. 101. At the Court's request, the parties also filed a joint position paper on how to proceed on the plaintiffs' request for injunctive relief under RCRA. Dkt. 99. Although the parties not surprisingly disagree as to how proceed, the joint status report was extremely helpful, and the Court thanks counsel for their efforts in this regard. For the reasons that follow, General Electric's petition for certification and for a stay [89] is denied, the plaintiffs' motion for interim costs and fees [101] is denied, and the plaintiffs' request in the joint position paper for appointment of a special master is denied without prejudice.

I. INTERLOCUTORY APPEAL

General Electric seeks certification under 28 U.S.C. § 1292(b), which allows a party to appeal an interlocutory order if the issue to be appealed (1) involves a controlling question of law, (2) the question of law is contestable (*i.e.* there is a substantial

ground for difference of opinion), and (3) the immediate appeal would materially advance the disposition of the litigation. 28 U.S.C. § 1292(b); *Ahrenholz v. Board of Trustees of the Univ. of Ill.,* 291 F.3d 674, 675 (7th Cir. 2000). To appeal, a party must obtain authorization from both the district and then the appellate courts. 28 U.S.C. § 1292(b); *People Who Care v. Rockford Bd. of Educ. Dist. No. 205*, 921 F.2d 132, 134 (7th Cir. 1991). The requirements balance the need for interlocutory appeals in extraordinary instances with the interest in keeping the court system efficient and not interjecting on every motion presented at the district court. *Ahrenholz,* 291 F.3d at 677. Under *Ahrenholz*, the "denial of summary judgment is a paradigmatic example of an interlocutory order that normally is not appealable." *Id.* at 676.

A. Controlling Question of Law

A controlling question of law involves "the meaning of a statutory or constitutional provision, regulation, or common law doctrine." *Id.* Typically a question of law is one that an appellate court can "decide quickly and cleanly without having to study the record." *Id.* 677. The question is controlling "if its resolution is quite likely to affect the further course of the litigation, even if not certain to do so." *Sokaogon Gaming Enter. Corp., v. Tushie–Montgomery Assocs., Inc.*, 86 F.3d 656, 659 (7th Cir.1996).

General Electric contends that its proposed appeal involves a controlling question of law, specifically, whether RCRA prohibits a citizen suit if the state has already sued the defendant under a state law similar to or "in lieu of" § 6972(a)(1)(B) of RCRA program. *See*

42 U.S.C. § 6972(b)(2)(C)(i). The Court generally agrees that the issue is, in fact, a question of law. But the plaintiffs argue that the question of law is not "controlling" because it would not likely end litigation if answered in the movant's favor. Specifically, they argue that to find in favor of General Electric, the Court would also have had to find that General Electric's state suit was being diligently prosecuted, a finding the Court explicitly declined to address. *See* 42 U.S.C. § 6972(b)(2)(C)(i). Because the Court never addressed the diligent prosecution prong of the citizen suit inquiry, General Electric would not prevail even if the Seventh Circuit favored General Electric's argument regarding "in lieu of." Thus, to further the litigation, the diligent prosecution issue must first be addressed, which would require the kind of focus on the record that takes the issue beyond the scope of an appropriate interlocutory appeal. *See NMHG Financial Services, Inc. v. Wickes Inc.*, No. 07 CV 2962, 2007 U.S. Dist. LEXIS 77886, at **6-7 (N.D. Ill. Oct. 17, 2007) (issues that require an analysis of the factual record are not controlling questions of law for purposes of certification of interlocutory appeals)

B. Contestable

A question of law is contestable if there is substantial ground for a difference of opinion. 28 U.S.C. § 1292(b); *Ahrenholz*, 219 F.3d at 675. A substantial ground for a difference of opinion exists if there is a "'difficult central question of law which is not settled by controlling authority,' and a 'substantial likelihood' exists that the district court's ruling will be reversed on appeal." *Republic Bank of Chicago v. Desmond*, No. 13

CV 6835, 2015 U.S. Dist. LEXIS 93020, at *11 (N.D. Ill. July 17, 2015).

Although in *Adkins v. VIM Recycling, Inc.*, 644 F. 3d 483, n.2 (7th Cir. 2011), the Seventh Circuit specifically declined to address the "in lieu of" argument General Electric now advances, the argument was addressed by the district court in *Mejdreck v. Lockformer Co.*, No. 01 CV 6107, 2002 U.S. Dist. LEXIS 14785 (N.D. Ill. Aug. 9, 2002). In *Mejdreck*, the court rejected the argument that a state court lawsuit brought under the Illinois Environmental Protection Act barred a citizen suit under RCRA because the court noted that under the statute only prior lawsuits brought under § 6972(a)(1)(B) of RCRA barred citizen suits. Moreover, the approach taken in *Mejdreck* and adopted here followed the rules of statutory construction that focus on a statute's plain meaning. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) ("If the language at issue has a plain and unambiguous meaning, then that meaning controls."). General Electric has not presented authority rejecting that approach, and thus has not established a substantial ground for a difference of opinion.

C. Materially Advance the Disposition of the Litigation

The final requirement of § 1292(b) is that the interlocutory appeal would materially advance the ultimate termination of the litigation. *See* 28 U.S.C. § 1292(b). General Electric contends that an interlocutory appeal would materially advance the litigation because a favorable decision from the Seventh Circuit "will moot efforts by this court to now

require the parties to engage in further proceedings to determine whether injunctive relief is available." Motion [Dkt. 89 at 6]. However, as noted above, even if General Electric succeeds on appeal on its "in lieu of" argument, this Court must still address whether the state proceeding has been diligently prosecuted. If the plaintiffs are able to show that the state prosecution has not been diligent, General Electric would not have established that the citizen suit is barred, and the case would proceed to the injunctive relief phase just as it is now. Therefore, success on the "in lieu of" argument would not, by itself, moot the RCRA claim. Moreover, the parties sought summary judgment on only the RCRA claim, meaning they must still litigate the plaintiffs' claims under CERCLA. . Because multiple issues would remain unresolved, even if General Electric succeeded on an interlocutory appeal, the appeal would not materially advance the ultimate termination of the litigation. *Republic Bank*, 2015 U.S. Dist. LEXIS 93020, at *11 (the existence of other unresolved issues means even a successful interlocutory appeal would not significantly advance the litigation).

Given that the question of law at stake has not been shown to be controlling, and an interlocutory appeal in favor of General Electric would not materially advance the disposition of the litigation, the Petition for Certification is denied, and the request for a stay pending an interlocutory appeal is denied as moot.

II. Motion for Interim Costs

The plaintiffs filed a motion for leave to file an interim bill of costs and advised that they also plan to file a motion for interim fees. In support, the plaintiffs contend that under RCRA they are entitled to costs and fees as "the prevailing or substantially prevailing party." 42 U.S.C. § 6972(e). They contend an additional source of authority to award costs is found in Federal Rule of Civil Procedure 54(d)(1), which allows costs to the prevailing party. They argue that they are the prevailing party under both RCRA and Rule 54 because the Court granted their motion for summary judgment as to liability under RCRA.

To be prevailing, a party must have obtained an enforceable judgment, a court-ordered consent decree based on a settlement, or an award of damages. *See Buckhannon Board & Care Home, Inc. v. West Virginia Dep't of Health & Human Resources*, 532 U.S. 598, 603-04 (2001). A plaintiff who obtained a judgment that he was wronged but no "action (or cessation of action) by the defendant that the judgment produces-the payment of damages, or some specific performance, or the termination of some conduct" is not a prevailing party. *Hewitt v. Helms*, 482 U.S. 755, 7601 (1987) ("The real value of the judicial pronouncement--what makes it a proper judicial resolution of a 'case or controversy' rather than an advisory opinion--is in the settling of some dispute which affects the behavior of the defendant towards the plaintiff."). The plaintiffs have cited no case in which interim fees were awarded.

The plaintiffs proposed the bifurcated approach the Court took under which the issue of injunctive relief

will be separately addressed. Without injunctive relief, the plaintiffs have only an order establishing liability, not a judgment granting relief, the scope of which and right to the parties will be briefing. Accordingly, the plaintiffs are not yet "prevailing parties" entitled to fees or costs. The Court notes that the case on which the plaintiffs here relied and modeled their bifurcated approach sought fees not after obtaining a judgment of liability in 2002, but rather five years later in 2007, after obtaining relief in the form of a court-ordered environmental study. *See Maine People's Alliance v. Holtrachem Manufacturing Co.*, No. 00 CV 69, U.S. District Court, District of Maine, Dkts. 331 (plaintiff's memorandum in support of fees) and 356 (order denying motion for fees). Notably, the court in *Maine People's Alliance* denied the motion as premature because no final order had issued. *Id.* at Dkts. 331 (plaintiff's memorandum in support of fees) and 356 (order denying motion for fees). Only now are the parties in that case briefing the issue of costs and fees. *See* Dkts. 842 and 847.

Accordingly, the plaintiffs here are not yet prevailing parties, and therefore any request for interim fees and costs is premature.

III. Special Master

In the parties' joint position paper, the plaintiffs propose appointment of a special master to assist the Court in its decisions on their request for a preliminary injunction. In support, the plaintiff cited a case in which a special master was appointed, *Interfaith Comm. Org. v. Honeywell Int'l, Inc.,* 263 F.Supp.2d 796, 834 (D.N.J. 2003), but did not otherwise identify under

what authority the Court could make such an appointment, set out who the special master would be or identify who would bear the costs. The parties and Court discussed the issue further at oral argument, including the possibility of utilizing the expertise of the Illinois Environmental Protection Agency, which is already involved in the ongoing state proceeding. However, the Court is not persuaded at this time to appoint a special master given the Court's role as ultimate finder of fact, as well as the financial burden a special master would entail. Additionally, at this time, the Court is not convinced that the issues in this case are so complicated and time consuming that a special master is warranted. Without doubt, environmental litigation can be complicated and protracted. However, much of this Court's docket, as well as the dockets of other federal judges around the country, is complicated and protracted. But federal judges should not run in fear from such cases, even when the cases involve (gasp!) matters of science. Accordingly, the request for a special master at this point is denied without prejudice.

IV. Preliminary Injunction Proceedings

In light of the parties' views expressed in their joint status report as well as discussions during oral argument, the Court shall proceed to the preliminary injunction phase as follows. At the parties' request, the Court shall proceed with briefing. As the Court previously concluded in its decision on the motions for summary judgment, to obtain injunctive relief under RCRA the plaintiffs must establish not only liability, but must also satisfy the traditional elements of

injunctive relief even where a statute specifically authorizes that type of relief. *United States v. Bethlehem Steel Corp.*, 38 F.3d 862, 867 (7th Cir. 1994) (citing *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531 (1987)). Thus, the plaintiffs must also show (1) an irreparable injury, (2) an inadequate remedy at law, (3) the balance of hardships weighs in favor of an injunction, and (4) the public interest would not be disserved by a permanent injunction. *Maine People's Alliance & Natural Resources Defense Council v. Mallinckrodt, Inc.*, 471 F.3d 277, 296 (1st Cir. 2006). The parties need not brief the underlying issue of whether these elements must be met. The Court recognizes that it has changed its position in regard to the need for briefing on this issue. The plaintiffs have preserved their record with regard to this issue so no further briefing is necessary. The parties efforts and the Court's time are better spent in addressing whether injunctive relief is available and required under the facts of this case, and if so, the extent of that relief. Briefing will therefore be limited as follows: (1) whether the plaintiffs can establish the traditional required elements for injunctive relief; (2) whether the plaintiffs' request for relief is moot because of the Consent Order entered in the state proceeding; and (3) the possibly related issue of whether this Court can contradict or second-guess determinations made by the IEPA or the court in the state proceeding. The plaintiffs' memorandum in support of injunctive relief shall be filed by 3/11/2016, General Electric shall respond by 4/1/2016, and the plaintiffs shall reply by 4/15/2016. If oral argument is required, the Court shall set a date for a hearing. Otherwise, the Court will rule by mail.

V. Conclusion

For the reasons given, the motion for certification and an interim stay [89] is denied, the motion for interim fees and costs [101] is denied, the request for appointment of a special master is denied without prejudice, and briefing limited to the issues identified above shall proceed as follows: plaintiffs' memorandum shall be filed by 3/11/2016, General Electric's response shall be filed by 4/1/2016, and the plaintiffs' reply shall be filed by 4/15/2016. The Court urges the parties to consider the possible benefits of a settlement conference, perhaps one coordinated with the parties to the state court proceeding between the Illinois Environmental Protection Agency and General Electric. If they believe a settlement conference would be beneficial, they may express their interest by jointly contacting the Court's operations specialist at the e-mail address on the Court's website.

Date: February 17, 2016

By: /s/Iain D. Johnston
Iain D. Johnston
United States Magistrate Judge

APPENDIX H

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

No. 13 CV 50348
Magistrate Judge Iain D. Johnson

[Filed December 18, 2015]

LAJIM, LLC, PRAIRIE RIDGE GOLF COURSE, LLC, LOWELL BEGGS, and MARTHA KAI CONWAY, Plaintiffs,	)
v.	)
GENERAL ELECTRIC CO., Defendant,	)

MEMORANDUM OPINION AND ORDER

Plaintiff Lowell Beggs contends that the golf course he bought in 2007 contains more hazards than just bunkers and a creek. Beggs alleges that the course also has toxic hazards migrating through the groundwater and soil under the course and his adjacent home. He and his business partners sued General Electric under multiple environmental statutes seeking a court order requiring General Electric to clean up and pay for the damage caused by the contaminants from its former

plant. The parties have each moved for partial summary judgment on one of the environmental claims, and General Electric has moved for partial summary judgment on all of the state-law claims. For the reasons that follow, General Electric's motion for summary judgment on the state law claims [48] is granted, its motion for summary judgment on the federal environmental claim [57] is denied, and the plaintiffs' motion for summary judgment on the federal environmental claims [37] is granted as to liability.

I. BACKGROUND

A. General Electric Plant

The following facts are undisputed except where noted. From 1949 through 2010, General Electric operated a plant in Morrison, Illinois. The plant manufactured appliance and automotive controls for products, including refrigerators, air conditioners, and motor vehicles. During the relevant time, the manufacturing process involved using chlorinated organic solvents to remove oil from parts. The solvents included trichloroethylene ("TCE") through 1974, perchloroethene ("PCE") from 1973 through 1980, and 1,1,1 trichlorethane ("TCA") from 1974 through 1994. These solvents can break down into other matter, such as 1,2-dichloroethane ("1,2-DCA), all of which are toxic and regulated by federal and state environmental agencies. General Electric stored the chlorinated solvents in degreasers located in the plant. The degreasers were decommissioned in 1994, when General Electric started cleaning parts with a soap-like solution.

In 1986, chlorinated solvents were detected in three municipal supply wells that provided water to the City of Morrison. The wells were located several thousand feet southeast of the General Electric plant. In 1987, the Illinois Environmental Protection Agency ("IEPA") subcontracted environmental consultant Mathes & Associates to install eight monitoring wells, and to sample and analyze water and sediment from Rock Creek and a storm water retention pond northwest of the General Electric plant. A test Mathes performed in 1987 revealed 620 micrograms per liter ("μg/L") of TCE in one of the municipal water wells, far in excess of the 5 μg/L Maximum Contaminant Level ("MCL") for drinking water established by the United States Environmental Protection Agency ("U.S. EPA"). In addition, chlorinated solvents were discovered in groundwater obtained from two monitoring wells downgradient from (which is south of) the plant. In 1988, a local newspaper reported that the IEPA had traced the source to the plant.

After a notice and request from the IEPA, in 1988, General Electric hired environmental consultant Canonie Environmental to perform a Phase II Remedial Investigation, including the installation of an additional six monitoring wells, with the IEPA overseeing Canonie's activities. That year, Canonie also installed an air stripper to treat water pumped from one municipal well so it could continue to supply water to the City of Morrison. The other two municipal wells were sealed.

In March 1989, tests found TCE in at least four of the eight monitoring wells. Canonie's report issued

later that year concluded that while a "specific source of the VOCs [or volatile organic compounds] or the chlorides was not found" during the investigation, "the industrial complex [the site of General Electric's plant] is not a source of VOCs to the unconfined aquifer, and therefore remediation in the industrial complex is not appropriate." Canonie Phase II Report [Plaintiffs' Statements of Fact [42] Ex. 23 at ES 1-2]. The Canonie Phase II Report did, however, recommend a soil gas survey be completed under the floor slab of the plant around the location of the degreasers.

Following issuance of the Canonie Phase II Report, on September 27, 1988, the IEPA issued a notice pursuant to § 4(q) of the state's Environmental Protection Act, which grants authority to "provide notice to any person who may be liable pursuant to Section 22.2(f) of this Act for a release or a substantial threat of a release of a hazardous substance or pesticide. Such notice shall include the identified response action and an opportunity for such person to perform the response action." 415 ILCS 5/4(q).

In 1989, Target Environmental Services conducted the soil gas survey recommended in the Canonie Report. Soil gas samples revealed the presence of eight different chlorinated solvents, mostly TCE and TCA, and the highest levels were found in the area beneath the degreasers.

Under supervision of the IEPA, General Electric, through Canonie and its successor, Harrington Engineering & Construction, continued periodic testing of groundwater sampled from the monitoring wells. General Electric did not, however, install any soil

borings or monitoring wells at the location of the degreasers.

In June 1994, the IEPA issued a notice requiring a Phase III remediation investigation. After conferring with the IEPA, General Electric agreed to conduct a supplemental investigation to evaluate the groundwater downgradient from its plant.

In 1996, General Electric solicited proposals for a new environmental consultant to conduct the supplemental investigation of the groundwater at and downgradient from the plant. General Electric ultimately hired GeoTrans in 1999 to conduct a groundwater flow modeling and a natural attenuation analysis, including performing soil borings near the locations of the degreasers.

Two years later in 2001, GeoTrans issued its findings. According to its Natural Attenuation and Groundwater Modeling Report, the concentration of chlorinated solvents had decreased significantly by 2001, and the report concluded that contaminants would naturally attenuate to levels below the MCL. GeoTrans also concluded that Rock Creek was a regional groundwater divide that would prevent the chlorinated solvents from migrating to the south side of the creek. The report also found that the remaining concentrations of contaminants posed no risk to the public. According to GeoTrans, a City of Morrison ordinance prohibiting the use of private wells in the area and the air stripping treatment of groundwater from the affected municipal well eliminated any risk.

The IEPA responded to the GeoTrans report and stated that it "cannot approve the proposal for monitored natural attenuation as a remedy for this site" for numerous reasons, including that after 15 years concentrations of contaminant remained relatively high. In particular, the IEPA reported a finding of 12 μg/L at one well, which was higher than previous results, and 4,300 μg/L found at another well, all in excess of the 5 μg/L MCL. The IEPA concluded that active remediation would be appropriate.

In February 2004, the Illinois Attorney General filed suit against General Electric to recover costs the state had incurred because of General Electric's release of hazardous substances as well as an injunction requiring General Electric to determine the nature and extent of the soil and groundwater contamination, and then to perform remediation. The state's claims were brought under provisions of Illinois' Environmental Protection Act: Count I for cost recovery, *see* 415 ILCS 5/22.2(f); Count II to enjoin water pollution, *see* 415 ILCS 5/42(d), (e); and Count III to enjoin a water pollution hazard, *see* 415 ILCS 5/12(d). In December 2010, the Illinois Attorney General and General Electric entered into a Consent Order. Pursuant to the Consent Order, General Electric agreed to submit to the IEPA for its approval a series of plans and reports including: (1) a work plan to survey private wells, install additional monitoring wells, and complete additional soil borings; (2) a Focused Site Investigation Report ("FSI") summarizing the results of the work plan; (3) a Remedial Objectives Report to address the impact of the soil and groundwater contamination; and (4) a Remedial Action Plan to meet the remediation

objectives within six years of the entry of the Consent Order.

After development of the approved work plan, General Electric installed monitoring wells along Rock Creek. In April 2013, General Electric submitted its FSI prepared by its environmental consulting firm, MWH Americas. The FSI detailed data obtained from the monitoring wells along Rock Creek and elsewhere. The FSI also contained data showing that chlorinated solvents released at the General Electric plant had migrated south of the plant. Specifically, the data showed that in January 2012, TCE levels were 480 μg/L in the groundwater from one well along the creek (MW7-LS), and 4,800 μg/L in another (MW8-LS). Those wells are both 1,400 feet downgradient from the plant. In August 2012, those same two wells detected levels of 2,700 μg/L and 2,000 μg/L, respectively. Groundwater collected that same month from a supply well on the plaintiffs' golf course south of the plant detected TCE at a concentration of 5,000 μg/L, 1,000 times the MCL. Meanwhile, shallow "grab" groundwater samples from wells adjacent to the plant also detected contamination, yielded concentrations of 130 μg/L from one site (SB-17) and 2,200 μg/L from another site (MW-10). Tests of the groundwater obtained from private wells south of Rock Creek did not detect chlorinated solvents. However, an August 2012 test of groundwater collected from a supply well on the plaintiffs' golf course located south of Rock Creek detected TCE, although at 0.93 μg/L. The level falls under the MCL.[1]

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[1] In their memorandum [38], the plaintiffs note the detection of other contaminants at levels exceeding the MCL. For instance, the

After comments by the IEPA, General Electric submitted a supplemental work plan in August 2013 and an FSI Addendum in May 2014. In August 2014, the IEPA made additional comments to the FSI Addendum and withheld approval pending responses to the comments. In October 2014, MWH Americas submitted General Electric's responses.

Meanwhile, in 2010, the City of Morrison passed an ordinance that prohibited the use of groundwater as a supply of potable water, and prohibited the installation or drilling of wells in the city. The city passed the ordinance "to limit threats to human health from groundwater contamination while facilitating the redevelopment and productive use of properties that are the source of said chemical constituents." Ex. U to GE's Rule 56.1 on Count I [Dkt. 59-8].

B. Prairie Ridge Golf Course

In 2007, plaintiff Lowell Beggs purchased the then-closed Prairie Ridge Golf Course in Morrison, Illinois. He conveyed the property to plaintiff Prairie Ridge Golf Course, LLC. Plaintiff LAJIM, LLC operates the course. Plaintiff Martha Kai Conway is Mr. Beggs' companion, and they moved into a home next to the course. The home is held in Ms. Conway's name. The

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plaintiffs note that the FSI reported levels of 1,2-DCE detected in groundwater at a concentration of 22,000 µg/L, over 314 times the MCL of 70 µg/L, and concentrations of vinyl chloride in groundwater at 1,200 µg/L, 600 times the MCL of 2 µg/L. But that data is not incorporated into any Rule 56.1 statement of fact and, as a result, the plaintiffs have not established that the data is undisputed.

golf course and the plaintiffs' home are both south of the General Electric plant and are both hydrogeologically downgradient from the plant.

Mr. Beggs first learned that the course was for sale in April 2007. At the time, the course was owned by Citizens First Bank of Morrison, which had acquired it in foreclosure. Mr. Beggs asked his real estate attorney Gary Gehlbach to gather information about the course, and Mr. Gehlbach wrote to Citizens First Bank requesting "whatever information you may possess that will help us put together an offer to purchase." Ex. L to GE's Rule 56.1 on State Law Claims [Dkt. 52]. In response, the bank provided a legal description of the property and financials from the last five years the course was in operation. Additionally, in an e-mail from Keith Hooks dated May 1, 2007, the bank stated the following: "Gary, the golf course has contamination on the first hole. This was caused by General Electric. If you go to the EPA web site, GE is listed as a superfund site. No further remediation was needed according to what I can find." Ex. N to GE's Rule 56.1 on State Law Claims [Dkt. 52-2]. Mr. Gehlbach confirmed that he passed the information on to Mr. Beggs. Mr. Beggs did not ask Mr. Gehlbach or anyone else to gather any more information about the environmental condition of the golf course.

Later that same day as Mr. Hooks' e-mail about the contamination on the golf course, Mr. Gehlbach wrote to Mr. Hooks: "Keith, Thanks for the information. Lowell is, as you suggested, anxious to proceed, and after talking further with him, I have revised the Memorandum to reflect this." Ex. O to GE's Rule 56.1

on State Law Claims [Dkt. 52-3]. The bank and Mr. Beggs reached an agreement, and the purchase closed on May 29, 2007. The purchase agreement was drafted by Mr. Gehlbach and contained the following: "[S]eller, however, has disclosed to Purchaser that there is contamination on the first hole of the Real Estate, such contamination having been caused by General Electric, as which contamination is part of the Superfund Site that apparently does not require any further remediation." Ex. Q to GE's Rule 56.1 on State Law Claims [Dkt. 52-5] at 7.

At some time before his purchase, Mr. Beggs walked the entire golf course and noticed that the head of a monitoring well protruded above the ground surface. Later in 2007, after his purchase, Mr. Beggs noticed that the well head had been damaged by equipment used to maintain the course and was leaking water onto the course. Mr. Beggs contacted General Electric to fix it. At the time, Mr. Beggs knew the well monitored "how much stuff was coming out of GE." Beggs Deposition [Dkt. 53-1] at 66.

After purchasing the course, Mr. Beggs used two supply wells on the golf course. It is undisputed that the wells were used for irrigation, but the parties dispute whether maintenance workers also drank water from the north well. As discussed above, an August 2012 test of the water from the north supply well detected a concentration of TCE of 5,000 μg/L, one-thousand times the MCL, while a test of the south well located south of Rock Creek detected a TCE concentration of 0.93 μg/L. After General Electric conducted the well survey required under the IEPA

work plan in 2012, it delivered signs to the golf course's groundskeeper to install on the north and south well pumps and spigot that read, "DO NOT DRINK, IRRIGATION WELLS, NON-POTABLE WATER."

The golf course also included a club house. Testing of a "grab" groundwater sample collected next to the clubhouse detected a TCE concentration of 170 μg/L.

In 2012, sampling by General Electric's environmental consultant ARCADIS detected 0.55 micrograms per cubic meter ("μg/m³") of the compound 1,2-DCA in the indoor air at the Beggs/Conway home, above the current residential standard of 0.09 μg/m³. Other chlorinated solvents were also detected in groundwater, soil boring, and soil gas samples taken from near and beneath the Beggs/Conway home, but those samples did not detect 1,2-DCA. However, 1,2-DCA has been detected elsewhere in soil and groundwater samples at and downgradient from the General Electric plant.[2]

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[2] In the memorandum in support of their motion for summary judgment, the plaintiffs also assert that vapor intrusion in the home next to theirs is so bad that General Electric installed two sub-slab depressurization systems to prevent chlorinated solvents containing vapors from entering that home. Memorandum [38] at 26 & 35. But they did not include that assertion in their Rule 56.1 statements of fact and so have not established it as an undisputed fact. In any event, according to the ARCADIS report cited in support, 1,2-DCA was detected in the neighbor's indoor air, but not in the sub-slab soil gas. ARCADIS 2014 Report [Rule 56.1, Ex. 19], at 13.

C. Federal Lawsuit

The plaintiffs filed suit against General Electric on November 1, 2013. They seek a mandatory injunction to require General Electric to remediate the contamination (Count I) under the Resource Conservation and Recovery Act ("RCRA"), *see* 42 U.S.C. § 6972(a)(1)(B); cost recovery (Count II) and a declaratory judgment (Count III) under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), *see* 42 U.S.C. § 9607(a) (cost recovery) and § 9613 (g)(3) (declaratory judgment); and allege state law claims of nuisance (Count IV), trespass (Count V), and negligence (Count VI). Before the Court are three motions for partial summary judgment. First, the plaintiffs seek summary judgment in their favor on Count I for an injunction under RCRA, contending that the undisputed facts establish that the groundwater contamination and vapor intrusion may present an imminent and substantial endangerment. Dkt. 37. Second, General Electric filed a cross-motion for summary judgment on Count I contending that the plaintiffs' claim under RCRA is barred because the IEPA has commenced and is diligently prosecution its own enforcement action. Dkt. 57. Finally, General Electric has filed a motion for summary judgment on the plaintiffs' three state law claims, arguing that the claims are barred by the statute of limitations. Dkt. 48.

II. ANALYSIS

1. Summary Judgment Standard

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Life Plans, Inc. v. Security Life of Denver Ins. Co.*, 800 F.3d 343, 349 (7th Cir. 2015). A genuine issue of material fact exists if, when viewing the record and all reasonable inferences drawn from it in the light most favorable to the non-movant, a reasonable jury could return a verdict for the non-movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Life Plans*, 800 F.3d at 349. The burden to show that no genuine issue of material fact exists falls on the movant. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Hotel 71 Mezz Lender LLC v. National Retirement Fund*, 778 F.3d 593, 601 (7th Cir. 2015). If the movant meets this burden, to survive summary judgment the non-movant must set forth specific facts that demonstrate the existence of a genuine issue for trial. Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. at 324.

In addition, on the plaintiffs' motion for summary judgment, because the plaintiff bears the burden of persuasion on an issue at trial, it must sustain that burden as well as demonstrate the absence of a genuine issue of material fact. *Hotel 71*, 778 F.3d at 601. Accordingly, a moving party that bears the burden at trial must satisfy both (a) the initial burden of production on the summary judgment motion – by

showing that no genuine dispute exists to any material fact – and (b) the ultimate burden of persuasion on the claim – by showing that it would be entitled to a judgment as a matter of law at trial. Schwarzer, *The Analysis and Decision of Summary Judgment Motions*, 139 F.R.D. 441, 477-78 (1991); *see also Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.*, 971 F.2d 37, 42 (7th Cir. 1992); *S. Cal Coal Co. v. City of Santa Ana*, 336 F.3d 885, 888 (9th Cir. 2003) (moving party that bears burden at trial must establish beyond contention every essential element of claim); *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 989 (9th Cir. 2007) (party must demonstrate that no reasonable trier of fact could find for non-movant); 11 *Moore's Federal Practice*, § 56.40[1][c], p. 56-112 (3d ed. 2013). Therefore, in these circumstances, the often-quoted rule of *Celotex Corp. v. Catrett*, with respect to the obligation of the non-moving party that bears the burden of proof at trial is inapplicable. *Reserve Supply Corp.,* 971 F.2d at 42. However, the rule that the court will view the facts in the light most favorable to the non-movant still applies. *Soremekun*, 509 F.3d at 989.

2. General Electric's Motion for Summary Judgment on Count I (RCRA)

The Court begins with General Electric's motion for summary judgment on Count I, which is the plaintiff's request for injunctive relief under RCRA. "RCRA is a comprehensive environmental statute that governs the treatment, storage, and disposal of solid and hazardous waste." *Meghrig v. KFC Western, Inc.,* 516 U.S. 479, 483 (1996). Under RCRA, "any person may commence a civil action on his own behalf . . . against any person

. . . who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B). Upon such a showing, a district court may "restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (l)(B), to order such person to take such other action as may be necessary, or both ...." 42 U.S.C. § 6972(a); *Meghrig*, 516 U.S. at 484. The statute entitles these actions"[c]itizen suits." 42 U.S.C. § 6972.

However, "[n]o action may be commenced under subsection (a)(1)(B) of this section if the State, in order to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment . . . *has commenced and is diligently prosecuting* an action *under subsection (a)(1)(B) of this section.*" 42 U.S.C. § 6972(b)(2)(C)(i) (emphasis added).

In its motion for summary judgment on Count I, General Electric contends that because the Illinois Attorney General already commenced suit against it in state court in 2004, and has diligently prosecuted the suit since, § 6972(b)(2)(C)(i) prohibits the plaintiff from commencing a citizen suit. The plaintiffs respond that under § 6972(b)(2)(C)(i), only a state's prior suit brought under § 6972(a)(1)(B) of RCRA may serve to bar a later-filed citizens suit, and therefore Illinois' suit alleging claims under its own Environmental

Protection Act rather than RCRA does not serve to bar their citizen suit. Moreover, the plaintiffs contend the State has not diligently prosecuted the case as evidenced by the fact that in the eleven years since it sued and 29 years after contamination was first discovered, it "has done nothing to compel GE to actively remediate its contamination." Response [Dkt. 68] at 14.

To determine the scope of the bar set out in § 6972(b)(2)(C)(i), the Court looks first to the plain meaning of the language of the statute. *KM Enterprises, Inc. v. Global Traffic Technologies, Inc.*, 725 F.3d 718, 728 (7th Cir. 2013). If the language at issue has a plain and unambiguous meaning, then that meaning controls. *Id.* (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)). Section 6972(b)(2)(C)(i) bars the commencement of a citizen suit under RCRA only where the state "has commenced and is diligently prosecuting an action under subsection (a)(1)(B) of this section." Thus, under the plain meaning of the terms used, only a suit brought by the State under the "imminent and substantial endangerment to health or the environment" provision of RCRA can serve to bar a citizen suit. *See* 42 U.S.C. § 6972(a)(1)(B).

But General Electric contends that even a State's suit under state law bars a citizen suit if the state law was implemented "in lieu of" RCRA. General Electric notes that 42 U.S.C. § 6926(b) allows the U.S. EPA to authorize a state to implement its own hazardous waste program "in lieu of the Federal program," and that Illinois has received authorization. 51 Fed. Reg.

3778 (Jan. 31, 1986) (authorizing Illinois to operate its own hazardous waste program).

General Electric has cited no authority directly holding that a suit brought under a State program operated in lieu of RCRA triggers the bar under 42 U.S.C. § 6972(b)(2)(C)(i) for citizen suits brought under subsection § 6972 (a)(1)(B). Moreover, General Electric's argument is not supported by the statutory language. RCRA allows the U.S. EPA to authorize states to implement a hazardous waste program "in lieu of the Federal program *under this subchapter*" of RCRA, which is subchapter 3 entitled "Hazardous Waste Management." 42 U.S.C. § 6926(b) (emphasis added). The "imminent and substantial endangerment" provision of 42 U.S.C. § 6972(a)(1)(B) appears in an entirely different subchapter of RCRA; namely, subchapter 7 which is entitled "Miscellaneous Provisions." Because § 6926(b) gave the U.S. EPA the power to authorize states to implement programs only in lieu of subchapter 3, not subchapter 7, the U.S. EPA did not authorize Illinois to implement a program in lieu of § 6972(a)(1)(B). Therefore, General Electric has not established that the IEPA's suit under state laws acting in lieu of subchapter 3 is the equivalent of a suit brought under subchapter 7's § 6972(a)(1)(B).

Nevertheless, General Electric contends that if the claims and relief sought in a citizen suit are similar to the claims and relief sought in a State's earlier-filed suit, the citizen suit is barred even if the earlier suit was not brought under § 6972(a)(1)(B). General Electric contends that the plaintiffs' suit is similar to Illinois' suit because the IEPA first issued a § 4(q) notice

alleging an "immediate and significant risk of harm to human health and the environment," and then sought a permanent injunction, just like the plaintiffs allege and seek here. *See* GE Supplemental Statement [85] at 2. In support, General Electric relies on *Adkins v. VIM Recycling, Inc.*, 644 F.3d 483, 494 (7th Cir. 2011), for the proposition that "to the extent that the plaintiffs' RCRA claims overlap with the claims [the state] asserted in its first suit . . . they cannot be pursued in this citizen action because of 42 U.S.C. § 6972(b)(1)(B)." But what General Electric does not address is that *Adkins* involved a citizen suit under 42 U.S.C. § 6972(a)(1)(A), which allows citizens to file suit based on the "violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter," as opposed to § 6972(a)(1)(B) suits based on "waste which may present an imminent and substantial endangerment to health or the environment." The circumstances under which a § 6972(a)(1)(A) citizen suit is barred is far broader than for a § 6972(a)(1)(B) citizen suit. *Compare* 42 U.S.C. § 6972(b)(1)(B) (applicable to (a)(1)(A) citizen suits) *with* 42 U.S.C. § 6972(b)(2)(C) (applicable to (a)(1)(B) citizen suits). Notably, citizen suits under § 6972(a)(1)(A) are potentially barred by a prior suit by the Administrator or the State to require compliance with any "permit, standard, regulation, condition, requirement, prohibition, or order" under RCRA. *See* 42 USC § 6972(b)(1)(B). This is in stark contrast to citizen suits under § 6972(a)(1)(B), which are potentially barred only by a prior suit by the State under RCRA's § 6972(a)(1)(B) (or certain provisions of CERCLA not relevant here). *See* 42 USC § 6972(b)(1)(C). *Adkins* addresses only the restrictions on citizen suits under

§ 6972(a)(1)(A), and therefore provides no basis for setting aside the plain meaning of the far different restrictions on citizen suits under § 6972(a)(1)(B).

Even if the Court were to look beyond the plain meaning of the relevant statutory provisions, General Electric still fails to find support for its assertion that claims under state laws implemented in lieu of subchapter 3 of RCRA are equivalent to claims under § 6972(a)(1)(B) found in subchapter 7. General Electric relies on *Hudson Riverkeeper Fund, Inc. v. Harbor at Hastings Assocs.*, 917 F. Supp. 251 (S.D.N.Y. 1996), in which the court determined that an earlier lawsuit by the state that did not specifically allege a claim under § 6972(a)(1)(B) nevertheless barred a later-filed citizen suit. *Id.* at 256. Because the state's earlier complaint was "silent as to what law they were brought under," the court determined that under New York's unique pleading standard, "all cases brought in the New York Supreme Court are as a matter of law brought under all applicable federal statutory provisions applicable by their terms to the 'occurrence or transaction' sued on, except where Congress has reserved exclusive jurisdiction to a federal court." *Id.* Based on that unique pleading standard, the *Hudson Riverkeeper* court found that "the pending State Court action is the equivalent of one brought under the RCRA," including § 6972(a)(1)(B). *Id.* at 255 ("it is impossible to say that any lawsuit arising out of an occurrence which implicates the RCRA is *not* being brought pursuant to that statute"), 256 ("Once it is determined that the pending action by New York State qualifies under section (b)(1)(B) of the statute of [sic] this Court concludes that it does, it must then be shown that the

state has been diligently prosecuting the action for it to act as a bar to citizen's suits."). Therefore, *Hudson Riverkeeper* is distinguishable because here the State of Illinois, through the Illinois Attorney General and IEPA, specifically identified the Illinois Environmental Protection Act as the basis of its claims.

Moreover, a decision by another court within this district specifically rejected the argument General Electric asserts here. *Mejdreck v. Lockformer Co.*, No. 01 CV 6107, 2002 U.S. Dist. LEXIS 14785 (N.D. Ill. Aug. 12, 2002), involved a citizen suit brought after the State filed an earlier lawsuit alleging violations of only state environmental laws. The defendant sought to dismiss the citizen suit because "the goal of avoiding duplicitous suits can only be met if citizens' suits are preempted by state suits seeking the same relief." *Id.* at *30. Like General Electric here, the defendants in *Mejdreck* cited *Hudson Riverkeeper* to support their argument. But the court in *Mejdreck* rejected the argument because it was contrary to the language of the statute: ". . . the IEPA specifically brought its case under the Illinois Environmental Protection Act. Therefore, there is no ambiguity the Court needs to resolve and the Court finds that *Hudson* is not persuasive to overlook the plain language of the RCRA." *Id.* at *31. *See also Northern California River Watch v. Humboldt Petroleum, Inc.*, No. 00 CV 1329, 2000 U.S. Dist. LEXIS 15939, at *7 (N.D. Calif. Oct. 30, 2000) ("only an action by the state under RCRA subsection (a)(1)(B) itself will bar a private suit" under § 6972(a)(1)(B), rejecting defendant's argument that earlier-filed state law actions were "the equivalent of RCRA actions").

General Electric argues that *Mejdreck* is inapplicable because it does not address that Illinois was authorized to implement its own hazardous waste program in lieu of RCRA, and because no other case has followed *Mejdreck*. However, at the same time, General Electric has cited no case rejecting *Mejdreck*, and General Electric has cited no authority holding that suits under the Illinois Environmental Protection Act fall under the bar set out in § 6972(b)(2)(C)(i). General Electric cites to *Acme Printing Ink Co. v. Menard, Inc.*, 881 F. Supp. 1237, 1244 (E.D. Wisc. 1995), for the proposition that "the diligent prosecution bar in RCRA equally ensures that a civil suit filed in state court by a state agency which is authorized to administer the RCRA program as the primary enforcement authority prohibits citizen suits which overlap seeking the same relief in a parallel proceeding." Reply [71] at 3. But *Acme Printing* involved a proposed citizen suit to restrain ongoing violations under § 6972(a)(1)(A), which, as detailed above, is not subject to the same bar as suits under § 6972(a)(1)(B), and therefore the case is inapplicable.

General Electric also notes that *Mejdreck* predates *Adkins v. VIM Recycling, Inc.* According to General Electric, in *Adkins*, the Seventh Circuit "acknowledged that an earlier-filed state action (in state court, under state law and not under RCRA) may preempt a later-filed citizen suit under § 6972(b)(2)(C)(i)." Reply [71] at 5. But, as with *Acme* and as discussed earlier, *Adkins* focuses on the bar found in § 6972(b)(2)(B) involving claims under § 6972(a)(1)(A), and did not decide whether a prior suit under state law could be the equivalent of a claim under § 6972(a)(1)(B). Although

it did refer to citizen suits under § 6972(a)(1)(B) and when they might be barred under § 6972(b)(2)(C)(i), it merely noted ---in a footnote, no less---only that the parties had not argued equivalency: "Although the district court found that section 6972(b)(2)(C)(i) could operate as a bar if the State had commenced its own RCRA 'endangerment' action, the parties failed to address whether IDEM's suits could constitute such an action 'under' RCRA. . . VIM has not renewed on appeal any argument it may have that the plaintiffs' 'endangerment' claim was statutorily preempted under section 692(b)(2)(B) or (b)(2)(C)." *Adkins*, 644 F.3d at 491 n.2. Additionally, even if the *Adkins* court addressed the correct statutory section, it did not address the issue. Instead, the *Adkins* court ducked the issue. And questions that lurk in the record, but that are not ruled upon by a court, do not constitute precedent. *Webster v. Fall*, 266 U.S. 507, 511 (1925); *see also United States v. L.A. Truck Lines, Inc.*, 344 U.S. 33, 37-38 (1952) (an opinion creates no precedent on points not argued or discussed); *United States v. Torres*, No. 14-1538, 2015 U.S. App. LEXIS 20908, at *11 (7th Cir. Dec. 2, 2015) (caselaw cited to support an issue is unhelpful where the court "explicitly avoided" the issue). Accordingly, *Mejdreck* is not at odds with *Adkins*.

General Electric also relies on two cases in which courts noted that a citizen suit under RCRA was not barred because the State had not filed an earlier enforcement action in court, either federal or state. *See Chico Service Station, Inc. v. Sol Puerto Rico Ltd.*, 633 F.3d 20, 35 (1st Cir. 2011) ("Because the EQB has not filed an enforcement action in state or federal court, we

hold that Chico's citizen suit is not subject to dismissal pursuant to the diligent prosecution bar."); *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 618 (7th Cir. 1998) ("We are mindful that a citizen's (that is, that PMC's) suit under RCRA is barred if the state at the time of suit 'has commenced and is diligently prosecution an action' in a federal or state court under the statute to clean up the site."). According to General Electric, because a claim under § 6972(a)(1)(B) may be filed only in federal court, the only reason for these courts to have mentioned state court was if suits based on state law could be considered the equivalent of suits under RCRA. But the issue in those cases was whether the earlier enforcement action was an administrative proceeding rather than a lawsuit, as only a prior lawsuit (as opposed to administrative proceeding) can serve as a bar. *See Chico*, 633 F.3d at 35; *PMC*, 151 F.3d at 618-19. The cases did not decide that a state suit based on a state law standing in lieu of RCRA was the equivalent of a suit based on § 6972(a)(1)(B) itself.

During the argument on the cross motions for summary judgment, General Electric's counsel made a powerful argument that this Court should not interfere with a matter that is pending in state court. Counsel cited to several valid policy concerns that arise when a federal court interferes with ongoing matters that are being litigated in state court; concerns that this Court shares. However, importantly, Congress disagrees with General Electric's position. And Congress' express views trump this Court's concerns. The clear language of RCRA evidences Congress' belief that multiple enforcers of RCRA should exist: the U.S. EPA, the States, and private citizens. But in expressing its

belief, Congress carefully balanced how, when and under what circumstances citizens can enter the fray and avail themselves of the equitable power of the federal courts. When those Congressional mandates are satisfied, citizens can file suit even when a state court has already undertaken the matter. The clear language of RCRA establishes the intentional Congressional policy decision that this Court cannot ignore.

In summary, General Electric has presented no authority persuasive enough to overcome the plain language of RCRA. Specifically, § 6972(b)(2)(C)(i) applies only to actions commenced and diligently prosecuted "under subsection (a)(1)(B) of this section." Because the State of Illinois sued only under the Illinois Environmental Protection Act and not under § 6972(a)(1)(B) of RCRA, General Electric's motion for summary judgment on Count I is denied.[3]

3. Plaintiffs' Motion for Summary Judgment on Count I (RCRA)

Having determined that the plaintiffs' claim under RCRA is not barred, the Court now turns to the plaintiffs' motion for summary judgment on their RCRA claim. The primary purpose of RCRA is to limit the harmful effects of hazardous waste "to minimize the present and future threat to human health and the environment." 42 U.S.C. § 6902(b). Under 42 U.S.C. § 6972(a)(1)(B), a court "may restrain any person who has contributed or who is contributing to the past or

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[3] Because the Court finds §6972(a)(1)(B) was not the basis for the State's suit, the Court need not address whether the State is diligently prosecuting its case.

present handling, storage, treatment, transportation, or disposal of any solid of hazardous waste" and "to order such person to take such other action as may be necessary" where the waste "may present an imminent and substantial endangerment to health or the environment." To succeed, a plaintiff must establish each of the following: "(1) that the defendant has generated solid or hazardous waste, (2) that the defendant is contributing to or has contributed to the handling of this waste, and (3) that this waste may present an imminent and substantial danger to health or the environment." *Albany Bank & Trust Co. v. Exxon Mobil Corp.*, 310 F.3d 969, 972 (7th Cir. 2002). General Electric does not dispute that the plaintiffs can establish the first two elements. Therefore, the Court focuses on the third element: whether the undisputed facts establish that the contaminants may present an imminent and substantial endangerment to health or the environment.

When interpreting the phrase "may present an imminent and substantial endangerment," courts have found that the operative word is "may," and that its presence requires an expansive interpretation of the entire phrase. *Forest Park Nat'l Bank & Trust v. Ditchfield*, 851 F. Supp. 2d 949, 976 (N.D. Ill. 2012) ("Though the Seventh Circuit has yet to comment on the significance of 'may,' several other circuits have construed § 6972(a)(1)(B) broadly, in large part, because of the use of the word 'may.'"); *Interfaith Community Organization v. Honeywell Int'l, Inc.*, 399 F.3d 248, 258 (3rd Cir. 2005) (citing *Parker v. Scrap Metal Processors*, 386 F.3d 993, 1015 (11th Cir. 2004)). They find support for a broad interpretation in

Congress' decision in 1980 to extend the reach of RCRA by substituting the words "may present" for "is presenting." Solid Waste Disposal Act Amendments of 1980, Pub. L. No. 96-482, § 25, 94 Stat. 2334, 2348 (1980); *Maine People's Alliance & Natural Resources Defense Council v. Mallinckrodt, Inc.*, 471 F.3d 277, 287 (1st Cir. 2007).

In that spirit, courts have construed "may present" as requiring plaintiffs to show only the potential for an imminent and substantial endangerment. *Interfaith Community*, 399 F.3d at 258. Likewise "imminent" is not limited to an "existing harm, only an ongoing threat of future harm." *Albany Bank*, 310 F.3d at 972; *see also Maine People's*, 471 F.3d at 287-88 ("generally has been read to require only that the harm is of a kind that poses a near-term threat; there is no corollary requirement that the harm necessarily will occur or that the actual damage will manifest itself immediately.") (citing *Cox v. City of Dallas*, 256 F.3d 281, 299-300 (5th Cir. 2001)). Thus, a threat is imminent if the endangerment exists now, even though the harm may not be felt until later. *Meghrig*, 516 U.S. at 486. As for "substantial," courts have construed that word to mean serious, as opposed to any certain minimum quantification of the endangerment. *Grace Christian Fellowship v. KJG Investments, Inc.*, No. 07 CV 348, 2009 U.S. Dist. LEXIS 76954, at *16 (E.D. Wisc. Aug. 7, 2009); *Interfaith Community*, 399 F.3d at 259.

However, "there is a limit to how far the tentativeness of the word *may* can carry a plaintiff." *Crandall v. Denver*, 594 F.3d 1231, 1238 (10th Cir.

2010) (emphasis in original). An endangerment must be more than merely possible. *Id.* In addition, a plaintiff cannot prevail based solely on evidence that a contaminant is present, but rather must show that its presence may present an imminent and substantial endangerment. *Birch Corp. v. Nevada Investment Holding, Inc.*, No. 97-55282, 1998 U.S. App. LEXIS 14923, at **9-10 (9th Cir. June 29, 1998) (where groundwater was nonpotable anyway and where the contamination plume was stabilized and levels were dropping, the contamination did not present an imminent threat to either health or the environment).

The plaintiffs assert that the undisputed evidence establishes that an imminent and substantial endangerment may be present in the area around the General Electric plant including at the golf course and their home. In support, they identify the following undisputed evidence:

- chlorinated solvents were released at the General Electric plant and since at least 1986 have been detected in the groundwater;
- the contamination forced the City of Morrison to remove two municipal wells from serving as sources of drinking water, and the city continues to use an air scrubber to eliminate contaminants from drinking water from the remaining municipal well;
- contaminated groundwater has migrated from the plant to areas south of the plant including the Prairie Ridge Golf Course;

- the chlorinated solvents in the contaminated groundwater have been detected at levels far exceeding the MCL, sometimes at levels more than one-thousand times the MCL;
- although GeoTrans reported in 2001 that contamination levels were dropping and would naturally attenuate to levels below the MCL, tests in 2012 detected levels far in excess of the MCL in wells south of the plant including: up to 2,700 μg/L in MW7-LS, 4,800 g/L in MW8-LS, and 5,000 μg/L in the golf course's north supply well;
- though at a level below the MCL, chlorinated solvents have been detected in one well south of Rock Creek, despite GeoTrans' finding that Rock Creek was a natural barrier;
- Morrison city ordinances prohibiting the use of wells for drinking water will not protect against the use of groundwater for drinking outside the city limits;
- the chlorinated solvent 1,2-DCA was detected inside the plaintiffs' home; and
- General Electric installed a vapor control system in the home next to the plaintiffs'.

According to the plaintiffs, these undisputed facts establish that the contamination originating from the General Electric plant is "uncontrolled, unabated, undefined and unaddressed." Memorandum [Dkt. 38] at 34. And the plaintiffs argue that even after 30 years since the contamination first came to light, followed by

all of the environmental consultants hired and studies performed, General Electric has still not yet determined: (1) the vertical extent of contamination; (2) the southern boundary of contamination; or (3) whether the solvents continue to feed the plume.

In response, General Electric argues that the evidence does not establish that the contamination may present an imminent and substantial endangerment for three reasons. First, General Electric contends that all pathways to human exposure have been eliminated. Specifically, General Electric contends that (1) the City of Morrison shut down two of the three contaminated municipal wells used for drinking water, and uses an air scrubber to remove the contaminants from water obtained from the remaining well, (2) the city enacted two ordinances to prohibit the use of private wells for potable water and from drilling new wells, (3) the contaminated wells on the golf course are used only for irrigation, and (4) signs warn users not to drink water from the golf course wells.

General Electric argues that because all pathways to human exposure have been eliminated, the evidence does not establish that the contaminated groundwater may present an imminent and substantial endangerment. It purports to find support in decisions in which evidence that humans were not drinking from contaminated groundwater led courts to conclude that no threats of an imminent and substantial endangerment existed. For instance, in *Scotchtown Holdings LLC v. Goshen*, No. 08 CV 4720, 2009 U.S. Dist. LEXIS 1656 (S.D.N.Y. Jan. 5, 2009), the plaintiff sued under RCRA to enjoin the defendant, whose use

of road salt had contaminated the groundwater beneath a site, rendering the groundwater undrinkable and prevented the site's redevelopment for residential housing. The court dismissed the complaint because the plaintiff had failed to "allege any deleterious effects that the sodium chloride has had or may have on health or the environment other than preventing the development of the Site." *Id.* at *7. *Scotchtown* is thus distinguishable for two reasons. First, the court found that the contaminant---salt---was deleterious only to plans to develop the site, not to humans or the environment. *Id.* Second, the site was uninhabitated, and there was no evidence that the contamination was migrating anywhere else, as opposed to the contamination at issue here, which is moving under residential and recreational sites within Morrison.

General Electric also relies on *Two Rivers Terminal, L.P. v. Chevron USA, Inc.*, 96 F. Supp. 2d 432 (M.D. Penn. 2000), in which the court granted the defendant's motion for summary judgment on the plaintiff's RCRA claim because "[t]he fact that no one is drinking this water eliminated it as a threat to health or the environment." *Id.* at 446. However, in *Two Rivers* the nearby groundwater was unusable for drinking not solely because of the petroleum and BTEX hydrocarbons contaminating it but because of a preexisting high iron content. *Id.* at 445. In addition, the contaminants were flowing away from off-site drinking wells. *Id.*

Two other cases on which General Electric relies for this point are likewise distinguishable. *In Avondale Federal Savings Bank v. Amoco Oil Co.*, 170 F.3d 692

(7th Cir. 1999), the Seventh Circuit affirmed the district court's entry of summary judgment for the defendant on the basis that gasoline that had leaked from an underground storage tank did not present an imminent and substantial danger. But in *Avondale*, the defendant had already remediated the site, obtained a "No Further Remediation" letter from the IEPA, and the plaintiff's own expert had testified that the contaminants would present a threat only if a nearby street was ever excavated. *Id.* at 693, 695. Likewise, in *Foster v. United States*, 922 F. Supp. 642 (D.D.C. 1996), the court granted summary judgment to the defendant because asphalt paving covered the contaminated site, there was no evidence that the contaminated groundwater was migrating or percolating through the soil, or had been used for drinking or any other purpose. *Id*. at 662.

The contamination that was found not to present an imminent and substantial endangerment in General Electric's cases stands in contrast to the contamination at issue here. It is undisputed that the groundwater contaminated by General Electric's plant has been moving under residential and recreational sites, and has demonstrated its deleterious reach by contaminating municipal wells that had been used for drinking water. In addition, a contaminated well on the golf course continues to this day to be used for irrigation. Moreover, no remediation has yet occurred, and although General Electric tried to rely on natural attenuation to solve the contamination, the contaminated groundwater continues to migrate with no sign that it has stopped. To the contrary, although chlorinated solvent levels in the well south of Rock

Creek do not presently exceed the MCL, their detection indicates that the plume *may* have crossed the creek despite GeoTrans' assertion that the creek allegedly acted as a natural barrier.

Thus, the contamination here is more akin to that in *Fairway Shoppes v. Dryclean USA*, No. 95 CV 8521, 1996 U.S. Dist. LEXIS 22364 (S.D. Fla. Mar. 7, 1996) and *Lincoln Properties v. Higgins*, 91 CV 760, 1993 U.S. Dist. LEXIS 1251 (E.D. Calif. Jan. 18, 1993), where district courts found that evidence that groundwater contaminated with the chlorinated solvent Perc was migrating toward populated areas, and had or may reach wells from which the groundwater was used for drinking, established or was likely to establish that the contamination may present a substantial and imminent endangerment to health. In *Lincoln Properties*, the court partially reached its conclusion based on that fact that, as here, the contamination had already forced the removal from service and the destruction of four municipal wells. *Lincoln Properties*, 1993 U.S. Dist. LEXIS 1251, at *48 (granting plaintiff's motion for summary judgment). In *Fairway Shoppes*, the court found that the migration of contaminants towards a residential development and the threat that they may reach potable water supplies "unquestionably meets the 'imminent and substantial endangerment' standard of RCRA. The Court need not—and should not—wait until the contaminated water is actually detected in public water supply wells before taking action." *Fairway Shoppes*, 1996 U.S. Dist. LEXIS 22364, at **22-23 (granting plaintiff's motion for a preliminary injunction). The *Fairway Shoppes* court found that the contamination was an imminent

and substantial endangerment not only to health but also the environment for the independent reason that it had entered the soil and groundwater *See also Voggenthaler v. Maryland Square*, No. 08 CV 1618, 2010 U.S. Dist. LEXIS 74217, **41-42 (D. Nev. July 22, 2010) (granting plaintiff's motion for summary judgment where contaminated plume continued to migrate toward residential properties even though wells in the plume's path were not currently used for drinking water), *rev'd in part on other grounds* 724 F.3d 1050 (9th Cir. 2013).

For similar reasons, the cases which General Electric cites for the proposition that the mere presence of contaminants is insufficient under RCRA are also distinguishable. For instance, in *Birch Corp. v. Nevada Investment Holding, Inc.*, the court held that the mere presence of contaminants did not present an imminent and substantial threat because the plume was stabilized, contamination levels were dropping, and the threatened groundwater was nonpotable anyway. *Birch*, 1998 U.S. App. LEXIS 14923, at **9-10. In contrast, the plume from the General Electric plant is migrating under residential areas downgradient from the plant where levels have risen over time, some to thousands of times the MCL. In another case General Electric cited to support its mere presence argument, *Leister v. Black & Decker*, No. 96-1751, 1997 U.S. App. LEXIS 16961, at *9 (4th Cir. July 8, 1997), the court held that the contaminants that remained after a fully-implemented remediation plan did not present an imminent and substantial endangerment because the evidence suggested that the remaining contaminants were no longer a threat to health or the environment.

In contrast, the contaminants from the General Electric plant have not yet been remediated, remain at levels far in excess of the MCL, and continue to migrate.

General Electric contends that because the City of Morrison's wells have already been removed from service and city ordinances prohibit the use of any other wells for drinking, the contaminated groundwater no longer meets the "may present a substantial and imminent threat" standard. But the court in *Forest Park National Bank & Trust v. Ditchfield*, 881 F. Supp. 2d at 976, rejected as "twisted" a similar argument offered by a defendant in support of its motion to dismiss. The defendant argued that a threat was not imminent where environmental reports recommended that a building remain vacant because of contaminated air vapors. The court rejected the defendant's argument: "Whether a threat is 'imminent' cannot turn on whether the allegedly contaminated residence is currently occupied; by that twisted rationale, the owner of any property rendered uninhabitable by extreme contamination could not bring a § 6972(a)(1)(B) claim based on an imminent threat to health." *Id.* Likewise, General Electric cannot establish lack of imminence based on the fact that contamination from its plant was so extreme that all of Morrison is prohibited from using wells for drinking water. Unlike the situation in the cases offered by General Electric and discussed above, the contamination from the plant is the sole---and undisputed---reason that Morrison's groundwater is no longer potable.

The court notes that General Electric focuses only on the threat to humans even though RCRA also addresses contaminants that "may present an imminent and substantial endangerment to health *or the environment*." 42 U.S.C. § 6972(a)(1)(B) (emphasis added). Thus, in cases such as *Interfaith Community v. Honeywell Int'l*, 399 F.3d at 262, the court granted the plaintiff's motion for summary judgment based on evidence that a contaminated river threatened not only humans but also the environment where the evidence showed that the area was home to dogs, birds, and fish, and that the mortality rate for organisms living in the river's sediment was 50 to 100 percent. *See also Fairway Shoppes Joint Venture*, 1996 U.S. Dist. LEXIS 22364, at *22 (although wells towards which contamination was migrating "are apparently used for irrigation, and not for potable water supply, the drawdown effect of these wells may result in further spreading of the contamination into the development" and thus may present a threat to the environment). Although the plaintiffs have identified undisputed evidence that groundwater used to irrigate the golf course is contaminated, they have not identified if or how that constitutes a threat to plants or wildlife and, therefore, could not prevail at this stage based solely on endangerment to the environment. However, as discussed above, they have presented sufficient evidence to establish liability under RCRA based on endangerment to health.

In short, although General Electric purports to find support in cases where contamination fell short of the substantial and imminent standard, those cases are distinguishable because the contamination was not

spreading, had already been remediated, or was not threatening residential areas. In contrast, in Morrison, chlorinated solvents have been migrating for nearly 30 years and continue to contaminate the groundwater at levels up to one-thousand times the MCL; the contamination has already forced the removal of municipal wells from service, and continues to contaminate a well still used for irrigation. The plant may also be the source of contamination detected south of Rock Creek, despite GeoTrans' finding that Rock Creek was a natural barrier. Therefore, the extensive contamination in Morrison satisfies the plain meaning of the language of RCRA as waste that may present an imminent and substantial threat to health or the environment.

Second, General Electric argues that disputed questions of fact preclude the entry of summary judgment on the portion of the plaintiffs' RCRA claim premised on contaminated air vapors in the home of Lowell Beggs and Martha Kai Conway. The plaintiffs contend that 0.55 $\mu g/m^3$ of the compound 1,2-DCA was detected in the indoor air at the Beggs/Conway home, above the current residential standard of 0.09 $\mu g/m^3$, citing in support the May 2014 report by ARCADIS. The plaintiffs contend that because other undisputed evidence shows that 1,2-DCA was also detected in soil and groundwater samples at the General Electric plant and downgradient from the plant, it follows that General Electric is also responsible for the air contamination in their home. In response, General Electric points to evidence to create a genuine question of fact over whether the air vapor contaminants originated from its plant. Specifically, it cites to the

same ARCADIS report that 1,2-DCA was not detected in soil vapor testing beneath the Beggs/Conway home and was not detected in shallow groundwater nearby the home, facts the plaintiffs do not dispute. Thus, although there is no dispute over where and at what levels 1,2-DCA was detected, the parties do dispute whether the 1,2-DCA detected at the Beggs/Conway home originated at the General Electric plant. General Electric contends that the lack of 1,2-DCA in the soil under the home or in shallow groundwater upgradient and within 100 feet of the Beggs/Conway home creates a gap in evidence of a direct pathway from the plant to the home. General Electric notes that the ARCADIS report speculates that the 1,2-DCA that was detected may have originated from within the home from pesticides, upholstery cleaners, synthetic resins, rubber adhesive, or even off-gassing holiday ornaments. It argues that without evidence of a direct pathway of contamination into the Beggs/Conway home, the plaintiffs cannot establish that there may be an imminent and substantial endangerment based on the detection of 1,2-DCA.

In *Price v. United States Navy*, 39 F.3d 1011, 1020 (9th Cir. 1994), the court held that speculation, rather than any evidence, that contaminants lurked under a foundation did not establish a pathway for contaminants into a residential home, and therefore did not establish a threat of imminent and substantial endangerment. Similarly in *Grace Christian Fellowship v. KJG Investments, Inc.*, 2009 U.S. Dist. LEXIS 76954, at *27, the court found no threat of imminent and substantial endangerment in the absence of evidence of a pathway through which compounds under a

building's concrete slab were migrating into the basement air. General Electric argues that because of the absence of evidence of 1,2-DCA under the plaintiffs' home, they too cannot establish a pathway of contamination, and therefore have not shown that the contamination may present an imminent and substantial threat.

However, even assuming a lack of a direct pathway into the air inside the Beggs/Conway home, as discussed above, the plaintiffs have still shown that an imminent and substantial threat may be presented by the contaminated groundwater migrating from the General Electric plant into the surrounding area including municipal wells, residential areas, and the area under the golf course. Whether those contaminants have reached inside residential homes may impact the scope of any injunctive relief, but at this juncture any lack of a direct pathway into the homes does not undermine the Court's previous determination that General Electric's contaminants may present an imminent and substantial threat based on the presence in migrating groundwater.

The Court briefly addresses one other issue General Electric raised in opposition to the plaintiffs' motion. General Electric contends the relief the plaintiffs seek is moot because the Consent Order the state court entered in 2010 already obligates General Electric "to perform the investigation and remediation activities necessary to address the onsite and offsite soil and groundwater contamination." Reply [71] at 13. But the Consent Order requires remediation only after the adoption of a Remedial Action Plan, which is not due

until after adoption of a Remedial Objectives Report, stages the state court proceeding has not yet reached and, in fact, General Electric has not identified any remediation that has occurred. In contrast, in the cases General Electric cites, the relief the plaintiffs sought was moot because the defendants' remediation efforts were already underway. *See, e.g.*, *West Coast Home Builders, Inc. v. Aventis Cropscience USA Inc.*, No. 04 CV 2225, 2009 U.S. Dist. LEXIS 74460, at *15 (N.D. Calif. Aug. 21, 2009) ("remediation has been underway for years.")

Having established that the contaminated groundwater may present an imminent and substantial endangerment, the plaintiffs have established liability under RCRA. The court therefore proceeds to the relief sought, which is the plaintiffs' request for injunctive relief. In addition to liability, the plaintiffs must also satisfy the traditional elements of injunctive relief even where the statute specifically authorizes that type of relief. *United States v. Bethlehem Steel Corp.*, 38 F.3d 862, 867 (7th Cir. 1994) (citing *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531 (1987)). Thus, the plaintiffs must also show (1) an irreparable injury, (2) an inadequate remedy at law, (3) the balance of hardships weighs in favor of an injunction, and (4) the public interest would not be disserved by a permanent injunction. *Maine People's Alliance*, 471 F.3d at 296.

The parties have not focused on these factors and, in fact, the plaintiffs have asked the court to defer a decision on the scope of an injunction until after further proceedings. Memorandum [38] at 37-38. Bifurcating the determination of liability from the

determination of the ultimate injunctive remedy is supported by the approach taken by other courts. In *Voggenthaler*, 2010 U.S. Dist. LEXIS 74217, *44 (D. Nev. July 22, 2010), the district court granted the plaintiff's motion for summary judgment as to liability under RCRA, but saved the determination of precise terms of injunctive relief until after further hearing. The First Circuit affirmed a similar approach in *Maine People's Alliance*, 471 F.3d at 282, 296-97, in which after a bench trial the district court determined liability and enjoined the parties to attempt to agree on a study, before devising a feasible remediation plan.

Because the plaintiffs have sought summary judgment only as to liability under RCRA, and because the parties have confined their presentation of evidence and argument to issues of liability rather than whether injunctive relief is available and, if so, its scope, this Court will defer until later the parameters of any injunctive relief as to Count I. The Court notes that in their opening brief the plaintiffs also ask for leave to file a petition for fees as the prevailing parties and to assess a fine against General Electric. But General Electric never responded to those issues and they did not come up again in the parties' briefs. Without a full presentation of the issues of fees and fines, the Court likewise defers any decision on those issues.

4. General Electric's Motion for Summary Judgment on Counts IV – VI (State Law Claims)

Finally, General Electric seeks summary judgment on the plaintiffs' state law claims of nuisance (Count IV), trespass (Count V), and negligence (Count VI).

General Electric contends that the plaintiffs' claims are untimely because they were filed more than five years after plaintiff Lowell Beggs knew about the contamination on the golf course that serves as the basis for his claims. The plaintiffs respond that their state law claims are not untimely because they are based on continuing torts and, therefore, the statute of limitations has not yet run. Alternatively, they argue that General Electric is equitably estopped from asserting the statute of limitations defense because it has allegedly concealed the extent and significance of the contamination on and around its plant.

a. Discovery Rule & Continuing Tort Doctrine

Under Illinois law, tort claims for damage to property are timely if made within five years after the cause of action accrues. 735 ILCS 5/13-205. The cause of action in tort accrues when the injury occurs. *State Farm Fire & Cas. Co. v. John J. Rickhoff Sheet Metal Co.*, 914 N.E.2d 577, 593 (1st Dist. 2009). However, under the discovery rule the accrual date is tolled until "'the injured person becomes possessed of sufficient information concerning his injury and its cause to put a reasonable person on inquiry to determine whether actionable conduct is involved.'" *In re marchFirst, Inc.*, 589 F.3d 901, 903-04 (7th Cir. 2009) (quoting *Superior Bank FSB v. Golding*, 605 N.E.2d 514, 518 (Ill. 1992)).

General Electric contends that it is undisputed that the plaintiffs had sufficient information about the contamination in and around the golf course at least by the time Mr. Beggs purchased the course on May 29, 2007. In support, General Electric notes that seller

Citizens First Bank alerted Mr. Beggs to the contamination when bank representative Keith Hooks e-mailed Mr. Beggs' attorney Gary Gehlbach: "Gary, the golf course has contamination on the first hole. This was caused by General Electric. If you go to the EPA web site, GE is listed as a superfund site. No further remediation was needed according to what I can find." Ex. N to GE's Rule 56.1 on State Law Claims [Dkt. 52-2].

Mr. Gehlbach passed the information on to Mr. Beggs, but neither made any further inquiries. Rather, that same day Mr. Gehlbach confirmed to Mr. Hooks that Mr. Beggs intended to proceed with the purchase, and included in the sale contract the representation that: "[S]eller, however, has disclosed to Purchaser that there is contamination on the first hole of the Real Estate, such contamination having been caused by General Electric, as which contamination is part of the Superfund Site that apparently does not require any further remediation." Ex. Q to GE's Rule 56.1 on State Law Claims [Dkt. 52-5].

Mr. Beggs also testified that before the purchase, he noticed the head of a monitoring well protruding above the surface of the golf course. He testified that later in 2007, when he noticed that the well head had been damaged and was leaking, he knew the well was for monitoring contaminants from the General Electric plant, and contacted General Electric to fix it.

General Electric notes that it is also undisputed that by the May 29, 2007, sale of the golf course, the results of numerous tests revealing the presence of chlorinated solvents in excess of the MCL had been

filed with the IEPA. For instance, it notes that in August 2001, Harrington Engineering filed a letter report with the IEPA summarizing years of testing results as well as a map identifying the location of the wells tested, which included wells on the golf course. Harrington Engineering's comprehensive letter report filed with the IEPA in April 2007 also detailed test results from 2005 and 2006, revealing the presence of solvents in excess of the MCL. Although General Electric contends that the information filed with the IEPA was available in the public record, neither party has developed any evidentiary record of how the plaintiffs could have accessed the information. But the burden of establishing facts to avail itself of the discovery rule falls on the plaintiffs, *Hermitage Corp. v. Contractors Adjustment Co.*, 651 N.E.2d 1132, 1138 (Ill. 1995), who have not presented evidence that the records were not reasonably accessible, leaving General Electric's contention that the records were publicly available unrebutted. Moreover, the plaintiffs admit neither Mr. Beggs nor his attorney sought any information about the contamination from the IEPA.

Other information about contamination in the area around the plant and golf course was publicly and readily available by the time of the May 29, 2007, sale. In 1988, a local newspaper reported on the contamination and that it had been traced to the General Electric plant. That year the City of Morrison shut down two of its municipal wells because of the contamination, which was also reported in the newspaper article. In 2004, the State of Illinois sued General Electric over the contamination in a case that remains unresolved.

In response, the plaintiffs contend that their state tort claims are timely because of the continuing tort doctrine. Under Illinois' continuing tort doctrine, "when 'a tort involves a continuing or repeated injury, the limitations period does not begin to run until the date of the last injury or the date the tortious acts cease.'" *Brooks v. Ross*, 578 F.3d 574, 579 (7th Cir. 2009) (quoting *Belleville Toyota v. Toyota Motor Sales, U.S.A.*, 770 N.E.2d 177, 190 (Ill. 2002)). The doctrine applies for the duration of the tortious conduct, as distinguished from the duration of the damages that continue after the conduct ends. *Feltmeier v. Feltmeier*, 798 N.E.2d 75, 85 (Ill. 2003) ("A continuing violation or tort is occasioned by continuing unlawful acts and conduct, not by continual ill effects from an initial violation.").

General Electric argues that the continuing tort doctrine is inapplicable because it is undisputed that its use of chlorinated solvents ended in 1994. The plaintiffs respond that General Electric misapprehends the continuing tort, which the plaintiffs argue is General Electric's continuing failure to remediate the contamination it caused. But the failure to remediate contamination left over from prior conduct is not a continuing tort. In *Soo Line R. Co. v. Tang Indus., Inc.*, 998 F. Supp. 889, 897 (N.D. Ill. 1998), the court held that Illinois' continuing tort doctrine did not apply because the last possible tortious conduct occurred in 1982 when the defendant vacated its scrap yard operation, even though the site of the former scrap yard remained contaminated: "although the effects from Tang's violations may be persisting, any tortious activities by Tang ended in 1982." Likewise, in *Village*

of DePue v. Viacom Int'l, Inc., 713 F. Supp. 2d 774, 779 (C.D. Ill. 2010), the court held that Illinois' continuing tort doctrine did not apply because the last possible tortious conduct occurred in 1989, after the defendant had stopped operating its zinc smelting facility. The court rejected the plaintiff's argument that the continuing flow of contaminated water from the site of the former plant onto the plaintiff's property was a continuing tort: "Plaintiff alleges that it is continually re-injured by water flowing from the Site onto its property. Plaintiff does not allege that Defendants or their corporate predecessors engaged in any conduct aside from merely owning the Site after that date; the continuing tort doctrine therefore does not apply . . .". *Id. See also Powell v. City of Danville*, 625 N.E.2d 830, 831 (Ill. App. Ct. 1993) (continuing tort doctrine does not apply where defendant stopped operating landfill in 1974, but ground adjacent to landfill remained contaminated).

The facts of these cases stand in sharp contrast to situations involving contaminants that continue to leak into the environment and onto surrounding properties, as were the allegations in *City of Evanston v. Texaco, Inc.*, 19 F. Supp. 3d 817 (N.D. Ill. 2014). In *City of Evanston*, the court applied the continuing tort doctrine "at least at the pleadings stage," where the plaintiff alleged that contaminants continued to leak from underground storage tanks under the site of a former gasoline station. *Id.* at 827-28; *see also Leckrone v. City of Salem*, 503 N.E.2d 1093, 1101 (Ill. App. Ct. 1987) (defendant's continual dumping of sewage into a creek alleges a continuing tort).

The plaintiffs contend that cases like *Powell* and *Soo Line* are distinguishable because the defendants in those cases no longer owned the property or had long-ago vacated their operations. But in *Village of DePue*, 713 F. Supp. 2d at 779, the court explicitly held that "merely owning the Site" after the last act of contamination does not give rise to the continuing tort doctrine. Conversely, in *City of Evanston*, 19 F. Supp. 3d at 827-28, the court applied the continuing tort doctrine even though the defendant no longer owned the property, but where the defendant's underground tanks allegedly continued leaking contaminants into the environment. Thus, the applicability of the doctrine turns on continuing conduct, not continuing ownership or continuing injury.

Illinois' application of the continuing tort doctrine is not unique. For instance, in *First Virginia Banks, Inc. v. BP Exploration & Oil, Inc.*, 206 F.3d 404, 406-07 (4th Cir. 2000), the court held that Virginia's continuing tort doctrine did not apply to the continuous migration of petroleum hydrocarbons from the site of a former gasoline station onto the plaintiff's land where the tank from which the contaminants leaked was removed in 1986. Similarly, in *Haddonbrook Assocs. v. General Electric*, 427 Fed. Appx. 99, 102 (3d Cir. 2011), the court held that New Jersey's continuing tort doctrine required the breach of a "new" duty "apart from the duty to abate the contamination that is alleged in the nuisance claim." To hold otherwise would create an exception that swallows the rule that the doctrine does not apply to merely continuing injuries. *Gettis v. Green Mountain Economic Development Corp.*, 892 A.2d 162, 170 (Vt. 2005) ("The necessary tortious act cannot be

the failure to right a wrong committed outside the limitation period. . . . If it were, the tort in many cases would never accrue because the defendant could undo all or part of the harm.").

Finally, the plaintiffs argue that the decision in *Menard, Inc. v. Wells Mfg. Co.*, No. 03 CV 8313, 2007 U.S. Dist. LEXIS 67010 (N.D. Ill. Sept. 11, 2007), supports their assertion that General Electric's continuing failure to remediate falls within the continuing tort doctrine. In *Menard*, the plaintiff argued that its state law tort claims were timely under the continuing tort doctrine because the defendants continued to violate their duty to remediate, resulting in the continued migration of contaminants. *Id.* at *7. The court held that the plaintiff's evidence created a genuine issue of material fact about whether the defendants met their duty to remediate, which precluded the court from determining as a matter of law that there was no continuing tort. *Id.* at *9. However, according to the *Menard* decision, the defendants argued only that the plaintiff had failed to set forth evidence creating a genuine issue of material fact. *Id.* at *7. The decision does not identify any argument by the defendants that the failure to remediate prior contamination is not a continuing tort, and, therefore, the court had no occasion to address or resolve the issue. Accordingly, *Menard* is not persuasive authority for disregarding that the failure to fix the continuing effects of prior conduct is not a continuing tort.

Given the inapplicability of the continuing tort doctrine, the Court now focuses on when the plaintiffs'

state law claims accrued to determine whether under the discovery rule they were timely when filed on November 1, 2013. Under the relevant five year statute of limitations and the discovery rule, the claims were timely as long as the plaintiffs were not "possessed of sufficient information concerning his injury and its cause to put a reasonable person on inquiry to determine whether actionable conduct is involved" until November 1, 2008, or later. *In re marchFirst, Inc.*, 589 F.3d at 903-04 (internal quotation marks and citation omitted). When the plaintiff is possessed of sufficient information concerning his injury to investigate whether actionable conduct was involved is usually a question of fact "'unless the facts are undisputed and only one conclusion may be drawn from them.'" *Abramson v. Abramson*, 772 F. Supp. 395, 398 (N.D. Ill. 1991) (quoting *Bates v. Little Co. of Mary Hospital*, 438 N.E.2d 1250, 1253 (Ill. App. Ct. 1982)).

General Electric argues that the plaintiffs had actual knowledge of the contamination of the area south of the General Electric plant including the golf course before the May 29, 2007, purchase of the course as evidenced by e-mails between Mr. Beggs' attorney and the seller, as well as the sales contract itself, all of which explicitly noted the contamination under the golf course. Mr. Beggs also admitted he saw a monitoring well on the course before he purchased it, and later in 2007 contacted General Electric to fix the well knowing at that time that the well monitored contaminants from the General Electric plant.

In addition, information publicly available to the plaintiffs should have further alerted them to the

contamination. It is undisputed that the contamination was reported in 1988 in the local newspaper, which noted both that two Morrison municipal wells were closed as a result of the contamination, and that the IEPA traced the contamination to the General Electric plant. In 2010, the State of Illinois sued General Electric over the contamination in the circuit court of the Fourteenth Judicial Circuit. In addition, letters filed with the IEPA revealed the results of groundwater tests that showed levels of contaminants above the accepted MCL. The plaintiffs contend that unearthing those test results would have required them to review tens of thousands of pages of IEPA documents. But the plaintiffs concede that they never even tried, or for that matter sought out any information other than the seller's disclosure that there was contamination under the first hole of the golf course, though the seller believed no further remediation was required. The plaintiffs also contend that they had no reason to know the true extent of the contamination until 2012, when General Electric tested groundwater from the north supply well and found TCE one-thousand times the MCL. But "the fact that it obtained more detailed information" later does not negate that by 2007 the plaintiffs knew or should have known of the contamination in the area of the General Electric plant including on the golf course, enough to put them "'on inquiry to determine whether actionable conduct is involved.'" *Village of DePue*, 713 F. Supp. 2d at 780-81 (quoting *Vector-Springfield Properties, Ltd. v. Central Ill. Light Co.*, 108 F.3d 806, 809 (7th Cir. 1997)).

Based on the undisputed facts, the plaintiff knew or should have known by 2007 sufficient information about the contamination to trigger the accrual of their state law claims. Accordingly, their claims filed six years later in 2013 are outside the five-year statute of limitations period.

b. Equitable Estoppel

Alternatively, the plaintiffs argue that General Electric should not be allowed to assert the statute of limitations defense to their state-law claims under the doctrine of equitable estoppel. Under Illinois law, equitable estoppel suspends the statute of limitations for the time that the defendant took active steps to prevent the plaintiff from suing. *Jay E. Hayden Foundation v. First Neighbor Bank, N.A.*, 610 F.3d 382, 385 (7th Cir. 2010). The party claiming equitable estoppel must establish each of the following: (1) the other party misrepresented or concealed material facts; (2) the other party knew at the time the misrepresentations were untrue; (3) the other party intended or reasonably expected the party claiming estoppel to rely on the misrepresentations; (4) the party claiming estoppel did not know the misrepresentations were untrue; (5) the party claiming estoppel reasonably relied on the misrepresentations in good faith to his detriment; and (6) the party claiming estoppel would be prejudiced by his reliance on the misrepresentations if the other party were permitted to deny their truth. *Orlak v. Loyola Univ. Health Sys.*, 885 N.E.2d 999, 1011 (Ill. 2007). In addition, the party asserting equitable estoppel must have been diligent in its efforts to obtain enough information to determine whether it

had a claim. *Shropshear v. Corporation Counsel of City of Chicago*, 275 F.3d 593, 598 (7th Cir. 2001); *Nickels v. Reid*, 661 N.E.2d 442, 447–48 (Ill. App. Ct. 1996) ("A party claiming the benefit of an estoppel cannot shut his eyes to obvious facts, or neglect to seek information that is easily accessible, and then charge his ignorance to others.") (internal quotation marks and citation omitted).

The plaintiffs contend that they reasonably relied on the "rosy picture" General Electric painted "of a site with low levels of contamination that were rapidly declining by the forces of nature through natural attenuation." Response [55] at 11. But the undisputed evidence does not support an application of the doctrine of equitable estoppel. First, the plaintiffs cannot show that they reasonably relied on General Electric's representations about the levels of contamination or natural attenuation because they admit that they never looked into the issue of contamination beyond the seller's statement that the golf course was contaminated but appeared not to require remediation. Moreover, they present no evidence that General Electric knew at the time that natural attenuation would not work, or that any of the test results it filed with the IEPA were inaccurate. In short, the plaintiffs' broad accusations that General Electric covered up the true extent of contamination is insufficient to invoke the doctrine of equitable estoppel in the absence of evidence that General Electric made specific representations to the plaintiffs that it knew to be untrue at the time and of which the plaintiffs were aware and relied on.

In summary, the plaintiffs' state law tort claims accrued at least by 2007 when they knew or should have known of the contamination in the area of the General Electric plant and golf course, and they have identified no evidence to support application of either the continuing tort or equitable estoppel doctrines. Accordingly, the state law claims asserted in 2013 were filed outside the five-year statute of limitations period, are therefore untimely, and so General Electric's motion for summary judgment on Counts IV (nuisance), V (trespass), and VI (negligence) [48] is granted.

CONCLUSION

For the reasons given, General Electric's motion for summary judgment on the state law claims [48] is granted, its motion for summary judgment on the federal environmental claim [57] is denied, and the plaintiffs' motion for summary judgment on the federal environmental claims [37] is granted as to liability. By 1/15/2016, the parties shall submit a joint position paper on how the Court should proceed to the preliminary injunction stage on Count I as well as the propriety of assessing fees and/or fines. Status hearing is set for 1/26/2016 at 9:00AM at which time the Court will discuss the parties' suggestions. The Court also urges the parties to give serious consideration and to confer with the other side on whether a settlement conference would be beneficial.

Date: December 18, 2015

By: /s/Iain D. Johnston
Iain D. Johnston
United States Magistrate Judge

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Nos. 18-1522 & 18-2880

[Filed March 29, 2019]

LAJIM, LLC, et al.,
Plaintiffs-Appellants,

v.

GENERAL ELECTRIC COMPANY,
Defendant-Appellee.

Before

JOEL M. FLAUM, *Circuit Judge*

MICHAEL S. KANNE, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

Appeals from the United States District Court for the Northern District of Illinois, Western Division.

No. 3:13-cv-50348

Iain D. Johnston,
Magistrate Judge.

O R D E R

On consideration of the petition for rehearing and petition for rehearing en banc[*] filed by the plaintiffs-appellants in the above case on March 14, 2019, no judge in active service has requested a vote thereon and all judges on the original panel have voted to deny the petition. The petition is therefore **DENIED**.

[*] Chief Judge Diane P. Wood did not participate in the consideration of this petition for rehearing en banc.

APPENDIX J

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 18-1522 & 18-2880

[Filed March 14, 2019]

LAJIM, LLC, et al.,
Plaintiffs-Appellants,

v.

GENERAL ELECTRIC COMPANY,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois,
Western Division, No. 3:13-cv-50348.
The Honorable **Iain D. Johnston**, Judge Presiding.

PLAINTIFFS-APPELLANTS PETITION FOR REHEARING OR REHEARING *EN BANC*

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 18-1522 and 18-2880

Short Caption: LAJIM, LLC, et al. v General Electric Company

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.

[ ] PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate

disclosure information required by Fed. R. App. P 26.1 by completing item #3):

LAJIM, LLC, Prairie Ridge Golf Course, LLC, First National Bank of Amboy, as Executor of the Estate of Lowell Beggs, and Martha Kai Conway

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Greensfelder, Hemker & Gale, P.C.; Arnstein & Lehr, LP; and Ehrmann, Gehlbach, Badger, Lee & Considine, LLC

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None

Date: March 14, 2019

Attorney's Signature: s/ Matthew E. Cohn

Attorney's Printed Name: Matthew E. Cohn

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes X No ___

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None

Date: March 14, 2019

Attorney's Signature: s/ William J. Anaya

Attorney's Printed Name: William J. Anaya

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes X No ___

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RULE 35(b)(1) STATEMENT IN SUPPORT OF PETITION FOR REHEARING *EN BANC*

Rehearing *en banc* is appropriate because this Court's March 4, 2019 Opinion deviates from well settled precedent, including jurisprudence of the United States Supreme Court and this Circuit. District courts cannot use their equitable discretion in statutory injunction cases to undo Congressional mandates. Under the Opinion, Defendant's contamination will remain in place, will not be treated, and will not be restricted from access. Contrary to Defendant's representation, there is no groundwater control ordinance. Defendant's contamination is a continuing danger. As set forth in this statement requesting a hearing *en banc*, and as set forth with more detail in the Argument:

- The RCRA statute and Circuit precedent both require an injunction to abate the danger.[1]
- Supreme Court precedent requires the District Court to use its equitable discretion to *fashion* an injunction, not to choose against issuing an injunction at all.

1. *The Congressional Mandate of RCRA Requires an Injunction to Abate the Danger*.

In RCRA citizen suits under 42 U.S.C. § 6972(a)(1)(B), Congress intended for district courts to order injunctions for the "prompt abatement of

[1] RCRA is the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901, *et seq*.

imminent and substantial endangerments." *Adkins v. VIM Recycling, Inc.*, 644 F.3d 483, 497 (7th Cir. 2011), *quoting* H.R.Rep. No. 98-198, 98th Cong., 2nd Sess., pt. 1, at 53 (1984), reprinted in 1984 U.S.Code Cong. & Admin. News 5576, 5612. Once endangerments are found, as one was in this case, Congress did not intend for the district courts to use their equitable discretion to choose whether or not to issue injunctions. Congress already made that choice. Equitable discretion for established RCRA endangerments is to *fashion* injunctions. When the Congressional mandate is clear, as it is in RCRA, a district court's equitable discretion is to evaluate "simply whether a particular means of enforcing the statute should be chosen over another permissible means; the[] choice is not whether enforcement is preferable to no enforcement at all." *U.S. v. Oakland Cannabis Buyers' Co-op*, 532 U.S. 483, 497-98 (2001).

The Opinion failed to recognize Congress's carefully balanced federalism reflected in the preclusions set forth in 42 U.S.C. § 6972(b)(2)(C). Congress intended that a district court only refrain from issuing an injunction when there is already a diligently prosecuted federal RCRA or CERCLA case.[2] The Opinion improperly relieved Defendant from complying with RCRA because Defendant represented that it complied with state law. Such a finding is at odds with the carefully considered preclusions under 42 U.S.C. § 6972(b)(2)(C).

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[2] CERCLA is the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601, *et seq*.

Defendant's representations regarding compliance with the state consent order should also be considered in context with this Court's inaccurate factual findings. First, ***there is no ordinance preventing access to the contamination.*** The ordinance was rejected by the county government. Second, cleanup efforts would *not* cause more harm. Defendant said just the opposite – a cleanup would cause an actual cleanup, i.e., lessen the harm. And lastly, the idea that Plaintiffs did not adequately guide the District Court on the scope of an injunction stems from a belief that Defendant's plan provides protection from danger, through an ordinance, and nothing more is needed. These incorrect factual findings are fatal to the Opinion, and are explained in greater detail in the Argument. *See infra* Section I.

The District Court cannot accept Defendant's ordinance plan as a substitute for ordering an injunction to actually abate the contamination. Indeed, neither Plaintiffs, nor the District Court, nor the public, has authority to enforce the state consent order – and abstention is not available to the District Court in place of exercising jurisdiction and enforcing RCRA to eliminate the danger.[3] Abstention is not allowed under *Adkins,* 644 F.3d at 497.

RCRA citizen suits allow individuals to enforce federal environmental law – not individually, but as private attorneys general – in instances, such as here,

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[3] Plaintiffs are not a party in the state action, and there is no public participation. Plaintiffs are on the sidelines. This case is representative of precisely why Congress provided citizen suit relief.

when the state and federal agencies fail to do so. This Court should be asking if it would reach the same result had the plaintiff been the United States, represented by the Department of Justice, seeking the abatement of the half-billion gallons of poisoned water. *See U.S. v. Apex Oil, Inc.*, 579 F.3d 734 (7th Cir. 2009), where a cleanup injunction in favor of the government enforcing RCRA was upheld.

2. *An Injunction Should Issue When A Case Is Both Proven on the Merits and the Equitable Factors Are Met*.

Even though this is a RCRA case, there is a question of law applicable well beyond RCRA citizen suits: When a plaintiff has proven his or her federal case on the merits, and when the four equitable factors under *eBay Inc. v. Merc Exchange, L.L.C.*, 547 U.S. 388, 391 (2006) have been met, including irreparable harm, does a district court still have equitable discretion to deny an injunction, or at that point, is a district court's equitable discretion to be used to fashion the injunction that must issue? This Court's reliance on *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-12 (1982) and *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008) for the proposition that the District Court has, in this case, equitable discretion to issue or not issue an injunction is misplaced. This case presents a situation not shared in those cases – satisfaction of the four equitable factors.

The reason the District Court denied Plaintiffs injunctive relief was that it did not find irreparable harm. But this Court expressly disagreed, finding instead that a RCRA plaintiff who prevails on the

merits and proves an endangerment demonstrates irreparable harm – accordingly, the proven harm is irreparable absent an injunction. *LAJIM v. Gen'l Elec. Co*., 2019 WL 1011021, *7 (7th Cir. Mar. 4, 2019). Yet the Opinion also concludes that no injunction was "'necessary' to eliminate the danger." *Id*. at 10. When the sole remedy available is injunctive relief, and the four equitable factors including irreparable harm are met, the equitable discretion of a district court is only to *fashion* the injunction to achieve the Congressional mandate. The District Court's choice was the means by which to enforce RCRA, not whether to enforce RCRA at all. *See Oakland Cannabis Buyers' Co-op,* 532 U.S. at 497-98.

ARGUMENT

Before exploring the legal questions surrounding equitable discretion for injunctions (Part II) and this Circuit's RCRA precedent under *Adkins* (Part III), it is essential to explain this Court's key factual misunderstandings (Part I).

I. THE COURT HAS OVERLOOKED AND MISAPPREHENDED THE FACTS.

The "facts matter." *LAJIM*, 2019 WL 1011021 at *10.

A. It Is Not True That The Contamination Is "Contained and Restricted."

After recognizing the danger of TCE, and that TCE contamination was being left in place, this Court incorrectly described the contamination as "contained and restricted from access." *LAJIM*, 2019 WL 1011021

at *10. This finding, which goes to the very heart of this entire case, is simply wrong. Defendant's plan to leave the contamination in place, pursuant to a consent order in a state law action,[4] requires an ordinance to be enacted by Whiteside County, Illinois to prevent access to the contaminated groundwater. But there is no county ordinance. There never has been. Moreover, Defendant has demonstrated that it cannot secure such an ordinance. Defendant asked Whiteside County to adopt a groundwater restriction ordinance, and on September 22, 2017, that request was rejected. *See* Pl. Brief at 14, note 10; Dkt. 204-1, p. 2. Even after it knew the ordinance had been rejected, Defendant continued to promote its ordinance plan to Illinois EPA. Based only on Defendant's representations, Illinois EPA accepted Defendant's proposed plan six months later on March 2, 2018. *See* Dkt. 217-1. Whiteside County has not changed its mind about not enacting an ordinance. Simply, access to the contamination is not restricted, despite Defendant's representations to the contrary, and despite this Court's conclusion to the contrary. Moreover, even if there was an ordinance, an ordinance alone, without active remediation, is not a permissible RCRA remedy. *See* Pl. Reply Br. at 15-17.

Presently and foreseeably, the contamination is left unrestricted. It cannot be said that it is not "'necessary' to eliminate the danger." *LAJIM*, 2019 WL 1011021 at

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[4] When the State of Illinois filed its water pollution claims under 415 ILCS 5/12 in state court in February of 2004, the State lacked mandatory injunction authority under state law. The State could not even order a cleanup if it wanted to. *See People of the State of Illinois v. Einoder*, 28 N.E.3d 758, 764 (Ill. 2015).

*10. With unrestricted access to the contamination, there is danger. Putting aside the District Court's misunderstanding about the role of ordinances in RCRA remedies (they cannot be used alone), given the likelihood that Defendant will not be able to secure the ordinance, would it not have made more sense for the District Court to order a cleanup, and then if the ordinance is ever secured, Defendant could seek an amendment or vacation of the injunctive order at such time?

B. It Is Not True That "Additional Cleanup Could Cause Further Harm."

The Panel also incorrectly concluded that Defendant's expert testified that "additional cleanup could cause further harm." *Id*. at *11. Defendant's expert said no such thing. First, as to "additional," there has never been any cleanup, not ever. Defendant's expert believed that certain additional *investigation* work, not cleanup, could cause further harm – if performed negligently. Dr. Vagt was concerned that if Defendant negligently drilled through the shale to investigate the aquifer below, contamination could be drawn into the deep aquifer. But the focus of the cleanup at issue is in the aquifer *above* the shale, where there is known contamination. Tellingly, Dr. Vagt's plan included as an alternative an actual cleanup by pumping and treating the upper aquifer, which was not selected by Defendant. *See* Pl. Brief at 14; GE's RAP at Dkt. 194, p. 51, report p. 3-25. It should be self-evident that by proposing an active cleanup technology for the aquifer above the shale that Dr. Vagt said was workable, he was *not* saying that

cleanup would cause more harm. Just the opposite. While he may have believed *investigation* by drilling through the shale done negligently may cause harm, he clearly believed cleanup of the aquifer above the shale would cause an actual cleanup – it would lessen the harm.

C. Plaintiffs Provided The District Court With Detailed Guidance On Exactly What To Do.

Plaintiffs' expert did not leave the District Court without guidance. To the contrary. Plaintiffs fully investigated the data generated by Defendant and presented their findings to the District Court on summary judgment. That investigation was sufficient for the District Court to find an imminent and substantial endangerment. Further guiding the District Court, Plaintiffs' expert opined that recovery wells should be installed along with groundwater flow control technology to prevent further contamination from escaping from Defendants shuttered plant, and that source material should be removed. Dr. Banaszak's affidavit, Dkt. 121-1, sets this out in full detail, as do his prior expert reports. Dkts. 40-1 to 40-5, 68-1. As to Dr. Banaszak's hearing testimony referred to by this Court, that concerned the long-term solution – more investigation should precede the development of a long-term cleanup plan, which could be pump-and-treat. His testimony did not change his opinion that groundwater control and contamination recovery steps were needed right away, while the long-term plan gets developed. He did not decline to recommend anything to the District Court. The District Court misunderstood the testimony and did not fully consider his affidavit

and reports.[5] The proposed injunctive order, *see* Dkt. 121-2, explained in Dr. Banaszak's supporting affidavit, *see* Dkt. 121-1, contained the following specific guidance – install recovery wells, control groundwater flow, remove source material, supplement the investigation to better define the problem, and develop and implement a long-term remedy. This guidance is similar to the order that United States obtained and that this Court upheld in *Apex Oil,* 579 at 739-40. In essence, Plaintiffs' offered a *cleanup* plan to the *District Court*, while Defendant only represented compliance with an *ordinance-only* plan accepted by Illinois EPA. The District Court was very well guided on an abatement path by Plaintiffs and their expert, but the District Court followed Defendant's representations and Illinois EPA's acceptance of the ordinance plan, and so no amount of guidance from Plaintiffs would be adequate.

D. Summary Of Evidence Issues.

The fact is that there is danger. The ordinance plan results in continued danger. While it is true that "TCE is a dangerous contaminant and the current plan leaves the contamination in place," it is not true that the contamination is "contained and restricted from access" and that "additional cleanup could cause further harm." *LAJIM*, 2019 WL 1011021 at *10, 11.

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[5] As for the criticism that Dr. Banaszak did not conduct his own investigation, no new data would change the endangerment finding. Once there is known danger, the defendant has to do whatever is necessary to eliminate it, including any additional investigating to develop and implement a long-term remedy.

Plaintiffs offered the District Court clear guidance on how to abate the danger.

II. THE COURT OVERLOOKED AND MISAPPREHENDED SUPREME COURT CASE LAW ON EQUITABLE DISCRETION.

After the District Court's liability and endangerment finding, the *sine qua non* of the next two years and the evidentiary hearing was "irreparable harm." The District Court said that without irreparable harm, it could not order injunctive relief. After the evidentiary hearing, the District Court, satisfied with the ordinance plan, found no irreparable harm and thus did not order injunctive relief. This Court explicitly rejected the District Court's finding of no irreparable harm. "A RCRA plaintiff either demonstrates irreparable harm or fails to prove his or her case on the merits." *LAJIM*, 2019 WL 1011021 at *7. But after making this finding, this Court stated that an "injunction does not automatically follow from a success on the merits." *Id.*, *citing Maine People's Alliance v. Mallinckrodt, Inc.*, 471 F.3d 277, 296-97 (1st. Cir. 2006).[6]

However, what this Court failed to appreciate is that after an endangerment finding (i.e., there is a proven RCRA case on the merits), and after the four

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[6] This Court may be interested that after years of delay and inaction, and no cleanup, an injunction for a cleanup was ultimately issued in the *Maine People's Alliance* litigation in 2015. *See* Pl. Reply Br. at 5, *citing Maine People's Alliance v. HoltraChem Mfg. Co., LLC*, No. 00-CV-00069, 2015 WL 5155573 (D.Me. Sept. 2, 2015).

equitable factors for injunctive relief identified in *eBay* have been established, 547 U.S. at 391, including irreparable harm, a district court's equitable discretion is not to be used for the purpose of deciding whether or not to issue an injunction, but for fashioning the injunction that it must issue. As this Court explained, "A district court cannot … override Congress' policy choice…." *Adkins*, 644 F.3d at 497, *citing TVA v. Hill*, 437 U.S. 153, 194 (1978). In RCRA citizen suits, Congress expected courts to further the statutory goal of the "prompt abatement of imminent and substantial endangerments." *Adkins*, 644 F.3d at 498. In a Supreme Court case not cited in the Opinion, the Supreme Court explained that the "choice (unless there is statutory language to the contrary) is simply whether a particular means of enforcing the statute should be chosen over another permissible means; ***the[] choice is not whether enforcement is preferable to no enforcement at all***." *Oakland Cannabis Buyers' Co-op*, 532 U.S. at 497-98 (emphasis added).

This Court instead cited *Romero-Barcelo*: "[An injunction] is not a remedy which issues as of course … An injunction should issue only where the intervention of a court of equity is essential in order effectually to protect property rights against injuries otherwise irremediable." 456 U.S. at 311-12 (1982). And *Winter*: "An injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course." 555 U.S. at 32. But in neither *Romero-Barcelo* nor *Winter* did the Supreme Court find an injunction should not issue *after* the four equitable

factors has been established, including irreparable harm.

Referring to *Romero-Barcelo*, the Supreme Court in *Oakland Cannabis Buyers' Co-op* explained, "The District Court lacked discretion because an injunction was the 'only means of ensuring compliance.'" 532 U.S. at 497. Similarly, in this litigation, an injunction is the only way to remove the imminent and substantial danger. Even, for the sake of argument, assuming that the groundwater ordinance plan is consistent with the RCRA mandate for abatement (it is not), the District Court has no way to enforce it. The District Court can merely hope that Defendant follows through on its plan, and Defendant has already shown that it cannot.

Referring back to *Romero-Barcelo*, this Court's citation refers to a context in which private parties are damaged, i.e., "to protect property rights." 456 U.S. at 311-12. Again, this case is a citizen suit, with the citizen plaintiffs standing in the shoes of the United States seeking to enforce federal law. If the United States, represented by the Department of Justice, was standing before this Court, then property rights and injuries would not even be considered. So too are they irrelevant here.

This Court has effectively concluded that after a RCRA case has been proven on the merits, and after the four equitable factors have been met, including irreparable harm, there is another step in which a district court should evaluate whether it believes an injunctive order is "necessary," and such an evaluation of what is necessary may even consider representations of compliance with a state law which is not preclusive

under 42 U.S.C. § 6972(b)(2)(C). *See infra* Section III. The necessity of the injunction is established when the RCRA case is proven and the four equitable factors are met. The only equitable discretion is to fashion the injunction, not to choose against an injunction at all.

III. THIS COURT'S OPINION CANNOT BE RECONCILED WITH THE RCRA PRECLUSIONS UNDER 42 U.S.C. § 6972(b)(2)(C) AND THE ABSTENTION FINDINGS IN *ADKINS V. VIM RECYCLING*.

The only acceptable preclusive state actions absolving a district court of jurisdiction over a RCRA citizen suit are diligently prosecuted RCRA and CERCLA cases. 42 U.S.C. § 6972(b)(2)(C). Noticeably, not included in 42 U.S.C. § 6972(b)(2)(C) are state actions brought in state court pursuant to Section 12 of the Illinois Environmental Protection Act, 415 ILCS 5/12. This Court has previously analyzed the relationship between the statutory preclusions and abstention doctrines in depth, and has found that the preclusions are exclusive, and district courts may not abstain from exercising jurisdiction because of state law actions. *Adkins*, 644 F.3d at 497. Notably, Defendant never asked the District Court to abstain. But remarkably, the District Court then relieved Defendant from having to comply with RCRA based on Defendant's representation of compliance with a state law that was not preclusive under 42 U.S.C. § 6972(b)(2)(C).

By accepting the state court consent order as a substitute for entering an order of its own, the District Court improperly abstained. Clearly the District Court

cannot enforce the state court consent order, nor can plaintiffs or the public (even if the consent order did require an abatement). The District Court also now has no way to enforce RCRA and ensure compliance with the Congressional mandate of a prompt abatement of an imminent and substantial endangerment.

In a RCRA citizen suit decided by this Court two days after this one, *Liebhart v. SPX Corp*., in reference to this case, this Court expressed comfort with there being no injunction because there is "ongoing relief supervised by a state environmental agency." 2019 WL 1053618, *9 (7th Cir. Mar. 6, 2019). There is no ongoing relief under state supervision – there is no groundwater monitoring, there is no follow through on the rejected county ordinance, and there is no cleanup proposed or being implemented. Perhaps most importantly, there is no public participation. Unlike under RCRA and CERCLA which require public participation and are thus appropriately included among the preclusions under 42 U.S.C. § 6972(b)(2)(C), in the state case, Plaintiffs "may only watch from the sidelines," in direct conflict with this Court's analysis that such a situation is why Congress adopted legislation creating RCRA citizen suits in the first place. *Adkins*, 644 F.3d. at 507.

When Illinois EPA accepted Defendant's ordinance plan in response to Defendant's representations, the result was the continuation of unrestricted access to contamination. If the District Court has no jurisdiction over the state consent order (which does not even require an abatement), and the District Court has declined to order injunctive relief of its own, then the

danger persists, unabated. If Plaintiffs are on the sidelines of the state action, they cannot do anything to bring about the end of that danger. For whatever reason, the State sued Defendant under Section 12 of the Illinois Environmental Protection Act, a state statute that was missing any authority to order Defendant to perform remediation. *See infra* note 4. Congress provided citizen suits to abate imminent and substantial endangerments, precluding enforcement only for diligently prosecuted RCRA and CERCLA cases. It is unimaginable that Congress' intent can be so easily subverted.

CONCLUSION

The end result is that after the District Court exercised equitable discretion, there is no injunction, the danger persists unabated, and the District Court no longer has jurisdiction to do anything about it. The outcome is directly at odds with the Congressional mandate for the prompt abatement of imminent and substantial endangerments.

The contamination is not contained and restricted from access. A cleanup would lessen the harm, not cause more harm. There is no groundwater ordinance. Defendant's request for one was denied. Access to the contamination is not restricted. While Defendant acknowledged that a viable pump-and-treat cleanup plan would result in an actual cleanup, it chose to represent that its ordinance plan would work. If this Court truly believes its factual findings contrary to those above, then this Court should remand the case to the District Court for additional fact finding to verify or refute its findings. The findings do not match the

record. If this Court finds Plaintiffs' guidance insufficient to fashion an injunction, this case should be remanded so that the District Court can obtain whatever additional guidance it needs. The process can start with the well-marked roadmap of the proposed injunction supported by an expert affidavit presented by Plaintiffs. Dkts. 121-1, 121-2.

With this Court having found irreparable harm, Plaintiffs have both proven their case on the merits and established the equitable factors. A remand to the District Court is thus appropriate, where the District Court can use its equitable discretion to fashion an injunction, not to decline to enforce the RCRA statute at all.

In accepting the ordinance plan as a substitute for an abatement, the District Court has engaged in improper abstention in conflict with the Congressional mandate and the *Adkins* decision. The District Court is without question unable to enforce the state consent order, but now it is also unable to enforce RCRA and eliminate the danger as well. This Court should remand this case to the District Court to order Defendant to promptly abate the danger not abated by the state consent order.

Dated: March 14, 2019

Respectfully submitted,

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