

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

WARREN SMITH, et al.,	:	
	:	
Plaintiffs,	:	Case No. 5:97CV-3-M
	:	
v.	:	Judge Joseph H. McKinley, Jr.
	:	
CARBIDE AND CHEMICALS	:	
CORPORATION, et al.,	:	
	:	
Defendants.	:	

**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS'
MOTION TO EXCLUDE THE TESTIMONY OF R. THOMAS WALDROP, JR.**

INTRODUCTION

Plaintiffs submit this memorandum of law in opposition to *Defendants' motion* to exclude Plaintiffs' real estate appraisal expert, R. Thomas Waldrop, Jr. (c.v. attached as [Exhibit A](#)).

"On August 8, [1999] the [WASHINGTON POST](#) ran a series of stories based on very serious allegations that the Department of Energy used recycled nuclear fuel that was laced with plutonium and other radioactive material without informing the work force that handled this highly toxic material." *Statement of Senator Mitch McConnell*, October 26, 1999, *Special Hearing, "Paducah Gaseous Diffusion Plant"*, SUBCOMMITTEE OF THE COMMITTEE ON APPROPRIATIONS, U.S. SENATE, 106TH CONGRESS, p. 2 (2000) ([Exhibit B](#)). Senator McConnell commented on the "public's reaction *beginning with the* [WASHINGTON POST](#) story." *Id.* at 77 (emphasis supplied). As a result of these reports Kentucky Senator Jim Bunning held a field hearing in Paducah to gain input from local residents about "DOE's failure to disclose these findings to the workers." *Id.* at p. 5. These events led to a "torrent of information" which was widely covered in the

PADUCAH SUN and COURIER-JOURNAL newspapers in Paducah. *Waldrop Dep.* p. 19. “Until [the] [WASHINGTON POST](#) article appeared on August 8, 1999, most workers did not know they were potentially being exposed to plutonium.” *Id.* at 16. *Testimony of David Fuller, president of the Paper, Allied-Industrial, Chemical and Energy Union, Local 5–550.* The “series of [WASHINGTON POST](#) headlines prompted DOE to initiate another investigation at Paducah. The Phase I [and later Phase II] Independent Investigation identified numerous deficiencies in the oversight” of “subcontractors by the Oak Ridge Office.” *Id.* at 26.

Plaintiffs retained Joe Linn Sloan, a prominent local Paducah MAI (Member of the Appraisal Institute) expert, to study and report on whether the contamination reported and revealed to the public in August, 1999 adversely impacted plaintiffs’ properties which were in close proximity to the PGDP. Mr. Sloan prepared a series of reports (cited reports filed as [Exhibits C, D, E, F](#)) based upon a before-and-after model for determining the value of impaired (contaminated) property. Mr. Sloan died and Plaintiffs then retained another highly respect local MAI appraiser, Mr. Tommy Waldrop, to review Mr. Sloan’s work and offer his opinions at trial Mr. Waldrop reviewed Mr. Sloan’s appraisal reports and performed additional independent appraisals ([Exhibits G, H](#)).

As Defendants did in opposing the admissibility of radiation expert Mr. Bernd Franke, Defendants present the Court with a motion and memorandum to exclude Plaintiffs’ expert under *Daubert*. Defendants’ brief, however, is a one-sided deposition summary where the citations and authorities do not “square” with the record, the expert appraisal reports, the actual deposition testimony and case-law citations¹.

¹ This is an electronic brief. Hyperlinks to the cited portions of the record, exhibits, authorities and cases appear in blue text and open a separate PDF file or webpage.

Defendants fail to present the Court with *any* of Mr. Sloan's or Mr. Waldrop's reports nor do they submit the Rocky Flats Report (and the case studies it presents).

In this *Daubert* opposition memorandum Plaintiffs will refute Defendants' arguments and mis-citations of the record to detail that Mr. Waldrop's opinions and methodology are scientific, reliable, well-accepted and strongly footed on facts and data that are, in turn, reliable, sufficient and accurate.

I. MR. WALDROP: HIS OPINIONS AND METHODOLOGY

Mr. Waldrop graduated from the University of Kentucky in 1977 and immediately began working in his father's real estate business in Paducah. *Waldrop Dep.* p. 3. He obtained a degree from the University of Kentucky in land economics and agricultural economics. *Waldrop Dep.* p. 3. He obtained the coveted MAI designation in 1988. *Waldrop Dep.* p. 4. He has continuously worked in the real estate business in Paducah since 1977. *Id.* He has testified in numerous cases as an expert in real estate appraisal including cases of radiological and environmental contamination and construction defects. *Id.* at pp. 7, 10, 11, 138, 140). He has never been disqualified as an expert in court. *Id.* at p. 137.

Waldrop has testified as an expert for the Commonwealth of Kentucky (*Waldrop Dep.* p. 138) and gave expert appraisal testimony in prior PGDP litigation on the diminution of market value due to contamination in *Lamb v. Martin Marietta*, No. 5:90-cv-00005 (W.D. Ky. filed Jan. 4, 1990). (deposition filed, Dock. No. 58, Jan. 21, 1993) (Exhibit I).

Waldrop explained that he has used the "before and after" method many times to determine what a property is worth before a taking, contamination or acquisition and what it is worth afterwards. *Id.* at 7, 10, 138. This is a reliable and well-recognized methodology for real estate appraisal of properties that have been taken or impaired by

contamination. *Rockwell Intern. Corp. v. Wilhite*, 143 S.W.3d 604, 607 (Ky.App.,2003) (“the proper measure of permanent damage to real estate in Kentucky is the difference in the fair market value of the real estate just before and after the injury.”); *U.S. v. 6.24 Acres of Land*, 99 F.3d 1140 at *4 (6th Cir. (Ohio) 1996) (explaining before and after method in radiation contamination case [Fernald, OH]); *U. S. ex rel. Tennessee Val. Authority v. T. Industries, Inc.*, 489 F.2d 921 (6th Cir. (Tenn.) 1974) (discussing before and after method in condemnation case; *Sloan Report*, June 19, 2002 (p. 9) (“The appraisals utilize the ‘Before and After’ valuation process recognized in federal courts and state court on Kentucky to estimate damages.”)).

In working on this case Mr. Waldrop reviewed Mr. Sloan’s prior reports (e.g. Jan. 9., 2003, Aug. 10, 2003, July 18, 2003, June 19, 2003 and July 25, 2003). *Id.* at 12-13. He also reviewed peer reviewed articles from the APPRAISAL JOURNAL² and other publications dealing with the subject of appraising impaired and contaminated property. *Waldrop Dep.* pp. 13-14, 57 and 59.

Waldrop testified that he recognized Mr. Sloan’s methods and reports and professional appraisals and he has used similar methods in appraising properties “[a]ll my professional life.” *Waldrop Dep.* p. 136. Waldrop stated he used the same methods and principles in analyzing the diminution of market value he has used in the past for appraisal of environmentally-impacted property. *Id.* at 140, 144. Moreover, the principles and methods he used in this case to analyze the diminution of market value in this case were from the APPRAISAL INSTITUTE. *Id.* Mr. Sloan also made clear his appraisals followed and were in compliance with the APPRAISAL INSTITUTE and the

² The APPRAISAL JOURNAL is peer reviewed.
http://www.appraisalinstitute.org/profession/ai_role.aspx

Uniform Standards of Professional Appraisal Practice of the Appraisal Foundation (USPAP). *Sloan Report*, January 9, 2002, p. 11).

Both Mr. Sloan and Mr. Waldrop performed market appraisals of the plaintiffs properties as of August 1999 – the “unimpaired” “before” valuation and the “after” valuation as if impaired. *Waldrop Dep.* p. 77. As Sloan stated in his *Report of June 19, 2002*:

Re: Appraisal of 5 Properties impacted by Paducah Gaseous Diffusion Plant contamination:

Dear Mr. Owens and Mr. Schmidt:

In accordance with your request, I have made complete appraisals of 5 properties for purpose of estimating their market values as of August 9, 1999 as *if unimpaired*. I have further made appraisals of the market values of the properties *as if impaired by environmental contamination*. The impaired value estimates are subtracted from the unimpaired value estimates to determine the diminution in property value caused by the event. The results are reported in the summary appraisal report.

[The summary then provided the results for the 5 properties]:

Benny Frank Heady:
Value Unimpaired: \$ 105,000
Value Impaired: \$91,000.
Difference: **\$14,000.**

Leon & Deena Hoskins:
Value Unimpaired: \$ 59,000
Value Impaired: \$44,000.
Difference: **\$12,000.**

Kendal & Jamie Jerrell:
Value Unimpaired: \$ 220,000
Value Impaired: \$160,000.
Difference: **\$60,000.**

Eugene and Helen Henley:
Value Unimpaired: \$ 90,000
Value Impaired: \$60,000.
Difference: **\$30,000.**

Thomas Foster Stone:
Value Unimpaired: \$ 89,900
Value Impaired: \$66,000.
Difference: \$23,900.³

Stone and Waldrop state in their Reports and testimony that the “impairment event” (contamination) was assumed to be “significant contamination” from PGDP as established and based upon information provided to them from Plaintiffs’ experts in the environmental field. *Sloan Report*, June 19, 2002 p. 5, ¶ 3; *Sloan Dep.* p. 74. Waldrop assumed that in all cases the plaintiffs’ properties have elevated levels of radionuclides above background levels “relying on information furnished to [him] with respect to contamination.” *Waldrop Dep.* 68, 71, 75. Both Sloan and Waldrop acknowledged (appropriately) that they were real estate appraisal experts, not environmental experts, and thus made assumptions about contamination (that it was “significant” “elevated radioactivity” “above background levels” causing the property to be “impaired by trespass of the contaminant.” *Waldrop Dep.* p. 75, 25, 68.

A real estate appraiser expert may offer an opinion based upon reliance on contamination proved by environmental experts and need not make any independent finding or determination that the property is contaminated. *In re Custom Distribution Services Inc.*, 224 F.3d 235, 246-247 (3rd Cir. (N.J.),2000:

But despite City's claim to the contrary, none of these cases precludes a real estate appraiser from evaluating contaminated property without the testimony of an environmental expert. At best, they stand for the proposition that a real estate appraiser cannot establish valuation without proof that environmental contamination exists. Here, the real estate expert did not make any findings as to whether the property was contaminated. Rather, he testified-relying on the letters from the United States Environmental Protection Agency and the New Jersey Department of

³ One factor for this Court to consider in a *Daubert* analysis of “the validity of an expert's testimony” is whether the expert “uses accepted methods to achieve highly anomalous results.” *Avery Dennison Corp. v. Four Pillars Enterprise Co.*, 45 Fed.Appx. 479 at * 3 (6th Cir. (Ohio) 2002). Here, Sloan and Waldrop have reached very conservative and reasonable results that fully comport with damages analysis in similar cases.

Environment and the Killiam Report, all of which indicated that environmental contamination existed FN8-about the valuation *247 of the property as affected by such contamination. Because there is no merit to the City's argument, we find that the District Court did not err in affirming the Bankruptcy Court's determination that Custom met its burden of providing credible expert testimony on property valuation.

Indeed the testimony of a real estate expert is necessary to prove the market effect of contamination. *Cunningham v. Masterwear Corp.*, 569 F.3d 673 (7th Cir. (Ind.) 2009) (“The plaintiffs needed evidence by a real estate agent or real estate appraiser to establish the effect of the contamination on the value of their property.”). Defendants’ real estate Randall Bell, expert conceded at his deposition that is appropriate for a real estate appraiser expert to rely on other environmental experts for proof of contamination.⁴

There is no dispute in this case that Waldrop and Sloan’s *unimpaired* appraisal analysis (valuing the properties as of August 9, 1999 based upon comparable sales) was reliable and based upon sound methods. USPAP recommends the development of an unimpaired value under the hypothetical condition that the property is “free of any contamination.” USPAP, ADVISORY OPINION 9, *The Appraisal of Real Property That May Be Impacted by Environmental Contamination* (2003) <http://www.real-analytics.com/AO-9.pdf> (Exhibit J). *Defendants’ Memorandum to Exclude Waldrop*, pp. 6, 8, 21.

Sloan and Waldrop then arrived at the “impaired” market value from PGDP contamination by following well-accepted appraisal principles. *See* USPAP, ADVISORY

⁴ Q. All right. And you would agree that a real estate appraiser, number one, may rely upon environmental studies from either state or federal or other experts, environmental experts, to determine whether contamination exists. Correct?

A. Well, generally yes. A real estate appraiser can rely on the special assumption and limiting condition that another expert's report is correct.
Randall Bell Dep. at p. 9 (Exhibit L).

OPINION 9.⁵ In determining the “impaired” market values Sloan and Waldrop, *correctly* used a sales comparison approach using analogous comparable sales studies and market data from the Rocky Flats nuclear arsenal and other studies of contaminated property (the “Case Studies” cited at pages 126-162 of the Rocky Flats Study) (Exhibit K) because there was inadequate local market data. Defendants’ real estate expert Mr. Bell also acknowledged the acceptance of this *methodology*:

Q. -- did Mr. Sloan also identify studies showing contaminated properties showing diminution of market value from contamination in other studies, such as Rocky Flats and in New Jersey, and he had a chart saying what studies he was relying on?

A. Right, yes.

Q. All right

A. He did specifically identify the Rocky Mountain Flats study and their related case studies.

Q. Okay. And that methodology of relying upon other studies in connection with arriving at an opinion about whether a property is contaminated, that's an accepted methodology. Correct?

A. Well, you're talking about the case studies methodology. And yes, I mean, in speaking in terms of generalities, that is an acceptable methodology. Typically case studies are looked at as secondary data. But looking at case studies is **something that is done all the time**.

Randall Bell Dep. p. 14-15 (Exhibit L) (emphasis supplied).

In fact, as came out during his deposition, Defendants’ expert in the instant PDGP litigation was an expert *for the Plaintiffs* in the Rocky Flats case in Colorado. The Plaintiffs in Rocky Flats, in *Cook v. Rockwell Intern. Corp.*, 580 F.Supp.2d 1071, 1133 (D.Colo., 2006) filed a *Supplemental Proffer for Rebuttal Witness Randall Bell* (Exhibit M) that summarized his expected testimony in the Rocky Flats case-- that methods used in

⁵ “In general, the unimpaired value of the property being appraised can be estimated using the sales comparison approach [SR 1-4(a)], income approach [SR 1-4(b)], and cost approach [SR 1-4(c)]. Estimating the effects of environmental contamination on real property value usually involves the application of one or more specialized valuation methods. These methods should be consistent with the requirements related to the valuation approaches in USPAP.”

the Rocky Flats study (upon which Sloan and Waldrop rely here) conformed “with prevalent appraisal standards acceptable techniques.”

MR. SMITH: Could you mark that as Exhibit 1?

2 (Plaintiffs' Supplemental Proffer

3 for Rebuttal Witness Randall Bell

4 marked Exhibit 1 to this

5 deposition.)

6 Q. (By Mr. Smith) I show you what has been

7 marked as Plaintiffs' Exhibit 1, which is a court paper

8 from Cook versus Rockwell International, United States

9 District Court for the District of Colorado, Number

10 90-CV-181-JLK, signed by Peter Nordberg, with the law

11 firm of Berger and Montague in Philadelphia, attorneys

12 for the plaintiff and the class. And it states,

13 "Plaintiffs' Supplemental Proffer for Rebuttal Witness

14 Randall Bell."

15 And the second paragraph states (as read):

16 "Mr. Bell is a real estate appraiser and a principal in

17 the firm of Bell, Anderson, and Sanders, LLC, of Laguna

18 Beach, California. He specializes in real estate damage

19 economics and is the author of the textbook Real Estate

20 Damages (1999). He served as a member of the Appraisal

21 Institutes panel on professional standards for area-wide

22 appraisals. He is knowledgeable about the prevailing

23 standards and techniques for studies of area-wide

24 impacts from environmental disamenities, and **his**

25 **testimony will be offered to rebut contentions by**

1 **defendants that Mr. Hunsperger's work did not conform**

2 **with the prevalent appraisal standards and techniques."**

3 Have I read that correctly?

4 A. As far as I followed along, yes.

Randall Bell Dep. p. 17-18 (Exhibit L).

Waldrop and Sloan used “damages studies” from The Rocky Flats Study ([Exhibit K](#)) particularly real estate appraisal expert Hunsperger’s work from Rocky Flats (that included contaminated property sales from many other studies and locations (e.g. Ohio; New Jersey; Colorado; Texas; New Mexico, and California). [Sloan Report June 19, 2002, p. 21](#); [Waldrop Dep. 32; 45](#). This comparable sales approach using sales from previous studies as methodology was not only *supported* by Defendants’ expert Randall

Bell in his Rocky Flats Proffer ([Exhibit M](#)) and in his deposition, *Randall Bell Dep.* p. 14-15 ([Exhibit L](#)), it is a well recognized, reliable and accepted method of appraisal.

A persuasive analysis (and approval) of the use of out-of-state analogous comparable sales studies was discussed in the Rocky Flats case, *Cook v. Rockwell Intern. Corp.*, 580 F.Supp.2d 1071, 1133 (D.Colo.,2006). In *Cook*, the expert testimony from certified real estate appraiser and property consultant Mr. Hunspergerb regarding 13 area-wide property studies, including academic, government-funded, and litigation-related analyses, that examined the impact on neighboring properties of more than 30 sites posing contamination or other environmental concerns and estimating the total loss in value to residential properties located in close proximity to federal weapons production facility to be \$166 million was based on reliable valuation methodology, and, was therefore admissible in class action brought by property owners against operators of the federal weapons production facility. Sloan and Waldrop have used the same methods. See also *Bonnette v. Conoco*, 837 So. 2d 1219, 1238-1239 (appraiser's opinion upheld to loss in market value from 1994 asbestos contamination by reference to studies of contaminated property in 1982 and 1983 from flood that showed a 10% impairment); *Valley View Angus Ranch v. Duke Energy Field Services, LP*, 2008 WL 2329169 (W.D. Okla., 2008.) (expert opinion permitted as to diminution of soil and ground water from gas pipeline leak)⁶.

Waldrop and Sloan explained the *necessity* in this case to use analogous sales data from comparable sales set forth in studies (especially the Rocky Flats cited studies) to determine the degree of impairment because there was insufficient local sales data

⁶ "Defendant argues that he employed incorrect standards and did not utilize proper criteria in selecting properties as examples of comparable values. Defendant's . . . arguments in that motion also go to the weight of Artman's testimony. Defendant's motion and supplemental motion regarding Artman are thus denied."

such that the quantity and quality of data available to perform the sales comparison approach adversely impacted its accuracy. Sloan explained: “No comparable improved sales reflecting the ‘as impaired’ market conditions sales could be located in the local market.” *Sloan Report, Jan. 9, 2002 at “Value Estimate ‘As Impaired’*. Waldrop testified that the area around the plant in West Paducah was “a very small submarket of McCracken County”, a “micro-market” that was not a mature market” with few sales and most of the adjacent land was dominated by the plant itself, the Shawnee steam plant and a wildlife refuge. *Waldrop Dep. pp. 33,143*. In Waldrop’s opinion there were “no purely comparable sales close to the plant that could validly used for comparable sales” and “very few transactions that meet” the “criteria” and “none within that impaired submarket of McCracken County.” *Id. at 34-35*. Waldrop further explained that the “none of the properties we have investigated has sold or resold” since August, 1999 and therefore the market reaction has yet to occur. *Waldrop Dep. p. 32,33, 34-35*. Defense real estate appraiser Randall Bell agreed that “But with the sales comparison approach, the presumption is that there is adequate market data.” *Randall Bell Dep. p. 8 (Exhibit L)*.

Waldrop testified that he “does market analysis every day, ” “looks at sales [in Paducah] all the time” has “his finger on the pulse” (and has since 1977) and that “there has not been the quantity of sales necessary to develop a trend line.” *Waldrop Dep. pp. 38, 40, 76*. He explained: “You have to have quantity in order to develop that trend line. And this market is so small, and so slow and so lethargic, we’ve not had that trend.” *Waldrop Dep. p. 40*. There was simply not enough local “market evidence in that submarket to satisfy the statistical requirements for that trend line.” *Waldrop Dep. p. 41*.

Waldrop stated that he and Sloan relied on the Rocky Flats market studies “which is very much an industry standard” and “did not use any local sales” to

determine impaired value because “there’s an insufficient quantity of those local sales that would meet the criteria to develop that trend line.” *Waldrop Dep.* p. 59. There was simply “little or no market activity” in the appropriate West Paducah market which was “rural, “not active” with a huge amount of government land.” *Waldrop Dep.* p. 39, 42. By contrast, the studies he relied upon (Rocky Flats and others) were “reputable reliable” studies that showed “property that is impacted by contamination suffers value loss.” *Waldrop Dep.* pp. 44-45. The Rocky Flats studies provided “relevant and objective market data that these parties have been impaired”, consistent with peer reviewed literature that “market evidence” “doesn’t have to be local.” *Waldrop Dep.* p. 66-67. Given the “insufficient local evidence to develop a trend line” it was “powerful” to “go to areas where the market has matured.” *Waldrop Dep.* p. 80. “Hundreds” of comparable sales would be necessary to establish a statistically valid impairment cost comparison and there “has not been a quantity of data available to take out the idiosyncrasies of individual sales.” *Id.* at 81. *See also* pp. 104-105 (“not a sufficient volume of data.”

Defendants confuse and misapply the applicable law. Mr. Waldrop’s role is to testify as to damages: whether the properties have an impaired market value as a result of PGDP contamination. His testimony is not (and cannot) be offered as an expert to testify whether there is actual injury to the property that would effect use and enjoyment. In other words, Waldrop’s proffered diminution of market value is *damages testimony* that comes into play only if and when there is proof of actual injury due to an unreasonable interference with the use of Plaintiffs’ property. This analysis was cogently set forth by both the Supreme Court of Kentucky and the Sixth Circuit in the appellate history of this case.

In *Smith v. Carbide and Chemicals Corp.*, 226 S.W.3d 52, 57 (Ky.,2007) the Supreme Court of Kentucky stated: “Thus, the diminution in the property's value due to an intentional trespass is a recognized measure of damages after, or if, an actual injury has been found.” *Smith v. Carbide and Chemicals Corp.*, 226 S.W.3d 52, 54 (Ky.,2007)

explicitly held that proof of actual harm is *not required* to state a claim for intentional trespass. *Id.* at p. 54. Furthermore, the Court held that a property owner may be injured through contamination of imperceptible materials in ways other than through a health hazard:

“Property owners are not required to prove contamination that is an actual or verifiable health risk, nor are they required to wait until government action is taken. An intrusion (or encroachment) which is an unreasonable interference with the property owner’s possessory use of his/her property is sufficient evidence of an actual injury (or damage to the property) to award actual damages.
Smith v. Carbide and Chemicals Corp., 226 S.W.3d 52, 54 (Ky.,2007).

By illustration, the Supreme Court of Kentucky explained that groundwater or surface water contamination to the extent that it cannot be used normally constitutes “an unreasonable interference with one’s use and enjoyment.” The Supreme Court of Kentucky concluded, “the amount of harm, if any, to the individual parcels, and the correspondence measure of actual or compensatory damages will depend upon the proof introduced at trial – an issue of fact.” *Smith v. Carbide and Chemicals Corp.*, 226 S.W.3d 52, 56-57 (Ky.,2007). The Supreme Court of Kentucky ruled in favor of the Plaintiffs on the certified question : that groundwater and soil contamination caused by facility substantially and unreasonably interfered with use and enjoyment of their property and was actionable, holding at page 52:

- 1) proof of actual harm is not required, under Kentucky law, to state a claim for intentional trespass, and
- (2) the diminution in the property's fair market value due to an intentional trespass is a recognized measure of damages after, or if, an actual injury has been found.

The Court concluded that where actual harm from contamination is proven, “the diminution in the property’s value due to an intentional trespass is a recognized measure of damages . . .” *Id.*

As the Sixth Circuit in its opinion remanding this case to this Court for trial explained in *Smith v. Carbide and Chemicals Corp.*, 507 F.3d 372, 378 (6th Cir. (Ky.) 2007):

Following the Kentucky Supreme Court’s decision, the parties submitted supplemental briefs. Appellants contend that the record contains evidence of actual injury sufficient to survive summary judgment and require a trial on their intentional trespass claim. We agree. Indeed, while the key inquiry is obviously whether Appellants suffered “actual injury,” the emphasized language instructs that **this is a factual inquiry for trial**. With respect to the record, eight of the 16 Appellants had their water wells capped or have been prevented from digging wells. The Department of Energy has provided all 16 Appellants with free municipal water as a result of the groundwater contamination, and **Appellants affirmed that they have stopped raising livestock, gardening, and consuming fish from nearby streams**. Appellants also presented an expert report from Bernd Franke, who examined actual radiation monitoring records and prepared a dispersion model. Franke determined the amount of radiation exposure and contamination and concluded that the soil contamination exceeded EPA standards. Appellants also offered affidavits from some of the property owners as to financial harm caused by the contamination, including a diminution in property values, clouds on their title, and the denial of mortgages because of the contamination. Appellees argue that the record does not contain sufficient evidence that Appellants suffered an actual injury as a matter of law. They do, however, concede that the eight property owners whose property is located above the plumes are potentially impacted. They also take issue with Appellants’ expert’s conclusions and reports on property values, citing their own expert’s conflicting reports. Appellees’ interpretation of the record is better directed to a fact finder and does not, in our view, indicate an absence of a genuine issue of material fact as to actual injury.

Thus, Appellants have satisfied their burden of showing a genuine issue of material fact with respect to the issue of actual injury to their properties under Kentucky law. This requires the case to go to trial on their claim of intentional trespass. In so holding, we express no opinion regarding the amount of damages to which Appellants may be entitled.

Smith v. Carbide and Chemicals Corp., 507 F.3d 372, 378 (6th Cir. (Ky.) 2007) (emphasis supplied).

Plaintiffs have submitted an *Affidavit* signed by eight (8) Plaintiff property owners whose properties are located over the groundwater contamination plume that contains technetium and trichloretholene. (Docket Entry No. 288, Attach. 1). These Plaintiffs have had their well's capped or have been prevented from installing water wells as a result of the groundwater contamination caused by the Defendant's intentional conduct *Id.* Additionally, Plaintiffs submitted the affidavits of two additional Plaintiffs (not part of the 16 segregated for trial) to establish that they also own property that is over the groundwater contamination plume. [Ex. 1 and 2, Plaintiffs' Reply Memorandum, *Affidavit of Phyllis Robertson* and *Affidavit of Marshall Bobo*, Docket Entry No. 295]. Defendants did not contest these Affidavits. Plaintiffs Warren Smith and Ken Jerrell no longer range cattle on their property. Plaintiffs Warren Smith, Charles Robertson, Eugene Henley, Jewell Warford, Ronald and Doris Lamb, and Ronnie and Glenda Wray no longer farm or grow gardens on their property. Plaintiff Ben Hedley no longer fishes in the nearby waterways due to the contamination. [Discovery Answers of *Heady, Robertson, Henley, Lamb, , and Ronnie Wray*, Notice of Filing Exhibits, Dock No. 288). Plaintiffs also submitted record proof of substantial deprivation of the use and enjoyment of their properties as a result of groundwater, surface water and radioactive contamination. Plaintiffs submitted uncontested affidavits and discovery responses detailing the loss of use and enjoyment from contamination. *Id.*

I. DEFENDANTS' ARGUMENTS AND PLAINTIFFS' RESPONSE

In this section Plaintiffs respond to the misstatements and falsehoods that comprise the Defendants' motion.

1. Defendants' memorandum of law states at page 3-4 (without record citation) that :

Extensive environmental monitoring began even before the plant started production in 1952 and has never detected radioactive or non-radioactive contaminants at levels that exceed federal regulatory exposure limits in any Plaintiff's air, soil, surface water, or well water.

Plaintiffs do not claim that radioactive particles in their soil exceed the federal regulatory limits that apply to their property.

These allegations are untrue. Plaintiffs have introduced record proof that "Reported alpha activity exceeded the standard for an unknown mixture of TH-230, U-234, U-238, NP-237 and Pu-239 in air of uncontrolled areas during a number of years of PGDP operation." (*Franke Report*, p 17). "As shown in Figures 8 to 11 of my report, based on the plant's records the reported concentration of alpha emitters exceeded the applicable limits in a number of years. I therefore conclude that PGDP was not in compliance with standards for its emissions of radioactive materials into the air." (*Franke Declaration*, page 2). Moreover, the person responsible for testing at the plant, Richard Baker, admitted:

Q. For certain periods of time, and for some operations, maximum permissible concentrations of radiological materials were exceeded in 1960?

A. Yes.

(*Richard Baker Dep.*, page 38) (excerpt attached as Exhibit N).

In addition, Plaintiffs have introduced record proof that radioactive nuclides from the Paducah plant exceeded EPA "Preliminary Remediation Goals" for Superfund Cleanup Sites and were in violation of allowable governmental regulatory limits:

- 1) "For all tracts, the entire 95% confidence level [of Tc-99] exceeds the [EPA] PRG [preliminary remediation goal] for agricultural soil. District Court Docket Entry No. 290 (*Franke Report*, p 19 at [unnumbered] ¶ 7.
- 2) "Figure 45 [at *Franke report*, p. 76] indicated that in all but one case (Tract 13) the predicted concentration of Tc-99 exceed the PRG level for residential soil." District Court Docket Entry No. 290 (*Franke Report*, p 19 at [unnumbered] ¶ 7.
- 3) "Median concentrations of plutonium-239/240 (Figure 49 [at p. 80]) are one to three orders of magnitude larger than the values expected from

fallout. They exceed the EPA PRG value for agricultural soil. . .” (*Franke Report*, p 20 at [unnumbered] ¶ 6.

- 4) “Median concentrations of neptunium-237 (Figure 48 [p. 79]) are one to three orders of magnitude larger than values expected from fallout. They exceed the PRG values for agricultural soil. . .” (*Franke Report*, p 20 at [unnumbered] ¶ 5.
- 5) “Median levels [of uranium-234] in sector segments (Figure 52 [p. 83]) exceed the PRG value for agricultural soil . . .” (*Franke Report*, p 20 at [unnumbered] ¶ 8.
- 6) “There is no doubt that plaintiff properties are contaminated by radionuclides that were released into the environment as a result of past PGDP operations.” (*Franke Report*, p 21).
- 7) “Reported alpha activity exceeded the standard for an unknown mixture of TH-230, U-234, U-238, NP-237 and Pu-239 in air of uncontrolled areas during a number of years of PGDP operation.” (*Franke Report*, p 17). “As shown in Figures 8 to 11 of my report, based on the plant’s records the reported concentration of alpha emitters exceeded the applicable limits in a number of years. I therefore conclude that PGDP was not in compliance with standards for its emissions of radioactive materials into the air.” (*Franke Declaration*, page 2).

2. Defendants’ memorandum of law at page 4 states : “Moreover, since the early 90’s the DOE has provided free municipal water to any residents whose property could conceivably be affected by the plumes in exchange for their agreement to cap existing water wells and refrain from drilling new wells.” Mr. Waldrop testified he was aware of the agreement to provide water and that some homes in the area had been sold with free city water. Waldrop explained, however, that capping these wells , even with license agreement for access to free city water *impaired* these properties (citing uncertainty and risk as to the duration of free water and whether, for example, a commercial laundry could be used on the premises). *Waldrop Dep. p. 68.*

3. Defendants next argue, at page 5 (and at page 8):

Many of Plaintiffs’ damage claims have also been dismissed and are now limited to an alleged diminution in value of their real property, which purportedly reflects a “stigma” caused by “public perceptions of the contaminants” rather than by the contaminants themselves. (Deposition of

Tommy Waldrop, August 4, 2009, Dep., at 23,45, 62, 69-71, attached as Exhibit A.1)

Waldrop specifically disclaimed that his opinions were based upon stigma saying "I don't use that word." *Waldrop Dep.* p. 94. Waldrop accurately described that in performing a real estate appraisal for contaminated property, in accordance with MAI and USPAP standards, the issue is whether *environmental contamination* affects the marketability of the site. *Waldrop Dep.* p. 23. As USPAP Advisory Opinion 9 states:

Environmental contamination and its remediation to appropriate regulatory standards may affect the feasibility of site development or redevelopment, use of the site during remediation, use of the site after remediation, marketability of the site, and other economic and physical characteristics of a contaminated property.

Environmental Contamination: Adverse environmental conditions resulting from the release of hazardous substances into the air, surface water, groundwater or soil. Generally, the concentrations of these substances would exceed regulatory limits established by the appropriate federal, state, and/or local agencies.

Since the appraiser is usually not an expert on the scientific aspects of contamination, experts from other fields will typically provide this information. Appropriate regulatory authorities should also be consulted to confirm the presence or absence of contamination. The appraiser should consider the use of extraordinary assumptions when this information serves as a basis for an opinion of value. The appraiser should also collect similar data for any comparable sales used in the analysis.

USPAP, ADVISORY OPINION 9, *The Appraisal of Real Property That May Be Impacted by Environmental Contamination* (2003) <http://www.real-analytics.com/AO-9.pdf> (Exhibit J)

The record establishes real estate expert Waldrop testified in accordance with accepted real estate appraiser methodology that property that is contaminated above government standards is "impaired." *Waldrop Dep.*, pp 73, 86.⁷ Waldrop stated that

⁷ In fact Defendants' real estate expert, Randall Bell agreed:

"Q. You've said that a property can only be considered genuinely contaminated if the level of contamination exceeds government regulatory standards. Is that correct?"

A. Actually, I didn't say that. USPAP AO9 says that. Generally that's the way it's looked at." *Randall Bell depo.* p. 117 (Exhibit L).

contamination above EPA standards meant “the value of the property is necessarily impaired.” *Waldrop Dep.*, p. 86. Waldrop was asked “What information do you have concerning the degree of contamination on any of the properties that are involved in this case?” *Waldrop Dep.*, p. 17. Waldrop testified that for “[s]pecifically the degree of contamination” he “reviewed” “two reports.” *Waldrop Dep.*, p. 18. Waldrop stated: “One was a hydrologist. The other guy was . . . (inaudible).” *Id.*⁸ Waldrop testified that the market became aware of the contamination when the *WASHINGTON POST* article, “*In Harm’s Way, But in the Dark*” was published in August 1999 (*Exhibit P*). *Waldrop Dep.*, p. 21. Waldrop explained that the “cause of the impairment” was “clearly the contamination or potential for contamination” *Waldrop Dep.*, p. 21, explaining: “It’s been impaired either by the trespass or the contaminant, physical trespass of the contaminant, or by the nuisance of its location close to the plant. . .” *Waldrop Dep.*, p. 25.

4. Mr. Waldrop was asked about Defendants’ Laguna Beach, California real estate appraisal expert, Randall Bell’s⁹ opinion he “lacked competency” in the area of radioactive contamination or environmental property damages economics.” He responded: “I (Mr. Waldrop) consider myself an expert in the matter of property damage economics” (*Waldrop Dep.* pp. 130-131) and added that, in the PGDP case, “[t]he level of contamination in these properties has risen to the level of diminishment of the value of the real estate.” *Waldrop Dep.* p. 132.

5. Defendants’ argument in connection with Mr. Waldrop’s passing reference in his deposition to “reputation” at page 23 is inaccurate. Waldrop explains

⁸ Waldrop received Franke’s Report on August 3, 2009 and groundwater expert Steve Amter’s report on October 19, 2009. See emails to Waldrop attached as *Exhibit O*.

⁹ Owner and operator of the website “Real Estate Damages.com”:
[http://realestatedamages.com/;](http://realestatedamages.com/)
<http://whois.org/whois/realestatedamages.com>

in detail that it is *impairment* to the property from *contamination* that has affected the value (diminution) *not* merely reputation:

Q. Okay, number one, you're presupposing that they had impaired real estate, are you not?

A. I am supposing. I am not an expert in industrial solvents or radioactive materials. I am supposing that all of these properties that we are going to appraise are either impacted or imminently in danger of being impacted, and therefore impacted by the market.

Q. All right, well, let's talk about that. Let's talk about that with respect to the groundwater contamination. Have you looked at the maps that show where the groundwater contamination is?

A. I have.

Q. Have you compared those maps with where these properties are located?

A. I'm sure I have. I haven't had an overlay of the contamination of the properties themselves.

Q. Okay, is it your testimony then, if, in fact, any of the properties that you appraised or you are testifying about are not impacted by the groundwater plume or can never be impacted by the groundwater plume and that your testimony with respect to any impairment of the value of those properties is invalid?

A. No, that's not my testimony. My testimony is that there are properties in the neighborhood that will be impacted by the contamination regardless of the state of contamination.

Q. And why is that?

A. It's because of the reputation, it's because of the--remember, what we're trying to determine here is the market's perception of the danger of buying a piece of property in a contaminated area. So how much education and advertising and guarantee and indemnity is someone, the government, the property owner, how much is someone going to have to offer to the prospective property owner to say that your never have any impact in this property, if you buy it from me today, it will never have an impact on this property. But it's clear that the plume is migrating and moving and it will continue to move.

Q. Are you saying that people's property values have been impaired irrespective of whether there's any actual contamination on their property?

A. Clearly, there's a limit to that. It's not my testimony that every property in McCracken County has been impacted. **But on the property on which there has been testing or an action on the part of the government, free water, for instance, any of those things that would indicate to a property**

owner that there was concern about that property, those properties have been impaired.

Q. All right, is it your testimony that the cause of that impairment is the contamination or the cause of that impairment is the publicity with regard to contamination?

A. **I think the cause is clearly the contamination** or the potential for contamination, but the publicity was the straw that broke the camel's back. The publicity was the point at which the information reached critical mass.

Waldrop Dep. at pages 22-24 (emphasis supplied).

6. Defendants argue that Mr. Waldrop “disclaimed” “any expertise with respect to” “environmental assessments” citing pages 4, 22, 139-140 of Mr. Waldrop’s deposition. Waldrop did state (correctly) he was not “an expert in industrial solvents or radioactive materials” (page 22) and was thus not an expert in “environmental assessment,” however this point was made in the context that though he was not an environmental expert (on radiation or solvents), he has extensive experience as a real estate appraiser in cases of “environmental contamination.” He has testified in numerous cases as an expert in real estate appraisal including cases of radiological and environmental contamination and construction defects. *Id.* at pp. 7, 10, 11, 138, 140).

7. Defendants argue at pages 5-6 and 14 that PGDP “contamination” was “widely known” to local residents during and after 1988 and Waldrop and Sloan assumed that it “hadn’t reached a level that it would have impacted real estate values” until an article containing the same information appeared in the *WASHINGTON POST* newspaper in August 1999, citing *Waldrop Dep.*, at 19-20. Waldrop was drawing a distinction between when the first “trickle” of information became known versus when it rose to the level of “common knowledge” that was “published” and “validated by the scientific community” so as to affect market values:

Q. What information do you have concerning the degree of contaminations on any of the properties that are involved in this case?

A. Specifically, the degree of contamination, in terms of the migrating plume is widely known through news media, through many sources.

It's common knowledge in the area. Anybody that read the Paducah Sun. It became common knowledge in 1999... When that trickle of information in the '80s became a torrent of information when it was published and validated by the scientific community....

I am not saying it wasn't widely known [that there was groundwater contamination in the 1988, 1990, 1991 time frame], just that it hadn't reached the levels that it would have impacted real estate values.

Waldrop Dep., at 18-20.

Plaintiffs would note that the use of a sentinel news as the date for a before and after taking real estate appraisal analysis in the case of radioactive contamination was specifically approved in *Cook v. Rockwell Intern. Corp.*, 580 F.Supp.2d 1071, 1133 (D.Colo.,2006) where Mr. Hunsperger used the date of a 1989 FBI raid at Rocky Flats for his before/after appraisal.

8. Defendants disingenuously assert at page 14 that the [August 1999 WASHINGTON POST \(Exhibit P\)](#) article only pertained to "workers" (underlining in original) at the plant and related to the discovery of ground water contamination that had been known for decades. A reading of the article proves otherwise: these were new and dramatic revelations that affected the "public" "public health" and "the environment" -- not simply workers -- and the threat was so "immediate" DOE was dispatching a team to determine the threat to the "public":

Radioactive contaminants from the plant spilled into ditches and eventually **seeped into creeks, a state-owned wildlife area and private wells, documents show.** Plant workers contend in sealed court documents that **radioactive waste also was deliberately dumped into nearby fields, abandoned buildings and a landfill not licensed for hazardous waste.**

"The **plant's monitoring data** did not indicate an accumulation of [plutonium and other highly radioactive wastes] in the workplace **or the environment** that would be a health concern to workers **or to the public,**" the DOE said. That position is vigorously contested in more than 2,000

pages of documents filed in the lawsuit by two of the plant's health physicists, or radiation safety experts...

But documents obtained by The Post show that plant officials became increasingly concerned about the contaminants. **A 1992 report** by Martin Marietta **concluded** that they caused "**significant**" **environmental problems** and "also pose a radiation hazard to the workforce."

The agency [DOE] is investigating the charges and dispatched a team to Paducah to determine if conditions posed an immediate threat to workers **or the public.**

9. Defendants argue at page 6 that "Waldrop and Sloan assumed that public perceptions that the property was contaminated, which allegedly began after the newspaper article appeared in August 1999, reduced the value of the property, and that this occurred regardless of the level of "contamination" and regardless of whether any contaminants were actually present on the property, citing [Waldrop at pages at 20, 23, 45.](#)" This statement is incorrect and not supported by the testimony at [pages 20, 23 and 45](#) or anywhere else.

At [page 20](#) Waldrop explains real estate values would not have been affected until 1999 because the knowledge of the "severity" of the contamination did not occur until then.

At [page 23](#) Waldrop is responding to a hypothetical question ([on page 22](#)) that if certain plaintiffs are "not impacted by the groundwater plume" would his testimony as to impairment then be invalid? Waldrop answered by stating "No that's not my testimony. My testimony is that there are properties in the neighborhood that will be impacted regardless of the state of contamination [groundwater vs. other types of contamination]." *Waldrop Dep. p. 23.* Waldrop did *not* state, as Defendants incorrectly assert, that it was his opinion that property values would be lowered "regardless of the level of 'contamination' and regardless of whether any contaminants were actually

present on the property.” In fact he said just the opposite. He was asked at [page 23](#), “Are you saying that people’s property values have been impaired irrespective of whether there’s any actual contamination on their property?” Waldrop answered:

A. Clearly, there's a limit to that. **It's not my testimony that every property in McCracken County has been impacted. But on the property on which there has been testing or an action on the part of the government, free water, for instance, any of those things that would indicate to a property owner that there was concern about that property, those properties have been impaired.**

Q. All right, is it your testimony that the cause of that impairment is the contamination or the cause of that impairment is the publicity with regard to contamination?

A. **I think the cause is clearly the contamination** or the potential for contamination, but the publicity was the straw that broke the camel's back. The publicity was the point at which the information reached critical mass.

Waldrop Dep. at pages 22-24 (emphasis supplied).

At [page 45](#) Waldrop testifies that the Rocky Flats study supports his opinion that properties near PGDP have suffered a diminution in market value and were impaired. He states, in response to a question of whether the principle that properties impacted by contamination suffer a value loss is dependent on the degree of contamination, that “In some cases, **yes**, some type of contamination.” *Waldrop Dep. p. 45*. He then goes on to state that “It has to do with the ability of that contamination to be remediated” and that in the PGDP case “this contamination that these properties suffer is not curable” and cannot be “remediated.” *Id.* Waldrop simply did not testify in any way that market loss had occurred regardless of the level of “contamination” and regardless of whether any contaminants were actually present on the property.

10. Defendants next argue at page 6 that “Waldrop and Sloan did not examine any local real estate sales from any time period to determine whether the prices paid for the “contaminated” lands were relatively lower than the prices paid for

local property outside the “affected” area surrounding PGDP. (*Id.*, at 30, 130.) As explained above, however, Waldrop and Sloan did not use *local* sales to arrive at impaired or “after value” (and used, appropriately analogous comparable sales studies of contaminated property, Rocky Flats et al.) because the “few data points were not sufficient in the local market” to yield reliable results. *Waldrop Depo.* p 130 and at pp. 41, 59, 80, 81, 104-106, 130, 143.

11. Defendants at pages 6-7 and 14 take Waldrop’s testimony concerning market immaturity in West Paducah (the area near the plant) out of context, saying :

“. . . the reduction in value described by Waldrop and Sloan reflects a change in the “highest and best use” of the properties that “occurred upon the anticipated market reaction to the contamination,” which has “[c]ertainly not” occurred with respect to Plaintiffs’ property and may not occur until “the distant future.” (*Id.*, at 31-32, 148; emphasis added.)

Defendants imply that this is some sort of speculative or indefinite testimony as to whether damages have occurred. Defendants misrepresent Waldrop’s testimony. Waldrop’s testimony was there were “no purely comparable sales close to the plant that could validly used for comparable sales” and “very few transactions that meet” the “criteria” and “none within that impaired submarket of McCracken County.” *Id.* at 34-35. Waldrop further explained that the “none of the properties we have investigated has sold or resold” since August, 1999 and therefore the market reaction has yet to occur. *Waldrop Dep. p.* 32,33, 34-35. His testimony at page 32 that market reaction has “certainly” not occurred “on these sixteen properties” is nothing more than a factual statement that “none of the properties we have investigated has sold or resold”. *Waldrop Dep. p.* 33. Defense real estate appraiser Randall Bell agreed that “But with the sales comparison approach, the presumption is that there is adequate market data.” *Randall Bell Dep. p.* 8.

12. Defendants citation to page 148 is a typographical error. Waldrop's "distant future" reference is at page 143 and, again, is taken out of context by Defendants. Waldrop was asked why he could not simply, as Mr. Tait suggested, look at sales after 1999 in the area and see if the values of comparable sales have diminished or appreciated. Waldrop explained, as he had done throughout the deposition (*Waldrop Depo.* pp. 41, 59, 80, 81, 104-106, 130 130) that "There will be a time when we can do that. I can't wait for that time. It's sometime in the distant future, *because this is not a mature market.*" *Waldrop Dep. p. 143* (emphasis supplied). Ironically, the paucity of sales and depressed economic activity is "a lucky scenario" for the Defendants because there "are relatively few property owners in the area." *Waldrop Depo. p. 33.*

13. Defendants state at page 7: "Waldrop "know[s] of no pure sales . . . before and after that would indicate a market reaction" to the public perceptions of contamination and has "no knowledge of any sale that would demonstrate that either the property has impaired [in value] or not."(*Waldrop Dep. at pp. 34, 38.*)" Waldrop did testify, at pages 33 to 34 that because the number of properties in the vicinity was small, it was a small sub-market with relatively few property owners and large portions of land held by the Plant, the Shawnee steam plant and a wildlife refuge, he was aware of "no pure sales, pure paired sales before and sales that would indicate a market reaction. " Waldrop did not use the word's "public perceptions to contamination" on either page 34 or page 38.

14. Defendants next state at page 7: "At his deposition two months ago, he was "not prepared" to identify "one single property whose sale price has been impacted by being supposedly impaired by the Paducah Gaseous Diffusion Plant," even though he has his "finger on the pulse of the [local real estate] market every day." (*Id.*, at 38, 40.) Waldrop was explaining at these pages that in order to reach a valid opinion one had to

have sufficient data and a “trend” and that it “takes a lot of data” and there was “not enough to develop a trend” such that “even if you could point to one or two” “you have to have quantity in order to develop a trend line” and this “market is so small and so slow, so lethargic, we’ve not had that trend.” *Waldrop Dep. at pp. 38-40*. It was at this point and after this testimony that Mr. Tait asked the question of whether Mr. Waldrop could provide “one single property whose sale price has been impacted.” Waldrop did not deny that he could perhaps provide a single sale at another time but came back to his point that “there is not a sufficient quantity of market information in that micro-market to develop a trend line that all of us are looking for.” *Waldrop Dep. at p. 41*. Defendants arguments are mere matters for cross-examination and in no way undercut the reliability or methodology used by Mr. Waldrop.

15. Defendants at pages 7-8 next criticize Waldrop and Sloan for their use of the Rocky Flats studies by arguing that the percentage decrease that Waldrop and Sloan assigned to each of the individual properties in this case was purely subjective, based on whether the property was is “in a good location,” is “quiet,” or has “a nice house,” and on the age, size, and “quality” of the property, referencing Waldrop’s testimony at [pages 110, 120, 128-29](#).) This is misleading out-of-context argument that over simplifies Sloan and Waldrop’s methodology for arriving at impaired “after” values and their correct use of the Rocky Flats studies to arrive at percentage reductions.

Both Sloan and Waldrop used the Rocky Flats studies to determine a loss in value based upon the analogous studies in Rocky Flats. Waldrop stated at [page 109](#) that The Rocky Flats studies showed “damages from contamination” from “zero percent to fifty per cent” with consensus damages levels between “ten and thirty per cent.” Neither Waldrop nor Sloan based their percent decreases simply on such subjective

factors such as whether a house was a in “ a good location” or “a nice house.” They based their impaired value conclusions on the findings and results of the Rocky Flats series of studies (giving ranges of percentage reductions) and on their assessment of the “size, age, quality, the condition of the property ” and “what someone was likely to do with the property” based upon highest and best use. *Waldrop Dep.* pp. 90, 107, 110.

The testimony about “nice location” and “good house” (at page 120) has nothing to do with Waldrop’s assessment of impaired value, percentage reduction or use of the Rocky Flats studies. Waldrop explained earlier (at pages 116-120) that he assessed a 20% diminution to Mr. Frazier’s property in Kevil. At page 120 Mr. Waldrop was asked what distinguished Mr. Frazier’s property from other property in Kevil such that comparable Kevil sales could not be used. Waldrop, in passing reference mentioned Mr. Frazier had a nice house in good condition, but his point was that its true value and highest and best use was as agricultural land. The references to “nice house,” etc. had nothing to do nothing to do with Mr. Waldrop’s damages analysis was that the highest and best use was “agricultural.” He explained again to Mr. Tait that local sales data could not be used because, “first of all, the sales “ “would have to be subject to the same degree of impairment.” *Waldrop Dep.* p. 121.

16. Similarly, at pages 128-129 Mr. Waldrop was asked why he placed a 40% diminution on Ms. Robertson’s property. Waldrop did note that the house was “in a good location” and was on a “nice piece of ground” with a double wide manufactured home. The *basis* for his opinion on diminution, however, was “because the property is so small, in terms of overall property value,” that is has severely damaged the improvement and moderately damaged the site.” “Because it is so small, the 40% level is appropriate.” *Waldrop Dep.* p. 129.

Plaintiffs emphasize the necessity to consider and review Mr. Waldrop's testimony "as a whole" as to make it clear that he arrived at the percentage reductions based upon the Rocky Flats studies and his own appraisal and knowledge of the properties and market and not upon such trivial subjective factors as whether the plaintiffs had a "nice house" in a "good location". *Waldrop Dep.*, pp. 45, 55, 58, 59, 83,84, 90, 107, 109, 110, 132-34. See *SCM Chemicals, Inc. v. Nationwide Mut. Ins. Co.* 69 F.3d 537 at * 3 (6th Cir. (Ohio) 1995) ("the deposition as a whole makes it clear that Mr. Mauri was not differentiating . . .)(emphasis supplied). Waldrop and Sloan did not apply their own subjective method to determine impair market values. The record is precise that the basis for his percentage reductions was the Rocky Flats data and professional appraisal methods for appraising contaminated property. *Waldrop Dep.* pp. 45, 55, 58, 59, 83,84, 90, 107, 109, 110, 132-34. Waldrop further explained that Rocky Flats studies demonstrated that "properties having the closest proximity to the source demonstrated the highest damages." *Waldrop Dep.* p. 109.

17. Defendants then advance a particularly specious argument at page 19 that three appraisals (attached as Exh. C to Defendants' Memorandum) of Ms. Robertson's property in 1994 (\$103,000), 1997 (\$120,000) and 2003 (\$139,000) "show her property is increasing in value despite claimed groundwater and soil contamination." That Ms. Robertson's property "increased" in appraised value by \$19,000 in appraised value from \$120,000 in 1997 to \$139,000 --an "increase" over six years of (15.8%)-- actually *refutes* Defendants' point. According to the Federal Housing Finance Agency Home Price Index¹⁰ real estate home prices in Kentucky *actually* appreciated 27.1% over this period of time, such that Ms. Robertson's home *should have*

¹⁰<http://www.fhfa.gov/Default.aspx?Page=215&Type=compare&Area1=KY&Area2=&Area3>

appreciated to **\$152,573.00**. This shows a loss of **\$13, 573** instead of the gain she should have had of **\$32, 573**. The point being that her impaired property suffered significant *sub-par* appreciation to the point of a loss.¹¹

Defendants, however, never asked Mr. Waldrop at his deposition about these appraisals of Ms. Robertson's property. Mr. Waldrop was careful to point out in his deposition that "present value" analysis was misleading and his loss figures were based as of the date of the impairment event, August 1999. *Waldrop Dep.* p. 116.

Waldrop explained that the mere fact that a property might go up in price after an impairment or taking event did not mean there had been no loss because you have "to measure the facts that are in place on the day of the impairment" and not subsequent market forces. *Waldrop Dep.* p. 78.

18. Defendants return to this argument at pages 8 and 13-- that Waldrop Sloan do not offer any opinions "about the extent, if any, to which the present value of any Plaintiffs' property is diminished." Waldrop explained that the proper methodology is to value as of the date of impairment (August 1999) because "property that had a fair market value before the publication of this information became different after the information." *Waldrop Dep.* p. 79. Waldrop also explained that it would be wrong to use current valuations because of intervening market forces. *Id.* The use of the before and after method based upon a takings model is appropriate in cases of environmental damage, leaks and contamination. *Rockwell Intern. Corp. v. Wilhite*, 143 S.W.3d 604, 607 (Ky.App.,2003) ("the proper measure of permanent damage to real estate in Kentucky is the difference in the fair market value of the real estate just before

¹¹ The 2003 appraisal for Ms. Robertson's home notes the property was "inside the area of investigation for groundwater contamination" and received "city water" from USEC. Ms. Robertson's property, understandably, has not sold and is one of the properties slated for trial.

and after the injury”) citing: *Central Kentucky Drying Co., Inc. v. Department of Housing*, 858 S.W.2d 165, 167 (Ky. 1993). See *Valley View Angus Ranch v. Duke Energy Field Services, LP*, 2008 WL 2329169 (W.D.Okla.,2008.) (expert opinion permitted regarding the value of the property at issue before and after the pipeline leak); *Fisher v. Ciba Specialty Chemicals Corp.*, 2007 WL 2995525 at * 6 (S.D.Ala.,2007) (“In general, the proper measure of damages for injury to property is the difference in market value before and after the injury.”); *New Mexico v. General Elec. Co.* 335 F.Supp.2d 1185, 1251 (D.N.M.,2004) (The measure of damages for a real property is “what was the value of the property immediately before the occurrence and immediately after the occurrence. The difference between these two figures is the legal measure of damages to real property.”).

19. Defendants contend at page 13 that the Supreme Court of Kentucky’s decision in this case renders Waldrop’s testimony irrelevant because:

“The diminution in value that Waldrop describes in this case is based solely on its reputation as contaminated property, without regard to the level of contamination or any impairment of the physical use of the land.”

First, this is factually wrong. Waldrop’s opinions that these properties have suffered a diminution in market value is precisely because there is real, substantial contamination, in excess of EPA standards that impairs the value of the property. This is not a stigma case but a case of environmental contamination from radiation that was in excess of emission standards and has left the properties with radiation levels in excess of EPA standards, above background levels and beyond remediation.

Secondly, the Supreme Court of Kentucky specifically held that “Thus, the diminution in the property’s value due to an intentional trespass is a recognized measure of damages after, or if, an actual injury has been found.” *Smith v. Carbide and Chemicals Corp.*, 226 S.W.3d 52, 57 (Ky.,2007). The Court also held “An intrusion (or encroachment) which is an unreasonable interference with the property owner’s

possessory use of his/her property is sufficient evidence of an actual injury (or damage to the property) to award actual damages.” *Id.* at 56-57. Therefore, if Plaintiffs prove, as the record demonstrates, that the Defendants trespassed by causing an unreasonable interference with the use and enjoyment of their land by soil and water contamination that exceeded EPA standards and governmental emission standards they have proven their actual trespass case and a real estate expert such as Mr. Waldrop may testify to how the impairment from the “significant” contaminated levels diminished market value. This is precisely what was real estate appraisers do all the time in cases of environmental contamination. *See* USPAP, ADVISORY OPINION 9, *The Appraisal of Real Property That May Be Impacted by Environmental Contamination* (2003) <http://www.real-analytics.com/AO-9.pdf>.

20. Defendants devote pages 18-22 of their brief to a critique of Waldrop and Sloan’s reliance on the Rocky Flat Report and its studies. Defendants fail to note that their expert, Randall Bell, fully endorsed the reliability and methodology of the Rocky Flats studies and report in his expert witness disclosure in *Cook v. Rockwell Intern. Corp.*, 580 F.Supp.2d 1071, 1133 (D.Colo.,2006). The Rocky Flats Report did in fact cite and rely upon published and peer reviewed case studies¹² in addition to comparable sales studies relating to contaminated property prepared for litigation. Mr. Sloan and Mr. Waldrop also relied on *all* ten of the studies, including those that showed minimal diminutions (*Waldrop Dep. p. 83-94*, discussing studies cited in Rocky Flats Study) and upon the Rocky Flats’ separate conclusions (pp. 253-259) (a 30% reduction) (*Exhibit Q*).

¹² The “Case Studies” cited in Rocky Flats are at pages 126-163 of the Report. They are attached as *Exhibit K*. The summary of the studies appears at pages 164-177 of the Report (*Exhibit R*). Study 7 was published in the JOURNAL OF URBAN ECONOMICS; Study 8 was published by the Office of Policy, Planning, and Evaluation, U.S. Environmental Protection Agency, Washington, DC 20460 available at: <http://bit.ly/q0f9Z> and Study 10 was published in the APPRAISAL JOURNAL.

This methodology was accepted by the court in *Cook v. Rockwell Intern. Corp.*, 580 F.Supp.2d 1071, 1133 (D.Colo.,2006).

Defendants at page 20 argue that Waldrop and Sloan ignored “important legal differences” asserting, without citation or any support that “many of the studies [contained in the Rocky Flats Report] found only ‘stigma loss in value.’” This argument is both immaterial and incorrect factually.

The Rocky Flats Report used case studies (13), multiple regression analyses and public opinion surveys to measure market reaction to environmental conditions. *Cook v. Rockwell Intern. Corp.*, 580 F.Supp.2d 1071, 1133 (D.Colo.,2006). The report concluded that in almost all cases properties suffer some loss in value due to actual contamination and/or proximity to a negative environmental condition, with the amount of the loss varying from nominal to as much as 50 percent. *Id.* Based on this finding, expert Hunsperger was permitted to use this reliable methodology to conclude that these studies indicated a likely 10 percent average diminution in the value of residential property across the Class Area following the FBI raid. *Id.*

The substantive rule of law for recovery or damages that applied in any of the case studies was immaterial to any findings, significance or science of the Report and studies. Neither “stigma” nor the substantive law relating to a right to recover for contamination or the law of damages in a particular state or study was even mentioned in the discussion of the thirteen analogous case studies except in one “Comment” in Case Study 6 in New Mexico where a public opinion survey was used to establish damages. The Comment simply noted New Mexico allowed damages for perceived loss due to public perception. Rocky Flats Report, p. 138; case reported at: *City of Santa Fe v. Komis*, 114 N.M. 659, 662, 845 P.2d 753, 756 (1992). This legal fact, however, had no relevance to the conclusions of the Rocky Flats Study (that “in almost all cases

properties suffer some loss in value due to actual contamination and/or proximity to a negative environmental condition”) nor was this in any way relevant to the specific finding in the New Mexico study that a public opinion survey showed that proximity to a landfill lowered real estate values by 11 to 30%. That was a damages *fact* that is separate from and irrelevant to the question of whether one can recover for such a loss. Defendants confuse the Kentucky Supreme Court’s requirement that the Plaintiffs demonstrate that contamination through intentional trespass or nuisance caused actual injury, with the separate issue of measure of damages that can include “the diminution in the market value of their properties due to the contamination.” *Smith v. Carbide and Chemicals Corp.*, 226 S.W.2d 52, 54-56 (Ky. 2007) (discussing confusing the “right to recover” with the “measure of damages” and explaining that the measure of damages for trespass may include loss of market value due to the contamination.”

III. LAW APPLICABLE TO *DAUBERT*

In *Jahn v. Equine Services PSC 233* F.3d. 382 (6th Cir. 2000), the Sixth Circuit reversed the district court’s ruling that the plaintiff’s expert testimony was inadmissible and explained that Rule 702 “displays a ‘liberal thrust’ with the ‘general approach of relaxing the traditional barriers to opinion testimony.’” *Jahn v. Equine Services PSC 233* F.3d 388 (quoting *Daubert* 509 U.S. at 588, 113 S. Ct. at 2786).

A district court should not weigh the value or credibility of competing opinions in determining an expert’s admissibility. The Court in *Jahn* cautioned that “comparing two pieces of evidence and determining which is more credible should be left for the finder of fact and should not be considered when ruling on 702 admissibility.” *233 F.3d at 391.*

CONCLUSION

Defendants' Memorandum, when correctly compared to the record on the twenty points discussed above and measured against controlling law, fails under the weight of the factual record and as a matter of law. Defendants argue cross-examination points and express disagreement with Mr. Waldrop. Defendants, however, have not shown that Mr. Waldrop's methods, data or opinions are properly excludable under *Daubert*.

The use of analogous case studies (especially where local sales data is insufficient) is an appropriate and well-accepted methodology for real estate appraisal of properties assumed to be contaminated (by reliance on other environmental experts). Contrary to Defendants' position, the Rocky Flats data and studies include published and peer reviewed publications and studies. The use of analogous case studies to determine the impaired value of contaminated property has been accepted as a reliable methodology by many courts, generally, and in the case of Rocky Flats specifically, by the federal court in *Cook v. Rockwell Int'l*. Most ironically the reliability of the Rocky Flats data and methodology was recognized by Mr. Randall Bell — Defendants' real estate expert in this case!

Mr. Waldrop has lived in the Paducah area for his entire professional life as a real estate expert (over 30 years). He is intimately familiar with the market in Paducah and Western Kentucky and steadfastly defends his opinion that there is insufficient local market sales data to reliably render an opinion on impaired value and diminution of market value as a result of trespass/contamination. His use and application of case studies from analogous sales of contaminated property is a well-recognized valuation methodology.

At trial Plaintiffs must *first* prove, by *other* experts and witnesses, that there is contamination that amounts to a trespass -- an unreasonable interference with use and

enjoyment of the Plaintiffs' property. Both the Sixth Circuit and the Supreme Court of Kentucky have stated these are issues for the trial and that an expert such as Mr. Waldrop may *then* properly offer his opinion that impairment from contamination on these properties has resulted in a diminution of market value. Such expert opinion is relevant, reliable, helpful and admissible. Plaintiffs respectfully submit Defendants' motion should be denied.

Respectfully submitted,

LAW OFFICES OF DAVID RANDOLPH SMITH &
EDMUND J. SCHMIDT III

By: /s/David Randolph Smith
David Randolph Smith #011905
Edmund J. Schmidt III #021313
1913 21st Avenue South
Hillsboro Village
Nashville, Tennessee 37212
(615) 742-1775
web: <http://www.drslawfirm.com>
e-mail: info@drslawfirm.com

Ronald Simon #945238
1797 North Street, NW
Washington, D.C. 20036

James W. Owens #53290
730 Clark Street
P.O. Box 2757
Paducah, KY 42002-2757

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was filed with the Court's ECF system on November 13, 2009, which will automatically provide service copies to all counsel of record.

/s/David Randolph Smith
David Randolph Smith