IN THE CIRCUIT COURT OF ST. LOUIS COUNTY
STATE OF MISSOURI

STATE OF MISSOURI ex rel. Attorney General Chris Koster and Missouri Department of Natural Resources, Plaintiff, v. REPUBLIC SERVICES, INC., ALLIED SERVICES, LLC, and BRIDGETON LANDFILL, LLC, Defendants.	))))))))))))))	Case No. 13SL-CC01088 Div. 10

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND EMERGENCY MOTION TO COMPEL DEFENDANT TO PROTECT AND PRESERVE PHYSICAL EVIDENCE

Over a year ago this Court entered an Agreed Order in this case requiring Bridgeton Landfill, LLC to monitor the Bridgeton Landfill North Quarry, to gather and forward data to the State of Missouri, and to take a variety of other actions designed to ensure protection of public health and safety and the environment. Ex. A First Agreed Order as amended. The actions taken pursuant to the Agreed Order have contributed significantly to the achievement of a safe, managed state at the Bridgeton Landfill North Quarry. In accord with the Agreed Order, Bridgeton Landfill, LLC has regularly gathered voluminous data and shared it with the State of Missouri. The data, measured against conservative standards set by the State, continues to affirm that the site is safe. Indeed, to date, every measurement has confirmed that measured against those standards, the North Quarry is safe and stable.

Unfortunately, in what has become an all too common pattern of behavior, the State has again decided, metaphorically speaking, to shout fire in a crowded theater. Ignoring the

procedural requirements of the Agreed Order (which establish an orderly and intelligent process to resolve issues such as those currently before the Court) and disregarding the evidence, he has launched what amounts to a collateral attack on the very standards for evaluating the data that his own experts chose. In a singularly inappropriate pair of motions, the State continues to attempt to spread panic and fear amongst his constituency by making baseless accusations, misconstruing data, and filing "emergency" motions for no real purpose.

By any reasonable standards -- even by the conservative evaluations of the State's own experts -- the conditions of the Bridgeton Landfill North Quarry represent a managed state not requiring any additional action beyond the monitoring and reporting set forth in the Agreed Order. As such, Bridgeton Landfill requested additional technical discussions regarding the State's directive for yet another round of Temperature Monitoring Probes ("TMP") installations, additional data collection and modified reporting protocol. Rather than engage in technical discussions, the Attorney General chose instead to manufacture yet another false crisis, completely ignore the dispute resolution provisions of the Agreed Order and forego any attempt to promote cooperative technical discussions. For this, and the reasons outlined below, Bridgeton Landfill, LLC, Allied Services, LLC and Republic Services, Inc. (collectively, "Defendants") oppose the State's (hereinafter referenced as "Plaintiff's") Motion for Temporary Restraining Order for collection of additional data and installation of two additional temperature monitoring probes.

The State coupled this request with its "Emergency Motion to Compel Defendants to Protect and Preserve Physical Evidence," which in fact is a nothing more than an improper and misleading attempt to get the Court to direct the collection of new physical evidence to support

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the State's declared dispute with the United States Environmental Protection Agency ("US EPA").[1]

As is discussed below, the State's emergency motion should be denied because:

(1) The North Quarry is safe and stable.

(2) There is no new data or other exigency that warrants circumventing the Agreed Order entered by this Court and the procedures (including dispute resolution) embodied therein.

(3) The State lacks authority, and its witnesses lack expertise, with respect to the radioactive impacted materials (RIM) at the site. The State's thinly veiled attempt to usurp US EPA's authority over the West Lake Landfill should be denied, or addressed as the federal question that it raises by the agency or, if appropriate, judge with jurisdiction over such issues.

I. There is no Emergency. The North Quarry of Bridgeton Landfill is safe and stable.

Since December 2010, there has been ongoing pyrolysis (that is, smoldering) in the South Quarry of the Bridgeton Landfill.[2] Defendants have been collecting extensive data to track the pyrolysis since its initial discovery, that data has been collected under the work plans created by Defendants and approved by the MDNR, and under the procedures set forth in this Court's Agreed Order. These data show that the area subject to pyrolysis is moving very slowly in a southerly direction, away from the North Quarry.

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[1] Missouri Attorney General Koster reportedly recently described EPA as "kicking the can down the road" and stated he and his office "share the frustration of the residents in North County that the federal government is not moving with any strength on this issue….It's time for action, and we've had two years of dialogue that has not moved any bulldozers." Quoted in Ex. B St. Louis Post-Dispatch, "Frustration with EPA Handling of West Lake Growing," Jan 3 2015.

[2] The correct term for the smoldering of trash in the oxygen-depleted environment at depth in the landfill is "pyrolysis." The Plaintiff uses the incorrect term "fire."

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As Defendants have repeatedly proven through extensive monitoring and reporting, the North Quarry of the Bridgeton Landfill is safe and stable. There are no indications of pyrolysis in the North Quarry, and Bridgeton Landfill's substantial investment – more than $125 million spent in response to the pyrolysis to date – is successfully controlling and containing the pyrolysis in the South Quarry of the Bridgeton Landfill.

Even as measured by the conservative assessment standards established by experts engaged by the Missouri Department of Natural Resources ("MDNR"), the conditions within the North Quarry not only fail to constitute an *emergency*, they in fact require no action other than continued monitoring under the existing monitoring plans.

The State premises its claims for emergency action on data referenced in its witnesses' affidavits. Yet the two critical types of data – temperature and carbon monoxide – show no emergency at all.

Bridgeton Landfill has been collecting these data in accordance with the requirements of the First Agreed Order and under the Second Amendment to the First Agreed Order, which expanded the monitoring within the North Quarry. *See* Ex. A. Under the agreed procedures embodied in the Second Amendment, carbon monoxide is measured every other month for all wells, except that sampling frequency is to be increased to monthly for any well that exceeds 145 degrees F. Only one North Quarry well (which is outside Plaintiff's "area of concern") has ever reached this threshold for increased monitoring frequency – and it returned to below the trigger level more than one year ago.

In fact during the time period "of concern" to the State, the wells in the "area of concern" not only fail to trigger additional monitoring under the existing orders, they do not even reach the threshold for increased attention set forth in the Clean Air Act New Source Performance

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Standards (the rules applicable here and to most every landfill in the nation). These rules, embodied in the landfill permit, require wellhead temperatures to remain below 131 degrees Fahrenheit unless a variance is granted. The North Quarry wells are in compliance with this permit requirement – all below 131 degrees. Thus there is no evidence of a heating event based upon the extensive well data collected and reported under the currently existing Agreed Orders.

In addition, there is no evidence of elevated carbon monoxide in the North Quarry. There is, of course, some level of carbon monoxide throughout the landfill, as there is at any landfill. The Plaintiff cites to carbon monoxide readings of 130 and 280 parts per million ("ppm") as if such levels presented an emergency. They do not.

But the Court need not rely exclusively on the Defendant's experts' affidavits. In fact, in his earlier evaluation of Bridgeton Landfill carbon monoxide data, the State's own witness, Mr. Thalhamer, noted that there are natural processes in a landfill that create carbon monoxide and therefore that 1000 ppm should be used as the minimum threshold value for heightened scrutiny. He wrote:

> Other landfill fire literature uses CO concentrations as low as a few parts per million to 100 ppm as a possible positive indicator of a landfill fire (Waste Age 1984; Environment Agency 2004; Industry Code of Practice 2008). ***Based on other landfill fire evaluations and case studies, other processes may produce CO at these concentrations (Martin et al. 2011) and therefore one should use the higher CO concentration of greater than 1,000 ppm as the threshold value to prevent false assumptions.*** (emphasis added)

Ex. C Data Evaluation of the Subsurface Smoldering Event at the Bridgeton Landfill, Todd Thalhamer, June 17, 2013 at 7. The wells in the North Quarry are all below 300 ppm, or less than a third of the threshold level identified in more level-headed days by the State's own witness.

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The State's decision to ignore the total absence of temperature- or carbon monoxide-based indicators of pyrolysis is thus a drastic reversal from: (1) its own long standing position; (2) the positions taken in the recurring data evaluations by its own expert Todd Thalhamer, (*See* Ex. C; Ex. D Thalhamer Comments to North Quarry Contingency Plan July 2013; Ex. E Thalhamer Data Review June 2014; and Ex. F Thalhamer Data Review August 2014); and (3) the indicators established by the North Quarry Contingency Plan and North Quarry Action Plan developed pursuant to the Agreed Orders entered by this Court. Further, asserting that changes in gas quality over a one to two month period could constitute some emergency condition runs contrary to the earlier assessment of Mr. Thalhamer that levels be monitored "over time" and recognition that NSPS requirements are an appropriate operational goal. *See* Ex. C at 8. The State's December 26th demand, January 5th request for emergency hearing, January 5th media blitz, and January 7th filing of its emergency motions are simply inexplicable because the State had data confirming the North Quarry's compliance with NSPS requirements in its possession prior to any of these actions. *See* Ex. G Dec 26, 2014, letter from Chris Nagel to Brian Power; Ex. H Jan 5, 2015 response letter from Brian Power to Chris Nagel; *See e.g.* Ex. I St. Louis Public Radio, "State Takes More Legal Action Over Concerns Landfill Fire May be Spreading," Jan 5 2015.

Based on any reasonable standards, and even the conservative standards of MDNR's own expert, the North Quarry levels for temperature, CO, methane and balance gas are within the normal range and not indicative of any pyrolysis event. There is no emergency occurring in the North Quarry of the Bridgeton Landfill.

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II. <u>There is No Emergency. There are No Actions that Need to Be Taken on an Emergency Basis and No Reason to Circumvent the Dispute Resolution Process of the Agreed Order.</u>

A. *The dispute resolution procedures of the Agreed Order are adequate and should be followed.*

On May, 13, 2013, the State and Bridgeton Landfill, LLC entered into the First Agreed Order of Preliminary Injunction. Subsequently, the parties entered into a Second Amendment to the First Agreed Order of Preliminary Injunction on June 19, 2014, requiring even more monitoring and reporting. These agreements were entered into for the mutual objective of protecting human health and the environment *See* Ex. A, ¶¶ 4; 10. Over the more than 18 months since entry of the First Agreed Order, Bridgeton Landfill has not only met the requirements of each Order but has repeatedly agreed to additional monitoring and reporting and has itself developed and implemented additional, innovative steps to control the pyrolysis. Bridgeton Landfill has invested more than $125 million in controlling the impacts of the pyrolysis, upgrading site controls and instituting innovative measures – all of which have been successful at preventing any impact to the North Quarry. During this time Bridgeton Landfill has also collected and reported to the State literally hundreds of thousands of data points in order to aid the clear, transparent, and scientifically based evaluation.

The Plaintiff ignored the Agreed Order, the objectives of the Agreed Order and the tremendous effort of Bridgeton Landfill by filing the present motions. Bridgeton Landfill has complied with the extensive monitoring, reporting and transparency requirements of the Agreed Order and subsequent Amendments. In fact, just recently Bridgeton Landfill has yet again gone beyond those requirements in agreeing to more temperature and carbon monoxide monitoring in the neck area proximate to the pyrolysis, and in agreeing to install twelve (12) TMPs in the North

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Quarry. Ongoing data submissions continue to show the North Quarry is safe and stable. Plaintiffs have nevertheless concocted a false "emergency" and alleged that a pyrolysis event has started in the North Quarry, despite the total lack of support for these claims in the extensive data in the North Quarry.

Upon receipt of their December 26, 2014 letter requesting the installation of additional TMP's and collection of yet more data from the already extensively monitored North Quarry wells, Defendants requested a meeting with the State and invoked the mandatory dispute resolution procedures of paragraph 47 of the First Agreed Order. *See* Ex. H; *see also* Ex. G. In a telephone conversation with the Attorney General's Office that same date, counsel for Bridgeton Landfill suggested an in-person meeting on Thursday January 8th to discuss the technical questions, but the Attorney General's Office refused, stating they would not be prepared for a meeting so quickly. The State has yet to suggest any time to meet and confer on the technical questions, but instead elected to file emergency motions where no emergency exits.

The Dispute Resolution Process under the Agreed Order is important, and established a procedure that calls for a rational informed assessment – i.e., just the opposite of the process the State initiated here. The Dispute Resolution Process is contained in Paragraph 47 of the Agreed Order and sets forth a four tiered system. First, in the event discussions on issues under the Agreed Order become a dispute, in the sole determination of Bridgeton Landfill, Bridgeton Landfill shall raise them to the State, in writing, within 15 days of the dispute. Brian Power's letter to Chris Nagel does this. Second the State and Bridgeton Landfill are to "expeditiously and informally attempt to resolve any disagreement." In contravention of the Agreed Order, the State has refused to proceed to this level of dispute resolution, opting to circumvent the Agreed Order and file their pending motions. The third step, given the technical nature of the pyrolysis

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management is of particular importance. If the Parties are unable to reach an agreement, they are required to submit their dispute to the Director of the Department of Natural Resources (the Attorney General's client in this matter) which shall issue the Department's (again – the statutory regulating agency for Bridgeton Landfill) final position on the dispute. Only then, after all three steps have been accomplished, are the Parties permitted to approach the Court for final resolution. The rationale is clear – managing and regulating Bridgeton Landfill is a complicated, technical matter. Requiring the parties to first engage in dispute resolution, with the Attorney General's own client as the arbiter before this Court must act, interjects an already knowledgeable party to determine the technical nature of the dispute, rather than setting up a battle of experts. It is notable that the Attorney General has wholly excluded the Department's position and input from their client, while relying on experts who are out of their field.

In his rush to file a motion and alert the media, the Plaintiff violated the protocols set forth in the First Agreed Order entered by this Court. The State's pleadings and supporting affidavits do not justify such non-compliance.

B. *The Plaintiff cannot meet the high burden required to justify a temporary restraining order.*

The Plaintiff's pleadings and supporting affidavits also do not meet the threshold of an emergency required for a temporary restraining order. "Temporary restraining orders, of course, are emergency measures, often issued *ex parte* where there is a need to protect an applicant from immediate and irreparable injury." *Furniture Mfg. Corp. v. Joseph*, 900 S.W.2d 642, 646 (Mo.App. W.D. 1995).

Beyond the absence of any indication that pyrolysis has moved to the North Quarry (discussed above), the Plaintiff fails to establish that presence of pyrolysis indicators demanding remedial measures on an emergency basis. Indeed, there are no emergency measures required,

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because Bridgeton Landfill has already implemented the remedial measures that would be required if pyrolysis were occurring in the North Quarry.

In the First Agreed Order, the parties obligated themselves to agree upon two items of interest here. One was the North Quarry Contingency Plan, which specified the remedial measures to be taken in the event that the pyrolysis event threatened or occurred within the North Quarry. The principal remedial measures set forth in the Agreed Order for inclusion in the plan were gas system upgrades in the North Quarry, extension of the special EVOH liner that had previously been installed over the South Quarry, and construction of a barrier to isolate the North Quarry from the West Lake Landfill immediately to the north of the North Quarry.

The second item was a set of "triggers" to determine whether and when to implement the remedial measures of the North Quarry Contingency Plan. Despite proposing what it considered to be already conservative triggers, Bridgeton Landfill nonetheless accepted the more conservative trigger values proposed by MDNR and its expert and the trigger conditions were approved. Following that agreement, but prior to any triggers being met, Bridgeton Landfill advised the Plaintiff that it would simply go ahead and implement the North Quarry Contingency Plan, thereby obviating the need for any triggers. The Plaintiff agreed, and the Second Amendment to the Agreed Order noted the requirements of the North Quarry Contingency Plan had been timely completed, and that Bridgeton Landfill had subsequently developed and implemented the North Quarry Action Plan in advance of any triggers being met.

As recognized by the Second Amendment to the Agreed Order, Bridgeton Landfill has already conducted the North Quarry gas extraction system upgrades ensuring the gas extraction system can continue to function, even if the North Quarry were to experience high temperatures resulting from a pyrolysis event. Bridgeton Landfill has also already installed the EVOH liner to

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aid in odor control, even if the North Quarry were to be impacted by pyrolysis. So the North Quarry has already been upgraded with controls to manage the impact of pyrolysis.

With respect to the isolation barrier, approval is under the jurisdiction of the US EPA. Bridgeton Landfill has diligently provided the US EPA the designs and other information requested by that agency. Bridgeton has completed and reported on the extensive initial investigation, engaged in numerous planning meetings with the US EPA and the Army Corps of Engineers and submitted a requested Alternatives Assessment. While Attorney General Koster has openly expressed his frustration with the US EPA to the media, nothing in the data the State is seeking is going to somehow obviate the engineering design and safety considerations that US EPA is currently evaluating in advance of taking action.

The State is completely silent on how it would apply the data to require any steps different than the ongoing aggressive management conducted by Bridgeton Landfill.

C. *This Court should view the Plaintiff's assertions of emergency with skepticism.*

This is not the first time the State has made baseless accusations or dire predictions that have spread fear amongst the community. Within weeks of the entry of the Agreed Order the State made its first claim that the progression of the pyrolysis warranted a shift in the only weeks-old monitoring protocol. Bridgeton Landfill engaged in detailed technical discussions with the State and its experts and no change was implemented since the data clearly showed no change in conditions. Then in June 2013, the State's expert preempted the North Quarry Contingency planning process and published a report alleging the "fire" was in the neck, supposedly moving into the North Quarry at a rate of 2.8 to 3 feet per day. *See* Ex. C. Fortunately, this scare tactic was inaccurate and rather than having already reached the landfill

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entrance road by now as was predicted by Thalhamer's June 2013 calculations, the pyrolysis remains safely contained in the South Quarry to this day.

In January 2014 the State used its concern about the reaction reaching the radiological material as a basis for a press conference and "emergency" motion to obtain carbon monoxide data Bridgeton Landfill had already agreed to provide. *See* Ex. J January 9, 2014, Press Release. The State followed this in June by press releasing a motion for "emergency" injunction based upon air sampling data that was within the standards set by the Department of Health and Senior Services. *See* Ex. K June 2, 2014, Press Release. The State followed its press blitz by actually filing its "emergency" motion with this Court several days AFTER its release to the press. The parties subsequently dispensed with all issues within their Motion through the entry of the Second Amendment to the Agreed Order in advance of a status hearing that had been on this Court's calendar for months.

Again in June 2014 and August 2014, the State published reports of its expert witness wrongly alleging the pyrolysis had left the neck and entered the North Quarry and the pyrolysis was at risk of "daylighting." *See* Ex. E; Ex. F.

Contrary to the State's panicky publications, the pyrolysis has remained stable and all temperatures, gas measures, and settlement surveys continue to prove the State's allegations are simply wrong. For two years, the State has made the same baseless claim the pyrolysis is just about to be erupting in or from the North Quarry. It is time Plaintiffs start looking at the data Bridgeton Landfill is already providing on a weekly and monthly basis and face the science, rather than constantly asking for more data in its endless attempt to find any support for a baseless conclusion that it continues to trumpet in public, at the cost of good science, rational decision-making, and responsible stewardship.

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III. <u>The Motions improperly attempt to pre-empt the EPA's exclusive jurisdiction, and in the absence of the EPA, a necessary party.</u>

At their heart, the Plaintiff's motions are about the presence of Radiologically Impacted Material ("RIM") and the effect that subsurface pyrolysis could have on RIM if the reaction ever reached that far. There is RIM in the West Lake Landfill adjacent to the north of the North Quarry. Some RIM was also detected in the northern-most part of the North Quarry in December, 2013.

Plaintiff's RIM-related justifications for its motion fail. First, the USEPA has exclusive jurisdiction over all the RIM and any actions to be taken in connection therewith. Defendants are not free to take any sampling or other RIM-related actions without USEPA approval. Moreover, any directive from this Court regarding RIM runs a serious risk of interfering with the USEPA's efforts at the site. Finally, Plaintiff's experts simply lack the expertise to justify any court action, let alone emergency action by this Court.

A. *The Court lacks subject matter jurisdiction over the request to compel Bridgeton Landfill to investigation EPA's Superfund site for more RIM.*

The West Lake Landfill Site is a National Priorities List Superfund Site under EPA's exclusive jurisdiction, as the Attorney General himself has acknowledged in writing. As discussed below, EPA has confirmed that its exercise of federal jurisdiction over the site extends to any location in the Bridgeton Landfill where RIM may have come to be located, not just the currently defined boundaries of Operable Unit 1. How and when and to what extent to investigate that is up to EPA. And any lawsuit designed to interfere with that decision-making by EPA is a federal question subject to exclusive federal court jurisdiction. CERCLA Section 113(b) ("Except as provided in subsections (a) and (h) of this section, the United States district courts shall have exclusive original jurisdiction over all controversies arising under this chapter,

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without regard to the citizenship of the parties or the amount in controversy.") Therefore, the Court must decline the State's request to order Bridgeton Landfill to take samples for the purpose of identifying the extent of RIM, because such a lawsuit, it possible at all, plainly is a CERCLA-related claim subject to exclusive federal court jurisdiction.

B. *The EPA is an indispensable or at least a necessary party.*

The pending motions improperly seek to upset the existing division of legal authority between the United States Environmental Protection Agency and the State of Missouri, and to do so without the participation of EPA. This is directly at odds with EPA's paramount authority under CERCLA over the RIM. This attempt to assert State authority over RIM requires, at a minimum, EPA's presence under Missouri Supreme Court Rule 52.04 because it (a) seeks to prejudice the authority of the Agency, and (b) threatens Defendants with multiple, inconsistent obligations with respect to RIM.

EPA asserted its jurisdiction over Operable Unit 1 pursuant to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"—the "Superfund" statute) nearly 25 years ago. *See* 55 Fed. Reg. 35502 (August 30, 1990) (adding West Lake Landfill to the National Priorities List contained in 40 CFR Part 300). EPA did so based on a potential threat from the RIM disposed at the site. The State has publicly acknowledged as much, and confirmed that EPA has jurisdiction over any radioactive material at Bridgeton Landfill.

In fact, just last year Attorney General Koster wrote the Regional Administrator of EPA to articulate the legal division of authority over the site:

> ***The entire West Lake/Bridgeton landfill complex was long ago designated as a Superfund site under federal control***. To date, EPA has limited its exercise of regulatory jurisdiction to the defined Operable Units at West Lake, and it deferred its oversight of the remainder of the Bridgeton landfill to the Missouri Department of

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> Natural Resources. But the developing information indicating the spread of OU-1's radioactive material suggests ***this division of legal authority may require a change***. *** ***It is the federal government—whether EPA exclusively or EPA working in conjunction with the Army Corps of Engineers—that is vested with the legal authority and the resources to direct remediation of sites containing OU-1's radioactive waste***. If radioactive material from OU-1 is confirmed to be located in the Bridgeton landfill, legal authority over the contaminated site must shift back from the State to the federal government.

Ex.L, p. 2; emphasis added

EPA agreed. Responding to the the Missouri Attorney General's letter, the EPA emphasized that while it would work with the state, federal jurisdiction was paramount:

> EPA's jurisdiction under [CERCLA] covers release of hazardous substances wherever they have come to be located. ***EPA is committed to taking actions that compel the West Lake/Bridgeton PRPs to bear the costs legally required to contain and manage [RIM] resulting from the disposal of leached barium sulfate, regardless of where it is located at the site.***
>
> ***EPA's jurisdiction extends to wherever hazardous substances are located within the landfill complex.*** We will of course, closely cooperate with your office and the MDNR to align CERCLA work with PRP duties compelled by your Order at Bridgeton. I assure you that EPA work at the West Lake/Bridgeton NPL site will respect state authority while ***ensuring consistent site evaluations and appropriate allocation of federal and state responsibilities***.

Ex. M, p. 1, emphasis added

The State's position in the current motions is clearly contrary to the division of responsibility as reconfirmed just last year by the Attorney General. In addition to relying upon the State's own assessment of the risk from the RIM as a paramount piece of the supposed emergency, the State's pending motions threaten to impose multiple, inconsistent obligations with respect to RIM on Defendants.

In a direct contradiction to the State's earlier, accurate description of EPA's legal authority at the site as paramount, the TRO Motion and the Motion to Compel seek to set the state up to regulate the RIM itself. This effort, without EPA's presence and participation in this

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lawsuit, would all but guarantee that there are not the "consistent site evaluations and appropriate allocation of federal and state responsibilities" that EPA sought to achieve.

The Motion to Compel argues "[t]he State's consultants need access to these core samples to analyze and characterize the subsurface conditions, the progression of the fire, and the presence of any **radiologically impacted material (RIM)**." ¶ 13 (emphasis added) There is no assurance—indeed, given differing agendas it is all but inconceivable— the State's consultants will "characterize the subsurface conditions" in a way that is "consistent" with EPA's. More troubling, there is no indication, based on the Affidavits and attached credentials submitted by the State's consultants, that the State would engage the expertise to provide scientifically based advice if RIM is present. The State's present expert witnesses certainly are not RIM experts, and they assert no such expertise in their Affidavits.

The Affidavits accompanying the TRO Motion and the Evidence Motion are even more single-minded in their focus on RIM and their anticipation that the State will ultimately assert control over it. The Affidavit of Timothy Stark, for example, seeks to justify the relief the State requests by suggesting the evidence he seeks would "***better prepare the community and the State to respond to the possibility of the subsurface fire reaching RIM.***" Stark Aff. ¶ 19 (emphasis added); *see also id.* ¶¶.10, 18. The Affidavit of Todd Thalhamer is similarly pointed, and focuses exclusively on alleged threats posed by RIM. Thalhamer Aff. ¶¶ 8, 10, 11, 12, 15, 16. However the State's filing says nothing about what skills these experts have to guide such preparation. Nor have the State's experts, in their affidavits or CVs made any claim of expertise in the area of RIM. There is no suggestion they have reviewed the body of material and analyses that have been submitted to the EPA. There is no indication they have consulted with anyone at EPA.

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In light of EPA's long-standing jurisdiction over RIM at the Bridgeton landfill, the State's newly-articulated focus on it means the EPA is needed for just adjudication under Rule 52.04(a). EPA plainly

> claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

In this case both prongs of Rule 52(a) are satisfied: EPA's jurisdiction over the RIM at the landfill would be compromised if the State takes it upon itself to decide what to do about the RIM. And Defendants are obviously at substantial risk of being subject to multiple, and likely inconsistent, obligations if both EPA and the State can independently decide what (if anything) to do about the RIM.

C. *EPA is not subject to this Court's jurisdiction.*

For a non-governmental party, the normal action in light of the Motions would be to join EPA under Rule 52.04(a), which authorizes the Court to "order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant." But as a federal agency EPA is immune from any suit in any state court, absent its consent. *United States v. Sherwood,* 312 U.S. 584, 586 (1941).

Joinder of EPA is thus not feasible, which means that Rule 52.04(b) controls:

> If a person as described in Rule 52.04(a)(1) or Rule 52.04(a)(2) cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it or should be dismissed, the absent party being thus regarded as indispensable. The factors to be considered by the court include: (i) to what extent a judgment rendered in the person's absence might be prejudicial to that person or those already parties; (ii) the extent to which by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (iii) whether a judgment rendered in the person's absence will be adequate; and (iv) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

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In this case, subjection (ii) should lead to simple denial of the pending motions, because by denying the requested relief the Court can avoid the prejudice that would otherwise result.

IV. <u>The Plaintiff seeks to have this Court apply the wrong standard.</u>

A. *The Motion applies an incorrect standard.*

Plaintiff moves for a temporary restraining order ("TRO") but articulates a preliminary injunction standard. Missouri Supreme Court Rule 92.02 sets forth the framework for TROs and preliminary injunctions. The two forms of relief are found in separate and distinct portions of the statute. TROs and preliminary injunctions are distinct steps in an injunction proceeding. *Pomirko v. Sayad*, 693 S.W.2d 323, 324 (Mo.App. E.D. 1985) (Three permissible phases in injunction proceedings are 1) a restraining order; 2) a temporary injunction after notice and hearing; 3) a permanent injunction after final merits disposition).

"The purpose of a temporary restraining order is to maintain the status quo of the parties pending the resolution of their claims, which generally involves the issuance or denial of preliminary and permanent injunctions." *Grist v. Grist*, 946 S.W.2d 780, 781 (Mo.App. E.D. 1997); *Leone v. Leone*, 917 S.W.2d 608, 616 (Mo.App. W.D. 1996); *Hemme v. Euans*, 866 S.W.2d 922 (Mo. Ct. App. E.D. 1993)

In describing the TRO analytical framework, Plaintiff incorrectly uses language from cases considering preliminary injunctions. Plaintiff cites *Joseph*, 900 S.W.2d at 648, for the proposition that a court considering "temporary injunctive relief…is entitled to consider all the factors customarily considered in connection with motions for preliminary injunctive relief." Read in its entirety and in connection with Rule 92.02, "temporary injunctive relief" did not mean a TRO. TRO Mot. at 4-5.

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The *Joseph* court reasoned the "temporary injunctive relief" could consider preliminary injunction factors because Rule 92.02 "does not address the substantive factors to be considered." Rule 92.02(a) and (b) do list substantive factors to apply to a TRO, namely "immediate and irreparable injury, loss, or damage will result in the absence of relief." Mo. Sup. Ct. R. 92.02(a)(1). In contrast, Rule 92.02(c) on preliminary injunctions lacks any substantive factors for consideration. Earlier in the decision, the Joseph court uses the phrase "temporary restraining order" to analyze the trial court's actions. Id. at 643, 645-46. However, it says "temporary injunctive relief" in the section quoted by Plaintiff. Thus, *Joseph* does not address the standard for TROs and does not permit Plaintiff to conflate the standards for a TRO and a preliminary injunction.

The plain text of the Motion reveals this basic misapplication. A TRO granted with notice in Missouri can only last fifteen days. Mo. Sup. Ct. R. 92.02(a)(5). Nonetheless, Plaintiff requests the TRO supplant the monitoring procedures of the Second Amendment to the Agreed Order -continuing for months from issuance. TRO Mot. at 13. Phrases quoted by Plaintiff include: "For purposes of temporary injunctive relief…;" "When considering a motion for a preliminary injunction.." Id. at 4-5. Additionally, Plaintiff terms its "temporary protective order." Id. at 5. There is no such form of relief in Missouri. Plaintiff plainly misapplies the legal standard and requests the Court consider factors inapplicable to a TRO.

B. TROs and preliminary injunctions cannot compel behavior.

Moreover, neither a TRO nor a preliminary injunction is permissible here. Plaintiff requests a TRO to mandate actions and substantial expenditures. TROs and preliminary injunctions are not used to compel behavior. "A temporary restraining order maintains the status of the parties until the merits of their claims are resolved and does not purport to pass upon the

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merits of the controversy or dispose of any issue." *Ballesteros v. Johnson*, 812 S.W.2d 217 (Mo. Ct. App. E.D. 1991); *Salau v. Deaton*, 433 S.W.3d 449, 453 (Mo.App. W.D. 2014). These forms of equitable relief are meant "to preserve the status quo until later adjudication of the permanent injunction on the merits." *St. Louis Concessions, Inc. v. City of St. Louis*, 926 S.W.2d 495, 497 (Mo.App. E.D. 1996). Plaintiff's attempt to use a TRO to force Defendants to expend funds and take action reflects a misunderstanding of the basic law governing the relief for which they move.

C. A statutory injunction cannot be considered at this stage in the proceedings.

Plaintiff argues, in the alternative, a TRO should enter pursuant to Missouri Revised Statute § 260.240(1). This statute forms a basis of relief for the underlying Petition. *See, e.g.* Am Pet. ¶¶ 111, 115, 137. This court cannot merge a trial on the merits with a TRO or preliminary injunction hearing without notice. "An order accelerating the trial on the merits and consolidating it with the preliminary injunction hearing must be clear and unambiguous." *State ex rel. Cohen v. Riley*, 994 S.W.2d 546, 548 (Mo. 1999). Defendants have received no notice regarding consideration of the underlying merits of this case. RSMo § 260.240 forms an important basis of the underlying case and a decision on the relief permit is premature before a full development of the record.

V. <u>There is no basis for an order against Republic Services, Inc. or Allied Services, LLC</u>

The State casually asks the Court to require Republic Services, Inc. and Allied Services, LLC as well as Bridgeton Landfill, LLC to take actions at the Bridgeton Landfill and spend money doing so. The State has shown no basis to impose vicarious liability for anything on either of them. Neither Republic Services, Inc. nor Allied Services, LLC now does or ever has

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owned or been the operator of the Bridgeton Landfill. Recognizing this issue, the Agreed Order was only against Bridgeton Landfill, LLC. To enter any order against a party other than Bridgeton Landfill, LLC without proof would be manifest error.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above pleading was served via the Court's electronic filing system on this 9th day of January, 2015, upon the following counsel of record:

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