IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

LENORA PERRINE, CAROLYN HOLBERT, WAUNONA MESSINGER CROUSER, REBECCAH MORLOCK, ANTHONY BEEZEL, MARY MONTGOMERY, MARY LUZADER, TRUMAN R. DESIST, LARRY BEEZEL, and JOSEPH BRADSHAW, individuals residing in West Virginia, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

Case No. 04-C-296-2
Honorable Thomas A. Bedell

E.I. DU PONT DE NEMOURS AND COMPANY, a Delaware corporation doing business in West Virginia, MEADOWBROOK CORPORATION, a dissolved West Virginia corporation, MATTHIESSEN & HEGELER ZINC COMPANY, INC., a dissolved Illinois corporation formerly doing business in West Virginia, NUZUM TRUCKING COMPANY, a West Virginia corporation, T. L. DIAMOND & COMPANY, INC., a New York corporation doing business in West Virginia, and JOE PAUSHEL, an individual residing in West Virginia,

Defendants.

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ORDER GRANTING CLASS CERTIFICATION

Presently pending before the Court is the "Plaintiffs' Memorandum of Law in Support of Class Certification," which Counsel filed on or about November 14, 2005. The Court also is in receipt of the "Plaintiffs' Supplemental Memorandum of Law in Support of Class Certification," which Counsel filed on or about February 28, 2006. The Court also is in receipt of "Dupont's

Memorandum of Law in Opposition to Class Certification," which Counsel filed on or about March 31, 2006. The Court also is in receipt of "Defendant, Nuzum Trucking Co., Motion for Denial of Class Certification," which Counsel filed on or about March 31, 2006. The Court also is in receipt of the Defendants' "T.L. Diamond & Company, Inc.'s and Joe Paushel's Response to Plaintiffs' Motion for Class Certification," which Counsel filed on or about March 31, 2006.

Furthermore, the Court is in receipt of the "Plaintiffs' Memorandum in Reply to Defendants' Response in Opposition to Class Certification," which Counsel filed on or about April 13, 2006. Finally, the Court is in receipt of "Dupont's Surreply in Response to Plaintiffs' Memorandum in Reply to Dupont's Memorandum of Law in Opposition to Class Certification," which Counsel filed on or about April 24, 2006.

On May 1 through 3, 2006, this Court held a hearing on the issue of whether this matter should proceed as a class action. Before the hearing, the parties submitted briefs, as noted above, and evidence. At the hearing, the parties presented testimony, additional evidence, and argument on the issues related to class certification.

After the hearing of May 1 through 3, the parties submitted proposed findings of fact and conclusions of law. The Court is in receipt of the Plaintiffs' proposed "Order Granting Class Certification," which Counsel filed on or about August 14, 2006. The Court also is in receipt of "E.I. Dupont De Nemours and Company's Proposed Findings of Fact and Conclusions of Law Regarding Plaintiffs' Motion for Class Certification and Proposed Case Management Order," which Counsel filed on or about August 15, 2006. The Court also is in receipt of the proposed "Findings of Fact and Conclusions of Law on Behalf of Nuzum Trucking Company," which Counsel filed on or about August 22, 2006. Finally, the Court also is in receipt of the "Defendant Joe Paushel's Proposed Findings of Fact and Conclusions of Law," which Counsel filed on or

about August 24, 2006 and the "Defendant T.L. Diamond & Company, Inc.'s Proposed Findings of Fact and Conclusions of Law," which Counsel filed on or about August 24, 2006.

After a rigorous analysis of the class certification evidence and arguments presented by the parties, and after a thorough examination of the entire record in this matter and pertinent legal authority, the Court finds that Plaintiffs' Motion for Class Certification should be **GRANTED**.

I. Overview of Certification Order.

A class trial of the instant action will permit a number of issues to be addressed in one action. These issues include liability, medical monitoring, property damages, and punitive damages. The Court recognizes that some issues may require individual resolution, which is not an uncommon feature of class actions. Those issues notwithstanding, the Court finds that class treatment, especially when considering the overwhelming predominance of common liability issues, will provide the most efficient and fair procedure to handle Plaintiffs' claims.

A. Class Definition.

Pursuant to this finding, this Court adopts the class definition as proposed in Plaintiffs' Second Amended Class Action Complaint as modified herein:

1. **Property Class**. Those who currently own, or who on or after December 1, 2003 have owned, private real property lying within the below-referenced communities or any other private real property lying closer to the Spelter Smelter facility than one or more of the below-referenced communities.[1]

[1] In its proposed findings of fact and conclusions of law, Dupont raises a concern about ambiguity in the definition of the property class that the Plaintiffs propose. The Court does not perceive any such ambiguity and adopts the Plaintiffs' definition as proposed. However, for the sake of clarity, the Court further defines the property class as those who actually own property at the time of entry of this Order or owned property as of December 1, 2003. If this definition needs

2. **Medical Monitoring Class.** Those who currently reside, or who at any time in the past have resided, for a total of 277 days, on private real property lying within the below-referenced communities or any other private real property lying closer to the Spelter Smelter facility than one or more of the below-referenced communities.[2]

3. **General Provisions**. The initial proposed class area includes the following communities within Harrison County, West Virginia, and all other private real property lying closer to the Spelter Smelter facility than one or more of these communities: Spelter, Erie, Hepzibah, Lambert's Run, Meadowbrook, Gypsy, Seminole, Lumberport, Smith Chapel, and as further modified to include additional impacted areas as described in Plaintiffs' air model. The Court finds that private real property lying within these communities, as well as any other private real property lying closer to the Spelter Smelter facility, has been impacted by the release of hazardous substances at or from the Spelter Smelter facility. Plaintiffs shall submit a proposed class boundary map within 30 days from the entry of this Order that clearly demarks class boundaries as described in this Order. Excluded from the definition of the class are Defendants and any entity in which any Defendant has a controlling interest, any current employees, officers, or directors of any Defendant, and the legal representatives, heirs, successors, assigns, and spouses of any Defendant. To the extent Plaintiffs' counts seek monetary damages, they only relate to private real property owners. To the extent Plaintiffs' counts seek medical monitoring,

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further clarification, the Court will entertain additional briefing on the matter and modify the definition if necessary.

[2] The Plaintiffs' medical monitoring expert, Dr. James Kornberg, initially proposes the 277-day residency requirement for one to be a member of the medical monitoring class. (*See* Class Certification Hearing Transcript at 424; *also see* Kornberg, James P., "Medical Surveillance Guidelines and Recommendations," Nov. 11, 2005). Given that the parties have yet to litigate the merits of the Plaintiffs' claims, this residency requirement, as well as the types of medical monitoring available to class members, may fluctuate somewhat.

they relate to all past and present residents, whether or not they are private real property owners. This action does not seek damages for personal injuries.

At this time, the Court believes that there is a reasonable basis for the class boundaries to be enlarged based on Plaintiffs' air model. This Court has the power to modify this definition as justified by the evidence.

B. Certification Categories.

Plaintiffs have alleged three general demands for relief: medical monitoring, property damage, and punitive damages. Like liability, these categories of relief will benefit from class treatment as both equitable and monetary classes. While medical monitoring is generally considered an equitable remedy, West Virginia courts have certified medical monitoring under Rules 23(b)(1)(A), 23(b)(2) and 23(b)(3). Plaintiffs' claims for property damage seek injunctive and monetary relief and, like medical monitoring, are appropriate for class treatment under Rules 23(b)(1)(A), 23(b)(2), and 23(b)(3).

1. **Medical Monitoring**. The medical monitoring subclass is certified under Rule 23(b)(1)(A) because separate adjudications would impair the ability to pursue a single, uniform monitoring program. The medical monitoring subclass is also certified under Rule 23(b)(2) because of the equitable and/or injunctive nature of the relief. Because common issues predominate over any individual questions, medical monitoring is also certified under Rule 23(b)(3).

2. **Property Damage**. Plaintiffs' claims for property damage are certified under Rule 23(b)(1)(A), 23(b)(2), and 23(b)(3). Plaintiffs' common claims for property remediation are equitable and/or injunctive in nature making certification appropriate under Rule 23(b)(1)(A) and under Rule 23(b)(2). Common administration of any

remediation program would likely increase cost savings and efficiency in clean-up measures. Plaintiffs' common claims for property damage also involve issues that predominate over individual issues making certification appropriate under Rule 23(b)(3). Plaintiffs also seek monetary relief for damages to their properties and class pursuit of such relief is appropriate under Rule 23(b)(3).

3. **Punitive Damages.** Plaintiffs' claims for punitive damages are predicated on alleged acts or omissions that are common to all class members. With respect to punitive damages, common issues predominate over any individual issues and are therefore appropriately certified under Rule 23(b)(3).

II. Procedural History.

In June 2004, the Plaintiffs brought this class action in the Circuit Court of Harrison County, West Virginia, pursuing claims for negligence and recklessness, negligence per se, public and private nuisance, trespass, strict liability, unjust enrichment, and medical monitoring. On or about September 27, 2004, DuPont removed this action to the United States District Court for the Northern District of West Virginia. Plaintiffs filed a Motion to Remand, which was granted on October 26, 2004.

Following remand to this Court, the Court entered an "Agreed Scheduling Order" on July 20, 2005 as well as an Order on February 21, 2006 entitled "February 13, 2006 Amendments to the 'Agreed Scheduling Order,'" to govern the conduct of this matter as to the question of class certification. The parties were given the opportunity to submit briefs and evidence before the hearing on certification. At the hearing on May 1 through 3, 2006, the parties presented testimony, evidence, and arguments regarding class certification.

III. Findings of Fact.[3]

The parties generally agree on the history of the smelter, the town of Spelter, and the surrounding communities. Spelter's modern history begins around the end of the 19th century with a DuPont subsidiary. In 1899, the DuPont Powder Company obtained several hundred acres in the area now known as Spelter to build a gun powder mill. "Powder Hill" was the name given to the area. Two years into its operation, however, the powder mill was destroyed by a huge explosion and was never reopened.[4]

In 1910, Grasselli Chemical Company (Grasselli) purchased Powder Hill in West Virginia from the Fairmont Coal Company for the purpose of constructing a zinc smelter.[5] Immediately after this acquisition, Grasselli began the construction of a zinc plant as well as a town for its employees. Originally called Ziesing, the town would grow into the Spelter community.[6] The zinc smelter began production in 1911. By 1915, 175 homes had been built in Spelter and housed about 1,500 residents. Graselli leased the homes to the zinc smelter employees for $11 a month and provided the residents with water, garbage disposal, and maintenance to their houses.

Grasselli produced zinc from zinc ore, which was brought in from zinc ore mines. Zinc in the ore was primarily found in a mineral known as sphalerite (zinc sulfide). Sphalerite was

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[3] Plaintiffs and Defendants submitted evidence to support their respective positions. Much of the evidence was duplicative, being submitted by Plaintiffs and one or more of the Defendants. Citations to factual material referenced in this Order are the same as those used by the parties.

[4] A. B. Morrison, *Black Powder Plant Powder Hill Harrison County, West Virginia*, (1969) (DPZ0203613).

[5] A. B. Morrison, *The Grasselli Chemical Company Meadowbrook Plant Harrison County, West Virgina,*(1969) (DPZ0203615); A. B. Morrison, *Brief History Meadowbrook Plant*, (1964) (DPZ0203618).

[6] A. B. Morrison, *Brief History Meadowbrook Plant*, (1964) (DPZ0203618).

extracted from shaft mines where it is normally associated with other minerals. For example, galena (lead sulfide) is a mineral typically associated with sphalerite. Importantly, sphalerite typically contains a number of impurities, most notably, arsenic, cadmium, and lead.

After the sphalerite ore was mined, it was crushed and roasted. The roasted ore was then shipped to the Spelter smelter, where it was sintered and subjected to high temperatures in a furnace known as a retort. The high temperatures selectively evaporated the zinc, which was later condensed as pure zinc. After each firing, the liquid zinc was removed, and the retorts were cleaned to remove the waste products.

In addition to sphalerite, zinc can be produced from waste material from other processes. For example, previously refined lead and copper ores have been used in zinc smelters. Lead and copper ores also contain arsenic as an impurity. Zinc can also be reclaimed from waste derived from manufacturing processes that produce zinc-containing products. This waste also contains impurities, including heavy metals.

In the 1920s, a number of individual lawsuits were filed against Grasselli alleging that smoke and fumes from the smelter were harming crops and livestock in the area surrounding the zinc smelter. The litigation apparently ended in a series of settlements with selected property owners in the area surrounding the facility. As a result of this litigation, easements were placed in certain deeds that purport to release Grasselli and its successors and assigns from any liability allegedly caused by "past, present or future" smelting operations at the zinc smelter.[7] Parcels with this easement comprise approximately 40% of the land in the class area.[8]

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[7] *Named Plaintiff Title Reports and Release-Easement Title Reports, Steptoe and Johnson.*

[8] *Plat Depicting the Location and Size of 32 Tracts or Parcels Situate in Eagle, Clay, Coal & Simpson Districts of Harrison County.*

In 1928, Grasselli consolidated with or was purchased by E.I. Dupont de Nemours & Co. (DuPont).[9] DuPont operated the zinc smelting plant until August 31, 1950, when it then sold the plant to the Matthiessen & Hegeler Zinc Co. (Meadowbrook Works) of La Salle, Illinois. Meadowbrook Works operated the plant as a subsidiary known as Meadowbrook Company.[10] In 1951, DuPont sold the town site to John J. Moschetta. Moschetta, in return, sold the houses to the employees who lived there at the time. When DuPont sold the smelter (and later the town site), it likely knew or had reason to know its zinc smelter had been a source of pollution to the surrounding communities.[11] A report commissioned in 1919, as well as the lawsuits of the 1920s, put the zinc smelter owners on notice that its operation was adversely affecting the surrounding environment.

By 1915, the Spelter smelter was the largest horizontal retort furnace zinc plant in the United States. In 1929, the plant began a "modernization" by converting to the use of vertical retort furnaces.[12] By the time the Spelter smelter closed down on July 3, 1971, it had been used to produce "more than four billion pounds of slab zinc, 400 million pounds of zinc dust, 100 million pounds of anodes, and 50 million pounds of other alloys."[13] The waste from such a massive production was, throughout the smelter's history, simply piled on the smelter property—to the sides and back of the plant.

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[9] A. B. Morrison, *Brief History Meadowbrook Plant* (1964) (DPZ0203618).

[10] *Id.*

[11] 1919 Report.

[12] A. B. Morrison, *The Grasselli Chemical Company Meadowbrook Plant Harrison County, West Virginia* (1969) (DPZ0203615); A. B. Morrison, *Brief History Meadowbrook Plant* (1964) (DPZ0203618).

[13] A. B. Morrison, *The Grasselli Chemical Company Meadowbrook Plant Harrison County, West Virginia* (1969) (DPZ0203615).

In the 1960s and 1970s, Nuzum Trucking performed a variety of tasks for Matthiessen & Hegeler Zinc Company, including hauling coal to the facility, grading roads to remove snow, and hauling material from the settling ponds to the cool spots on the zinc tailings pile.

In January 1972, the Spelter smelter was conveyed to a T.L. Diamond entity known as The Meadowbrook Corporation, which later merged with T.L. Diamond and Company (Diamond) in 1984.[14] Diamond first acquired the property in two separate acquisitions: first it purchased the smelter and then it purchased the property where the waste pile was located. During its time operating the plant, Diamond produced a large volume of zinc. Although the smelter was no longer a primary zinc smelter, Diamond continued using the plant to produce a large volume of zinc. Following the practices started by the previous smelter owners, Diamond continued to transport and dump byproducts of the zinc production process onto the pile surrounding the plant and stretching to the West Fork River. The waste pile covered more than 50 acres in range and varied in thickness levels from 0.5 to 100 feet.

The Defendant Joe Paushel's involvement with the Spelter Smelter began when T.L. Diamond & Company, Inc. purchased the Spelter Smelter. Mr. Paushel was hired as a millwright and eventually became plant superintendent in approximately 1975, and continued to be the plant superintendent until the plant closed in 2001.

The waste pile, open and exposed to environmental elements, contained dust composed of various hidden harmful substances such as arsenic, cadmium and lead. The waste pile was often smoldering or actively burning, well into the 1970s.[15] Large amounts of dust were also

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[14] A. B. Morrison, *Brief History Meadowbrook Plant* (1964) (DPZ0203618).

[15] C.S. Lee, *Letter to Joe Paushel, RE: Waste Pile Fires* (1976) (SPEPUB05082); R. Evans, *Memo Documenting Inspection* (1979) (SPEPUB06419).

noticeably present across the plant site, with considerable amounts of dust accumulating on the ground and on top of buildings, as noted in inspection reports as late as 1999.[16] During one 1999 inspection, the West Virginia Department of Environmental Protection observed:

> Each day, large quantities of heavy metal particulates and metal fumes are exhausted into the Spelter community atmosphere.[17]

These findings were not new revelations to Diamond. During Diamond's operation of the smelter, it received numerous notices of violations of the Clean Air Act from State and federal officials,[18] which prompted a series of correspondence concerning Diamond's failures to bring the plant into compliance with air pollution regulations.[19] During Diamond's operation, there were also various studies documenting site-related soil and water contamination.[20] Contaminant substances included arsenic, lead, and cadmium. Some of these studies, as well as related

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[16] Dale L. Gable, *Meadowbrook Facility Inspection Report* (1999) (Potesta 2-04495).

[17] *Id.*

[18] T. L. Diamond, *Letter to W. Va. Air Pollution Control Commission, RE: Compliance Program*, Status Report (1982) (TLD200162); R. A. Pride, *Letter to Dean Bangor, Meadowbrook Corporation from W. Va. Air Pollution Control Commission* (1985) (TLD200183); W. R. Cunningham, *Letter to Dean Bangor from U.S. E.P.A., RE: Notice of Violation* (1985) (TLD200205).

[19] T.L. Diamond, *Letter to U. S. E.P.A.* (1982) (TLD200170); *Compliance Program Outline* (1982) (TLD200172); S. R. Wassersug, *Letter to T.L. Diamond from U.S. E.P.A.* (1982) (TLD200175); *T.L. Diamond, Letter to U.S. E.P.A.* (1982) (TLD200177); R.D. Bangor, *Letter to U.S. E.P.A., RE: Compliance Program* (1982) (TLD200179). R.D. Bangor, *Letter to U.S. E.P.A. RE: Compliance Program* (1983) (TLD200181); R.A. Pride, *Letter to Dean Bangor from U.S. E.P.A.* (1985) (TLD200183).

[20] R.V. Groder, *Letter to U.S. E.P.A. RE: Spelter Smelter Site – ATSDR Data Package* (1996) (TLD200309); T. Walker, *Health Consultation, Spelter Smelter Site, U.S. Dept. of Health and Human Services* (1996) (TLD200454); J. Downie, *Memo regarding E.P.A. assessment* (Not Dated) (TLD200522);. J. Downie, *Memo regarding E.P.A. assessment* (Not Dated) (TLD200523); J.G. Britvec, *Letter to Dean Bangor from W.Va. Dept. of Natural Resources* (1986) (TLD200558); K. G. Orloff, *Exposure Investigation for Spelter Smelter, U.S. Dept. of Health and Human Services* (1996) (TLD202366).

correspondence, noted health threats posed to residents and individuals utilizing the nearby biking trail, situated between the waste pile and the West Fork River, through ingestion, direct contact with the skin, and inhalation of these substances in the dust.[21] Comments in future studies also expressed concerns for the long-term and ongoing nature of health risks posed by the waste pile.[22]

As would reasonably be expected, the zinc smelter proved to be a health threat to its employees working at the plant as well as to the residents living near the plant. A number of Diamond's employees filed claims for occupational pneumoconiosis, a respiratory illness, during their employment at the plant. Also during the plant's operation under Diamond, Jack Downie, the United States Environmental Protection Agency officer in charge of monitoring the site, recommended that the plant site be declared an imminent and substantial endangerment to the public health and welfare as well as the environment.[23] Further, Diamond and DuPont, as of 1996, were on direct notice from the EPA of their potential liability to perform or finance removal actions of hazardous substances on the plant site.[24]

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[21] J. Dodd, *Memo regarding exposure to users of the hike and bike trail* (1996) (TLD200510); J.L. Downie, *Recommendation for Determination of Imminent and Substantial Endangerment* (1996) (TLD200593).

[22]DuPont, *Health and Safety Plan* (DPZ0116882); DuPont, *Health and Safety Protocol for Visitors* (DPZ0120423).

[23] J. Dodd, *Memo regarding exposure to users of the hike and bike trail* (1996) (TLD200510); J.L. Downie, *Recommendation for Determination of Imminent and Substantial Endangerment* (1996) (TLD200593).

[24] A. Ferdas, *Notice to Diamond of its Liability under CERCLA* (1996) (TLD200551).

On June 30, 2001, Diamond ceased operation of the plant, with DuPont once again assuming ownership of the property on October 31, 2001.[25] Pursuant to the Environmental and Sale Agreement, DuPont, along with Diamond, began a program of remediation at the property. Remediation was necessary because toxic contaminants had been found throughout the smelter site. High levels of arsenic, cadmium, and lead, as well as other substances such as zinc, iron, and copper, were found throughout the site and especially in the waste pile. Three of these metals, namely lead, arsenic, and cadmium, were identified as contaminants of concern because of their toxicity. The remedial activities have consisted primarily of the construction of a geosynthetic cap placed over the contaminated soil and covered with other soil and sod. The geosynthetic cap has only been utilized on plant property.

In carrying out the remedial activities and dealing with the hazardous substances still present on the ground and in the dust, workers were required to take safety precautions including wearing protective clothing, decontaminating clothing, and utilizing respiratory protection devices among other safeguards.[26] While the remediation was taking place, DuPont assured its residential neighbors that their properties were not contaminated and that they need not have the property tested.[27] Air monitoring at the perimeter of the site and prior monitoring at outside locations in the community, however, showed high levels of arsenic and cadmium.[28]

DuPont's remedial efforts did not address the removal of the contamination found in the surrounding communities and its resultant damage, whether it involves health threats to

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[25] D. Bangor, *Letter to West Virginia Department of Environmental Protection, RE: Pre-Closure Inspection* (2001) (TLD203826); *Environmental and Sale Agreement* (2001) (TLD203798).

[26] Potesta, *Work Plan for Residential Water Well Abandonment* (2001)(DPZ0120139).

[27] C. Skaggs, *The Spelter Reclamation Project* (2001) (SPEPUB02190).

[28] DuPont, *Summary of Removal Activities* (1998) (DPZ0154176).

individuals or damage to property in the proposed class. According to Plaintiffs, many thousands of people have been exposed to the hazardous substances from the smelter site. Currently, approximately 3,000 people live within a one-mile radius of the smelter site.[29]

On behalf of the proposed class, a team of experts hired by Plaintiffs collected and tested soil, interior dust, and air samples from these communities. Plaintiffs' experts analyzed these samples for zinc, arsenic, cadmium, and lead. George Flowers, Ph.D., a professor of geochemistry at Tulane University, personally collected over 1,000 soil samples and had the samples analyzed. (R.T. at 138). According to Dr. Flowers, the entire proposed class area was contaminated with lead, cadmium, zinc, and arsenic. (R.T. at 138).

Dr. Flowers also reviewed an extensive study (Bear and Morgan Report) conducted in 1919. The study memorialized the effects that the then eight-year-old smelter was having on the surrounding communities. (R.T. at 139). The 1919 study found that the smelter significantly and negatively impacted the surrounding communities. Although DuPont contends that the 1919 study has little relevance because the study was limited to studying zinc contamination in the surrounding communities, the study is certainly useful for demonstrating the common impact the smelter has had on the surrounding areas. Plaintiffs contend, through the testimony of Dr. Flowers, that arsenic, lead, and cadmium are inherent contaminants in zinc ore and intimately associated with zinc contamination, and therefore, measuring zinc contamination is, in effect, measuring arsenic, lead, and cadmium contamination. (R.T. 146-147). Moreover, Dr. Flowers explained that even in 1919, the investigators were able to determine, among other things, that the dust from the smelter contained up to two percent (20,000 part-per-million) lead. (R.T. 140). Regardless, however, of whether the 1919 report confirms the presence of toxic contaminants

[29] Dupont, *Site Action Plan Spelter Smelter Site* (2000) (DPZ0052182).

produced by the smelter, the 1919 study demonstrates that almost from its inception the smelter was having a dramatic deleterious effect on a common group of people and their properties. (R.T. 146-147).

Plaintiffs also presented the testimony of Dr. James Stewart, who developed a model showing the deposition of emissions from the smelter. Dr. Stewart used a modeling program known as "CALPUFF," which is a model recommended by the United States Environmental Protection Agency for terrain like that found in Spelter. (R.T. 272). According to Dr. Stewart's model, the entire class area has been affected by the emissions from the smelter. (R.T. 278). Interestingly, Dr. Stewart's model closely matches the affected areas documented on the 1919 report. (R.T. at 149). While DuPont attacks Dr. Stewart's model, it has offered no model demonstrating that the entire class area has not been affected by the emissions from the smelter—despite the fact that DuPont's expert (Dr. Shields) admitted to performing similar modeling of smelter emissions in other cases.

Dr. Flowers also analyzed the attic dust samples taken from homes in the class area. Using x-ray diffraction, Dr. Flowers was able to match the dust in the attics with the emissions from the smelter site. Dr. Flowers concluded that the attic dust samples demonstrate that the entire study area has been impacted by airborne particulates derived from the Spelter smelter.

It is undisputed that exposure to arsenic, cadmium, and lead poses significant health problems. For example, airborne exposure to arsenic compounds is linked with increased incidences of lung cancer.[30] Several studies have found that residents living near smelters or arsenical chemical plants have an increased risk of lung cancer. Based upon the risk of lung

[30] In his Medical Surveillance Guidelines and Recommendations, which is part of the record, Plaintiffs' medical monitoring expert, Dr. James Kornberg, outlines the adverse health effects of arsenic, cadmium, and lead.

cancer, the United States Environmental Protection Agency (E.P.A.) and other agencies have designated arsenic as a known human carcinogen. When the major pathway of exposure is oral, arsenic compounds increase the risk of skin cancer. In addition to lung and skin cancer, arsenic is also associated with damage to a number of internal organs and other cancers.[31] Cadmium also has been classified as a human carcinogen. In addition to being a carcinogen, low-level exposure to cadmium also has been found to cause a number of serious kidney and liver diseases. [32] (R.T. at 507, 514. 763-764)

Lead has been classed by the EPA as a probable human carcinogen. Low-level exposure to lead has been demonstrated to cause a number of permanent neurological effects in humans. (R.T. 555). Lead exposure is especially harmful to children who can experience substantial neurobehavioral impairments. As is the case with cadmium and arsenic, lead, too, can cause damage to internal organs. [33]

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[31] According to the report of Plaintiffs' expert Dr. James Kornberg, arsenic is known to cause acute gastrointestinal symptoms, following ingestion, leading to renal, respiratory, cardiovascular, and central nervous system damage, as well as bone marrow suppression, hemolysis, hepatomegaly, melanosis, polyneuropathy, hyperkeratosis and various cancers, including skin, nasal passages, lung, and bladder cancer. It is also suspected to cause kidney cancer as well as perforation of the nasal septum, peripheral vascular disease, cardiac disease, cerebrovascular disease, hypertension, diabetes, neurotoxicity and reproductive neurotoxicity. Kornberg's Medical Surveillance Guidelines and Recommendations at 5-6 (internal references & citations omitted).

[32]Dr. Kornberg also reported that cadmium is known to cause severe gastrointestinal effects, severe nausea, vomiting and abdominal pain, leading to renal damage. Exposure to cadmium fumes can lead to severe nasal, upper respiratory and pulmonary symptoms, cadmium fume pneumonitis, pulmonary fibrosis and persistent restrictive pulmonary defect. Chronic exposure has been linked to cancers of the lung, prostate, kidneys and stomach. Kornberg's Medical Surveillance Guidelines and Recommendations at 6-7 (internal references & citations omitted).

[33] Dr. Kornberg reported that lead is known to cause gastrointestinal effects, headaches, arthralgias, myalgias, lead colic, paresthesias and motor weakness. Exposure can lead to poisoning of enzyme systems affecting hemoglobin, integrity of cell membranes and steroid metabolism. Long term exposure to lead will affect every major organ system in the human body and lead to hypertension, chronic interstitial nephritis, hypothryroidism, decreased fertility,

IV. Conclusions of Law.

A. Plaintiffs' Motion for Class Certification is granted.

"Rule 23 of the West Virginia Rules of Civil Procedure . . . was adopted with the goals of economies of time, effort and expense, uniformity of decisions, the promotion of efficiency and fairness in handling large numbers of similar claims." *In re W. Va. Rezulin Litig. v. Hutchison*, 214 W. Va. 52, 62, 585 S.E.2d 52, 62 (2003). It is well-settled in West Virginia that, as long as the prerequisites to class-certification set forth in Rule 23 are met, a case should be allowed to proceed on behalf of the class proposed by a plaintiff. *See* W. Va. R. Civ. P. 23; *Mitchem v. Melton*, 167 W. Va. 21, 25, 277 S.E.2d 895, 899 (1981) ("If the requirements of Rule 23 are met, then the Class should be allowed."); *Evans v. Huntington Pub. Co.*, 168 W. Va. 222, 223, 283 S.E.2d 854, 855 (1981). Under Rule 23, the only prerequisites to certifying a case to proceed on behalf of a class are that (1) the class is so numerous that joinder of all members is impractical (the "numerosity" requirement); (2) there are questions of law or fact common to the class (the "commonality" requirement); (3) the claims or defenses of the represented parties are typical of those of the class (the "typicality" requirement); (4) the represented parties will fairly and adequately protect the interest of the class (the "adequacy" requirement); and that at least one of the three potential bases for seeking class relief set forth in Rule 23(b) exists. *See* W. Va. R. Civ. P. 23(a), (b). If appropriate, the Court may allow the action to be brought or maintained as a class action with respect to only particular issues or may allow the class to be divided into subclasses. *Id.* at R. 23(c)(4). In this regard, the Court has the discretion to enter whatever order it feels will

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spontaneous abortion, reduced and abnormal sperm counts and morphology, stillbirths and increased infant mortality. Inorganic lead is suspected to be a carcinogen and has been classed by some agencies as a probable carcinogen. Kornberg Medical Surveillance Guidelines and Recommendations at 7-8 (internal references & citations omitted).

best provide for the orderly conduct and management of issues to be handled in a class action proceeding under Rule 23, including entry of an order reserving any "unmanageable" issues for litigation at a later time. *See* W. Va. R. Civ. P. 16, 23(d); *Gasperoni v. Metabolife Int'l, Inc.*, 2000 WL 33365948, slip. op. at *4 (E.D. Mich. Sept. 27, 2000) (*citing In re Diet Drugs Prod. Liab. Litig.*, 2000 WL 1222042 (E.D. Pa. Aug. 28, 2000)).

Although the Court is required to perform a "rigorous analysis" in determining whether the prerequisites to class certification exist under Rule 23, *see, e.g., General Tel. Co v. Falcon*, 457 U.S. 147, 160 (1982), the Court also recognizes that "[t]he recent trend in class certification decisions is to interpret Rule 23 flexibly and give it a liberal construction." *Black v. Rhone-Poulenc, Inc.*, 173 F.R.D. 156, 169 (S.D. W. Va. 1996). In performing such a rigorous analysis, the Court's focus should not be on whether a plaintiff will prevail on the actual merits of any substantive aspect of the plaintiff's claims, but should be only on whether the procedural requirements of Rule 23 are met. *See Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 177 (1974) ("nothing in either the language or history of Rule 23 . . . give a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action"); *Burks v. Wymer*, 172 W. Va. 478, 486, 307 S.E.2d 647, 653 (1983). "In other words, the named plaintiff has a 'procedural ... right to represent a class' that is independent of his substantive claims." *U.S. Parole Commissioner v. Geraghty*, 445 U.S. 388, 402 (1980).

By allowing any inquiry into the merits of any of the plaintiffs' substantive claims, the Court would effectively deprive the plaintiffs of the right to a trial by jury on those claims. *See Guar. Ins. Agency Co. v. Mid-Continental Realty Corp.*, 57 F.R.D. 555, 564 (D.C. Ill. 1972); *Rezulin*, 214 W.Va. at 63, 585 S.E.2d at 63. Further, the West Virginia Supreme Court of Appeals has recognized "as have other state courts, that the failure to permit the maintenance of

a class action by a trial court can have grave procedural consequences to the parties who are denied class participation as if a final judgment has been rendered against them on the merits." *Mitchem*, 167 W. Va. at 27, 277 S.E.2d at 901. Therefore, even in a doubtful case, any question as to whether the case should proceed as a class should be resolved in favor of allowing class certification. *See, e.g. Esplin v. Hirschi*, 402 F.2d 94, 101 (10th Cir. 1968)("[t]he interest of justice require that in a doubtful case . . . any error, if there is to be one, should be committed in favor of allowing the class action."); *Gasperoni*, 2000 WL 33365948, slip. op. at *8.[34]

B. DuPont's claims of property specific issues do not defeat class certification.

Before turning to a discussion of how Plaintiffs' claims satisfy the elements of Rule 23, the Court addresses DuPont's general attack on class certification. DuPont's primary argument is that variability in the data and too many property-specific issues of alternate sources preclude class treatment.[35] Relying on and applying the guidelines established in West Virginia's leading case on class certification, *Rezulin,* 214 W. Va. at 62, 585 S.E.2d at 62, this Court finds that DuPont's arguments do not defeat class certification.

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[34] On a related note, the Defendants raise many substantive issues in opposition to class certification. These issues include, but are not limited to (1) whether Nuzum Trucking's activities on the site contributed to the pollution upon which the Plaintiffs focus, (2) whether T.L. Diamond & Company's and Joe Paushel's involvement at the site only post-1971 absolves them of responsibility for the injuries the Plaintiffs allege, (3) whether the Grasselli releases for property damage have force and effect in the instant litigation, and (4) whether Dupont defeats the Plaintiffs' claims with its arguments (a) that there are multiple sources of pollution and (b) that the degree of pollution is so slight as to not warrant property remediation or medical monitoring.

The Court finds, however, that such issues are inappropriate for resolution at the class certification phase of the litigation. Rather, these are the types of issues to be resolved during the phase of the litigation on the merits of the Plaintiffs' claims. Such issues may be appropriate for resolution via summary judgment proceedings; however, such issues may be suitable for resolution only by a jury. In any event, the Court anticipates setting a dispositive motion schedule and other milestones for litigation on the merits at the next status conference, presently set for October 16, 2006.

[35] According to Dr. Flowers, the greatest variability in the soil data is from samples collected on the old Spelter smelter site. (R.T. at 164-165).

Rezulin clearly cautions the trial court that where there is at least one predominating common issue, individual issues are expected and are not fatal to class certification. Discussing commonality under Rule 23(a)(2), the Supreme Court adopted the position of the leading commentary on class actions regarding the effect of individual questions on commonality:

> The Rule 23(a)(2) prerequisite requires only a single issue common to the class. Individual issues will often be present in a class action, especially in connection with individual defenses against class plaintiffs, rights of individual class members to recover in the event a violation is established, and the type or amount of relief individual class members may be entitled to receive. Nevertheless, it is settled that the common issues need not be dispositive of the litigation. The fact that class members must individually demonstrate their right to recover, or that they may suffer varying degrees of injury, will not bar a class action; nor is a class action precluded by the presence of individual defenses against class plaintiffs.

Rezulin, 214 W. Va. at 68, 585 S.E.2d at 68 (quoting A. Conte and H. Newberg, 1 *Newberg on Class Actions, 4th Ed.*, § 3:12 at 314-315 (2002)).

Again, relying on Newberg's treatise, the Supreme Court also cautioned trial courts that the predominance requirement does not mean the common issue must also be determinative or dispositive. Acknowledging the likely presence of individual questions, including individual questions of damages, *Rezulin* emphasized that where there is a single overriding common issue, numerous remaining individual questions should not defeat class certification:

> The predominance requirement does not demand that common issues be dispositive, or even determinative; it is not a comparison of the amount of court time needed to adjudicate common issues versus individual issues; nor is it a scale-balancing test of the number of issues suitable for either common or individual treatment. 2 *Newberg on Class Actions, 4th Ed.*, § 4:25 at 169-173. Rather, "[a] single common issue may be the overriding one in the litigation, despite the fact that the suit also entails numerous remaining individual questions." *Id.* at 172. The presence of individual issues may pose management problems for the circuit court, but courts have a variety of procedural options under Rule 23(c) and (d) to reduce the burden of resolving individual damage issues, including bifurcated trials, use of subclasses or masters, pilot or test cases with selected class members, or even class decertification after liability is determined. As the leading treatise in this area states, "[c]hallenges based on ...

> causation, or reliance have usually been rejected and will not bar predominance satisfaction because those issues go to the right of a class member to recover, in contrast to underlying common issues of the defendant's liability." 2 *Newberg on Class Actions, 4th Ed.*, § 4.26 at 241. "That class members may eventually have to make an individual showing of damages does not preclude class certification." *Smith v. Behr Process Corp.*, 113 Wash. App. 306, 323, 54 P.3d 665, 675 (2002) (citations omitted).

Rezulin, 214 W. Va. at 72, 585 S.E.2d at 72. In other words, where common issues permeate the litigation, as they do in the instant action, the need for individual inquiries does not preclude class certification.

While DuPont has raised numerous possible alternative sources, it has failed to show with any degree of certainty that these sources actually contaminated the class area. Dupont's failure of proof aside, its myopic presentation of alternate sources is akin to ignoring the elephant in the room.[36] Even assuming the existence of alternate sources, Plaintiffs have demonstrated that the emissions from the Spelter smelter facility will be a common, pivotal issue in this litigation. While disputing the risk posed by the heavy metal pollution from the smelter, DuPont's experts generally agree that the smelter has deposited zinc, arsenic, lead, and cadmium in the class area. As stated by DuPont's own experts, the fact that the smelter was a source of heavy metal pollution was "a given," leading the experts to admit that the smelter had an impact on property surrounding the smelter. (Shields depo. at 153-154; R.T. 481). DuPont's experts also admit that smelters are well established sources of heavy metal pollution. (R.T. 538). In particular, Dr. Rodricks, a toxicologist testifying on behalf of DuPont, concedes that the Spelter smelter had deposited heavy metals in the class area. (R.T. 538). Arguing that the smelter's impact on the class area has been negligible does not lessen the overriding common issue of contamination and

[36] As set forth in Footnote 34 herein, DuPont's arguments of multiple sources of contamination and many different polluters are factual issues that go to the merits of Plaintiffs' claims and are not arguments that should be addressed by the Court at this time. *Bentley v. Honeywell*, 223 F.R.D. 471, 478 (S.D. Ohio 2004).

should be saved for the jury.

C. Plaintiffs are adequate representatives and are not required to bring personal injury claims in order to safeguard the rights of absent class members.

In addition to arguing that individual issues should defeat class certification, DuPont has also argued that certifying this class action may deprive absent class members of the right to bring personal injury claims in the future. Specifically, DuPont argues that the named class representatives are inadequate because they have "split out" their personal injury claims. DuPont contends that because absent class members would be bound to remediation and medical monitoring Rule 23(b)(2) non-opt-out classes, any unasserted personal injury claims belonging to those absent class members would be barred by the principles of *res judicata.* The Court is satisfied, however, that the named representatives' interests are sufficiently aligned with the interests of absent class members and that the due process rights of the absent class members are adequately protected.[37]

A class action only binds the class members as to matters actually litigated. *Res judicata* will not bar personal injury claims when there has been no inquiry into personal injuries suffered by individual class members. The instant action will not resolve any claim based on individual circumstances that are not addressed in the class action, and, therefore, it should not jeopardize the class members' ability to subsequently pursue other claims. *See e.g. Cameron v. Tomes,* 990 F.2d 14, 17 (1st Cir. 1993)(citing *Cooper v. Federal Reserve Bank of Richmond,* 467 U.S. 867,

[37] As a practical matter, class actions have long been recognized as a "discrete exception . . . to restrictions against splitting a cause of action. Following the filing of a class complaint where the class is ultimately certified, or until class certification is denied, any requirement not to split a cause of action that may otherwise apply to require simultaneous assertion of individual and common claims must give way to two settled aspects of class action law. A class action will not bar individual claims that may be supportive of, but not determined by the common class issues. At the same time, class members are entitled to rely on the class action for protection of their interests that are common with the class." 5 NEWBERG ON CLASS ACTIONS § 17:12, n.6 (4th ed.)(internal citations omitted).

880, 104 S. Ct. 2794)(1984)). Rejecting the argument that an absent class member *has* to litigate his issues in the earlier class action or "forever hold his peace," the *Cameron* court affirmed that claim preclusion is possible only where an earlier class action claim is essentially the same as a later action for individual relief.

Here, Plaintiffs' non-opt out claims on behalf of the class are for injunctive relief for medical monitoring and property remediation. Although they may arise from the same conduct, medical monitoring and property remediation claims are obviously very different from a personal injury claim, requiring different evidence of causation and damages. As a practical matter, a medical monitoring claim and a personal injury claim cannot be resolved at the same time and, therefore, they should not be treated as identical claims subject to *res judicata.* Based upon the record before the Court, there would seem to be no reason to inquire into any bodily injuries allegedly suffered by the individual class members. Hence, *res judicata* would not apply to bar and/or prejudice any personal injury claims that the class members may have. To the extent the defendants are able to remediate the contamination of the property surrounding the zinc plant, a ruling to that effect will not prejudice the class members who may have personal injury claims resulting from the contamination that allegedly has existed for many years. Similarly, to the extent the defendants are able to monitor individuals for latent diseases associated with exposure to zinc, arsenic, cadmium or lead, a ruling to that effect will not prejudice the class members who may have personal injury claims resulting from exposure to the contamination that has allegedly existed for many years. *See Bentley v. Honeywell Int'l Inc.*, 223 F.R.D. 471,483 (S.D. Ohio 2004).

Nor does the Court agree that because plaintiffs have not alleged personal injury claims, they have disregarded the interests of the absent class members. In the instant action it is clear

that the named plaintiffs are not advancing their own interests at the expense of the class, but have instead made a choice to pursue substantial, meaningful claims that stand a chance of being redressed in a lasting, effective, consistent, and efficient manner. They have devoted substantial resources to the substantive development of these claims and demonstrated a commitment to vigorously prosecute these claims.

Moreover, the Court has found no indication that the named plaintiffs are pursuing relatively insignificant class claims at the expense of individual class members. On the contrary, the Court has found the named plaintiffs to be pursuing the claims that have the best chance of benefiting the class members. The latency period for diseases from heavy metal exposure can be decades. Waiting for such a disease to manifest before bringing a claim could create statute of limitations issues for property remediation and medical monitoring. Moreover, property remediation and a medical monitoring program could provide ways to avoid serious consequences of heavy metal exposure. Accordingly, the Court is unpersuaded that any impermissible conflict of interest exists between the class representatives and its members. *See In re Universal Service Fund Telephone Billing Practices Litig.*, 219 F.R.D. 661, 669-670 (D. Kansas 2004)(Lungstrum, J.)(observing that the class representatives' interests become misaligned with the class members' interests when the class representatives elect to pursue relatively insignificant claims while jeopardizing the ability of class members to pursue far more substantial, meaningful claims).

DuPont's argument is also unsupported by West Virginia precedent, which has consistently allowed medical monitoring claims to go forward as class actions without also requiring named plaintiffs to bring personal injury claims. In *Rezulin*, for example, the class representatives only sought to recover the costs of medical monitoring, economic damages under

the Consumer Protection Act, and punitive damages. *Rezulin*, 214 W. Va. 52, 59-60, 585 S.E.2d 52, 59-60. The *Rezulin* Court rejected the trial court's observation that absent class members' future claims for compensatory damages might be compromised by *res judicata*,[38] instead finding the named plaintiffs to be adequate and their interests to be sufficiently aligned with the interests of the absent class members — even though the named plaintiffs were not pursuing personal injury claims. *Id.* at 69.

Since *Rezulin*, the West Virginia courts have allowed a number of class actions seeking medical monitoring but not personal injury damages to go forward. For example, in the tobacco litigation, a separate medical monitoring class and a separate personal injury class were certified. The separate classes signaled not only that a medical monitoring class of asymptomatic claimants is permissible, but also that a medical monitoring class will not foreclose a personal injury class. *See In re Tobacco Litigation (Medical Monitoring Cases),* 215 W. Va. 476, 600 S.E.2d 188 (W. Va. 2004); *In re Tobacco Litigation (Personal Injury Cases*), 624 S.E.2d 738 (W. Va. 2005); *see also Chemtall Inc. v. Madden*, 216 W. Va. 443, 442-444, 607 S.E.2d 772, 781-783 (W. Va. 2004)(ultimately permitting medical monitoring class action without accompanying personal injury claims); *Stern v. Chemtall, Inc.*, 217 W. Va. 329, 339, 617 S.E.2d 876, 886 (W. Va. 2005)(where court was permitting group of personal injury plaintiffs to intervene in medical monitoring class action, circuit judge retained discretion to try the class action and personal injury actions together or separately, thus indicating that the trial of one class's claims would not jeopardize the claims of the other); *Leach v E. I. DuPont De Nemours & Co., Inc.*, No. 01-C-608, 2002 WL 1270121 (W. Va. Cir Ct. 2002)(Hill, J.)(finding no

[38] *See In re West Virginia Rezulin Litigation,* 2001 WL 1818442 at *23 (W. Va. Cir. Ct. Dec. 13, 2001)(Hutchinson, J.).

antagonistic interest between named plaintiffs and class members and certifying medical monitoring class).

Plaintiffs have demonstrated to the Court's satisfaction that their interests are aligned with the interests of the absent class members. Plaintiffs' claims are certainly substantial and meaningful. Plaintiffs have demonstrated that they are adequate representatives by their level of preparation. Even though this case is not in the merits phase, Plaintiffs have devoted substantial resources to the substantive development of these claims. In light of Plaintiffs' vigorous prosecution of their claims, which, if successful, will greatly benefit absent class members, Plaintiffs' decision not to include personal injury claims does not give rise to the conclusion that a conflict exists and appears to have been a choice that advances all class members' interests.[39]

[39]There is some question as to whether the Court can allow members of a class certified under Rule 23(b)(1) or (b)(2) to opt-out of such a class. While Rule 23 explicitly provides for opt-out capability for (b)(3) classes, it is silent regarding opting out of (b)(1) and (b)(2) classes. West Virginia law does not clarify the issue, and the parties cite authority from other jurisdictions in support of their polar opposite positions.

Apparently, there is a split of authority at least among federal courts on this issue. *See* 146 A.L.R. Fed. 563. However, in the instant case, in the interest of absent class members' due process rights, the Court retains the discretion to order class notice and opt-out provisions for Rule 23(b)(2) class members. *See In re Universal Service Fund Telephone Billing Practices Litig.*, 219 F.R.D. 661, 670 n.5. Following the example of *Billing Practices,* the Court agrees that out of an abundance of caution for due process rights of absent class members, it would be prudent to include language in the class notice advising potential class members that this lawsuit does not involve personal injury claims and further that class members may risk being barred from pursuing any such potential claims in the future if they do not opt out of the class.

V. Certification of the Class is appropriate under Rule 23(a).

A. The proposed Class satisfies the "numerosity" requirement of Rule 23(a)(1).

If the members of the class are so numerous that joinder is impracticable, the numerosity requirement is satisfied. "[T]he test for impracticability of joining all members does not mean impossibility but only difficulty or inconvenience of joining all members." *Mitchem*, 167 W.Va. at 33, 277 S.E.2d at 902. While class size is a factor in the test for impracticability of joinder, numbers alone are but one consideration. Consequently, courts have certified classes with as few as 20 members. In making the determination of impracticability, courts have been guided by the following principles.

- When the class size is large, numbers alone will be dispositive.
- Proof of the identity of each class member is not required.
- A court may rely on reasonable estimates of the class size.
- A court may not deny class certification solely because some members of the class suffered no injury or do not want to participate in the class action.

In this particular case, class size alone makes joinder impractical.[40] Defendants have made no serious attack on numerosity. Plaintiffs have identified slightly over 2,700 parcels in the class area and the owner of each parcel. While one may quibble over whether 17 or 50 or even 500 persons is enough, there can be little serious debate about whether joining 3,000 persons (Plaintiffs' estimate of residents in the affected communities) is feasible. A. Conte and H. Newberg, 1 *Newberg on Class Actions*, 4th Ed., § 3:5 (2002) ("Certainly, when the class is very large, for example, numbers in the hundreds, joinder will be impracticable . . . . In light of the prevailing precedent, the inherent difficulty in joining as few as 40 members should raise a presumption that joinder is impracticable, and the plaintiff whose class is that large or larger

[40] U. S. Census Bureau, *Fact Sheet Harrison County, West Virginia* (SPEPUB03119).

should meet the test of Rule 23(a)(1) on that fact alone."). Based upon the number of class members and number of property parcels, this Court finds that the numerosity requirement has been satisfied.

B. The proposed Class satisfies the "commonality" requirement of Rule 23(a)(2).

In the *Rezulin* decision, the Supreme Court set out the requirements of commonality.

- The party seeking class certification must show that "there are questions of law or fact common to the class." "A common nucleus of operative fact [or law] is usually enough to satisfy the commonality requirement." *Rezulin*, 214 W. Va. at 67, 585 S.E.2d at 67 (quoting *Rosario v. Livaditis*, 963 F.2d 1013, 1017-18 (7th Cir. 1992)).
- "The threshold of 'commonality' is not high," and "requires only that resolution of the common questions affect all or a substantial number of the class members." *Id.* (quoting *Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468, 472 (5th Cir. 1986)).
- Commonality simply requires that the class members share a single, significant common issue, which need be neither important nor controlling. *Id.*

The presence of common issues is virtually axiomatic in mass toxic tort cases, for the very circumstance giving rise to liability, i.e., the release of hazardous material, is one which by definition affects all class members. In *Clark v. Trus Joist MacMillian*, 836 So. 2d 454 (La. App. 2002) for example, which upheld the certification of a class action by residents exposed to toxic emissions from a nearby lumber processing plant, the court observed:

> In this case, the common issue for all plaintiffs is whether emissions from the Trus Joist plant during the time period in question contained toxic chemicals of such a level to cause harm to plaintiffs and whether plaintiffs were in fact harmed. We find this issue decided for one class member will be decided for all.

836 So. 2d at 461.[41]

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[41]To like effect, *see, e.g.*, *Bentley*, 223 F.R.D. at 482 (class action by residents alleging contamination of water supply "present[ed] a common nucleus of operative fact: Defendants' releases of TCE and PCE, which commingled to create the plume that contaminated Plaintiffs' properties and water supplies"); *Johnson v. Orleans Parish School Bd.*, 790 So. 2d 734, 746 (La. App) (class of residents whose property had been contaminated by toxic substances from

The extent to which such issues cut across the entire class, indeed, has prompted one court to characterize them as not only common, but "straightforward" as well.

> The questions whether Met-Coil leaked TCE in violation of law and whether the TCE reached the soil and groundwater beneath the homes of the class members are common to all the class members. The first question is particularly straightforward, but the second only slightly less so. The class members' homes occupy a contiguous area the boundaries of which are known precisely. The question is whether this area or some part of it overlaps the area of contamination.

Mejdrech v. Met-Coil Systems Corp., 319 F.3d 910, 911 (7th Cir. 2003) (affirming certification of class of property owners alleging soil and groundwater contamination from defendant's storage tank).

The abundance of common questions in the case at bar exceeds, both in quality and quantity, the threshold of commonality required by Rule 23(a)(2). For example, a single source (the smelter) is alleged to be responsible for the arsenic, cadmium, and lead contamination in the class area. *Ludwig v. Pilkington North America, Inc.*, 2003 W.L. 22478842 (N.D. Ill.) (common nucleus of operative facts exist when a defendant has engaged in a standardized conduct towards class members). Plaintiffs' air model shows that the entire class area has been affected by smelter emissions. This shared question of fact, by itself, is sufficient to satisfy the commonality requirement. It is not just a significant question of fact; it is *the* controlling question of fact. Commonality is also established because the alleged conduct that caused the contamination is identical for each proposed class member, and each Defendant's conduct towards the class is alleged to be uniform.[42]

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landfill: "The class members in this case claim that they were all injured by the same conduct. . . . Therefore, the plaintiffs meet the commonality requirement"); *Northern Indiana Pub. Service Co. v. Bolka*, 693 N.E.2d 613, 617 (Ind. App) (class of owners of boats which had been damaged by emissions from nearby power plant: "there was one common course of conduct: harmful emissions from NIPSCO's plant which impacted on each of the class members").

[42]*See, e.g.*, Second Amended Class Action Complaint ¶¶ 26, 27.

For example, the Complaint alleges that the defendants dumped large amounts of waste laden with hidden hazardous substances on the huge uncovered refuse pile beside the plant, that the pile was not maintained in a safe and controlled manner, and that wind, heavy equipment, and frequent fires released airborne contaminants to the air of the surrounding communities. *See also Bentley*, 223 F.R.D. at 481("Indeed, when the defendants' conduct towards the proposed class is alleged to be uniform the commonality requirement is met."); *Muniz v. Rexnord Corp.*, 2005 W.L. 1243428 (N.D.Ill.)(alleged standardized conduct directed against the proposed class satisfied the commonality requirement). Each member of the proposed class can be expected to rely on the same common nucleus of operative facts to prove each defendant's liability.

Apart from liability issues, further common questions of fact are raised by the remedies sought. A claim for medical monitoring requires a showing that the plaintiff has been significantly exposed to a hazardous substance through the defendant's tortious conduct, and that, as a result, the plaintiff has an increased risk of contracting a serious disease relative to the general population. *Bower v. Westinghouse Elec. Corp.*, 206 W. Va. 133, 522 S.E.2d 424 (1999) [Syll. Pt. 3]. The issues of whether a substance is hazardous, a community has been exposed, a defendant has behaved tortiously, an exposure can result in increase risk of latent diseases, and monitoring procedures exist by which latent diseases can be diagnosed are all questions that are common to each plaintiff and can be answered on a class-wide basis.

Where a multitude of persons are alleged to have been exposed, it is the most practical course of conduct to address these questions as to the group as a whole. For example, in *In re Paoli Railroad Yard PCB Litig.*, 35 F.3d 717 (3d Cir.1994), *cert. denied sub. nom. General Elec. Co. v. Ingram*, 513 U.S. 1190, 115 S. Ct. 1253, 131 L. Ed. 2d 134 (1995), whose formulation of medical monitoring law was adopted by the West Virginia Supreme Court in *Bower*, 206 W. Va.

at 141, 522 S.E.2d at 432, the court concluded that proving significantly increased risk should be done en masse:

> [W]here experts individualize their testimony to a group of individuals with a common characteristic (i.e., levels of exposure to chemical X above Y amount), we do not think there is a need for greater individualization so long as they testify that the risk to each member of the group is significant. We fail to see the purpose in requiring greater individualization.

Paoli, 35 F.3d at 788. It is for this reason that mass medical monitoring claims are so often certified as class actions. *See, e.g., State ex rel. Chemtall Inc. v. Madden*, 216 W. Va. 443, 607 S.E.2d 772 (2004); *In re Tobacco Litig.*, 215 W. Va. 476, 600 S.E.2d 188 (2004); *State ex rel. E.I. Dupont De Nemours & Co. v. Hill*, 214 W. Va. 760, 591 S.E.2d 318 (2003); *Rezulin, supra;* . *Leach v. E. I. DuPont De Nemours and Company*, 2002 WL 1270121 at *11(W. Va. Cir. Ct. 2001) (not reported) ("In cases like this involving claims from a chemical release, commonality is readily found, particularly where medical monitoring claims are involved.").[43]

Plaintiffs' other requested remedy — i.e., damages for injuries to their properties — raises more common fact issues, including property valuation methods. Although the amount of each class member's loss will vary, the mass appraisal used by Plaintiffs' appraiser is a method

[43] It has not escaped the Court's notice that in at least one other case, DuPont recognized that commonality issues permeate claims for medical monitoring. Just as in the instant action, the plaintiffs in *Leach* were alleging DuPont had contaminated the surrounding community with toxic substances (ammonium perfluorooctanoate ("C-8")), and, consequently, the plaintiffs were seeking a medical monitoring program for the class of residents who had suffered exposure. *Leach v. E. I. DuPont De Nemours and Company*, 2002 WL 1270121 (W. Va. Cir. Ct. 2001)(Hill, J.)(not reported). However, in an attempt to stay the action until West Virginia state agencies had "resolved" common issues, DuPont argued that *Leach* was essentially "a medical monitoring case" and, as such, there were a number of common issues a jury would have to decide in order to determine whether the plaintiffs or proposed class were entitled to medical monitoring. According to DuPont, common issues that affected all class members included whether the chemical posed a risk to human health, and, if so, at what dose and through what routes of exposure, whether the chemical had a propensity to accumulate and persist in human populations and the environment, and whether the chemical had been released into the environment at sufficiently high concentrations so as to cause human populations distances away to be exposed. *Id.* at *10.

that combines practicality with commonality. Dr. John Kilpatrick, an expert retained by the plaintiffs, has conducted extensive field examinations in the Spelter area.[44] (R.T. 324). Based upon his investigation and expertise, Dr. Kilpatrick has concluded that the overwhelming weight of prevailing valuation methodology prefers a mass-appraisal model to determine the impact of the contamination on property values over an individual-appraisal approach.

In fact, at least one court found it error to deny class certification where class property claims were subject to mass appraisal techniques. *Guillory v. Union Pacific Corp.*, 817 So. 2d 1234 (La. App. 2002). In *Guillory*, the appellate court found error where the trial court denied certification of a class of residents near a hazardous chemical spill. Among the factors that led to the finding of error was the fact that the class's damages were amenable to mass appraisal techniques for the computation of diminished property values:

> Dr. Mundy's testimony addressed the process by which he would calculate the value impacts on the properties within the boundaries devised. He explained that the devaluation of properties will vary depending on each piece's proximity from the spill site. He opined that the property devaluation figures for each individual plaintiff could be easily calculated *after performing a mass appraisal* and would be the simplest and most cost-efficient method.

817 So. 2d at 1238 (emphasis added). Property damage, to a large extent, is a common issue that can be determined on a class-wide basis using the mass appraisal technique proposed by Dr. Kilpatrick.

DuPont's own valuation witness demonstrated the impracticability of requiring individual appraisals for each claimant. In response to the Court's inquiries, Jay Goldman testified that conducting individual appraisals of the properties in the class area would take over a year and

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[44] Dr. Kilpatrick holds a Ph.D. in Real Estate Finance and is a state-certified real estate appraiser in West Virginia and many other states. For the last two decades, his firm has specialized in appraising properties that have been affected by contamination. The appraisal model that Dr. Kilpatrick proposes to use in this case has been peer-reviewed by professionals in the field of real estate.

would cost approximately $1,350,000.00. (R.T. 719, 720). Thus, in addition to satisfying the commonality requirement, mass appraisal represents the most economical methodology to address what, if any, harm had been done to property values in the class area.

There are common questions of law as well as common questions of liability and remedies. Questions such as "whether Defendants' conduct was unlawful," for example, will be identical as to each class member. Plaintiffs' legal theories can be determined on a class-wide basis because they are predicated on objective standards that do not depend on the idiosyncrasies of each individual class member. *See e.g. Restatement (Second) of Torts* § 821F, Comment *d* ("If normal persons in that locality would not be substantially annoyed or disturbed by the situation, then the invasion is not a significant one, even though the idiosyncrasies of the particular plaintiff may make it unendurable to him."). To require 3,000 plus claimants to relitigate the same legal issue would be the height of folly and a waste of judicial resources.

C. The proposed Class satisfies the "typicality" requirement of Rule 23(a)(3).

Rule 23 requires that the claims of the representative parties be typical of those of the class. Typicality ensures that the representatives, in advancing their own self-interest, will advance the interest of the class. Typicality has been described by the Supreme Court of Appeals of West Virginia as follows:

- Typicality is satisfied if the representative parties' claims arise from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based upon the same legal theory.
- Class representatives' claims need only be typical of — not identical to – those of the class.
- When the representative parties' claims arise out of the same legal or remedial theory, factual variations are insufficient to defeat typicality.

Typicality closely parallels commonality. As evident from the description above, many courts use the same terms when defining commonality and typicality.

In this particular case, the representative parties have been affected by the same conduct that has affected the class members. *Bentley*, 223 F.R.D. at 482. Not only do they claim to have been aggrieved by the same conduct, but they also advance legal theories and remedies available to each other and to the class members.

D. The proposed Class satisfies the "adequacy" requirement of Rule 23(a)(4).

Adequacy of representation focuses on the qualification of the counsel representing the class and any conflicts between the named plaintiffs and the class they seek to represent. *Rezulin*, 214 W. Va. at 69, 585 S.E.2d at 69. As previously discussed, this Court does not find any conflicts between the named plaintiffs and the class they seek to represent. Furthermore, this Court finds that Plaintiffs' counsel are qualified to represent the class. Class counsel has demonstrated their ability to investigate the claims of the proposed class and to fully prosecute this case. Class counsel has conducted a thorough investigation of the contamination in the class area. To conduct this investigation, class counsel has employed well-qualified experts in the fields of geochemistry, remediation, economics and real estate, medicine, industrial hygiene, and toxic exposure modeling. Over 1,000 samples have been taken and analyzed. In addition, class counsel has thoroughly mapped and documented the class area including the identification of every parcel and its owner.

VI. Certification of the Class is appropriate under Rule 23(b).

A. Certification of the Class is appropriate under Rule 23(b)(1)(A) & (B).

When there is a probability of multiple lawsuits over the same matter, defendants run the risk of inconsistent outcomes that could create incompatible standards for them while plaintiffs

run the risk that they may not be able to protect their interests. "The phrase 'incompatible standards of conduct' is thought to refer to the situation where different results in separate actions would impair the opposing party's ability to pursue a uniform course of conduct." Charles A. Wright, et al., 7A *Federal Practice & Procedure*, § 1773 at 431 (2d ed. 1986). Rule 23(b)(1) was designed to ameliorate the effects of inconsistent outcomes by providing a mechanism to deliver a uniform remedy. *Boggs et al. v. Divested Atomic Corp.*, 141 F.R.D. 58 (S.D. Ohio 1991) (Rule 23(b)(1)(A) ". . . allows a single court to fashion an appropriate remedy, and to bring a controversy to a final and complete resolution.").

Cases involving remediation and medical monitoring are well-suited for class certification under Rule 23(b)(1)(A) and (B). Plaintiffs' remediation claim seeks to have the contaminants removed from their communities. If each resident brought a separate suit, defendants could be subjected to various and inconsistent positions. For example, defendants could be required to fund or conduct potentially hundreds or thousands of remediation plans differing in scope and degree. Under substantially similar circumstances within the same geographical area, defendants could be required to remove surficial contamination in one case, while in another case be required to remove surficial soil and contaminated subsoil and in another only be required to pay damages as a result of substantially the same contamination.

However, the existence of inconsistent outcomes would subject the Plaintiffs to a far worse injustice. For example, a successful plaintiff could be awarded injunctive relief in the form of remediation, while a neighbor may receive an award of only monetary damages. Therefore, separate suits could result in a remediated property lying adjacent to contaminated property. Under this scenario, plaintiffs, especially children, would still be subject to exposure, and remediated property could be re-contaminated.

B. Certification of the Class is appropriate under Rule 23(b)(2).

Certification is warranted under Rule 23(b)(2) for two reasons: (1) the nature of Defendants' conduct, and (2) the nature of the relief sought. The Supreme Court has affirmed that "[t]he key [in applying Rule 23(b)(2)] is whether the actions of the party opposing the class would affect all persons similarly situated, so that the acts apply generally to the whole class." *Rezulin*, 214 W. Va. at 70, 585 S.E.2d at 70. For example, in *Rezulin*, where the plaintiffs asserted the defendants had exposed the class members to the same risks, the allegations not only justified, but required, certification under Rule 23(b)(2):

> The plaintiffs assert that all members of the proposed class took the same drug, and were subject to the same risk of possible injuries. The drug was made by the same defendants, and the defendants' conduct was directed toward a discrete population: the plaintiffs, all West Virginia diabetics who needed medication for control of their condition. . . . [W]e conclude that the plaintiffs have met the initial requirements of Rule 23(b)(2) and shown that the defendants acted, or refused to act, in a manner generally applicable to the entire proposed class. The circuit court therefore erred in holding otherwise.

214 W. Va. at 71, 585 S.E.2d at 71.

Plaintiffs' allegations in the case at bar are analogous to those in *Rezulin*: all members of the class were exposed to the same toxic substances and have at a minimum reached the same threshold risk of injury; all class members' properties have suffered the same harm (diminished value) for the same reason; the same wrongful practices were knowingly or negligently perpetrated by the same defendants; and Defendants' conduct affected a discrete populace, i.e., residents of the communities around the smelter. Thus, this Court finds that Plaintiffs have alleged that Defendants have acted in a manner generally applicable to the class. Such a finding is unsurprising, for that is often the situation where a large group of persons is exposed to an environmental hazard. *See e.g. State ex rel. Chemtall Inc. v. Madden*, 216 W. Va. at 450, 607 S.E.2d at 779.

The appropriateness for certification under Rule 23(b)(2) is further evidenced by the fact that Plaintiffs are seeking a common medical monitoring program under the oversight of the court. *See Rezulin* Syll. Pt. 14 ("[u]nder Rule 23(b)(2) . . . a court may exercise its equitable powers to establish and administer a court-supervised medical monitoring program to oversee and direct medical surveillance, and provide for medical examinations and testing of members of a class").

C. Certification of the Class is appropriate under Rule 23(b)(3).

Plaintiffs' claims are appropriately certified under Rule 23(b)(3). Under Rule 23(b)(3), a case may be certified as a class if:

> [t]he court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

W. Va. R. Civ. P. 23(b)(3). The two keystones of certification under Rule 23(b)(3) are "predominance" and "superiority."

In *Rezulin*, the Supreme Court rejected a rigid formulation of the test for predominance and opted for a test that contemplates a review of many factors, including the central question of whether "adjudication of the common issues in the particular suit has important and desirable advantages of judicial economy compared to all other issues, or when viewed by themselves." *Rezulin*, 214 W. Va. at 72, 585 S.E.2d at 72 (quoting 2 *Newberg on Class Actions*, 4th Ed. § 4:25 at 174). In setting the guidelines to determine predominance, the court made the following points:

- The predominance test does not demand that common issues be dispositive.
- It is not the amount of time needed to adjudicate common issues versus individual issues.
- It is not a scale-balancing test of the number of issues suitable for either common or individual treatment.
- A single common overriding issue will satisfy the predominance requirement even when the suit involves numerous individual questions.

Id. at 72.

Justice Springer, elaborating on these points, has provided the following salient advice:

> [T]he bigger the class, the greater the likelihood that the defendant will argue that there is no common problem across the system. Defendants will argue . . . that each plaintiff's case is different. . . .
>
> Defendants attempting to avoid class certification will, almost exclusively, overwhelm a circuit judge with the differences between each class member's case. It is akin to a judge being asked to look at a forest of oak trees and being told the difference between each tree: each tree has a different height, a different color, a different number of leaves, a unique number of branches, a wide variation in the number and size of tree rings, and so on.
>
> The test for the judge, though, is to step back and look at the similarities in class members. Step back and see the forest. No matter the number of branches or leaves, a collection of oak trees has enough similarities to be called a "class" of oak trees.

Gulas v. Infocision Mgmt. Corp., *supra*, 215 W. Va. 225, 230, 599 S.E.2d 648, 653 (Starcher, J., concurring).

In this case, the Court finds that there are common questions of law or fact that predominate over any individual issues that may arise among the class members. Liability is one such issue. A common overriding question in this litigation is, "did the defendants' operation and management of the smelter site cause the contamination of the proposed class area?" *Olden v. LaFarge Corp.*, 383 F.3d 495 (6th Cir. 2004) (Liability of plant owner for toxic emissions was a common issue that predominated over individual questions of damages.); *Bolanos v. Norwegian*

Cruise Lines, Ltd., 212 F.R.D. 144 (S.D.N.Y. 2002) ("Courts should particularly focus on the liability issue . . . and if the liability issue is common to the class, common questions are held to predominate over individual questions."). The defendants' liability arises out of the same nucleus of operative facts for each plaintiff. For example, each plaintiff would rely upon the same evidence to show the negligent conduct of each defendant. Each proposed class member would rely on the same evidence to prove the defendants' knowledge of the dangers posed by the waste generated at the smelter and of the releases of this waste into the surrounding communities.

Indeed, the only issue of any significance that is not identical to all class members is the amount of damages sustained by each claimant. But the need for an individual showing of damages does not preclude class certification under Rule 23(b)(3) where, as here, common issues predominate. *Rezulin*, 214 W. Va. at 72, 585 S.E.2d at 72. Moreover, the medical monitoring remedy is a class remedy that has as its purpose an ongoing determination of any individual injuries.

Olden v. LaFarge Corp., 383 F.3d 495 (6th Cir. 2004), *cert. denied*, __ U.S. __, 125 S. Ct. 2990, 162 L. Ed. 2d 910 (2005), for example, upheld the certification of a class of residents alleging personal injury and property damage caused by the emission of pollutants from a cement manufacturing plant. The court held that, despite variances in the amount of damages, common issues of liability predominated:

> [I]ndividual damage determinations might be necessary, but the plaintiffs have raised common allegations which would likely allow the court to determine liability (including causation) for the class as a whole. For instance, although some named plaintiffs admittedly describe a variety of minor personal medical issues . . . which might require individualized damage determinations, the thrust of the plaintiffs' personal injury complaint appears to be related to the general increased risk of the class suffering medical problems in the future. . . . Whether the defendant's negligence caused some increased health risk and even whether it tended to cause the class minor medical issues can likely be determined for the entire class. Similarly, although some named plaintiffs present a number of minor

> examples of specific property damage (roof damage, dead rose bushes, damaged window pane, peeling stain on deck, rusting of automobile), these examples seem to be no more than illustrative of the common argument that the class's properties are regularly covered in cement dust, causing minor property damage and a predictable reduction of property value and enjoyment of the property. Whether the defendant's negligence generally caused minor property damage and cement dust can likely be determined for the entire class as well.

383 F.3d at 508-09 (footnote omitted); *see also Clark v. Trus Joist MacMillian*, 836 So. 2d at 461 ("Trus Joist contends class certification must fail because plaintiffs have differing degrees of injury and assert disparate complaints and experiences. However, it is not necessary that all plaintiffs suffer identical damage and individual questions of quantum do not preclude a class action when predominate liability issues are common to the class.").

Class action is superior to other methods for adjudicating Plaintiffs' claims. Litigating common issues is far superior to thousands of individual claims. Applying the four factors set out in Rule 23(b)(3) underscores the superiority of class adjudication. The Court is persuaded that two individual actions out of the thousands of class members is insufficient to show that there is any interest by the putative class members in individually controlling the litigation. The Court further finds that the two pending cases will not present any difficulty in allowing this case to proceed as a class.[45]

Only two individual cases have been filed, which does not indicate there is an interest among the class members in individually controlling the prosecution. To the contrary, the fact that only two cases have been filed out of potentially thousands of cases demonstrates the superiority of class treatment. Individual actions would likely be prohibitively expensive. For example, class certification will permit a mass appraisal method to determine the effect, if any,

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[45] Defendants have already agreed to try the property damage and medical monitoring claims of one of the cases, the Drummond case, with the claims in the instant case, which also involves the same Plaintiffs' counsel; any other case with similar claims could be managed in like manner.

the smelter's operations have had on property values. Such a mass appraisal will allow spreading of the cost of the model over the entire class of property owners, as opposed to each property owner being forced to develop expensive and time consuming appraisal models to quantify the effects, if any, the smelter has had on his or her property value.

As to the third factor, the desirability or undesirability of concentrating the litigation of the claims in the particular forum, a class approach not only to liability but also to the establishment of uniform medical monitoring and property damage programs is highly desirable. As to the fourth factor, through proper case management, any difficulties likely to be encountered in the management of this class action will be minimized and will pale in comparison to the onerous, if not impossible task, of trying hundreds, if not thousands, of similar claims separately. Indeed, because of the type of vigorous defense mounted by Defendants, and the expense of hiring experts and otherwise challenging such a defense, it is doubtful that many of these relatively small medical monitoring and property damage claims could be brought without a class approach.

Common defenses such as the Grasselli "release" issue will also greatly benefit by common treatment as to those properties to which they apply.[46] Since some of the class representatives' properties are subject to the release issue, the issue will be joined and will be far more effectively litigated in a common manner than through piecemeal litigation. Similarly, to the extent Defendants request to undertake additional sampling for use in developing alternative

[46] Again, as set forth more fully in Footnote 34 herein, the issue of the Grasselli releases also may be addressed via summary judgment proceedings during the upcoming phase of the litigation on the merits. This issue also may warrant treating those properties affected by the Grasselli releases as a subclass, depending on how the parties brief the issue in the next phase of the litigation. In the meantime, in this Order, the Court does not purport to treat those properties affected by the Grasselli releases differently from other properties in the class area.

remediation cost assessments, these requests can be timely managed through the discovery process.

Post-class trial (i.e., phase two) individual damages adjudications may prove necessary for calculating individual damages such as mental suffering and individual application of the punitive damage liability findings. However, bifurcation, if it proves necessary, will not hinder the efficient litigation of the many class issues.

The decision faced by this Court, in sum, is whether to fragment the common issues into thousands of individual lawsuits, where each plaintiff would assert the same theories against the same defendants based on the same evidence, or to certify the class. In answer, this Court finds that a class action is superior to other available methods for the fair and efficient adjudication of the present controversy.

VII. Purpose of Findings of Fact.

The Findings of Fact set forth herein are made for the purpose of resolving the class certification motion issues and are not intended to be final and binding or usurp the function of the jury.

Based on the foregoing, the Court, having found the requirements for class certification to be satisfied, hereby **ORDERS** that this matter proceed on behalf of a class as defined in Plaintiffs' Second Amended Class Action Complaint, except that the class boundary shall expand to those additional areas depicted in Plaintiffs' air model.

Accordingly, it is **ORDERED** that:

(1) Plaintiffs' motion to certify the class defined in the second amended complaint, as modified by Plaintiffs' air model, is **GRANTED**.

(2) Within 30 days of this Order, Plaintiffs shall submit (a) a revised class boundary map consistent with this Order; (b) a proposal for what steps must be undertaken to attempt to identify and locate class members; (c) the proposed form of the notice to be given to class members that can be identified and located; and (d) a brief regarding the form of notice that must be given to class members that cannot be identified or located. Defendants shall submit a response to such notice proposal within 21 days thereafter.

Finally, it is hereby **ORDERED** that the Clerk of this Court shall provide certified copies of this Order to the following:

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ENTER: September 14, 2006

Thomas A. Bedell

Thomas A. Bedell, Circuit Court Judge

STATE OF WEST VIRGINIA
COUNTY OF HARRISON, TO-WIT:

I, Donald L. Kopp II, Clerk of the Fifteenth Judicial Circuit and the 18th Family Court Circuit of Harrison County, West Virginia, hereby certify the foregoing to be a true copy of the ORDER entered in the above styled action on the 14 day of September, 2006.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix Seal of the Court this 15 day of September, 2006

Donald L. Kopp II

Fifteenth Judicial Circuit & 18th Family Court
Circuit Clerk
Harrison County, West Virginia