

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

WOLVERINE WORLD WIDE, INC.,

Plaintiff,

v

Case No. 1:19-cv-00010

THE AMERICAN INSURANCE COMPANY,
et al,

Judge Janet T. Neff
Magistrate Judge Sally J. Berens
Special Master Paula Manderfield

Defendants.

**REPORT AND RECOMMENDATION REGARDING CERTAIN DEFENDANTS'
CROSS-MOTION FOR SUMMARY JUDGMENT ON APPLICATION OF THE
POLLUTION EXCLUSION TO THE UNDERLYING ENVIRONMENTAL ACTIONS**

Before the Court is Certain Defendants¹ Cross-Motion for Summary Judgment on Application of the Pollution Exclusion filed by Defendants Century, Wausau and Liberty Mutual (ECF Nos. 626 and 663). Plaintiff Wolverine World Wide, Inc.'s ("Wolverine") Response in Opposition to this Motion is at ECF No. 794. Certain Defendants filed a Reply Brief (ECF No. 895). Defendants Travelers and AIC joined the Motion and Travelers joined the Reply Brief. As Defendants Liberty Mutual and AIC have settled their primary policies, this report and recommendation will focus on the remaining three primary insurer Defendants, Century, Travelers and Wausau. After reviewing the motion, briefs and the appended exhibits, the Special Master submits the following report and recommendations.

I. Background

¹ Certain Defendants as used herein refers to Defendant Employers Insurance Company of Wausau ("Wausau"), Century Indemnity Company, as Successor to CCI Insurance Company, as successor to Insurance Company of North America ("Century"), and Liberty Insurance Company ("Liberty"). Defendant Travelers Indemnity Company ("Travelers") and The American Insurance Company ("AIC") joined in Certain Defendants motion (ECF Nos. 646 and 723) and Travelers filed a Separate Joinder to Certain Defendants' Reply Brief. (ECF No. 897). Certain Defendants, Travelers and AIC are referred to herein as Defendants or Defendant Insurers.

In this insurance coverage dispute, Wolverine has sought insurance coverage from Defendants, for both defense and indemnity, in regard to multiple lawsuits ("Underlying Actions") pertaining to Wolverine's historic manufacturing waste disposal practices. The Underlying Actions² allege property damage, personal injury and/or bodily injury related to Wolverine's use of per- or polyfluoroalkyl substances ("PFAS") in its historic tannery operations. The Underlying Actions all generally allege that PFAS were key ingredients in Scotchgard, which 3M began manufacturing in the mid-1950s, and which Wolverine began incorporating into its manufacturing processes at its facility in Rockford, Michigan. Wolverine began using Scotchgard in approximately 1958 and continued to use the product until 3M changed the formulation in approximately 2001. (ECF No. 794-4, Exhibit D, page 3)

Certain Defendants issued Wolverine primary comprehensive general liability insurance policies that were in effect from 1971 to 1986 (the "Policies"). The Policies contain pollution exclusions that exclude coverage for liabilities arising out of discharges, dispersals, releases or escapes of contaminants or pollutants, subject only to an exception where the relevant discharge, dispersal, release or escape is "sudden and accidental" (Wausau and Century Policies) or "expected or intended" by the insured (Travelers Policies).

More specifically, Defendant Century and Wausau's Policies include a pollution exclusion, substantially identical which states:

This insurance does not apply: (f) to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants, or pollutants into or upon the land, the atmosphere or any water course or body of water; but this

² The "Underlying Actions" refer to (1) multiple individual actions (estimated at 280 tort actions) filed in Kent County Circuit Court, consolidated as *In re Nylaan Litigation*, Case No. 17-10716-CZ; (2) the *Beverley Zimmerman, et al. v. 3M Company, et al.* class action; the *Megan Johns, et al. v. Wolverine* class action; and *Susan Henry v. Wolverine World Wide* class action (which have been consolidated); (2) *Michigan Department of Environmental Quality v. Wolverine World Wide*; (3) the Unilateral Administrative Order served on Plaintiff by the US EPA; and (4) the *Boulder Creek Development Co, LLC v. Wolverine* action.

exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental. (Certain Defendants' Brief (Sealed) ECF No. 633, page 10, Exhibit 2, pages 55-57).

Defendant Travelers' pollution exclusion states that:

This insurance does not apply: * * * to bodily injury or property damage arising out of any emission, discharge, seepage, release or escape of any liquid, solid, gaseous or thermal waste or pollutant if such emission, discharge, seepage, release or escape is either expected or intended from the standpoint of any insured or any person or organization for whose acts or omissions any insured is liable. (ECF No. 646 PageID.48660)

Certain Defendants assert in their motion that when the Policies are applied to the detailed allegations in the complaints in the Underlying Actions, it is clear that the Policies' pollution exclusions apply to completely bar Wolverine's claims for defense and indemnity in this action. In support of this, Certain Defendants attached as exhibits to its Brief the complaint in *Bronkema, et al v Wolverine*, Case No. 18-08894-CZ (ECF 544-6) pending in the Kent County Circuit Court. Defendants contend that the allegations in the *Bronkema* complaint are representative of all the individual actions filed by Varum LLP and that all individual actions contain similar allegations concerning Wolverine's long-term dumping and discharge of chemicals as well as its impact on groundwater and property (ECF 633, page 4, footnote 4).

Further, Certain Defendants attached to its Brief, the Amended Complaint in *MDEQ v Wolverine and The 3M Company*, Case No. 1:18-cv-0039-JTN-ESC, pages 92-111; the Amended Complaint in *Jeffrey M. Klekotka v Wolverine and The 3M Company*, Case No. 2018-01864-NI, pending in the Kent County Circuit Court, Decl. of Robert D. Anderle, Exhibit 3, pages 61-91; and the Amended Consolidated Class Action Complaint with Individual Claims in *Zimmerman, et al, v The 3M Company and Wolverine*, Case No. 1:19-cv-379 pending in the US District Court for the Western District, Southern Division., pages 112-164. Defendants contend that all of the complaints contain similar allegations focused on long-term disposal practices and dumping by Wolverine

which resulted in long-term contamination of the environment. Defendants further contend that there are no allegations identifying any sudden and accidental discharges (Certain Defendants Brief, ECF No. 633, page 16-18).

Defendants argue there is a recognized subset of pollution cases where the applicability of the pollution exclusion is so apparent from the complaint or other facts of record that coverage is not “even arguable” because the “sudden and accidental” exception to the pollution exclusion does not apply. In support of their position, Defendants point to *Auto Owners Ins. Co. v City of Clare*, 446 Mich. 1, 521 N.W. 2d 480 (1994) as the quintessential case for such an outcome. Additionally, Defendants point to *City of Bronson v. American States Ins. Co.*, 215 Mich. App. 612, 621-22, 546 N.W.2d 702 (1996) (no defense or indemnity based on the operation of the pollution exclusion because long-time dumping of industrial waste in a landfill was not sudden and accidental); and *Traverse City Light & Power Bd. v. Home Ins. Co.*, 209 Mich. App. 112, 530 N.W.2d 150 (1995) (no defense or indemnity for a pollution claim based on an expected or intended pollution exclusion because of an insured's long term dumping practices) and *Matakas v. Citizens Mut. Ins. Co.*, 202 Mich. App. 642, 509 N.W.2d 898 (1993) (no defense or indemnity because allegations of deliberate dumping of waste over time was not sudden or accidental, and the pollution exclusion applied). (ECF No. 633, Certain Defendants' Brief pages 13-14).

Defendant Travelers argues that the pollution exclusion in its Policies preclude coverage for the same reasons as the sudden and accidental pollution exclusions at issue in Century and Wausau’s policies: the Underlying Actions are based on Wolverine’s long-term and deliberate dumping of its tannery waste in West Michigan. (Travelers Joinder ECF No. 646 PageID.48660-61).

While Wolverine concedes that the Underlying Actions allege pollution claims, it maintains that the limited exception to the pollution exclusion is applicable and requires that Certain Defendants defend the Underlying Actions until each of those cases is fully and finally resolved. Wolverine argues that factual development, including findings of fact or dispositive rulings in all of the underlying claims or suits, is required in all cases applying the pollution exclusion. Wolverine further argues that the pollution exclusions here are not absolute and the determination of whether the exclusions apply would require an evaluation of complex facts to determine: (1) Under the Travelers' Policies, whether each and every alleged pollution event was "expected or intended from the standpoint of the insured"; and (2) Under the Wausau and Century Policies, whether there was any alleged discharge or dispersal or release or escape that was "sudden and accidental."

Wolverine contends that because such an analysis necessarily involves facts that the underlying plaintiffs have no reason to plead and that thus fall outside of the underlying complaints, Michigan courts have consistently held that consideration of such exclusions at the duty-to-defend stage is inappropriate, premature and, in fact, "impossible." Wolverine relies on, among other authorities, *Am. Bumper & Mfg. Co. v Hartford Fire Ins. Co.*, 452 Mich.440, 550 N.W.2d at 483 (1996) ("the insurers cannot escape their duty to defend on grounds of their pollution-exclusion clauses."), *Polkow v Citizens Ins. Co.* 438 Mich. 174, 476 N.W.2d at 384 (1991) ("resolution of whether the sudden and accidental exception applies is impossible" at the duty to defend stage (Wolverine Brief in Opposition, Pages 8-9). Defendants disagree and contend that Wolverine's position is directly contrary to many decisions applying the pollution exclusion that have found no duty to defend.

II. Standard of Review

Under Fed. R. Civ. P. 56, “summary judgment is appropriate when the ‘pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.’” *Estate of Smithers ex rel. Norris v City of Flint*, F.3d 758, 761 (6th Cir. 2010). The court must construe the facts in the light most favorable to the non-moving party. *Audi AG v D'Amato*, 469 F.3d 534, 542 (6th Cir. 2006). If the moving party carries the burden of showing that there is an absence of evidence to support a claim or defense, then the party opposing the motion must demonstrate by admissible evidence that there is a genuine issue of material fact for trial and cannot rest on its pleadings. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324-325 (1986); *George v Youngstown State Univ.*, 966 F.3d 446, 458 (6th Cir. 2020). The central issue is “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-252 (1986).

III. Analysis

A. The Exceptions to the Pollution Exclusions are Unambiguous.

A federal court sitting in diversity, is required to apply the substantive law of Michigan, the forum state. *Berrington v. Wal-Mart Stores, Inc.*, 696 F.3d 604, 607 (6th Cir.2012) (citing *CenTra, Inc. v. Estrin*, 538 F.3d 402, 409 (6th Cir.2008)). Sudden and accidental pollution exclusions substantially similar to the exclusions at issue in this case have been addressed by a myriad of cases in federal and state courts. In particular, the Michigan Supreme Court has defined the terms “sudden and accidental” as follows:

We conclude that when considered in its plain and easily understood sense, “sudden” is defined with a “temporal element that joins together conceptually the immediate and the unexpected.” *United States Fidelity & Guaranty Co. v. Star Fire Coals, Inc.*, 856 F.2d 31, 34 (6th Cir., 1988). The common, everyday understanding of the term “sudden” is

“happening, coming, made or done quickly, without warning or unexpectedly; abrupt.” *FL Aerospace v. Aetna Casualty & Surety Co.*, 897 F.2d 214, 291 (6th Cir., 1990). “Accidental” means “[o]ccurring unexpectedly and unintentionally; by chance.” The *American Heritage Dictionary: Second College ed.*, p. 72. We, therefore, reject the definition of “sudden and accidental” as set forth by the Michigan Court of Appeals in *Jonesville (Jonesville Products, Inc. v. Transamerica Ins. Group*, 156 Mich. App. 508, 512, 402 N.W.2d 46 (1986)). Thus, we find that the terms “sudden” and “accidental” used in the pollution exclusion clause are unambiguous. *Upjohn Co. v. New Hampshire Ins. Co.*, 438 Mich. 197, 207–208, 476 N.W.2d 392, 397–98 (1991) (some full citations added).

To be considered “sudden,” the discharges from the landfills and other locations must have been identifiable, temporally isolated events rather than part of a gradual seepage process of Wolverine's waste. In other words, for the “sudden” prong of the “sudden and accidental” exclusion to apply, Wolverine “must present evidence of isolated discharges apart from the overall continuous leaking” of the contaminants. *City of Albion v. Guar. Nat'l Ins. Co.*, 73 F.Supp.2d 846, 852 (W.D.Mich.1999) (quoting *South Macomb Disposal Auth. v. Am. Ins. Co.*, 225 Mich. App. 635, 681, 572 N.W.2d 686, 707 (1997)).

In addition, the Michigan Supreme Court has held, in the context of spraying insecticides, that the relevant discharge under the pollution exclusion is “the initial discharge, dispersal, release, or escape into the atmosphere and not the subsequent migration.” *Protective Nat. Ins. Co. of Omaha v. City of Woodhaven*, 438 Mich. 154, 476 N.W.2d 374, 377 (Mich.1991).

As an initial matter, the Special Master concludes that based on the foregoing authorities the “sudden and accidental” exception to the pollution exclusion found in Century and Wausau’s Policies is unambiguous and that unless the pollution arises out of identifiable, temporally isolated events, coverage under those Policies is excluded.

The Special Master further concludes that the pollution exclusion in Travelers’ Policies unambiguously excludes coverage if the pollution is “expected or intended” from the standpoint of the insured. Insurance policies are subject to the same contract construction principles that apply

to any other contract. *Rory v. Continental Ins. Co.*, 473 Mich 457, 461; 730 NW2d 23 (2005). The language of the parties' contract is the best way to determine what the parties' intended, and when the language is clear and unambiguous as it is here, the plain language will be given effect. *Klapp v United Ins. Group Agency, Inc.*, 468 Mich 459, 473; 663 N.W.2d 447 (2003) (citation omitted).

However, the Special Master does not agree with the assertion by Certain Defendants that when the unambiguous terms of the Policies are applied to the allegations in the complaints from the Underlying Actions that the pollutions exclusions necessarily bar Wolverine's claims for defense in this case. Rather, as explained in more detail below, the Special Master concludes that at least at this stage of the proceedings, the allegations in the Underlying Actions are insufficient, on their own, to demonstrate that Certain Defendants have no duty to defend.

B. Licensed vs Unlicensed Landfills

Before addressing the Certain Defendants' duty to defend notwithstanding the pollution exclusions in their policies, it is necessary to first consider how Michigan's appellate courts have addressed similar exclusions since the Michigan Supreme Court decided *Upjohn and City of Woodhaven*, *supra*. Three years after it decided those two cases, the Michigan Supreme Court explicitly declined to rule on whether, in the context of pollution at a landfill site, the proper focus for determining the applicability of a pollution exclusion is the discharge from, rather than into, the landfill. *Auto Owners Ins. Co. v. City of Clare*, 446 Mich. 1, 521 N.W.2d 480, 486 n. 12 (Mich.1994) (per curium). The court did not have to address *Woodhaven*'s "initial discharge rule" because the result would have been the same whether it focused on the discharge into or the discharge from the landfill. *Id.*

The Michigan Court of Appeals was then called on to determine whether the pollution exclusion barred insurance coverage for a plaintiff that had disposed of its fly ash, a waste material

produced by its electrical generation plant, at an abandoned, unlicensed gravel pit from 1975 to 1987. *Traverse City Light & Power Bd. v. Home Ins. Co.*, 209 Mich.App. 112, 530 N.W.2d 150, 151 (Mich.Ct.App.1995). The Court of Appeals held that the initial discharge rule articulated in *Woodhaven* applied to the case. The court accordingly focused on “the initial discharge or placement of the materials into the gravel pit, not on their alleged subsequent migration into the soil.” *Id.* Central to the court's analysis was its determination that the plaintiff's disposal of the fly ash into the gravel pit was an initial discharge of the material into the environment. *Id.* at 153.

Following those decisions, however, Michigan’s appellate courts held on various occasions that when considering an insurance policy’s pollution exclusion, the proper focus is on the discharge from the licensed landfill if the landfill was built according to then contemporary standards believed sufficient to contain the contaminants. For example, in *Kent County v. Home Ins. Co.*, 217 Mich. App. 250, 551 N.W.2d 424 (Mich.Ct.App. 1996), the court recognized that when the record was viewed in a light most favorable to the plaintiff, the landfill began operating at a time that it was a “state of the art facility licensed to receive solid waste only.” *Id.* at 427. The court held that for purposes of the pollution exclusion, the initial discharge was the discharge from the engineered landfill into the environment, rather than the discharge into the landfill. *Id.* at 441–42.

Kent County did not overrule *Traverse City*, *supra*. Rather the *Kent County* decision is more in the nature of a refinement of the analysis in *Traverse City*. *Kent County* distinguished discharges of contaminants into the environment (the atmosphere in *Woodhaven* and the gravel pit in *Traverse City*), where the focus is on the initial discharge, from the placement of contaminants in a container, where the focus is on the release of the contaminants into the environment from the container. *Id.* The court determined that the placement of contaminants into a licensed engineered

landfill believed to be adequate to contain the materials was like the placement of contaminants into a container. *Id.* at 432–33. Accordingly, for purposes of the pollution exclusion, the relevant discharge was the discharge from the landfill. The court distinguished *Traverse City* on the basis that the gravel pit was not engineered to be a contained area and the plaintiff disposed of its waste in the gravel pit without any regulatory approval. *Id.* at 434.

The Michigan Court of Appeals, on remand from the Michigan Supreme Court for consideration as on leave granted, again considered the pollution exclusion as applied to four licensed landfills in *South Macomb Disposal Auth. v. Am. Ins. Co.*, 225 Mich. App. 635, 572 N.W.2d 686, (Mich. Ct. App. 1997). The first landfill was created in 1967 at a site that had previously been used as a sand and gravel mine. *South Macomb*, at 691–92. The water table at the site was high, there was no artificial barrier, and the geologist who investigated the site was not enthusiastic about using the site as a landfill because of anticipated leachate problems. Nevertheless, for purposes of the pollution exclusion, the court held that the relevant discharge was the discharge from the landfill rather than the placement of the waste into the landfill. *Id.* at 703.

The *South Macomb* Court explained its decision as follows: The landfills were designed consistent with then contemporary standards. Experts testified that plaintiff responded sufficiently to the outbreaks under those standards. From the outset of their operations, these landfills, although approved by the DNR, were fraught with problems arising from their operation and maintenance. These continuing problems, however, do not render it improper to focus on the discharge of contaminants from the landfills. The refuse was placed into the landfills that had been constructed to contain the waste. "Consistent with the holding in *Kent Co.*, we agree that the proper focus is the leaking of leachate and contaminants from the landfill into the surrounding soil and

groundwater because the refuse had been placed into a landfill designed and licensed to contain waste". *Id.*; see also *City of Albion v. Guaranty Nat. Ins. Co.*, 73 F.Supp.2d 846, 852 (W.D.Mich.1999) (Quist, J.) (holding that for purposes of the "sudden and accidental" exception to the pollution exclusion, the relevant release was the release from the Landfill into the environment if the landfill was licensed by the State and designed and constructed in accordance with then-contemporary standards).

C. Application of Case Law to the Pollution Exclusions in this Case

Turning back to the case at bar, it is impossible to ignore the serious allegations in the Underlying Actions regarding the long time dumping of industrial wastes by Wolverine. Indeed, the underlying complaints outline in detail the waste disposal practice at various sites over many decades by Wolverine going back to 1939. However, that observation does not necessarily lead to the conclusion that the proper focus for determining the applicability of a pollution exclusion in this case should be on those activities, as Certain Defendants contend. The Defendants argue that because the complaints in the Underlying Actions include allegations that Wolverine, in the past, made the discharges of industrial waste directly into the environment, without any reasonable belief that there were sufficient measures to contain the contaminants according to then contemporary standards, coverage in this case is precluded and no duty to defend exists.

Certain Defendants' argument, however, does not properly consider that the complaints in the Underlying Actions do not allege claims for bodily injury and property damages that are premised on all of Wolverine's historic waste disposal practices. Rather, the complaints in the Underlying Actions more specifically contend that Wolverine's waste disposal practices related to its use of per- or polyfluoroalkyl substances ("PFAS") caused the bodily injury and property damage at issue. Accordingly, in considering the application of the pollution exclusions in this

case, the proper focus is on discharges related to PFAS and not on other types of discharges that may have occurred before that time.

To this point, the Special Master has recognized in a prior Report and Recommendation on Consequential Damages (ECF No. 1373) that the Underlying Actions all generally allege that PFAS were key ingredients in Scotchgard, which 3M began manufacturing in the mid-1950s, and which Wolverine began using at its facility in Rockford, Michigan in 1958. “Thus, 1958 is the most appropriate start date, or trigger date, for the allocation period as it relates to the duty to defend.” (ECF No. 1373, PageID.123522).

The Special Master also stated in footnote three of the same Report and Recommendation that “[w]hile some of the individual actions that were filed in the Kent County Circuit Court allege that Wolverine began dumping sludge and tannery waste at its House Street Property as early as 1939, the complaints also clearly attribute the alleged property damage and bodily injury to PFAS, which the complaints acknowledge were not used by Wolverine until 1958.” *Id.* Further, the class actions and the governmental action reference only the 1958 date and do not allege earlier contamination by Wolverine. (See e.g., ECF 510-3, PageID#12953 and ECF 510-4, PageID#13002). (ECF No. 1373, PageID.123522). *Id.* Therefore, the focus on pollution discharges should be Wolverine's waste disposal practices after Scotchgard was incorporated into its manufacturing processes in 1958 and going forward.

With the focus properly placed on the pollution discharges that occurred after Wolverine incorporated Scotchgard into its manufacturing processes, the complaints in the Underlying are, on their own, insufficient to demonstrate that Certain Defendants have no duty to defend. Pursuant to the MDEQ Amended Complaint the House Street Disposal Site was licensed under Act 87 of the Public Acts of 1965 (Act 87) for the disposal of solid waste in 1966 (Certain Defendants' Brief,

ECF No. 633, Exhibit 3, Decl. of Robert D. Anderle Exhibit B, page 98). It is not clear how long this site was licensed or used. However, in light of *Kent Co., South Macomb*, and the other authorities discussed above, it is at least arguable that the proper focus, when determining the applicability of the pollution exclusions, should be on the leaking of leachate and contaminants from the landfill into the surrounding soil and groundwater because the waste containing PFAS may have been placed into a landfill designed and licensed to contain that waste.

Under these circumstances, the case law relied on by Certain Defendants does not support their contention that coverage is excluded at this duty-to-defend stage of the proceedings. As Wolverine correctly notes, in the cases relied upon by Defendants, unlike here, the courts reached their decisions on whether the pollution exclusions applied based on a thorough factual record that included facts that were stipulated or otherwise agreed to by the parties and that definitively resolved the question of whether the narrowly defined discharges at single sites or involving singular actions were “sudden and accidental” or “expected or intended.” No similar factual record, stipulated or otherwise, exists here.

Consider *Woodhaven*, *supra*, for example. In that case, the Michigan Supreme Court held in favor of the insurer because the parties agreed that the release of the pesticide into the atmosphere was not sudden and accidental. *Id.* at 377. The facts in the *Woodhaven* case are distinguishable to the allegations here. The Underlying Actions do not involve any stipulated facts that any purported release of pollutants into the environment was intentional. Nor has there been any agreement by Wolverine that any or all purported releases, discharges, or other events at any of the sites at issue was anything other than sudden and accidental. To the contrary, Wolverine disputes the underlying plaintiffs’ allegations. (See, e.g., Garrison Decl., Ex. F.)

Similarly, *Auto Owners Ins. Co. v. City of Clare*, like *City of Woodhaven*, relied not on allegations of an underlying complaint, but on a stipulated statement of facts agreed to by the insured. *Id.*, 521 N.W. 2d 480, n. 1 (Mich. 1994). That stipulated statement of facts included, without limitation, an agreement by the insured that the single landfill in dispute was not licensed and that the landfill was the sole source of the contamination at issue. *Id.* at 482-83. Based on those agreed facts, the court determined that there was no possibility for the “sudden and accidental” exception to the pollution exclusion to apply. *Id.* at 486-87. (Wolverine's Brief, ECF No 794, page 25). But again, no such stipulated facts exist here, and the factual record as it currently exists does not resolve the issue.

Given the foregoing, the Special Master concludes, at least at this stage of the proceedings, that there is insufficient information to be gleaned from the facts alleged in the complaints from the Underlying Actions to conclude that coverage is excluded and that no duty to defend exists. This conclusion is perhaps even more true with respect to the pollution exclusion contained in the Travelers' Policies.

In *Decker Mfg. Corp. v. Travelers Indem. Co.*, 2015 WL 438229 (W.D. Mich. 2015) the Western District of Michigan interpreted the precise exclusionary language from a Travelers policy that is in the Travelers' pollution exclusions in the case at bar. In *Decker*, like here, the insured had a Travelers policy that included a pollution exclusion that applied only if the pollution events were “expected or intended” by the policyholder. *Id.* at *3. In determining whether that exclusion barred coverage, the court in *Decker* first reviewed Michigan Supreme Court case law and concluded that, where an insured's disposal practices are consistent with “then contemporary standards,” the “relevant discharge is the discharge from the landfill into the environment rather than the placement of waste into the Landfill” *Id.* at *9. The *Decker* Court held:

There is no factual dispute that this Landfill, like the landfills at issue in *Kent County* and *South Macomb*, conformed to then-contemporary standards when it was built. There is also no dispute that it was licensed by the State throughout the time it was used by *Decker*. The Court is satisfied that *Decker's* placement of its waste in the Landfill is equivalent to the placement of waste in a container, and that, under the facts of this case, the Michigan Supreme Court would apply the container approach used in *Kent County* and *South Macomb*. Under this approach, the relevant discharge is the discharge from the Landfill into the environment rather than the placement of waste into the Landfill.

The *Decker* Court then held that Travelers had not met its burden to establish that its exclusion applied “because there is no evidence to suggest that *Decker* was on notice of any problems at the landfill or that *Decker* ‘intended or expected’ that its wastes would be discharged from the landfill into the environment...” *Id.* The court thus entered a declaratory judgment in favor of the insured “that the pollution exclusion does not bar coverage regarding the landfill.” *Id.* (Wolverine's Brief, ECF No 794, pages 22-23).

Wolverine argues, and the Special Master agrees, that the appropriate inquiry for purposes of the Travelers “expected or intended” pollution exclusion thus is whether the insured expected or intended that its wastes, specifically the waste products containing PFAS, would be discharged from the disposal area into the environment. On this issue, Wolverine contends that its disposal practices were consistent with then-contemporary standards and, at this stage of the proceedings, there is no basis to assume that any alleged discharges or releases from Wolverine’s disposal sites were “deliberate.” (Garrison Decl., Ex. A, Wood Report, at 18; see also Garrison Decl., Ex. E.) Further, as noted above, in the Underlying Actions, Wolverine has denied all allegations that it expected or intended that its wastes would be discharged from the disposal area into the environment and has denied allegations that its disposal sites were “unlicensed.” (See, e.g., Garrison Decl., Ex. F (Wolverine’s Answer to McNaughton Complaint).) (Wolverine's Brief, ECF No 794, page 23).

Wolverine further points to the following Exhibits and others in support of its opposition to Certain Defendants' motion. In ECF No. 974-1, Exhibit A, **Rebuttal Expert Report of Eric S. Wood**, as part of a 98 page report, Wolverine's expert outlines the sites of disposal and waste disposal history, including the following:

1) **1855 House Street**, located in Plainfield Township, is a 76-acre parcel, vacant land that is partially capped and fenced. This location was operated as a disposal facility from 1939-1970. When new law passed in 1965 requiring disposal facilities be licensed, Wolverine applied for and received a State of Michigan license to dispose of wastewater treatment sludges in trenches excavated at the site, with the agreement of the Michigan Department of Conservation and the Water Resources Commission that this site use was appropriate.

2) **Wolven/Jewel** area in Algoma Township, west of Rockford. It is alleged that liquid waste from the former Tannery was disposed of in a gravel pit located in this area in the late 1950-1960's. Wolverine has not admitted, and it has not been established that PFAS contamination in this area originated from Wolverine.

3) **Northeast Gravel Site** is a 60 acres parcel located in Plainfield Township, which was a former sand and gravel pit that was used for waste disposal, and subsequently redeveloped as a golf course. From 1966-1978, the site accepted a variety of wastes from Wolverine's Wastewater Treatment plant and from other sources, besides Wolverine, such as liquid plating wastes and municipal solid wastes (that are the subject of the Boulder Creek lawsuit). The MDEQ reports this landfill was licensed from 1966-1979. It closed in 1977 to all but Wolverine, and all use was discontinued by January 1, 1980. Testing has allegedly shown tannery waste and plating waste contained PFAS.

4) **Former Tannery**, 14.5 acres, in Rockford, MI. After the City of Rockford built a Wastewater Treatment Plant ("WWTP"). Wolverine initially treated waste water and discharged it to the Rockford WWTP Facility for further treatment. Wolverine built its own WWTP in the early 50's. Treated wastewater was discharged into the Rogue River until the 70's and then to the City of Grand Rapids WWTP. Sludge generated from Wolverine's WWTP was managed offsite at licensed facilities including the House Street disposal site, Northeast Gravel site and other third party landfills.

With respect to the "sudden and accidental" pollution exclusion found in the Wausau and Century Policies, the argument for exclusion of coverage presents a closer call. Nevertheless, even here, the Special Master concludes that at least at this stage of the proceedings, it cannot be said

that coverage is not possible. See *Aero-Motive Co. v. Great Am. Ins.*, 2004 U.S. Dist., LEXIS 23827, *11-12 (W.D. Mich. 2004) (“Any analysis of an insurer’s duty to defend must begin with an examination of whether coverage is possible” and only if coverage is “not possible” is the insurer not obligated to offer a defense); see also *Aero-Motive Co. v. Great American Ins.*, 302 F.Supp.2d 738 (W.D. Mich. Nov. 23, 2004) (noting that Michigan courts have deemed discharges from waste disposal sites that were state of the art at the time the pollutant was placed into the site to be “accidental”).

Under Michigan law, the insured has the burden of proving that the release of the hazardous wastes was “sudden and accidental” with respect to the application of the exception in the pollution exclusion. *Firemen's Fund Ins. Cos. v. Ex-Cell-O Corp.*, 702 F. Supp. 1317, 1328 (E.D.Mich.1989). Where the totality of the circumstances indicates a regular pattern of release of hazardous wastes, discrete incidents of sudden or accidental release will not satisfy the requirements of the “sudden and accidental” exception. See *Lumbermens Mut. Cas. Co. v. Belleville Indus., Inc.*, 938 F.2d 1423, 1427–30 (1st Cir.1991) (“sudden and accidental” exception will not apply to an insured whose business operations involved release of pollutants over the course of several years even where insured points to specific incidents of “sudden and accidental” releases of pollutants).

Moreover, in order to demonstrate that the discharge from the landfill comes within the “sudden and accidental” exception, the insured must present evidence of isolated discharges “apart from the overall continuous leaking of the [L]andfill[].” *South Macomb*, 225 Mich. App. at 681, 572 N.W.2d at 707; see also *Aetna Cas. & Surety Co. v. Dow Chem. Co.*, 10 F.Supp.2d 771, 777 (E.D.Mich.1998) (mem.op.) (noting that “a blanket refusal [by an insured] to separate out evidence of discrete, isolated polluting events that are alleged to be sudden and accidental from allegations

of overall polluting and a parade of horrors would expand the pollution exclusion and swallow the exception”).

It remains to be seen whether or not Wolverine ultimately will be able to support its contention that the “sudden and accidental” exception to the pollution exclusion applies to the PFAS contamination in this case. The Special Master merely concludes that the record as it currently exists, and construing the facts in the light most favorable to the non-moving party, a genuine factual dispute exists and does not yet resolve the issue.

D. Personal Injury Coverage

Wolverine points out that Certain Defendants have failed to address in their briefing the personal injury claims for damages in the Underlying Actions. Wolverine argues that it can avoid the pollution exclusion because it does not apply to Personal Injury Coverage (Brief in Opposition, ECF No. 794, Page 5). Defendants argue that Wolverine again is mistaken and ignores the wealth of decisions applying Michigan law that rejected this argument. (Defendants Brief page 21-22). Certain Defendants’ reference their Cross Motion for Summary Judgment on Wolverine’s claims for Personal Injury Coverage, and that the Underlying Actions do not allege personal injury arising from an offense covered by Certain Defendants’ Policies.

Since the instant motion was filed the Special Master completed a Report and Recommendation on Certain Defendants’ Cross Motion for Partial Summary Judgment on Wolverine’s Claims for Personal Injury Coverage, (“Personal Injury Motion” ECF No. 651)

In that Report, the Special Master noted that “By its express language, and reading the policies as a whole, the pollution exclusions do not appear to apply to the Personal Injury Liability Insurance Coverage parts, but only to Contractual Liability Insurance Part for bodily injury and property damage coverage sections of the policies. Nothing in the policies state that the

pollution exclusion contained in the CGL Coverage Part applies to all other coverage parts in the policies". (ECF No. 1181, PageID.119715). However, the Special Master concluded that she is constrained by published cases based upon Michigan law as stated in *Harrow Products*, *South Macomb Disposal Authority*, and *Dow Chemical* to find that the pollution exclusion in the CGL Part applies to the Personal Injury Liability Insurance Coverage Part and that personal injuries as alleged by the underlying plaintiffs caused by pollution are not offenses which are covered under Defendants' policies (ECF No. 1181, PageID.119717).

The Special Master recommended that the Court grant Defendants' Motion for Partial Summary Judgment on Wolverine's Claims for Personal Injury Coverage to the extent that the pollution exclusion applies (ECF No. 1181, PageID.119721). Objections are pending (See ECF Nos. 1182, 1183, and 1184). As result personal injury coverage will not be further addressed in this Report and Recommendation.

IV. RECOMMENDATIONS

For the above reasons and findings, the Special Master recommends as follows:

IT IS HEREBY RECOMMENDED that the Court find that based on the foregoing authorities the "sudden and accidental" exception to the pollution exclusion found in Century and Wausau's Policies is unambiguous and that unless the pollution arises out of identifiable, temporally isolated events, coverage under those Policies is excluded.

IT IS FURTHER RECOMMENDED that the Court find that based on the foregoing authorities that the pollution exclusion in Travelers' Policies unambiguously excludes coverage unless the pollution is "expected or intended" from the standpoint of the insured.

IT IS FURTHER RECOMMENDED that the Court DENY Certain Defendants Cross-Motion for Summary Judgment on Application of the Pollution Exclusion without prejudice so

that Defendants may raise the unresolved issues addressed by the Special Master in this Report and Recommendation after conducting further discovery. Wolverine must identify evidence of discrete isolated polluting events that are allegedly sudden and accidental or not expected or intended and distinguish them from the allegations of overall leaking and discharge of PFAS into the environment outlined in the Underlying Actions or this motion should be granted in full.

PAULA J. MANDERFIELD
Special Master

Dated: June 2, 2022

By: /s/ Paula J. Manderfield
Special Master