BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

JOHNS MANVILLE, a Delaware corporation,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB No. 14-3
	)	(Citizen Suit)
ILLINOIS DEPARTMENT OF TRANSPORTATION,	)	
	)	
	)	
Respondent.	)	

NOTICE OF FILING AND SERVICE

To: ALL PERSONS ON THE ATTACHED CERTIFICATE OF SERVICE

Please take note that today, October 21, 2016 Respondent, Illinois Department of Transportation, filed and served IDOT'S MOTION FOR LEAVE TO FILE BRIEF IN EXCESS OF FIFTY PAGES with the Clerk of the Pollution Control Board, a copy of which is hereby served upon you.

Respectfully Submitted,

By: s/Evan J. McGinley
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CERTIFICATE OF SERVICE

***Johns Manville v. Illinois Department of Transportation*, PCB 14-3 (Citizens)**

I, EVAN J. McGINLEY, do hereby certify that, today, October 21, 2016, I caused to be served on the individuals listed below, by electronic mail, a true and correct copy of IDOT's Motion for Leave to File Brief in Excess of Fifty Pages on each of the parties listed below:

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

JOHNS MANVILLE, a Delaware corporation, Complainant,	)	
v.	)	PCB No. 14-3
	)	(Citizen Suit)
ILLINOIS DEPARTMENT OF TRANSPORTATION, Respondent.	)	

RESPONDENT'S MOTION TO FILE A BRIEF IN EXCESS OF FIFTY PAGES

NOW COMES RESPONDENT, the Illinois Department of Transportation ("IDOT"), through its attorney LISA MADIGAN, Attorney General of the State of Illinois, which herewith moves the Hearing Officer, pursuant to 35 Ill. Admin. Code 101.302(k), for leave to file a post-hearing brief in this matter in excess of the 50 page limit which he previously set.

In support of this motion, IDOT states as follows:

1. On the final day of hearing in this matter, the Hearing Officer set a fifty page limit on the parties' respective post-hearing briefs;
2. On August 12, 2016, JM filed a motion for leave to file a brief in excess of 50 pages. Paragraph 6 of Complainant's motion stated in part that "IDOT is not prejudiced by such a request and JM would not oppose a similar request for additional pages by IDOT."
3. IDOT did not object to JM's filing of an oversized brief.
4. As was the case for JM, IDOT now needs to file an oversized brief in order to adequately brief the issues raised by the hearing in this matter.

WHEREFORE, Respondent, IDOT, respectfully requests that the hearing officer issue an order:

1) Granting IDOT leave to file its oversized brief in this matter; and,

2) Granting such other relief as the Hearing Officer deems to be appropriate and just.

Respectfully Submitted,

ILLINOIS DEPARTMENT OF TRANSPORTATION

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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ILLINOIS DEPARTMENT OF TRANSPORTATION,	)	
	)	
	)	
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NOTICE OF FILING AND SERVICE

To: ALL PERSONS ON THE ATTACHED CERTIFICATE OF SERVICE

Please take note that today, October 21, 2016 Respondent, Illinois Department of Transportation, filed and served IDOT'S POST HEARING BRIEF with the Clerk of the Pollution Control Board, a copy of which is hereby served upon you.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

***Johns Manville v. Illinois Department of Transportation*, PCB 14-3 (Citizens)**

I, EVAN J. McGINLEY, do hereby certify that, today, October 21, 2016, I caused to be served on the individuals listed below, by electronic mail, a true and correct copy of IDOT's Post Hearing Brief on each of the parties listed below:

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ILLINOIS DEPARTMENT OF TRANSPORTATION'S POST-HEARING BRIEF

I. INTRODUCTION

By not later than September 2000, Johns Manville ("JM") was already claiming to the United States Environmental Protection Agency ("USEPA") that IDOT had some degree of responsibility for the asbestos contamination at Site 3 of the Johns Manville Superfund Site in Waukegan, Illinois. From 2000 up through at least 2007, it continued to urge USEPA to name IDOT as a potentially responsible party ("PRP") for the site. In June 2007, USEPA entered into an Administrative Order on Consent ("AOC") with JM and its fellow PRP, Commonwealth Edison. USEPA chose not to name IDOT as a PRP and did not require IDOT to participate in the AOC and the site removal action required by the AOC.

In 2013, JM commenced this citizen enforcement action before the Board, hoping to find a forum for the claims against IDOT that it had been making for at least thirteen years already. In bringing this action, JM hopes to obtain from the Board that which it had been unable to obtain from USEPA, namely, an order issued by the Board

compelling IDOT's participation in the USEPA-required removal action for Sites 3 and 6.

After conducting months of fact and expert discovery and after extensive motion practice, including JM's amending its complaint shortly before the case was initially set to go to hearing in March 2016, the Board finally held five days of hearings in May and June of this year. The Board heard testimony from 10 witnesses. Over 100 exhibits were received into evidence during the course of the hearing. And yet, for all of this expenditure of effort by JM, they have failed to make out their case against IDOT. They have been unable to meet their burden of proof to show that it is more likely than not that a construction project that took place over 40 years ago caused or somehow contributed to the asbestos contamination at Sites 3 and the western portion of Site 6 that JM is required to now remove.

The record and hearing in this case fully establish that the Board should deny all relief requested by Johns Manville. First, the record demonstrates that the credibility, relevant experience, and objectivity of IDOT's expert witness totally overshadows the opinions offered by Johns Manville's biased and dubiously credentialed expert witness. Next, the facts in evidence show that the Amstutz Project roadway construction performed by IDOT in the 1970s had nothing, whatsoever, to do with the contaminated sites discovered in the 1990s. Finally, land records in evidence prove that Commonwealth Edison and the City of Waukegan, Illinois, not IDOT, own, possess, and control the parcels at issue in this matter. For these reasons, as more fully discussed below, the relief requested in the Third Amended Complaint should be categorically denied.

Because of the extreme age of the events underlying JM's claims, the only way to even attempt to determine what might have occurred during the relevant time period was to have expert witnesses look at the extensive documentary record – including construction and environmental records - in this case and to then render opinions regarding what they believe is likely to have occurred. It is clear from the hearing record that the reliable opinion of IDOT's experienced and objective expert is significantly different from, and superior to, those offered by Johns Manville's expert witness.

Johns Manville decided to name Douglas Dorgan as its expert, regarding, among other things, the causes of the ACM contamination at Site 3 and the western portion of Site 6. Apparently, Mr. Dorgan's mandate was to develop an opinion that would allow Johns Manville to bolster its claims that IDOT's construction activities were responsible for the Transite pipe remnants that have come to be located at Sites 3 and 6. Mr. Dorgan, although acknowledging that other forms of ACM were present at these sites besides Transite, made no effort to ascertain how these non-Transite materials ended up at Sites 3 and 6. Mr. Dorgan relied upon the substantial body of data and other work which had been created by Johns Manville's environmental consultants in the course of reaching his opinions in this case. Yet, somehow, he reached a number of conclusions that are fundamentally different than those reached by consultants who have had years of experience investigating the nature and extent of the contamination at not only Sites 3 and 6, but the other Southwestern Sites Area, as well.

The reason why Mr. Dorgan has reached such vastly different conclusions was his wholesale adoption of Johns Manville's allegations that IDOT's work during the Amstutz Project resulted in the dispersion and placement of the asbestos at Sites 3 and 6. In

essence, he did not approach his work with an open mind as to how the asbestos material came to be found at Sites 3 and 6; rather, he cherry-picked the data for his opinions that best fit with Johns Manville's allegations. In pursuing his assignment for Johns Manville he ignored inconvenient facts for JM. For example, that the exact same types of asbestos containing materials ("ACM") were found not only Site 3 and the far western portion of Site 6, but throughout the rest of Site 6 and Sites 4 and 5, as well. Yet, with the exception of a tiny portion of Sites 4/5, IDOT did not do conduct any the Amstutz Project-related work at these other portions of the Southwestern Sites Area.

Mr. Dorgan was so focused on producing opinions that served Johns Manville's purposes that during testimony, he pointedly refused to acknowledge even the most basic fact relevant to this case, namely, that the ACM found at Sites 3, 4/5 and 6 was originally manufactured by Johns Manville at their former facility. Mr. Dorgan ignored (or, at the very least, failed to explain) Dr. Tatsuji Ebihara's conclusions that ACM at Site appeared to be associated with the location of utility lines located in and around that site. Finally, Mr. Dorgan failed to account for another conclusion reached by Dr. Ebihara, namely that ACM at Site 6 appeared to have ended up there because of material having fallen off of trucks during the period that Johns Manville conducted manufacturing operations at its facility.

Mr. Dorgan's theories also fail to taken into account the highly localized presence of ACM, as demonstrated by sampling locations where one soil boring has detectable amounts of ACM, yet an immediately adjacent soil boring has none. Finally, Mr. Dorgan's theories, which assert that IDOT's construction activities are to blame for the disposal and dispersal of ACM at Site 3, fail to account for the fact that there are several

instances of detectable quantities of ACM having been found at Site 3 that are at some distance from areas where IDOT undertook work on the Amstutz Project.

IDOT named Steven Gobelman as its expert witness for this case. Not surprisingly, Mr. Gobelman has reached fundamentally different opinions about the asbestos at Sites 3 and the western portion of Site 6 came to be present there. Despite these diametrically opposed opinions, any potential "battle between experts" necessitating a Board decision, is negated by the well-reasoned nature of Mr. Gobelman's credible opinions.

Boiled down to its essence, Mr. Gobelman's opinions about the case are superior to and more credible than Mr. Dorgan's because they are based on: 1) Mr. Gobelman unmatched expertise gained from, most critically, his 27 years of conducting environmental reviews of construction projects; and, 2) his highly detailed knowledge of the highway construction process and IDOT's protocols and procedures for conducting such projects. Moreover, unlike Mr. Dorgan's opinions, Mr. Gobelman's opinions find support in and are not contradicted by the work of Johns Manville's own environmental consultants.

A perhaps larger and more fundamental problem that the Board will have to confront in deciding this case is whether it would be able to even grant the relief sought by Johns Manville, were the Board to find in favor of Johns Manville on the allegations in its complaint. Johns Manville has requested that the Board order IDOT to participate in the work which both Johns Manville and its fellow PRP, Commonwealth Edison, have been compelled to conduct by USEPA under the terms of the AOC.

As argued at length in conjunction with IDOT's Fifth Affirmative Defense, while the Board has the statutory authority to order a respondent to "cease and desist" from further violations of the Act, it does not have the statutory authority to order a party to participate in a USEPA-ordered removal action. Moreover, the Board should be concerned that Johns Manville's requested relief in essence invites the Board to supplant its judgment for USEPA's judgment regarding who should be held responsible for addressing the asbestos contamination at Sites 3 and 6. Almost certainly, USEPA, which has been involved in overseeing a series of Superfund removal and remedial actions at the Johns Manville sites for over thirty years, is in a better position that the Board is to make those determinations.

Ultimately, IDOT believes that the question of whether the Board should grant Johns Manville's requested relief will prove to be moot, as the evidence and testimony from five days of hearing do not allow Johns Manville to meet its burden of proof nor to sustain the allegations in its third Amended Complaint. Accordingly, IDOT requests that the Board make a finding against Johns Manville and in favor of IDOT regarding all of the allegations in Johns Manville's Third Amended Complaint.

II. THE RECORD IN THIS CASE SHOWS THAT IDOT DID NOT CONTAMINATE SITE 3 OR THE WESTERN PORTION OF SITE 6 DURING CONSTRUCTION OF THE AMSTUTZ PROJECT

A. The former Johns Manville Facility is Almost Certainly the Source of All of the ACM at Sites 3 and 6

Testimony and documents received into evidence at hearing demonstrate that John Manville began operating from its Waukegan, Illinois facility at some point in 1922. (Tr. May 23, p.42:13-18.) For almost 75 years, Johns Manville manufactured a wide variety of asbestos-containing products at the facility, such as Transite pipe, various

fireproofing and insulation materials, roofing materials and automotive products such as brakes and brake liners. (Ex. 57-15; Tr. May 23, pp. 42:19-43:11.) These same materials are found in fill material throughout the Southwestern Sites Area, along with asbestos-containing sludge. (*See, e.g.*, Ex. 57-177 and Ex. 63-112 and 113 (Site 3), Ex. 63-139 through 148 (Sites 4/5), and Ex. 63-323, 63-325, and 63-331 (eastern/central portions of Site 6).[1] The prevalence of asbestos-containing waste along the entire southwestern periphery of the former facility suggests that Johns Manville engaged in the dumping of asbestos waste while the plant was in operation. Almost certainly, all of the ACM which have been found throughout the Southwestern Sites Area were originally produced at the former Johns Manville manufacturing facility. Yet during cross-examination, Johns Manville's expert, Douglas Dorgan, found himself unable to agree to this obvious proposition. (Tr. May 23, pp.304:21-305:4.)

B. Johns Manville Used ACM and Other Fill Materials to Construct the Parking Lot

By agreement between Johns Manville and Commonwealth Edison, dated November 16, 1956 ("License Agreement"), Johns Manville acquired the rights to construct the Parking Lot on Commonwealth Edison property immediately south of the Johns Manville facility, for its employees. (*See generally,* Ex. 50.) The questions of how the Parking Lot was constructed and used by Johns Manville are central to the larger issues of this case. Any inquiry regarding these questions must begin with the text of Johns Manville's agreement with its fellow potentially responsible party ("PRP"), Commonwealth Edison. Two provisions of this agreement are particularly relevant to the

[1] The pages from the cited exhibits essentially document the presence of asbestos-containing waste material along the periphery of the former Johns Manville facility, starting at the southeastern edge of the facility (i.e., the eastern edge of Site 6), then westward along Greenwood Avenue to Site 3, and finally traveling north along the western edge of the former facility (i.e., Sites 4/5).

questions about the Parking Lot's construction and use, specifically, paragraphs seven and nine.

The paragraph seven defines Johns Manville's rights and responsibilities with respect to the construction of the parking lot as follows:

> Licensee shall have the right and permission, insofar as Licensor has the right to grant such right and permission, to grad and level said area and improve the surface thereof, also Licensee shall install and maintain, at its Licensee's use therefore to the area specified herein.
>
> (Ex. 50-2.)

The ninth paragraph speaks to the manner in which JM was to layout the Parking Lot for use by its employees and provides:

> Licensee, at its sole cost and expense, shall also install and maintain wheel stops to provide an orderly alignment of the rows of cars in said parking area.
>
> (Id.)

In order to comply with the requirements of the ninth paragraph, Johns Manville claims that it used split lengths of Transite pipe as wheel stops at the parking lot.[2] (Ex. 62-6, at §IV.9.b.) While JM alleges that the Transite pipe was used as parking stops at the Parking Lot, there is substantial disagreement between the parties on the question of how the Parking Lot was actually constructed. IDOT's expert Steven Gobelman contends that Johns Manville had to use fill material to bring the area on which the Parking Lot was constructed level with Greenwood Avenue. (Tr. May 24, p. 143:16-144:11.) He further states that ACM was used, at least in part, as fill material, based

[2] It is also important to note that JM's evidence that it used Transite pipes in its parking lot in the 1950s and 1960s is very slim and very unreliable. A JM corporate official relied upon the statement of a former JM employee that he recalled that Transite pipes had been used on its parking lot. The statement from the former employee is hearsay and we are unable to actually question anyone regarding this statement. (Tr. May 23, p.54:18-22.)

upon statements contained in a 1998 report done by Johns Manville's environmental consultant. (Id., referring specifically to Ex. 57-11; *See also* Ex 57-16.)

Johns Manville asserts that the License Agreement did not permit it to bring fill onto Commonwealth Edison's property (Johns Manville Post Hearing Brief ("PHB") at 7). However, the agreement does not state this. (*See generally*, Ex. 50, particularly Ex. 50-2, ¶ 7.) In an effort to bolster this assertion, Johns Manville cites to pages 7 and 8 of Mr. Dorgan's rebuttal report (PHB at 7, citing Ex. 16-9 and 10.) However, the pages cited to contain absolutely no mention of the License Agreement.

Johns Manville called Denny Clinton as a witness at hearing to testify. During direct examination, Mr. Clinton was asked by JM's counsel about certain statement contained on page 1-4 of a 1998 report by JM's environmental consultant, ELM (e.g., Ex. 57-11), where it was stated that: "ACM in the subsurface was mostly concentrated in the area of the former parking lot. This is to be expected as the materials used to construct the parking lot contained ACM." Clinton testified that the quoted reference to ACM simply referred to the Transite pipes that had been used as wheel stops on the parking lot surface and that he had never made any statement to Johns Manville's consultant. (Tr. May 23, pp. 54:15-55:12.) He testified that he based this testimony on his recollection of a discussion he had had with a JM employee approximately 18 years ago. (Id. p. 60:12-19.)

However, Mr. Clinton's testimony cannot be squared with another statement in the report that:

> Historical aerial photographs indicate that pipes were used in the parking area to aid in determining parking spaces. Additionally, various other potential ACM was identified on the Site according to the photographs.
>
> (Ex. 57-16.) (Emphasis added.)

In order for JM to build the parking lot, it needed to raise the ground level so that the parking lot would be level with Greenwood Avenue. This would have required the use of fill material, which could have contained Transite and other ACM. (Tr. May 25, p.131:4-9.) The need for fill is evident when referring to historic topographic maps of the area. Maps from 1939 and before depict the area as wet and marshy and also depict swales between dune ridges. (Ex. 107, Tr. May 25, p.122:15-124:6, Ex. 53P, Tr., May 25, p.124:11-126:1.) The 1960 topographic map shows that the area is no longer depicts it as a wet area, which means that something had to be done to the area, so that it was no longer wet and marshy, like the addition of fill material to create a base upon which to construct the Parking Lot. (Tr. May 25, p. 138:18:21.) JM would have also needed to raise the ground to bring the parking area to a similar elevation as Greenwood Avenue and to keep the parking lot dry during wet times of the year and this fill material could well have contained ACM. (Ex. 8-10, Tr. May 25, pp.130:18-131:9, and 143:16-144:11.) This is a better explanation of how ACM came to be on Site 3 than JM's conjecture.

Finally, during the years that the Parking Lot was in operation, the Transite used as parking bumpers could have degrade, leaving ACM in surrounding soils. (Ex. 57-15: "The parking lot was constructed with materials containing asbestos containing materials." *See also*, Tr. May 25, pp. 203:18-204:6.)

In its post-hearing brief, Johns Manville contends that Steven Gobelman's opinion that the parking lot was built in part using ACM should be discounted, as he never sought to look into what Johns Manville claims are the apparent discrepancies between statements at page 1-4 (Ex. 57-11) with those at 3-2 of the ELM report (Ex. 57-16.) However, there is no discrepancy between the statements in Johns Manville's

consultant's report. These statements can simply be read as referring to two separate issues related to the construction of the parking lot; On the one hand, the question of how the parking lot was constructed, while on the other hand addressing the issue of what materials were used as parking stops, once the parking lot had been constructed.

Although the ELM report does not make clear what the "other potential ACM" was identified in these historic aerial photographs, it is clear from the above cited language that the ELM consultants were not limiting their references to ACM to only Transite pipes. Thus, it is reasonable to conclude that the multiple references in the ELM report to the use of ACM in the construction of the parking lot mean more than simply split lengths of Transite pipe that were used as bumpers on the Parking Lot surface.

C. IDOT Could Not Have Contaminated Sites 3 and 6 Through its Work on the Amstutz Project

The Amstutz Project consisted of building two bridges, elevating Greenwood Avenue over those two bridges, creating three detours roads, creating an embankment for Greenwood Avenue that rises along with Greenwood Avenue over the bridges (not just the embankment involved in Site 6) and an embankment and raising of Sand Street to meet Greenwood Avenue. (Ex. 21A and 21B; Tr. May 24, pp. 252:10-255:7, 264:9-14.)

IDOT developed the plans, and on September 3, 1971, issued a Notice to Bidders ("Bid"). (Ex. 20.) The construction plans include the designs for construction for the Amstutz Project. (Ex. 21B.) The construction bid documents, the construction plans, and the 1971 Standard Specifications for Road and Bridge Construction ("Standard Specifications", i.e., Ex. 19.), provide the standards applicable for this Amstutz Project.

Construction of the Amstutz Project began at Station 7+00 on Greenwood Avenue and went west to Station 29+21.04 with 100 feet between each Station, covering over

2,000 feet along Greenwood Avenue. (Ex. 21A-1, 21B-1, Tr. May 24, p. 255:8-256:13, 258:18-259:12, and 260:7-261:1, May 25, p. 95:9-97:9.) On September 30, 1971, the bid was awarded to Eric Bolander Construction Company and actual construction began in October of 1971, after the preliminary field studies. (Ex. 25.)

1. The Sequencing of the Amstutz Project:

The Amstutz Project entailed closing Greenwood Avenue to create the two bridges over the Amstutz Expressway and the railroad, requiring that a specific sequence of events had to be followed, as detailed in the Bid documents and the construction plans. (Ex. 20, Ex. 21B, *See also*, Ex. 8-13 and 14.) The Detour Roads were a necessary first step before Greenwood Avenue could be closed, so that traffic could continue into the JM facility and west on Greenwood Avenue. (Ex. 21A-1, 21B-1, Tr. May 24, pp. 261:5-264:8) Once the detour roads were in place, the bridges over the expressway and the railroad could then be built. (Ex. 21A-1, 21B-1,Tr. May 24, pp. 266:5-268:19.) The construction plans then called for the Greenwood Avenue bridges to be constructed, followed by the embankment for Sands Street. Detour Road A was the last improvement to be removed. (Id.)

The sequence of the project was as follows:

1) Construct Detour Roads A, B and C (Also needed to build a shoofly detour due to a railroad crossing delay Ex. 94-1, Ex. 141, Tr. May 24, pp. 269:15-275:3, May 25, pp. 92:19-94:2);
2) Divert Greenwood Avenue to Detour C and Sand Street traffic to Detour A and B.
3) Construct the bridges on Greenwood Avenue over Amstutz and Railroad (*See also*, Ex. 54Q, showing detour roads had been built and embankment to Amstutz and railroad started as of 1972, Tr. May 25, pp. 190:11-192:6);
4) Complete the grading and paving of Greenwood Avenue from Sand Street to the west end of the project;
5) Elevate Sands to meet Greenwood Avenue and complete grading and paving of Sand Street for its entire length;

6) Divert traffic from Detours B and C to Greenwood Avenue and Sand Street and remove Detours B and C;
7) Complete the grading and paving of Greenwood Avenue, including the embankment from the East end of the project to Sand Street; and,
8) Remove Detour Road A.

(Ex. 21A-1, 21B-1,Tr. May 24, pp. 265:1-269:14.)

After the completion of all of the steps listed above, the Amstutz Project would be finished and the contractor was required to restore the property to its prior, pre-construction state.

2. JM has not proven that Transite pipes were on site when IDOT's contractor began construction

JM argues that IDOT's contractor used Transite pipes in the construction of Detour Road A and the embankment to Greenwood Avenue which lies on what is now known as Site 6. (PHB at 22-23.)

As an initial matter, there is no proof or evidence that Transite pipes were actually present on the Parking Lot when IDOT's contractor began construction work in October of 1971. JM did not introduce any evidence at hearing, either, that the Parking Lot was in use immediately before IDOT began construction on the Amstutz Project or that Transite pipes were still present at the Parking Lot, when construction began. On Thursday, June 11, 1970, an aerial photograph was taken which represented conditions there on a typical work day. (Ex. 54S.) This photograph showed no cars present when the photograph was taken, and the Parking Lot appears to be in a dramatically different condition as compared to the conditions depicted at the Parking Lot in the October 20, 1967 aerial photo. (Ex. 54S, Tr. May 25, 2016, pp.188:4-190:5.) It appears the parking lot was no longer in use as of June 1970 and JM could have removed the pipes as it was property owned by Commonwealth Edison. This would have been more than a year before the

contractor had started construction work on the site. Johns Manville introduced no evidence at hearing to show how much Transite pipe was used for parking bumpers at the Parking Lot, what happened to those bumpers over the years, or whether they were removed prior to when IDOT began construction.

3. The contractor would not have used Transite pipes to build Detour Road A or in the area that is now Site 3

JM argues that IDOT is responsible for the ACM contamination on Site 3. However, an examination of the amount of Transite pipe found in the whole JM area and the construction of Detour Road A show that JM's theory is extremely unlikely and does not take into account the construction plans for the Amstutz Project, the sequence of steps that occurred in building the project, or simply common sense.

JM presented a theory that if IDOT's contractor had encountered Transite pipes, it would have used them in the building of Detour Road A where Site 3 is now located. However, given the construction plans, the sequencing and the existing ground level in that area, it is virtually certain that Bolander Construction would not have used Transite pipes from the parking lot (assuming any were present) in constructing Detour Road A.

IDOT's contractor did not need to use extra material, such as Transite pipes, when it constructed Detour Road A. The construction plans of Detour Road A show the stationing, cross section profiles, existing ground conditions and ground level. (Exhibit 21B-27 and 21A-23, Tr. May 24, pp.278:17-279:6.) The cuts and fills associated with the detour road can then be calculated. (Id. Tr. May 24, 280:12-281:10.) The proposed grade line for Detour Road A is 590 feet, which is the existing elevation of Greenwood Avenue. (Exhibit 21B-27 and 21A-23, Tr. May 24, pp.287:22-289:22.) The existing ground elevations in the area of Detour Road A showed there were 5148 cubic yards of

cut available and 1102 cubic yards of fill needed. (Tr. May 24, pp.285:6-287, and 289:23-292:24, Ex. 8-7.) Since there was more cut available than fill needed, the contractor would have used the readily available cut for the fill. It is likely the extra cut would have been used in the building of Detour Roads A, B and C. (Ex. 8-7, Tr. May 25, p.168:9-18.)

It is illogical to assume that the contractor would have used any Transite pipes as fill material for Detour Road A. In order for the contractor to use the pipes, they would have had to crush them first. Section 207.104 of Standard Specifications book (Ex. 19), provides that four inch pieces could be placed 12 inches from the surface of finished earth grade and the finished surface is 9 inches deep. (Tr. May 25, pp.166:14-168:18, Ex. 19-12 and 13.) The contractor would not have used pipe in that area because it would require the contractor to actually dig in order to use it when an available pile of dirt is available as fill. (Tr. May 25, p.168:8-18.) The contractor would not have buried pipes into the ground more than two feet. To dig when it was not needed would require extra work and would have made no sense. (Tr. May 25, pp.164:9-165:10, and 166:5-167:17.)

There was no room to add crushed pipe in Site 3, including the northeast corner of Site 3, thus the Contractor could not have crushed any pipe there. Additionally, the Parking Lot was already compacted at this point and was used to support the detour road according to the contract plans cross-section for Detour Road A. (Ex. 21A-23 and 21B-7.)

JM's arguments regarding drainage and disturbance also do not make sense. If drainage were an issue, the contractor would not excavate or dig, rather a pipe would be added to assist in drainage. (Tr. May 25, pp. 195:6 – 197:9, June 23, pp. 306:15-307:3.)

The aerial photo from that time frame does now show piles, evidencing digging. (Id., and Ex. 54Q.)

The plans also did not show any required removal of unstable and unsuitable materials for Detour Road A. (*See e.g.*, Ex. 21A-23.) The construction plans do not show Transite pipes although they do show the parking lot, further supporting the idea that the Transite pipes were not on the parking lot. (Id.)

It is also important to note that all construction work was confined to the construction limits in the plans. (Tr. May 24, 294:9-295:2; May 25, pp.156:19-157:23 and 158:19-21) If the pipes were present, and used for fill, they would have been removed from the construction limit (and away from Detour Road A) to be crushed.

4. <u>The contractor would not have used Transite pipes to build the embankment to Greenwood Avenue that is on Site 6</u>

If the contractor had encountered Transite pipes on the parking lot, contrary to JM's theory, the pipes would not have been used in the embankment area for Greenwood Avenue, which is now part of Site 6. No material from the building of Detour Road A would have been used in the embankment for that portion of Greenwood Avenue or Sand Street because the roads were still open at the time the detours were completed and the relevant portion of Greenwood Avenue was still open. The embankment to Greenwood Avenue east of Sands Street was the last aspect of the Amstutz Project that needed to be constructed. If Transite pipes had been on the parking lot in October of 1971, they would have been removed well before the construction of the embankment which is now Site 6. It would not have made sense for a contractor to find Transite pipes, move them, then drag them back to the construction area of Greenwood Avenue on Site 6, crush them and then use them for the embankment. (Tr. May 24, pp.265:1-268:11, May 25, pp. 163:11-

164:8, and June 23, p. 25:24-26:13, and 140:11-17.) Further, the evidence shows that fly ash – and not Transite pipe - was likely used as the borrow material in the embankments. (Ex. 8-12, Ex, 20-32, Ex. 29-1, Tr. May 24, 301:22- 303:19).

Moreover, the amount of fill that would have been needed to build the embankment at the areas relevant to this lawsuit would have been minimal. (Tr. May 25, , p.169:6-170:24) The portion of Site 6 that overlaps with the embankment work for Greenwood Avenue goes from just west of Station 7 to just west of Station 9 with 100 feet between each Station. The contractor's work ended at Station 7. (Tr. May 24, p.300:4-9.) The amount of fill needed for those areas to build embankment on Site 6 was minimal and the plans show low elevations for the Greenwood Avenue embankment where Site 6 is located as Greenwood Avenue is just beginning to rise at approximately Station 9 (Tr. May 24, 296:10 -301:5, Tr. May 25, 173:1-18.) The contractor's work on the embankment could not come close to explaining the extent of ACM contamination in that area and was obviously caused by something else.

5. Assuming Transite Pipers Were Present at the Project site, the Most Likely Scenario is that the Pipes Would Have Been Viewed as Obstructions and Removed

Over five days of testimony, Johns Manville was unable to put forth any evidence to demonstrate that Transite pipe was actually present at the Parking Lot at the time that IDOT's contractor commenced work on the Amstutz Project. However, assuming Transite pipes were present, the most likely scenario is that the pipes would have been viewed as obstructions and removed. (Tr. May 25, p.161:7-162:22; Ex. 19-5 and 6.) The pipes were unstable and unsuitable fill material, and would have required crushing in order to be used in either Detour Road A or the embankment. However there was no

room in the construction or easement limits near Detour Road A, nor would the contractor have buried them in the area of Detour Road A. If the pipes were crushed, that would most likely have occurred in a different area, away from Detour Road A. (Tr. May 25, 2016, pp.163:11-164:8.)

Since there was no room to dispose of material such as Transite pipe near Detour Road A, the contractor would likely have moved the pipe to other areas where more fill was needed, such as building a highway embankment, where large amount of fill would have been needed. Just such an area was closer to the bridge areas over the Amstutz expressway or west of the railroad. (Tr. May 25, pp.161:7-162:22.) Also, contrary to JM's arguments, it would not make any sense to crush the pipes where they were found and then move the crushed material; it is simpler to move the pipes and then crush them where they could have been used. (Tr. May 25, p.163:11-164:8.)

6. A Substantial Amount of the ACM That Has Been Found at Sites 3 and 6 Has Been Found in Close Proximity to Utility Lines

A number of utilities were buried in and around the parking lot on Site 3, including the City of Waukegan water and storm lines, Nicor Gas lines, and AT&T phone cable, Commonwealth Edison Company fiber optic cable and power lines. (Ex. 202.) Over the years the installation and maintenance of these utility lines would have necessarily disturbed the existing subsurface conditions, causing ACM on the surface to become buried in the ground at the Site and bring ACM that was on the surface and cause it to be buried in the ground. [3] When digging a hole and then refiling it, the deepest material ends up being on the surface once the hold is dug, bucket by bucket. Then, when the hole is refilled and material is moved back or pushed into the hole, the surface

[3] During initial field work at Site 3 in December 1998, a substantial amount of ACM, including Transite was found on the surface of the site. (Ex. 57-177 to 179.)

material ends up being the deepest or a comingling of material occurs. (Tr. May 25, 201:5-202:4, 202:15-19) Any utility e installation or maintenance could have encountered and handled ACM that was on the surface, be it from material that flew off trucks coming in and out of the JM manufacturing facility over its 70 year operational history, the bumping and degrading of Transite pipes/parking bumpers or, rather, close proximity to the JM facility. (Ex. 8-9 and 15.)

Further supporting this theory are the results of the soil samples taken by Johns Manville's own consultants that shows a close alignment between ACM contamination and utility lines at Sites 3 and 6, suggesting that the utility maintenance and installation had a large impact on the ACM contamination on Sites 3 and 6. (Ex. 8-9 and 15; Ex. 202, Tr. May 15, pp. 201:5-202:4, 202:15-17.) Further, ACM is found on the north and south sides of Greenwood Avenue, as are utilities located on the north and south sides of Greenwood Avenue. (Ex. 202.)

7. The Possibility Exists that ACM Could Have Been Disposed of or Disturbed After the Completion of the Amstutz Project

After IDOT completed Amstutz Project, for a period of roughly 23 years, from approximately 1975 through 1998, the property that would later become Site 3 was, as is best known, open and accessible to the public. (Ex. 4A-90 to 92.) Even today, there are no fences or other barriers surrounding Site 3 and Site 6, which consists of the shoulders and right of way along Greenwood Avenue, is similarly unfenced. (Ex. 4-92.) Douglas Dorgan was asked about this during his first deposition and testified that he Douglas Dorgan never investigated what might have occurred at these Sites after the Amstutz Project was completed.

Additionally, as noted by Johns Manville's consultant, portions of Greenwood Avenue were modified, presumably by the City of Waukegan, in 2007. (Ex. 63-19.)

D. Greenwood Avenue and Sand Street (now Pershing Road) Were Originally Built by the City of Waukegan and Have Always Been Under the City's Ownership and Jurisdiction

Greenwood Avenue was originally laid out by the City of Waukegan in 1895, when the City acquired the land, via quitclaim deed. (Ex. 162.) In 1915, the City acquired the land on which it subsequently constructed Sand Street (now Pershing Road). (Ex. 163.) Documents and testimony received into evidence at hearing unquestionably demonstrate that during the planning stages for what would ultimately become the Amstutz Expressway, IDOT's predecessor entered into similar agreements with both the City of Waukegan and Lake County for the construction of certain improvements on and in the vicinity of Greenwood Avenue. (Exs. 38 and 40.) Exhibits to one of these agreements show that City of Waukegan funds were to be used for the improvements to both Greenwood Avenue and Sand Street. (Ex. 40-11, 13 and 14.) Moreover, on one of the pages for the Exhibit shows that the City of Waukegan was identified as being responsible for the cost of the "structures" and the wear surfaces on Greenwood Avenue and Sand Street. (Ex. 40-13.) Exhibits 38 and 40 establish that at the time that the Amstutz Project was in the planning stages, the aforementioned streets were maintained by the City. The City's jurisdiction over Greenwood Avenue was also acknowledged by IDOT in its November 27, 2000 response to the United States Environmental Protection Agency's ("USEPA") September 29, 2000 information request. (Ex. 60-3.) And the City continues to have jurisdiction and responsibility for the maintenance of these roads to the present day. (Tr. May 25, p.34:8-18.) The City is also responsible for maintaining the

embankment that carries Greenwood Avenue over the railroad tracks that run north and south and lie just to the west of Sand Street. (Tr. May 25, pp. 32:17-33:10.) And, perhaps what is ultimately most important, is that it is the City, and not IDOT, which has the authority to tear down the embankment, although IDOT would object. (Tr. May 25, p.37:34-34:14.)

E. The Grants for Public Highway at Issue in This Case Benefit City of Waukegan Streets, Not IDOT Highways, and IDOT Does Not Own, Possess or Control any of the Parcels of Land at Issue in this Case and is not Liable as an Owner or Operator

Johns Manville has attempted to argue that, due to a temporary easement obtained to perform the Amstutz Project construction, IDOT still remains liable under the theory that it is an owner or operator of the contaminated Sites. This argument is based on the flawed logic that IDOT's inadvertent failure to release a 37 year old construction easement somehow triggers liability under Section 21 of the Illinois EPA statute, or analogous provisions under earlier versions of the Act. When evaluated closely against the evidence in record, this theory fails completely for the reasons explained below.

In 1971, as called for under IDOT's construction plans for the Amstutz Project, IDOT negotiated a "Grant for Public Highway" with Commonwealth Edison, in order to obtain several temporary and permanent rights-of-way over several parcels of land in the vicinity of the Amstutz Project. (Ex. 41.) The temporary easements granted to IDOT were necessary to facilitate IDOT's construction work on the Amstutz Project. Thus, Parcel E393 (one of the temporary easements granted by Commonwealth Edison to IDOT), was used for the construction of two of the project's detour roads, specifically Detour A and Detour B, which were needed to allow traffic to continue to move through the area. (Ex. 15-1.)

The right-of-way parcel that is most relevant to Johns Manville's case is Parcel 0393, which created a permanent right of way for highway purposes that covered a portion of the northwestern corner of Commonwealth Edison's Waukegan generating station property. (Ex. 15-1.) Parcel 0393 is adjacent to, but does not directly touch, either Greenwood Avenue on the north, or Sand Street to the west. Instead, Parcel 0393 is set back from both of these streets, as then existing rights-of-way covered the south shoulder of Greenwood Avenue, as can clearly been seen from the plat of survey for this parcel. (Id.)[4] At the time that IDOT negotiated the 1971 Grant for Public Highway, an existing right-of-way ran from the south shoulder of Greenwood Avenue, across the road itself, ultimately terminating along the north shoulder of Greenwood Avenue, as indicated in the plat of survey for Parcel 0393. (Id.) No part of Parcel 0393 lies on Site 6; the northern boundary of Parcel 0393 borders what is now Site 6. (Also, no Transite pipe was found in sample results on Parcel 0393.)

In its post-hearing brief, Johns Manville notes that that the Grant for Public Highway over Parcel 0393 "'exists today as a permanent property right in IDOT.'" (PHB at 9.) Johns Manville is correct in asserting that the Grant for Public Highway vested IDOT with certain rights with respect to Parcel 0393. However, as evidenced by IDOT's 1966 agreement with the City of Waukegan, it was the City – and not IDOT –which was originally to have acquired the necessary rights of way for the improvements that were to be constructed east of the Chicago and Northwestern Railroad. (Ex. 40-2, ¶ I.A.1.) The City's agreement to acquire the necessary rights of way makes sense, because the improvements to be constructed under were improvements to streets that were subject to

[4] The demarcation of this existing right-of-way line can be seen on Exhibit 15-1 just below and slightly to the left of the marking "GREENWOOD AVENUE" on the plat. Directly beneath the "GREENWOOD AVENUE" marking can be seen the proposed right of way line.

the City's jurisdiction. They were, and remain, local – as opposed to state – roads. (*See generally,* Exs. 162 and 163; Tr. May 25, pp. 32:17-33:10.)

Johns Manville claims that the Grant for Public Highway "was a conveyance of a 'direct' ownership interest in land," (PHB at 10), citing Joseph Fortunato's May 24th testimony and his expert report in this matter (i.e., Ex. 18.) This claim is a misrepresentation of both Mr. Fortunato's May 24th testimony, as he neither testified nor otherwise opined that IDOT had an "ownership interest" in Parcel 0393 through the Grant. He simply identified the Grant as a form of "interest" in real property. (Ex. 18-9, ¶ V.A.1.) Johns Manville's claim also finds no support under the law, which views the holding of an easement over a parcel of property as a distinctly different interest than would exist if owning the property. *Mueller v. Keller,* 18 I11.2d 334, 340 (1960) (the Illinois Supreme Court noting that an easement is "[a] privilege in land existing distinct from ownership of land.")[5]

Ultimately, regardless of whether or not IDOT holds a right of way over Parcel 0393, the "highway purpose" that the right-of-way exists to support of is related to the City of Waukegan's streets, especially Sand Street and Greenwood Avenue and not IDOT's state highways. IDOT's position finds support under the Illinois Highway Code, the relevant statute which Johns Manville's expert, Joseph Fortunato apparently did not

[5] Johns Manville again asserts at Page 26 of its post-hearing brief that "IDOT continues to hold a direct ownership interest in Parcel No. 0393." It is IDOT's position that this assertion is at odds with the Illinois Supreme Court's statement in the *Mueller* case. An easement provides use rights; it does not provide ownership rights or an ownership interest in the land. *Hahn v. Cty. of Kane*, 2012 IL App (2d) 110060, 964 N.E.2d 1216, 358 Ill. Dec. 194, 2012 WL 171879; An "easement" is a nonpossessory interest in land. *Steinbach v. CSX Transp., Inc.*, 393 Ill. App. 3d 490, 913 N.E.2d 554, 332 Ill. Dec. 622, 2009 WL 2184777 (2009), *as corrected* (Aug. 17, 2009); *Great Atlantic & Pacific Tea Co. v. La Salle Nat. Bank,* 77 Ill.App.3d 478, 482, 32 Ill.Dec. 812, 395 N.E.2d 1193 (1979).

consult in the course of developing his opinions in this case. Section 5/2-202 of the Code, 605 ILCS 5/2-202 (2014), provides, in relevant part, as follows:

> Highway-any public way for vehicular travel which has been laid out in pursuance of any law of this State . . . The term "highway" includes rights of way, bridges, drainage structures, signs, guard rails, protective structures and all other structures and appurtenances necessary or convenient for vehicular traffic. A highway in a rural area may be called a "road", while a highway in a municipal area may be called a "street". (Emphasis added.)

Section 5/2-217 of the Code, 605 ILCS 5/2-217 (2014), in turn, provides that a "right of way" is defined as "[t]he land, or interest therein, acquired for or devoted to a highway."

Thus, according to the clear statutory language of the Illinois Highway Code, a right-of-way, such as the one acquired by IDOT in this case, is associated with and relates to a highway. Here, the only "highway" that Parcel 0393 could be associated with is either Greenwood Avenue or Sand Street, both of which are City streets, not state highways. (Tr. May 25, p.34:14-20 and 35:5-8.)

At hearing, Johns Manville did not introduce any evidence to refute IDOT's assertion that Sand Street and Greenwood are under the City of Waukegan's jurisdiction. Similarly, they did not introduce any evidence to refute IDOT's witnesses' testimony that the City of Waukegan was responsible for maintaining Sand Street, Greenwood Avenue, as well as the Embankment that carries Greenwood Avenue over the nearby railroad tracks to the Amstutz Expressway. Thus, Parcel 0393 should be seen for what it is, a right-of-way for highway purposes that is connected to and supports local streets and not state highways, and thus is under the jurisdiction of the City of Waukegan.

Johns Manville also asserts, based upon Mr. Fortunato's opinions, "that IDOT continues to 'operate' on Parcel No. 393 and use it for a "highway purpose." (PHB at 26.) Fortunato's opinion, in turn, is based on his opinion that: 1) IDOT's 2011 wetland survey, which in part took place on Parcel 0393 and which was conducted as part of the planning process for the replacement of a bridge on Greenwood Avenue by IDOT, demonstrates that IDOT continues to "operate" the parcel; and, 2) the Embankment lies on Parcel 0393. His opinions regarding both points are incorrect.

As for the erroneous conclusions that IDOT's 2011 wetland study equated to "operation" on the land. (PHB, at 26, citing Mr. Fortunato's May 24th testimony.) However, as IDOT employee John Baczak testified that IDOT has statutory authority that allow its employees and others working on its behalf, to enter private property for the purpose of conducting highway-related work, specifically, 605 ILCS 5/4- 503(2014). (Tr. May 24 p. 91:8-24; *See also*, Ex. 167.) Thus, IDOT could conduct the wetland survey on Parcel 0393, whether it held an interest in that parcel or not.

Fortunato is also incorrect that the embankment lies on Parcel 0393 and that IDOT is continuing to "operate and maintain control over the entire embankment." (Ex. 18-10 and 12, cited at PHB 26-27.)[6] As indicated on various exhibits received into evidence at hearing, the northern boundary of Parcel 0393 ends just south of the shoulder on the south side of Greenwood Avenue. (Ex. 16-1.) Thus, contrary to Fortunato's opinion and Johns Manville's contention, the embankment that is part of Site 6 sits within the right-of-way of for Greenwood Avenue.

[6] While Fortunato's expert report refers to a singular "embankment" (e.g., Ex. 18-10), Johns Manville's Third Amended Complaint now refers to north and south embankments." (3rd Am. Compl. ¶12.) Thus, it become unclear how Fortunato's opinion regarding the embankment relates to new allegations in Johns Manville's 3rd Amended Complaint.

Thus, contrary to Johns Manville's and Mr. Fortunato's assertion, IDOT does not continue to "'operate'" on Parcel 0393 and has not "operated" on Parcel 0393. In fact, IDOT has failed to show that IDOT or the City has exercised any rights consistent with "for high purposes only" since the building of the Amstutz project. JM's arguments that IDOT has ownership and control over 0393 grossly misstate the grant of 0393.

Also, JM in its Complaint alleges that Parcel 0392 lies north of Greenwood Avenue and is part of Site 6. JM is wrong as Parcel 0392 lies along Sands Street, both north and south of Greenwood Avenue. (Ex. 21A-27). Moreover, JM does not address Parcel 0392 in its post hearing brief.

III. ENVIRONMENTAL STUDIES AT SITES 3 AND 6

There have been a number of studies done that contain information regarding conditions, the most relevant of which are the 1999 Subsurface Characterization Report ("ELM Report") (Ex. 57), the April 2011 Engineering Evaluation and Cost Analysis ("EE/CA") (Ex. 60) and the March 31, 2014 Remedial Action Work Plan ("RAWP") (Ex. 66.) Pertinent findings of each are discussed briefly below. All of three of these reports have been submitted to USEPA on Johns Manville's behalf by various environmental consultants. Both the EE/CA and the RAWP were submitted to USEPA in fulfillment of Johns Manville's obligations under the AOC.

A. ELM Report

Subsurface sampling was done at both Sites 2 and 3. Fifty subsurface borings were drilled on Site 3 and sampled as part of the field work for this report. (Ex. 57-191 to 196.) The forms of ACM encountered during this sampling exercise included Transite pipe fragments, asbestos-insulation, and asbestos-containing "raw material." (Id.) Raw material and Transite fragments were the majority of ACM that was encountered in these

samples. At hearing, Douglas Dorgan has acknowledged that the ELM field work was some of the most comprehensive sampling work done to date at the site.

B. EE/CA

The field work for this study was conducted during late January through early April 2008 for all of the Southwestern Area Sites. (Ex. 63-10) and targeted areas not previously studied at Site 3, Sites 4/5 and Site 6. (Id.) The most prominent concentrations ACM were found along the south side of Greenwood Avenue, where Site 3 meets Site 6. (Ex. 63-15.) Both underground gas and electrical lines are found in this same area, as well. (Ex. 202.)

At Sites 4/5, in 59 rows where subsurface sampling was conducted, all but four were found to contain ACM in the soil. (Ex. 63-19.) Materials found in this area included Transite, pipe, roofing materials, fibrous process waste, wall board, brake lines, and flex-board. (Id.)

At Site 6, ACM was present in soil 28 of 88 samples taken. Materials similar to those found at Sites 4/5 were encountered. (Ex. 63-23.)

C. RAWP

Appendix H to the RAWP, discussing conditions at Site 3, noted that:

> To date, a total of 66 soil borings, 32 test pits and 9 hydraulic excavation locations have been installed as the Site by ELM, LFR and AECOM. The results from the multiples investigations reveal that ACM occurrences are sporadic across the Site and typically coincide with the locations of utilities or other structures installed after the mid-1950s. (Ex. 66-766.)

Elsewhere, discussing Site 6, the RAWP notes that "the origin of the ACM in Site 6 is not known but presumed to be debris that fell from trucks while driving on

Greenwood Avenue." (Id.) This observation is consistent with IDOT's expert's findings. (Ex. 202.)

IV. THE EXPERTISE AND CREDIBILITY OF STEVEN GOBELMAN AS AN EXPERT WITNESS

Mr. Gobelman has the experience, training and skills to provide authoritative expertise to the Board, such that he is able to assist them in their fact finding role. Mr. Gobelman is a Professional Engineer, unlike Douglas Dorgan. And, also like Mr. Dorgan, Mr. Gobelman is a licensed Professional Geologist. Finally, he has a Bachelor of Science and Masters of Science degree in Geological Engineering. (Ex. 8-21 to 8-23.)

Mr. Gobelman also possesses extensive experience in environmental and remediation issues as the result of his twenty-two years of employment at IDOT, as well as employment with the Illinois EPA before going to work for IDOT. (Tr. May 24, p. 237:14-21.)

In the course of his 22 years with IDOT, Mr. Gobelman analyzed thousands of IDOT construction projects and analyzed literally thousands of reports in the course of investigating historic contamination associated with highways. (Tr. May 24, p. 251:9-14, May 25, pp. 207:16-208:14.) Mr. Gobelman provided the technical expertise for IDOT in regards to all soil and groundwater investigations throughout the State of Illinois along highway projects for approximately twenty years. (Tr. May 24, p.238:17-239:11) At Illinois EPA, he was a project manager involved with voluntary clean ups and state funded clean ups for CERCLA sites. (Tr. May 24, pp. 239:19-240:7.)

Mr. Gobelman also oversaw special waste and land and water quality issues. (Tr. May 24, p. 242:7- 242:9.) Additionally, he oversaw the preliminary environmental site assessment ("PESA") for IDOT projects, for possible environmental impacts on IDOT

property, whether a project consisted of building of roads, storm sewers, or any part of the state highway system. (Tr. May 24, p. 243:14-244:7.) He evaluated assessments for contamination and also evaluated the potential risks from contamination, and whether, in light of such risks, potentially contaminated material could stay on site or whether it would have to be removed. He reviewed numerous consultants' work plans related to property investigations conducted on behalf of IDOT, specifying where soil borings should be taken and analyzed the results of those borings. (Tr. May 24, p. 244:23-245:14.)

While at IDOT, Gobelman was in charge of the soil and groundwater investigation; He has viewed thousands of reports that IDOT investigated along our roadway since 1993; He managed the results of investigation reports that were put in the construction plans and he would also have to go out in the construction and deal with those remediation plans if an issue. (Tr. May 25, pp.207:17-208:14.)

Mr. Gobelman's ability to conduct these environmental reviews meant that he had to have an in-depth understanding of IDOT construction projects and practices. In his capacity with IDOT, he has analyzed thousands of construction plans. (Tr. May 24, p. 251:9-14.) Gobelman was involved with determining whether contamination was an issue in an IDOT construction project and analyzed plans to find waste locations. If soil contamination was an issue, Gobelman would determine if special revisions had to be installed in contracts, which may indicate a change in conditions and involve change orders. He would then analyze the construction plans, whether investigation were put into previous contract plans and whether contracts plans actually did what they were supposed to do. (Tr. May 24, p. 242:7-245:14.)

He also provided the technical review for all highway authority agreements that IDOT received from third parties asking IDOT to agree to contamination within their ROW in situations where a private party wanted a no further release statement from IDOT. Tr. May 24, p. 246:18-250:4.)

While working for the Illinois EPA, Mr. Gobelman oversaw sites in the CERCLA system, where State was overseeing site investigation and removal/remedial work, because there were no viable parties. (Tr. May 25, p.207:16-23.) He gained extensive experience working on various site remediation issues experience while at IEPA, ultimately overseeing a hundred or so projects in the voluntary cleanup process, as well as approximately 20 or so site-funded remediations. (Tr. May 24, p. 245:15-246:14.)

Mr. Gobelman is a highly credible witness and the Board should rely upon his opinions in this matter JM desperately tries to discredit and vilify Mr. Gobelman, but their arguments show JM's basic lack of understanding of a construction project such as the Amstutz project. JM tried to desperately obfuscate this matter by loosely using terms, misrepresenting testimony and trying to assume that any ACM in areas where IDOT worked was put there by IDOT. However, as Mr. Gobelman and the facts show, JM's theory does not hold water.

Further JM's claims that Gobelman somehow had information but purposely withheld it regarding the 2011 PESA discussed by JM are completely ridiculous. Gobelman would come across and review hundreds of PESA's in this time frame. JM has just created a fiction.

V. THE EXPERTISE AND CREDIBILITY OF DOUGLAS DORGAN AS AN EXPERT WITNESS

A. The Opinions Which Mr. Dorgan Has Offered in This Matter lack Credibility and Should Not be Relied Upon By the Board in Reaching a Decision in this Case

At hearing, Johns Manville presented Douglas Dorgan as an expert witness to support its contention that IDOT's construction activities in the 1970s essentially caused the conditions at Sites 3 and 6 that Johns Manville and fellow potentially responsible party Commonwealth Edison are now under a USEPA mandate to address. Mr. Dorgan's testimony, as well as his underlying opinions, should be given little, if any, weight by the Board because: 1) he does not have the appropriate background or experience to render opinions that will be helpful to the Board's ultimate decisions in this case; and 2) Mr. Dorgan's opinions are essentially the result of having cherry-picked data to support a causational theory that supports Johns Manville's case. However, Mr. Dorgan's theories lack robustness and are incomplete, because they fail to explain all of the contamination at Sites 3 and 6. Moreover, Mr. Dorgan's theories and testimony must be called into question, if for no other reason than that they are at odds with the findings of Johns Manville's own environmental consultants and, indeed, its own witness at hearing. Finally, Mr. Dorgan's reliance on Duane Mapes' third hand statements are unwarranted and unreasonable, because those statements are vague, it is unclear what they meant.

B. Mr. Dorgan Does Not Have Relevant Experience that Allows Him to Provide Helpful Expert Opinions in This Case

Given the complexities of the highway construction process, it would have made sense for Johns Manville to have obtained the services of at least one expert witness with a background in highway design and/or construction. Douglas Dorgan is not that an

expert and has no relevant experience upon which to opine about what did or didn't happened during the construction of the Amstutz Project.

His lack of relevant experience was apparent on cross-examination. During cross-examination on the first day of hearing, Mr. Dorgan conceded that he did not have any experience in highway construction. While under cross-examination, Mr. Dorgan was asked the following questions and gave the following answers:

> Q. Have you ever been an expert witness in a case involving construction of a highway?
> A. No.
> Q. Okay. Have you ever given any sort of expert opinion in support of – other than in this case – where you were asked to give or provide consulting services regarding a highway construction project?
> A. No.
> (Tr. 5/23 p.244:17-245:2.)
>
> * * *
>
> Q: Okay. Have you ever designed an embankment for a roadway?
> A. I've designed embankments, but not specifically for a roadway.
> Q. Okay. So your answer to the question is no, you've never designed an embankment for highway?
> A. No.
> (Tr. 5/23, p.251:16-24.)

Mr. Dorgan also has no experience dealing with asbestos-contaminated Superfund sites, yet another point he was forced to concede during cross-examination. (Tr. 5/23, p. 249:7-19.)

While the Hearing Officer allowed Mr. Dorgan to testify as an expert witness in this matter, given his lack of relevant experience, the Board should give little to no weight to his opinions in this matter, as they will not help to inform the Board regarding

the critical issues in this case. *Steele v. Provena Hosp.*, 2013 IL App. 110374, ¶ 74 (3rd Dist. 2013).

3. Dorgan's Opinions Should Also Not Be Given Credence by The Board Because They are Fundamentally Unsound and Are Based Upon Cherry-Picked Data and Facts

Taken as a whole, the sampling data from the ELM Report, the EE/CA, and the RAWP document pervasive ACM contamination along the southern and western edge of the former JM facility. JM was initially ordered by USEPA to conduct sampling at Sites 2 and 3. (Ex. 57-51 to 52.) Later, JM conducted additional sampling work at the Southwestern Sites Area, including Site 3 and Site 6, pursuant to its obligations to USEPA under the AOC. (Ex. 63-10.) Over the course of all of this sampling work, more than 100 soil samples were taken at Site 3. Additionally, almost 90 soil samples were taken from Site 6. (Ex. 63-93.) More than 150 soil samples were taken at Sites 4/5, both of which are located along the western edge of the former JM facility. (Ex. 63-60 to 63-63.)

Through all of this sampling work, the same types of ACM were found at all four sites. Thus, the same Transite pipe that Douglas Dorgan opines IDOT construction activities were responsible for spreading, buried, placing and disposing of at Site 3 (Ex. 6-13 to 15), is also found in abundance at Sites 4/5 and Transite was found through all four of these sites. (*See generally,* Ex. 63-60 to 63 (listing asbestos results for soil samples taken from Sites 4/5); *See also*, tr. May 23, p.313:14-22.) Additionally, asbestos-containing fibrous sludge and asbestos-containing roofing materials, such as tar paper and shingles, which Dorgan opines about having been found throughout the western end of Site 6 in fill material (Tr. 5/23, pp. 298:10-299:10, and 301:12-302:3; Ex.

84), are also found throughout the eastern and central portions of Site 6, also in fill material. (Ex. 63-63 through 68; *See generally*, Ex. 63-285 through 366, listing numerous instances of soil samples with detections of various forms of ACM in fill material.) The significance of the same types of ACM being present at Sites 4/5 and the central and eastern portion of Site 6 and, in the case of Site 6, also in fill material, is that IDOT's construction activities only cut through a small portion of Sites 4/5 and according to Dorgan's own work did not go east of sample locations 6S and did not show any of the sampling locations on the north side of Greenwood Avenue within Site 6. (Ex. 84.)

Dorgan has repeatedly opined that ACM is located "throughout" Site 3 and Site 6. (Tr. May 23, p.184:16 and 219:24, Ex. 6-14.) Yet the evidence insofar as Site 3 is concerned leads to the opposite conclusion, i.e., that ACM is <u>not</u> located "throughout" Site 3. (*See, e.g.*, Ex. 202; *See also*, Ex. 63-59.) Exhibit 202, which was prepared by Steven Gobelman provides a clear, visual representation of this conclusion. From this exhibit, it can be seen that there are a number of sampling locations within Site 3 where no ACM was detected; for example, sample locations B3-31, B3-30, and B3-21, all of which were taken within the footprint of the former Parking Lot. There are also instances of sampling locations where ACM was detected lie immediately adjacent to sampling locations where no ACM was detected, such as SB-8 and B3-32 (also located in the middle of the former parking lot), and B3-2 and SB-15 (located along the east central edge of Site 3.)

Mr. Dorgan's assertion that ACM is found "throughout" Site 3 and the western portion of Site 6 also cannot be reconciled with the conclusions reached by JM's own consultant and witness in this case, Dr. Tatsuji Ebihara. Dr. Ebihara has been overseeing

investigation and planning for the Southwestern Site Area from 2004 up to the present day. (May 23, p. 69:4-10.) Dr. Ebihara oversaw the development of the RAWP (Ex. 66), in which the following statement appears:

> The results from the multiple investigations reveal that ACM occurrences are sporadic across the Site (Site 3) and *typically coincide with the location of utilities or other structures installed* after the mid-1950s. (Ex. 66-766.) (Emphasis added.)

Under cross-examination on May 23rd, Dr. Ebihara was asked about the passage from the RAWP quoted above and affirmed the accuracy of the statement. (Tr. May 23, p.94:10-19.)

Upon further cross-examination, Dr. Ebihara was also asked about statement a in the RAWP concerning Site 6, that noted that: "[t]he origin of the ACM in Site 6 is not known but presumed to be debris that fell from trucks while driving on Greenwood Avenue." (Ex. 66-766.) Dr. Ebihara replied, as follows:

> Q. Is there anything today as you site here that causes you to reevaluate this statement?
>
> A. No. The origin is really unknown. There is no knowledge of what the origin of the material is.
>
> (Tr. 5/23, p. 96:16:21.)

Dr. Ebihara went on to testify that he had included this statement about why ACM debris came to be present at Site 6 came at the behest of USEPA. (Id., p.97:1-3.) While Dr. Ebihara appeared to engage in some degree of backpedaling during his cross-examination, at the very least, neither the RAWP nor his testimony concluded that IDOT had any role in the processes that lead to ACM being located at Sites 3 or 6.

Douglas Dorgan reviewed the RAWP and cited it as one of the sources he relied upon in the course of preparing his expert report (Ex. 6-34, item 1.) he acknowledged

that he has "no reason to believe that this isn't accurate information presented in these reports." (Id. p. 282:14-16.)

Yet Mr. Dorgan has reached entirely different conclusions about how the asbestos at Sites 3 and 6 came to be present there which are at odds with the conclusions reached by Dr. Ebihara and his over 10 years of experience working on the Southwestern Sites Area, including Sites 3 and 6. (Tr. 5/23, at pp. 282:21-283:7.)

In developing his opinions in this matter, Mr. Dorgan has studiously avoided any effort to look at asbestos contamination at the Southwestern Sites Area beyond Sites 3 and the far western portion of Site 6. He limited his "review of the documentation was limited almost exclusively to the conditions on those two locations (e.g., Site 3 and 6) and any time on any of the other sites, whether it be the main JM site or Site 4/5 was very limited." (Tr. May 23, p.313:9-13.) Yet, he was aware that the same types of ACM he was focusing on at Sites 3 and the western portion of Site 6 were also found elsewhere within the Southwestern Sites Area. (Id., 313:14-314:2.) Toward the end of cross-examination, Mr. Dorgan was asked whether the same processes which resulted in the deposition of ACM wastes at Sites 3 and 6 could have also been the cause of the waste deposited at Sites 4/5 and acknowledged that this was a possibility." (Id., p.316:9-317:2.)

Mr. Dorgan also takes issue with other reports which he has cited as source material for the opinions reached in his own expert report, such as 1999 ELM Report, which is the third item cited listed on his bibliography. (Ex. 06-34.) During cross-examination on May 23rd, Mr. Dorgan acknowledged that field and soil sampling done in conjunction with this report was "certainly very comprehensive." (Tr. May 23, p.269:4.)

Mr. Dorgan was then asked about the following statements at page 1-4 of the ELM Report (Ex. 57-11), that:

> There is little ACM at 0-3' bgs when the site of Site 3 and the number of soil sampling locations are taken into account. ACM in the subsurface was mostly concentrated in the area of the former parking lot. This is to be expected since the materials used to build the former parking lot contained ACM.
>
> (Id.)

Mr. Dorgan was asked whether these statements contradicted his opinion that there was ACM throughout Site 3. (Tr. May 23, p.269:11-14.) He replied that he "would have difficulty even understanding what that sentence says . . ." Mr. Dorgan was then asked whether he took issue with one of the most comprehensive subsurface investigation that's been done to date . . ." (Id., p.269:24-270:2), to which he replied "yes." (Id., p.270;8.)

At the end of his direct examination, JM's counsel asked whether he ever considered the possibility of JM having buried the ACM found at Sites 3 and 6. (Tr. May 23, p.226:23-227:2.) In responding to this question, Mr. Dorgan replied for the first time throughout the course of this case that that he had considered that possibility. There is no indication he did this in his expert report.. (Ex. 6-04 to 5.) In fact, as described in his report, he was tasked with developing an opinion on whether "IDOT is responsible for asbestos containing material ("ACM") found at Sites 3 and portions of Site 6. (Ex. 6-4, second paragraph.) This line of questions, asked at the end of his direct examination, and after all of the work that Mr. Dorgan has done on this case to date, can only be seen for the disingenuous testimony that it is. Moreover, his testimony on cross-examination fundamentally undercuts his direct examination testimony, as Mr. Dorgan several times

stated that he had a very narrow mandate and in fact did not consider other possibilities for the ACM at Sites 3 and 6. (Tr. May 23, p.316:19-317:2.)

In essence, what Mr. Dorgan has done in the course of preparing his opinions in this matter was to pick and choose from the vast amount of sampling data and the thousands of pages of submissions by JM to USEPA, choosing only that data which aligned with the allegations in JM's case. The 7th Circuit was faced with a similar situation in the case of *Barber v. United Airlines, Inc.*, 17 Fed. Appx. 433, **2 (2001). There, the court found that the trial court had properly barred an expert's testimony, where the expert relied on some data, but reject other data that contradicted his opinion. (Id.) Like the exert witness at issue in Barber, Mr. Dorgan has also "cherry-picked" the facts that he has chosen to use, disregarding those which do not fit with his opinions. Given how he has developed his opinions, the Board should give them little, if indeed, any, weight or credence.

4. Dorgan's Assertions During Direct Examination about Duane Mapes Statement Are Unfounded and Should Not be Relied Upon By the Board

Mr. Dorgan cited Mr. Mapes statement as support for his opinions that IDOT placed the ACM at Site 3 in his expert report. (Ex.6-08.) At hearing, Mr. Dorgan was asked to read question 10 from the USEPA's 104(e) request to IDOT. (Tr. May 23, pp. 193;23-194:8.) He was then asked about IDOT's response to that question, stating that he understood it to mean that Duane Mapes had buried pipes at Site 3. (Tr. May 23, pp. 197:9-198:13.) However, a closer reading of IDOT's response to question shows that Mapes did not state that he recalled burying pipe at Area of Concern 3, rather, he was stating that he "recalled dealing with some asbestos pipe and burying some of it." (Ex. 60-4 to 5.)

Mr. Dorgan's attempt to interpret the meaning of a statement that was made by Mr. Mapes to IDOT's attorney, who in turn apparently included this statement in IDOT's 104(e) response and to imply that it meant Mapes had buried pipe at Site 3 is completely speculative and flat out wrong and should not be given any weight or credence by the Board. *Modelski v. Navistar Intern. Transp. Corp*., 302 Ill.App.3d 879, 885 (1999) ("If the basis of an expert's opinion includes so many varying or uncertain factors that he is required to guess or surmise to reach an opinion, the expert's opinion is too speculative to be reliable.") (Internal citations omitted.)

VI. IDOT HAS NOT VIOLATED THE ENVIRONMENTAL PROTECTION ACT

In order for JM to prevail on their claims, they must show that it is more likely than not events occurred as they have alleged in their 3rd Amended Complaint. However, after five days of hearing in this matter and the introduction of over 100 exhibits into evidence, JM has failed to demonstrate that IDOT violated either the current or former version of the Act. Thus, there is no direct evidence in the record that supports JM's claims against IDOT.

JM sought to compensate for this lack of direct evidence by putting forth Douglas Dorgan as an expert witness in this matter. As discussed above, Dorgan is not a credible expert, as he lacks relevant experience with which to assist the Board, as the trier of fact, in reaching a decision in this case. Even if Dorgan had relevant experience, however, as also discussed above, his opinions should be given no weight, because: 1) they are the product of cherry-picked data; 2) they are at odds with the conclusions reached by virtually everyone else, including JM's own environmental consultants, USEPA and IDOT's expert witness, who provided better grounded, more convincing explanations

concerning key issues in this case; and, 3) they do not provide a robust and convincing explanation regarding how asbestos came to be present at Sites 3 and 6.

Under Section II.E, above, IDOT has articulated a well-reasoned set of explanation, based upon the testimony and report of its expert, Steven Gobelman, that demonstrate why IDOT's work on the Amstutz Project did not result in the disposal or deposition of ACM at Sites 3 and 6, during the course of the project. Mr. Gobelman's twenty-seven years of experience examining possible contamination issues with highway construction projects provides vastly superior bases for the opinions which he has rendered in this case. As the essence of Mr. Gobelman's opinions is that IDOT did not result in the disposal of deposition of ACM, it follows that IDOT has not violated the Act, as JM alleges.

Ultimately, JM has created a story, told by a paid consultant, which does not jibe with evidence in this case. JM's story also does not jibe with IDOT construction practices and the theories which they have advanced regarding why IDOT is liable for violations of the Act are not credible. Once those theories are, it becomes obvious that IDOT did not violate the Illinois Environmental Protection Act.

JM has not proved that IDOT caused or allowed the open dumping of any waste in violation of Section 21(a) of the Act, 415 ILCS 5/21(a) or in violation of Section 1021(b) of the Act, IL ST CH 111 ½ ¶ 1021. JM has not proved that IDOT caused or allowed the disposal or abandonment of waste or refuse at a site that does not meet the requirements of the Act in violation of Section 21(e) of the Act, 415 ILCS 5/21(e) or in violation of Section 1021(f) of the Act, IL ST CH 111 ½ ¶ 1021(f). JM has not proved that IDOT has conducted a waste-storage, waste-treatment or waste-disposal operation in

violation of Section 21(d) of the Act, 415 ILCS 5/21(d). JM has not proven that IDOT operated or continues to operate a refuse collection and/or refuse disposal operation in violation of IL ST CH 111 ½ ¶ 1021(e).

VII. THE APPLICATION OF THE SECTION 33(c) FACTORS IN THIS CASE DO NOT WARRANT THE BOARD'S GRANTING OF RELIEF FOR JOHNS MANVILLE

JM argues that the application of the Section 33(c) factors, 415 ILCS 5/33(c)(i-v) to the evidence in this case, warrants the granting of its requested. (JM PHB, pp. 47-56.) Neither the testimony nor exhibits received into evidence by the Board at hearing, nor the cases cited by JM in their post-hearing brief support of their request, support such a finding against IDOT. A discussion of each of these factors is set forth below.

The first Section 33(c) factor which the Board must consider is the nature and character of the injury. 415 ILCS 5/33(c)(i) (2014). JM failed to present any evidence or testimony at hearing which it presented at hearing that IDOT is responsible for having caused the "injury" which it has suffered. Additionally, the cases cited by JM with respect to this first Section 33(c) factor are either inapplicable or factually distinguishable. JM's citation to *People v. Champion Ent's Serves., Inc.*, PCB 5-199 (PHB, at 47-48) is but one example of this problem, because that case involved the egregious and improper removal and demolition of asbestos materials by an environmental contractor. IPCB 5-199, at *4.[7]

The evidence in the record also favors IDOT with respect to whether there was/was not social and economic value to the activity. 415 ILCS 5/33(c)(ii). Clearly, the

[7] In *Champion Environmental*, an IEPA inspector observed an asbestos removal contractor and its employees violating rules governing the asbestos removal process. Here, by comparison, there is absolutely no evidence in the record before the Board of IDOT ever having improperly disposed of any ACM during the Amstutz Project.

construction and development of road improvements to allow for use of the Amstutz Expressway must be seen as having social and economic value.

JM claims that there is no value in the waste that is present at Sites 3 and 6. IDOT does not argue with that proposition. However, there is also no proof that IDOT was responsible for having caused the placement or disposal of that waste, either. Thus there is no basis for weighing this factor against IDOT.

The third Section 33(c) factor – the suitability/unsuitability of the pollution source to the area in which it is located – also cuts in favor of IDOT. While the ACM wastes at Sites 3 and 6 are unquestionably unsuitable to the area in which they are located, once again, JM has failed to meet it burden of proof that IDOT was responsible for having disposed of the ACM that is present at those sites.[8]

The fourth Section 33(c) factor is whether it is technically practicable and economically reasonable to reduce or eliminate the pollution source. 415 ICLS 5/33(c)(iv). Once again, JM makes numerous references to various determinations and findings which USEPA has made about the feasibility of cleaning up the Southwestern Sites Area. And, once again, USEPA made these findings about the feasibility of JM and Commonwealth Edison undertaking the necessary removal activities, not IDOT. (Id.)

The final Section 33(c) factor concerns a respondent's lack of subsequent compliance. 415 ICLS 5/33(c)(v). JM accuses IDOT of not made any signed effort to come into compliance with the Act and continues to deny any responsibility for the

[8] Ironically, JM's arguments on this third Section 33(c) factor makes two references to USEPA's findings in the 2012 Enforcement Action Memorandum regarding the threats posed by the ACM located at Sites 3 and 6 (as well as Sites 4/5). (PHB at pp. 49-50.) Left unsaid in this portion of JM's post-hearing brief is the fact that USEPA directed JM and Commonwealth Edison – and not IDOT – to undertake the necessary actions to address the dangers posed by the buried ACM.[8] (*See generally,* Ex. 65.)

contamination and to defy the law." (PHB at 51.) There are several reasons why there is no merit to JM's allegations regarding this final Section 33(c) factor.

First, IDOT responded to USPEA's 104(e) request by answering all questions and providing a number of documents to USEPA, including a copy of its complete file for the Amstutz Project. Kirk Brown, then Secretary of IDOT, provided a sworn certification to that effect. (Ex. 60-1.) Ultimately, and despite JM's lobbying USEPA to do so, USEPA opted not to name IDOT as a PRP.

JM attempts to bolster its assertion that IDOT has failed to come into compliance by citing several cases, all of which are readily distinguishable on their facts from this case, such as *Peter v. Geneva Meat & Fish Market,* PCB 89-151, and *People v. Patrick Roberts Land Trust,* PCB 01-135. (PHB at 51.) The *Peter* case is distinguishable because it dealt with the respondent's failure to correct violations for at least 11 months after having been previously ordered to do so by the Board. *Peter*, at *1. Similarly, the respondent in *Patrick Roberts Land Trust* had failed to correct violations documented at its property by Illinois EPA, even after seven inspections by an Illinois EPA inspector. *Patrick Roberts*, PCB 01-135, *1.[9]

JM's reliance on *Bressler Ice Cream v. Pollution Control Bd.,* 21 Ill.App.3d 560 (PHB at 51-2), is similarly misplaced and is, once again, distinguishable on its facts from this case. In *Bressler,* the issue which confronted the court was whether a penalty was

[9] While it is true, as JM notes at page 51 of its post-hearing brief that the Board's *Patrick Roberts* opinion stated that "It should not be deemed a mitigating factor if compliance is achieved only after enforcement proceedings are initiated[,]" left unsaid by JM is that the Board made this pronouncement due to the respondent's failure to take timely action to address the compliance situation on his property. *Patrick Roberts,* *5.

warranted in a case where the company had begun taking corrective measures even before the Illinois EPA instituted a formal enforcement action. 21 Ill.App.3d at 561.

JM attempts to paint IDOT as recalcitrant for having "completely ignored JM's settlement overture at the beginning of the case." (PHB, at 52.) This claim is at best disingenuous, relying in part, as it does, on Exhibit 5, which is a July 11, 2013 letter from JM's counsel to Michael Forti, then IDOT's chief counsel. In relevant part, counsel's letter stated that:

> JM would like to meet with IDOT to discuss this matter and would be willing to stay the action before the Board in the interim, assuming IDOT would agree that any delay caused by the stay would not be used by IDOT as a defense to JM's claims.
> (Ex. 5-2.)

When JM introduced this at hearing on May 24th, IDOT's counsel objected, arguing that it was "a settlement communication and it should, therefore, not be admissible." (Tr. May 24, p.187:20-188:2.) JM's counsel countered that Exhibit 5 "was not a settlement communication. We didn't name it as such." (Id. p.188:14:16.) The Hearing Officer overruled IDOT's objection and admitted the letter into evidence. (Id., p. 189:14-16.)

Now, however, after stating on the record that Exhibit 5 was not a settlement communication, JM outrageously takes the opposite tack and declares that this letter was, in fact, a "settlement overture." (PHB at 52.) JM cannot have it both ways. Having argued during the hearing that the letter was not a settlement communication, it should not be allowed to take a contrary position in its post-hearing brief, in order to bolster its flimsy position on Section 33(c)(v).

Finally, JM attempts to have the Board find against IDOT on Section 33(c)(v) by claiming that IDOT sought to "hide fundamental facts from JM, the Board, and USEPA." (PHB at 52.) Part of its argument, in turn, rests on (yet again), a case that is readily distinguishable from the facts of this case, specifically, *Standard Scrap Metal Co. v. Pollution Control Bd.*, 142 Ill.App.3d 655 (1st Dist. 1986). *Standard Scrap* involved the long-standing and knowing failure of a metal recycling company to come into compliance with the requirements of the Environmental Protection Act and to obtain a Illinois EPA-issued permit for its operations. Id., at 656. By comparison, allegations of similar conduct by IDOT cannot stand, because the evidence in this case shows that IDOT fully responded to USEPA in 2000 and, unlike JM and its Commonwealth Edison, was not required to participate in the removal action at the Southwestern Sites Area.

As noted earlier, IDOT produced its entire file for the Amstutz Project, including Exhibits 41 and 42, both of which document the rights of way and temporary easements that IDOT obtained from JM's fellow PRP, Commonwealth Edison. Ai also made reference to these temporary easements in its 104(e) response. (Ex. 60-3 to 60-5.) JM also cannot credibly claim that IDOT hid "fundamental facts" from it, as IDOT also produced Exhibits 41 and 42 to JM early on in the course of responding to JM's written discovery. These claims fare no better with respect to allegations that IDOT hid fundamental facts from JM. Notably, JM is not alleging that IDOT failed to produce Exhibits 41 and 42, because IDOT did, in fact, produce both of those documents to JM in response to its initial written discovery demands.

JM then argues that: "Years later, while IDOT knew that JM was under the misimpression that the City (not IDOT) had acquired the easement in Parcel No. 0393,

IDOT did nothing to correct this impression." (PHB, 53.) But, after five days of testimony in this matter and the admission of more than 100 exhibits into evidence, JM is unable to cite a single piece of testimony, a document - indeed, any evidence at all - that supports its assertion that IDOT actively sought to misinform JM about Parcel 0393. Clearly, had such evidence existed, JM would have cited to it in its brief, *ad nauseum*.

In a further effort to gin up support for its groundless allegations of having hid "fundamental facts", JM asserts that Steven Gobelman's allegedly having "actively fostered JM's misapprehension of the facts" related who controls and has jurisdiction over Greenwood Avenue and Sand Street, and the rights of way thereto. (PHB, at 54.) Here, JM's claim purports to be based on "two independent pieces of evidence." (PHB, 54.)

The first alleged piece of "evidence" purportedly arises out of Steven Gobelman's having overseen work on a 2011 Preliminary Environmental Site Assessment ("2011 PESA") related to a proposed bridge removal project on Greenwood Avenue. (PHB, at 55.) JM essentially claims that IDOT was able to take soil samples in the vicinity of Site 3 and Site 6, because it held a right of way over Parcel 0393. (PHB at 44-55.) But as IDOT employee John Baczek later explained, IDOT has the statutory authority to come on to land to conduct studies and take samples, as needed, in conjunction with the Department's work. (Tr. May 24, p.91:8-24, referring to 605 ICLS 5/4-503.) That IDOT held a right of way over Parcel 0393 is irrelevant to the question of whether they could take the soil samples for its work on the 2011 PESA.

Although not specifically identified as such, it appears that the second piece of "evidence" which shows that Mr. Gobelman mislead JM concerns his inquiries into the

issue of who possessed the right of way in the period of time before he submitted his expert report in this matter.

Ultimately, there is simply no factual support for JM's allegation that IDOT "hid fundamental facts" from USEPA, the Board and the company and the Board should give no weight to such baseless allegations.

VIII. AFFIRMATIVE DEFENSES

A. 1st Affirmative Defense – JM's Unclean Hands

Under Illinois law, the affirmative defense of unclean hands is used to prevent a party from taking advantage of their own wrongful conduct and obtaining any form of equitable relief against another party. *Long v. Kember Life Ins. Co.,* 196 Ill.App.3d 216, 219 (2nd Dist. 1990)(internal citations omitted); *see also People v. Douglas Furniture of California*, PCB 97-133, *4 (May 1, 1997).

Unclean hands is properly raised in response to JM's claims against IDOT, because: 1) JM engaged in misconduct by disposing of hazardous waste, specifically waste asbestos containing materials, at its former facility and at the Southwestern Sites. (cite); and, 2) through its Third Amended Complaint, JM requests that the Board grant it certain equitable relief, namely, that the Board order JM to participate in the USEPA-mandated removal action at the Southwestern Sites, pursuant to the requirements of the 2007 AOC.[10] (3rd Am. Compl, Prayer for Relief, Item 3.)

The testimony and exhibits received into evidence at hearing clearly show that JM engaged in "misconduct" through its manufacturing and apparent waste-disposal practices which the company engaged in during the approximately 70 years that it

[10] As argued further under IDOT's Fifth Affirmative Defense, the Board does not have the authority to grant JM the relief that it requests through its Third Amended Complaint and it would be beyond the scope of the Board's statutory mandate to require IDOT to participate in the USEPA-mandated removal action.

engaged in manufacturing operations at its former facility. From some point in the 1920s up through 1998, JM manufactured a variety of asbestos containing products at its Waukegan facility. (Ex. 57-15; Tr. May 23, pp. 42:15-44:22.) The products which JM manufactured at their former facility included Transite pipe, various fire-proof and insulation materials, roofing materials and automotive products such as brakes and brake liners. (Ex. 57-15.)

The Southwestern Sites Area, which includes Sites 3 and 6, lies immediately adjacent to the site of JM's former facility to the south and west. (Ex. 62-6.) The Southwestern Site Area also includes Sites 4 and 5, which lies along the western edge of the former JM facility (Id.) All of these sites are part of the larger JM NPL Site. (Tr. May 23, pp. 30:8 to 31:12.)

The same forms of ACM-containing waste that have been found at Sites 3 and the western portion of Site 6 have been have throughout the rest of Site 6, as well as Sites 4 and 5. (Ex. 63-115, 63-18, and 63-22.) Furthermore, the vast majority of the asbestos-containing material found at the rest of Site 6, and Sites 4 and 5 have been predominantly found in fill. (*See e.g.*, Ex. 63-272 (Transite material found throughout four feet of fill material at Site 4/5), Ex. 63-202 (Transite, roofing paper and roofing material found in four feet of fill material at Site 4/5), Ex. 63-335 (roofing shingles and asbestos-containing sludge found in fill material and silty sand to a depth of 3 feet below ground surface at Site 6), and Ex. 63-296 (Transite and roofing materials in fill material, at a depth to a depth of 3 feet below ground surface, also at Site 6).) Although the same types of material have been found throughout the Southwestern Site Area, construction on the Amstutz Project involved only a relatively small portion of the Southwestern Site Area.

The presence of the same types of ACM so widely dispersed throughout the Southwestern Sites Area implies a similar causes or circumstances besides simply claiming "IDOT did it."

In 2007, JM, as well as Commonwealth Edison (the owner of the underlying property constituting Site 3), entered into an Administrative Order on Consent with USEPA, pursuant to which they were required to "[d]etermine the nature and extent of asbestos contamination at and near the Southwestern Site Area. . ." (Ex. 62-9.)

Given the prevalence of various forms of ACM material at the JM Site, Sites 3, 4/5, and 6, and JM's existing obligations under the AOC for removing this ACM, JM's efforts to name IDOT as a respondent in this present action should be barred, as JM has unclean hands. *Long v. Kemper Life Ins. Co.,* 196 Ill.App.3d 216, 219 (2nd Dist. 1990)

B. 2nd and 3rd Affirmative Defenses – Waiver and Laches

The Illinois Supreme Court has defined waiver as "the intentional relinquishment of a known right." *Ryder v. Bank of Hickory Hills*, 146 Ill.2d 98, 104-5 (1991). "There must be both knowledge of the existence of the right and an intention to relinquish it." *Pantle v. Industrial Commission*, 335 N.E. 2d 491, 496 (1975). Waiver may be implied from the conduct of a party, such as JM, where they have engaged in a course of conduct that is inconsistent with the intention to exercise a right which they hold.. *Ryder*, at 104-5.

Laches, by comparison, is an equitable doctrine that will defeat a plaintiff's cause of action where the plaintiff's delay in commencing the action is prejudicial to the defendant's ability to assert their rights. *Senese v. Climatemp*, 280 Ill.App.3d 570, 578-79 (1st Dist. 1997.) Additionally, laches will only lie where the plaintiff fails to provide a

reasonable basis for the delay.) *Long v. Tazewell/Pekin Consolidated Communications Center*, 236 Ill.App.3d 967, 970 (3rd Dist. 1992).

During the five days of hearing, JM elicited testimony regarding the use of Transite pipe as bumpers in the Parking Lot. For example, persons working for JM were allegedly aware that Transite pipe had been used as parking bumpers in the Parking Lot. (Tr. May 23rd, p. 46:4-6.) Presumably, then, JM continued to be aware of the presence of ACM at the time that IDOT began construction work on Greenwood Avenue and in the former Parking Lot that ACM Transite pipe was located on and at the Parking Lot. (Tr. May 23, p. 34:17-22.)

Additionally, JM was put on notice by USEPA beginning no later than July1998 (and quite likely earlier) that it had to begin an investigation of Sites 2 and 3, as part of JM's overall work on the JM NPL Site. (Ex. 57-51 and 52.) With respect to Site 3, USEPA directed JM "to define the vertical and horizontal extent of ACM on the surface and in the top three feet of soil of Site 3." (Ex. 57-8.)

On September 20, 2000, USEPA sent a 104(e) information request to IDOT seeking "information it may have that is relevant to the investigation of contamination at the Site (e.g., the JM NPL site) and the surrounding l." (Ex. 58-1.) USEPA's September 20th letter also contains the earliest confirmed instance of JM's contention that IDOT's work during the construction of the Amstutz Project may have led to the conditions of contamination at Site 3. (Id.) Thus, JM was making the same allegations about IDOT no later than September of 2000 that it was making when it filed its original complaint in this case some 13 years later.

From at least 2000 up through the June 2007 entry of the AOC, JM was in regular contact with USEPA, and actively lobbied the agency to name IDOT as a PRP for Sites 3 and 6. (Tr. May 24, pp. 215:15-217:22.) JM's efforts even included submitting federal Freedom of Information Act requests to USEPA, in an effort obtain information about USEPA's dealings with IDOT relative to the Site. (Tr. June 24, pp.111:16-112:5.) Yet in spite of JM's active and repeated overtures to USEPA to name IDOT as a PRP at the site, the agency never named IDOT as a party to the AOC. (Ex. 62-3 and 5.)

Clearly, JM was aware at the time that it entered into the AOC that it would be obligated to undertake a substantial amount of work at Sites 3 and 6, including "determining the extent of asbestos contamination at or near the Southwestern Site Area (AOC, §VIII.15.a), the development of an "Extent of Contamination Work Plan" (AOC, §VIII.15.b), and the implementation of the scope of work identified under that plan. (Ex. 62-7 through 11.)

The evidence admitted at hearing demonstrates, satisfied both of the two factors giving rise to waiver that were discussed by the *Pantle* court. First, by no later than 2000, JM was already claiming that IDOT was responsible for creating the then-existing conditions on Site 3. (Ex. 58-1.) These allegations, in turn, are central to the claims made by JM in its recently-filed Third Amended Complaint. (*See generally,* 3rd Am. Compl, ¶¶ 22-30, and 87.) JM has known of and sought to vindicate its purported claims against IDOT for years. Second, by waiting approximately 13 years to bring its claims against IDOT, JM evidenced its intention to relinquish its claims against IDOT, as its actions were inconsistent with its underlying rights and other.

The affirmative defense of laches is appropriately invoked in this case because: 1) JM's years-long delay in commencing this action is prejudicial to IDOT's ability to defend itself; and 2) because JM has failed to offer any "reasonable basis" for why it waited 13 years before finally bringing this case. *Long*, 236 Ill.App.3d at 970.

JM offers no valid reason for not filing this action until 2013. In Paragraph Two of its 3rd Amended Complaint, JM alleges:

> Section 31(d) of the Act provides that"[a]ny person may file with the Board a complaint . . . against any person allegedly violating this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit, or any Board order."

The evidence before the Board clearly demonstrates that the actions which form the basis for JM's case against IDOT were known to JM approximately 16 years ago. That knowledge would have provided JM with the same legal basis under Section 31(d) of the Act to have filed its case against IDOT 16 years ago, rather than waiting until 2013 to initiate this action. JM claims that it was compelled to bring this case after USEPA issued a Notice to Proceed with the removal action called for under the AOC. (Ex. 5.) But if, as JM claims, that IDOT violated certain provisions of the Act, and JM has brought this case as a citizen enforcement action, then it should not be a "reasonable basis for delay" that it did not bring this suit until it was ordered to implement the USEPA-required removal action, an event that has absolutely nothing to do with IDOT's alleged conduct which purportedly gives rise to JM's claims against it. Such self-serving conduct is proper predicate for IDOT's assertion of laches. IDOT therefore requests that the Board dismiss this action on those grounds.

C. 4th Affirmative Defense – Statute of Limitations

The Board has held in prior cases that a statute of limitations affirmative defense will not lie against enforcement actions brought by the State. *Caseyville Sport Choice, LLC v. Seiber*, PCB 08-30, *3 (Oct. 16, 2008). However, the Board has also recognized in other cases that the statutes of limitations may be an proper affirmative defense in cases not involving the enforcement of public rights. *Indian Creek Development Co. v. BNSF Railway Co.*, PCB 07-44 (June 18, 2009). Indeed, in *Caseyville*, the Board acknowledged the possibility that the statute of limitations defense could lie for cases where the complainant is not the State. *Caseyville Sports Choice, at* *3. Additionally, the Board has found that the five year statute of limitations under Section 13-205 of the Illinois Code of Civil Procedure, 735 ILCS 5/13-205 (2014) is the appropriate standard to be employed.

JM's causes of action under the Act began accruing at a minimum in 2000, when it first sought to have IDOT named as a potentially responsible party for the Site 3. (Ex. 58-1.) Thus their filing of this action in 2013 came well after the expiration of five year statute of limitations under Section 13-205 of the Code of Civil Procedure. As such, it is IDOT's position that JM's claims against it are time-barred under the statute of limitations and the Board should therefore dismiss the action.

D. 5th Affirmative Defense – Lack of Jurisdiction

Section 33(b) of the Act, 415 ILCS 5/33(b) (2014), provides, in relevant part, that if, after conducting a hearing, the Board finding the respondent liable, it may issue an opinion and order that "may include a direction to cease and desist from violations of this Act[.]"

The third paragraph of JM's Prayer for Relief in its Third Amended Complaint requests that the Board order IDOT:

> [T]o participate in the future response actions on Sites 3 and 6 - implementing the remedy approved or ultimately approved by EPA – to the extent attributable to IDOT's violations of the Act, pursuant to the Board's broad authority to award equitable relief under Section 33 of the Act, 415 ILCS 5/33, and under Section 1033 of the historical Act, IL ST CH 111 ½ ¶ 1033.

As the Illinois Supreme Court has noted, "[t]he only powers [an administrative agency] possesses are those granted to it by the legislature. Any action it takes must be specifically authorized by statute." *Daniels v. Industrial Com'n*, 201 Ill.2d 160, 165 (2002) (Emphasis added). By its plain language, Section 33(b) does not vest the Board with the authority to order IDOT to participate in a USEPA-mandated removal action. As such, the Board is without power to grant the relief sought by JM in its prayer for relief.

A second reason why the Board cannot order IDOT to participate in the removal action called for under the AOC is that the AOC is a settlement agreement. (Ex. 62-1.) As a settlement agreement, the AOC is, in essence, a contract between USEPA and JM and Commonwealth Edison. *City of Chicago Heights v. Crotty*, 287, Ill.App.3d 883, 885 (1st Dist. 1997). It is well-settled Illinois law "that a court cannot alter, change or modify existing terms of a contract, or add new terms or conditions to which the parties do not appear to have assented." *Thompson v. Gordon*, 241 Ill.2d 428, 449 (2011). During the five days of hearing in this matter, JM presented absolutely no proof that USEPA and Commonwealth Edison has "assented" to bringing IDOT in as a party participating in the removal action. If a court with its general powers of jurisdiction to hear and decide cases

cannot alter a contract without the consent of all parties, then the Board, as a creature of statutory law, most certainly lacks the authority to take such action.

Finally, as a claim made against an agency of the State of Illinois, to the extent that Johns Manville is seeking any form of monetary relief to be granted bythe Board, the Board lacks the authority to do so, as such relief can only be provided by a suit brought before the Illinois Court of Claims. *See generally*, 705 ILCS 505/1 *et seq.* (2014).

E. 6th Affirmative Defense – Failure to Join Necessary Parties

JM never sought to name USEPA or Commonwealth Edison as parties to this action before the Board, even though the actions which JM and Commonwealth Edison are required to take under the AOC are inextricably linked to John Manville's allegations in this case against IDOT. (*See, e.g.*, 3rd Am. Complaint, ¶10, ("Complainant JM entered into an Administrative Order on Consent ("AOC") with EPA . . ."), ¶42 ("On November 30, 2012, EPA issued an (sic) Action Memorandum selecting a remedy for the Southwestern Sites . . ."), ¶75 ("JM . . . must begin implementation of EPA's proposed remedy shortly after the RAWP is approved . . ."); and, Prayer for Relief, ¶C).

As an initial matter, all aspects of JM's work under the AOC are regulated by USEPA. For example, any contractor working on the project must meet certain prescribed criteria and USEPA has the authority to disapprove of any contractor. (Ex. 62-8, ¶12.) The AOC also specifically provides that JM seek USEPA's approval before changing any aspect of how it performs the work specified under the AOC. (Ex. 62-28, ¶74.) The RAWP, in turn, contains very specific details about who will perform the work to be conducted. For example, regarding relocation of AT&T lines in the vicinity of Sites 3 and 6, the RAWP provides that "JM will perform excavations and managed materials

generated from utility construction with HASPs for handling management of potential ACM . . .” (Ex. 67-25.) The RAWP also provides that “[t]he Respondents (i.e., JM and Commonwealth Edison) will replace” certain City of Waukegan water lines in the vicinity of Site 3 and that “[u]tility design is being completed by JM with City of Waukegan review and participation.” (Ex. 67-28.)

Ultimately, JM’s failure to join USEPA to this action runs afoul of the legal principles articulated by the ISC, that “[a]ll persons with an interest in the lawsuit should be joined to allow the court to dispose of the entire controversy.” *Feen v. Ray* 109 Ill.2d 339, 347 (1985). Clearly, the relief sought by JM implicates USEPA’s interests in how the work specified under the AOC will be performed.. Yet in spite of USEPA’s obvious and fundamental interest in this case, JM never sought to make them a party to this case. This omission is fatal to JM’s requested relief.

IX. CONCLUSION

For the reasons set forth herein, Respondent, ILLINOIS DEPARTMENT OF TRANSPORTATION (“IDOT”), respectfully asks that the Board find in favor of IDOT and against Complainant, JOHNS MANVILLE, as to all counts and claims in their Third Amended Complaint, and that the Board grant Johns Manville none of the relief requested thereunder.

Respectfully Submitted,

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