BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter Of:	)	
	)	
JOHNS MANVILLE,	)	
	)	
Complainant,	)	**PCB No. 14-3**
	)	**(Citizens Enforcement)**
v.	)	
	)	
ILLINOIS DEPARTMENT OF TRANSPORTATION,	)	**Hearing Officer Halloran**
	)	
	)	
Respondent.	)	

NOTICE OF FILING OF THIRD PARTY COMMONWEALTH EDISON

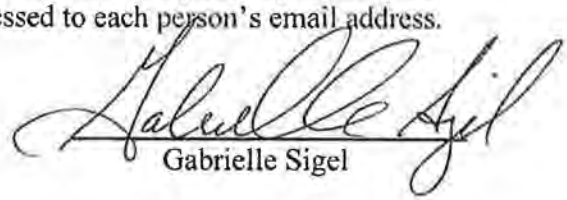
To: See Attached Service List

Please take note that today, August 4, 2017, pursuant to 35 Ill. Adm. Code Section 130.400, *et seq.*, I filed for *in camera* review by the Board, **Third Party Commonwealth Edison Company's *In Camera* Application for Non-Disclosure And For Protective Order In Response To Subpoena *Duces Tecum***, and **Privilege Log of Commonwealth Edison Co. for Non-Disclosable Information Documents in Response to IDOT Subpoena *Duces Tecum*, with attached Non-Disclosable Information Documents,** in the above-referenced matter with the Clerk of the Illinois Pollution Control Board. A copy of this Notice of Filing, and attached materials which are not sought to be protected from disclosure is hereby served upon you, pursuant to 35 Ill. Adm. Code 130.404(d).

Gabrielle Sigel, ARDC #6186108
Alexander J. Bandza, ARDC #6312301
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654
Telephone: (312) 222-9350
Facsimile: (312) 840-7758
gsigel@jenner.com
abandza@jenner.com

CERTIFICATE OF SERVICE

I, GABRIELLE SIGEL, do hereby certify that today, August 4, 2017, I caused to be served this **Notice of Filing Of Third Party Commonwealth Edison Company**, by sending the documents via email to all persons listed below, addressed to each person's email address.



Gabrielle Sigel

Evan J. McGinley
Office of the Illinois Attorney General
69 West Washington Street, Suite 1800
Chicago, IL 60602
E-mail: emcginley@atg.state.il.us

Matthew D. Dougherty
Assistant Chief Counsel
Illinois Department of Transportation
Office of the Chief Counsel, Room 313
2300 South Dirksen Parkway
Springfield, IL 62764
E-mail: Matthew.Dougherty@illinois.gov

Ellen O'Laughlin
Office of Illinois Attorney General
69 West Washington Street, Suite 1800
Chicago, IL 60602
E-mail: eolaughlin@atg.state.il.us

Illinois Pollution Control Board
Brad Halloran, Hearing Officer
James R. Thompson Center
100 W. Randolph, Suite 11-500
Chicago, IL 60601
E-mail: Brad.Halloran@illinois.gov

Illinois Pollution Control Board
Don Brown, Clerk of the Board
James R. Thompson Center
100 W. Randolph, Suite 11-500
Chicago, IL 60601
E-mail: Don.Brown@illinois.gov

Susan Brice
Lauren J. Caisman
161 North Clark Street, Suite 4300
Chicago, Illinois 60601
(312) 602-5079
Email: Susan.brice@bryancave.com
Lauren.caisman@bryancave.com

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:	)	
	)	
JOHNS MANVILLE, a Delaware corporation,	)	
	)	
	)	
Complainant,	)	**PCB No. 14-3**
	)	**(Citizens Enforcement)**
v.	)	
	)	
ILLINOIS DEPARTMENT OF TRANSPORTATION	)	**Hearing Officer Halloran**
	)	
	)	
Respondent.	)	

THIRD PARTY COMMONWEALTH EDISON COMPANY'S APPLICATION FOR NON-DISCLOSURE AND PROTECTIVE ORDER REGARDING CONFIDENTIAL AND PRIVILEGED INFORMATION

Confidential/Privileged Document

FOR IN CAMERA REVIEW; NON-DISCLOSABLE INFORMATION

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:	)	
	)	
JOHNS MANVILLE, a Delaware corporation,	)	
	)	
Complainant,	)	**PCB No. 14-3**
	)	**(Citizens Enforcement)**
v.	)	
	)	
ILLINOIS DEPARTMENT OF TRANSPORTATION	)	**Hearing Officer Halloran**
	)	
Respondent.	)	

THIRD PARTY COMMONWEALTH EDISON COMPANY'S APPLICATION FOR NON-DISCLOSURE AND FOR PROTECTIVE ORDER REGARDING CONFIDENTIAL AND PRIVILEGED INFORMATION

Exhibit 1 to ComEd's Application for Non-Disclosure and for Protective Order

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, May 26, 2017, Respondent, Illinois Department of Transportation, has filed a copy of the attached Subpoena for Documents directed on Exelon, along with proof of service upon Exelon on May 19, 2017, with the Clerk of the Pollution Control Board, and have served each person listed on the attached service list with a copy of the same.

Respectfully Submitted,

By: s/ Evan J. McGinley
EVAN J. McGINLEY
ELLEN O'LAUGHLIN
Assistant Attorneys General
Environmental Bureau
69 W. Washington, 18th Floor
Chicago, Illinois 60602
(312) 814-3153
emcginley@atg.state.il.us
eolaughlin@atg.state.il.us
mccaccio@atg.state.il.us

MATTHEW J. DOUGHERTY
Assistant Chief Counsel
Illinois Department of Transportation
Office of the Chief Counsel, Room 313
2300 South Dirksen Parkway
Springfield, Illinois 62764
(217) 785-7524
Matthew.Dougherty@Illinois.gov

CERTIFICATE OF SERVICE

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

I, EVAN J. McGINLEY, do hereby certify that, today, May 26, 2017, I caused to be served on the individuals below, by electronic mail, a true and correct copy of Respondent, Illinois Department of Transportation Notice of Filing and Service of Subpoena for Documents directed on Exelon along with proof of service upon Exelon on May 19, 2017, on each of the parties listed below:

Bradley Halloran
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph, Suite 11-500
Chicago, Illinois 60601
Brad.Halloran@illinois.gov

Don Brown
Clerk of the Pollution Control Board
James R. Thompson Center
100 West Randolph, Suite 11-500
Chicago, Illinois 60601
Don.Brown@illinois.gov

Susan Brice
Lauren Caisman
Bryan Cave LLP
161 North Clark Street, Suite 4300
Chicago, Illinois 60601
Susan.Brice@bryancave.com
Lauren.Caisman@bryancave.com

s/Evan J. McGinley
Evan J. McGinley

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

SUBPOENA DUCES TECUM

TO: Commonwealth Edison Company
Corporate Creations Network In
350 S. Northwest Highway 300
Park Ridge, IL 60068

Exelon Law Department
10 S. Dearborn St.
Chase Tower, 49th Floor
Chicago, IL 60603

Pursuant to Section 5(e) of the Environmental Protection Act (415 ILCS 5/5(e) (2024)) and 35 Ill. Adm. Code 101.622, you are ordered to produce the following documents identified below by June 20, 2017, to the following address: Evan McGinley, Assistant Attorney General, Environmental Bureau, 69 W. Washington, 18th floor Chicago, Il 60602, emcginley@atg.state.il.us.

1. All documents in your possession, custody or control regarding payments made by Commonwealth Edison Company related to the Johns Manville, Southwestern Site Area, in Waukegan, Lake County, Illinois, referenced by the Administrative Order on Consent, attached hereto as Exhibit A.;

2. All documents in your possession, custody or control regarding payments to be made by Commonwealth Edison Company related to the Johns Manville, Southwestern Site Area, in Waukegan, Lake County, Illinois, referenced by the Administrative Order on Consent, attached hereto as Exhibit A.;

3. All documents in your possession, custody or control regarding liability that Commonwealth Edison Company has been ordered to pay or has agreed to undertake in regard to Site 3 and/or Site 6, as defined by the Administrative Order on Consent, attached hereto as Exhibit A.

Failure to comply with this subpoena will subject you to sanctions or judicial enforcement of the subpoena. 35 Ill. Adm. Code 101.622(g), 101.802.

ENTER:

Don A. Brown

Don A. Brown, Assistant Clerk
Pollution Control Board

Date: May 19, 2017

I, the undersigned, on oath or affirmation, state that I served this subpoena upon

Exelon Law Department, 10 S. Dearborn Street, 49th Floor, Chicago, IL 60603 (person served) by

U.S. certified mail (manner of service)

on May 19, 2017.

Ellen O'Laughlin
Print Name

Signature

Notary Seal

Subscribed and sworn to before me this 19th day of May, 2017.

Notary Public

OFFICIAL SEAL
ARLENE MARYANSKI
NOTARY PUBLIC. STATE OF ILLINOIS
MY COMMISSION EXPIRES 06-06-2020

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:	ADMINISTRATIVE SETTLEMENT AGREEMENT AND ORDER ON CONSENT FOR REMOVAL ACTION
Johns Manville Southwestern Site Area including Sites 3, 4, 5, and 6 Waukegan, Lake County, Illinois	U.S. EPA Region 5 CERCLA Docket No. V-W- '07 -C-870
Johns Manville and Commonwealth Edison Company, Respondents	Proceeding under Sections 104, 106(a), 107 and 122 of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, 42 U.S.C. Sections 9604, 9606(a), 9607 and 9622

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I. JURISDICTION AND GENERAL PROVISIONS

1. This Administrative Settlement Agreement and Order on Consent ("Settlement Agreement") is entered into voluntarily by the United States Environmental Protection Agency ("EPA") and Johns Manville ("JM") and Commonwealth Edison Company ("ComEd") ("Respondents"). This Settlement Agreement provides for the performance of a removal action by Respondents and the reimbursement of certain response costs incurred by the United States at or in connection with certain property located on and adjacent to the southern and western property lines of the former Johns Manville manufacturing facility located near Greenwood Avenue and Pershing Road in Lake County, Illinois and denoted as the Southwestern Site Area in Attachment 1.

2. This Settlement Agreement is issued under the authority vested in the President of the United States by Sections 104, 106(a), 107 and 122 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. Sections 9604, 9606(a), 9607 and 9622, as amended ("CERCLA").

3. EPA has notified the State of Illinois of this action pursuant to Section 106(a) of CERCLA, 42 U.S.C. Section 9606(a).

4. EPA and Respondents recognize that this Settlement Agreement has been negotiated in good faith and that the actions undertaken by Respondents in accordance with this Settlement Agreement do not constitute an admission of any liability. Respondents do not admit, and retain the right to controvert in any subsequent proceedings other than proceedings to implement or enforce this Settlement Agreement, the validity of the findings of facts, conclusions of law, and determinations in Sections IV and V of this Settlement Agreement. Respondents agree to comply with and be bound by the terms of this Settlement Agreement and further agree that they will not contest the basis or validity of this Settlement Agreement or its terms.

II. PARTIES BOUND

5. This Settlement Agreement applies to and is binding upon EPA and upon Respondents and their successors and assigns. Any change in ownership or corporate status of a Respondent including, but not limited to, any transfer of assets or real or personal property shall not alter such Respondents' responsibilities under this Settlement Agreement.

6. Respondents are jointly and severally liable for carrying out all activities required by this Settlement Agreement. In the event of the insolvency or other failure of any one or more Respondents to implement the requirements of this Settlement Agreement, the remaining Respondents shall complete all such requirements.

7. Respondents shall ensure that their contractors, subcontractors, and representatives receive a copy of this Settlement Agreement and comply with this Settlement Agreement. Respondents shall be responsible for any noncompliance with this Settlement Agreement.

III. DEFINITIONS

8. Unless otherwise expressly provided herein, terms used in this Settlement Agreement which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Settlement Agreement or in the appendices attached hereto and incorporated hereunder, the following definitions shall apply:

a. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. Sections 9601, et seq.

b. "Day" shall mean a calendar day. In computing any period of time under this Settlement Agreement, where the last day would fall on a Saturday, Sunday, or Federal holiday, the period shall run until the close of business of the next working day.

c. "Effective Date" shall be the effective date of this Settlement Agreement as provided in Section XXX.

d. "EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies.

e. "Illinois EPA" shall mean the Illinois Environmental Protection Agency and any successor departments or agencies.

f. "Future Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs, that the United States incurs in reviewing or developing plans, reports and other items pursuant to this Settlement Agreement, verifying the Work, or otherwise implementing, overseeing, or enforcing this Settlement Agreement, including but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, the costs incurred pursuant to Paragraph 24 (costs and attorneys fees and any monies paid to secure access, including the amount of just compensation), and Paragraph 34 (emergency response). Future Response Costs shall also include all Interim Response Costs [and all Interest on those Past Response Costs] Respondents have agreed to reimburse under this Settlement Agreement that has accrued pursuant to 42 U.S.C. § 9607(a) during the period from June 30, 2006 to the Effective Date.

g. "Interest" shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

h. "Interim Response Costs" shall mean all costs, including direct and indirect costs, a) paid by the United States in connection with the Southwestern Site Area between June 30, 2006 and the Effective Date, or b) incurred prior to the Effective Date, but paid after that date.

i. "National Contingency Plan" or "NCP" shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto.

j. "Settlement Agreement" shall mean this Administrative Settlement Agreement and Order on Consent and all appendices attached hereto (listed in Section XXIX). In the event of conflict between this Settlement Agreement and any attachment, this Settlement Agreement shall control.

k. "Paragraph" shall mean a portion of this Settlement Agreement identified by an Arabic numeral.

l. "Parties" shall mean EPA and Respondents.

m. "Past Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs, that the United States paid at or in connection with the Southwestern Site Area through June 30, 2006, plus Interest on all such costs through such date.

n. "RCRA" shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. § 6901, et seq. (also known as the Resource Conservation and Recovery Act).

o. "Respondents" shall mean Johns Manville and Commonwealth Edison Company.

p. "Section" shall mean a portion of this Settlement Agreement identified by a Roman numeral.

q. "Site 3" means the area so identified and approximately delineated in Attachment 1 where asbestos containing material has come to be located, as generally described in Paragraph 9.b.

r. "Site 4" means the area so identified and approximately delineated in Attachment 1 where asbestos containing material has come to be located, as generally described in Paragraph 9.c.

s. "Site 5" means the area so identified and approximately delineated in Attachment 1 where asbestos containing material has come to be located, as generally described in Paragraph 9.d.

t. "Site 6" means the area so identified and approximately delineated in Attachment 1 where asbestos containing material has come to be located, as generally described in Paragraph 9.e.

u. "State" means the State of Illinois.

v. "Southwestern Site" or "Southwestern Site Area" means the area so identified and approximately delineated in Attachment 1 where asbestos has come to be located, including Sites 3, 4, 5, and 6.

w. "Waste Material" shall mean 1) any "hazardous substance" under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); 2) any pollutant or contaminant under Section 101(33) of CERCLA, 42 U.S.C. § 9601(33); 3) and any "solid waste" under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27).

x. "Work" shall mean all activities Respondents are required to perform under this Settlement Agreement.

IV. FINDINGS OF FACT

9. Based on available information, including the Administrative Record in this matter, U.S. EPA hereby finds that:

a. Johns Manville is a Delaware corporation, and Commonwealth Edison Company is an Illinois corporation.

b. Site 3 is owned by Commonwealth Edison Company and is located south of the Greenwood Avenue right-of-way near the southern property line of the former JM manufacturing facility. Pursuant to a license agreement with Commonwealth Edison, Johns Manville used Site 3 as a parking lot for Johns Manville employees and invitees from the 1950s through approximately 1970. Asbestos containing pipes were split in half lengthwise and used for curb bumpers on Site 3. Site 3 also contains miscellaneous fill material, some of which contains asbestos. The parking lot was taken out of service in approximately 1970 when the Amstutz Expressway was constructed. The Illinois Department of Transportation ("IDOT") constructed a detour road on the parking lot for use during construction of the Expressway. IDOT subsequently removed and destroyed the detour road. In December 1998, Respondent Johns Manville discovered ACM at the surface on Site 3. JM removed surficial ACM and conducted sampling of the area which showed ACM at depths of at least three feet at Site 3.

c. Site 4 is on and adjacent to the western boundary of JM's former manufacturing facility in Waukegan, Illinois. Site 4 is located within the right of way owned by Commonwealth Edison extending northward from the north end of the elevated roadway approach to Greenwood Avenue to Site 5. On October 26, 2000, Johns Manville personnel observed asbestos-containing material at Site 4 during excavation activities related to the decommissioning of a nearby natural gas line. Pieces of ACM in the form of roofing materials, transite sheeting and brake shoe materials were noted in the excavated soil. ACM exposed at the surface was picked up and disposed off-site at the Onyx Landfill located in Zion, Illinois but subsurface ACM remains.

d. Site 5 is located within a swale area of the Commonwealth Edison right of way, which is on and adjacent to the western boundary of the former JM manufacturing facility in Waukegan, Illinois from Site 4 on the south to a point west of the north end of the pumping lagoon. Asbestos was discovered in the swale on Site 5 during investigations for a study prepared for the

Waukegan Park District entitled "Waukegan Park District: An Evaluation of Offsite Asbestos and Air Pollutants and Their Potential Effect on Visitors to the Proposed Sports Complex in Waukegan, Illinois" dated March 7, 2002 ("Waukegan Park District Study"). According to this study, a composite sample from the swale exhibited elevated asbestos concentrations.

e. Site 6 is adjacent to the JM former manufacturing facility on the shoulders of Greenwood Avenue and within the right-of-way of Greenwood Avenue in Waukegan, Illinois extending from the east end of Greenwood Avenue's elevated approach to Pershing Road on the west to the boundary of Site 2 on the east. Samples of this area were taken as part of the Waukegan Park District Study. Both shallow and deeper sample material from the Greenwood Avenue shoulder showed elevated levels of concentrations of primarily chrysotile asbestos. The current known area of asbestos contamination at Site 6 is not owned by Commonwealth Edison.

f. Johns Manville has provided U.S. EPA with a drawing of the approximate locations where asbestos containing material has been identified at Sites 3, 4, 5 and 6.

V. CONCLUSIONS OF LAW AND DETERMINATIONS

10. Based on the Findings of Fact set forth above, and the Administrative Record supporting this removal action, EPA has determined that:

a. The Southwestern Site Area, including Sites 3, 4, 5, and 6, is a "facility" as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

b. The asbestos found at Sites 3, 4, 5, and 6 of the Southwestern Site Area is a "hazardous substance" as defined by Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).

c. Each Respondent is a "person" as defined by Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

d. Each Respondent is a responsible party under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and is jointly and severally liable for performance of response action and for response costs incurred and to be incurred at the Southwestern Site Area. Respondents are "owners" and/or "operators" of the Southwestern Site Area as defined by Section 101(20) of CERCLA. Respondents are either persons who at the time of disposal of any hazardous substances owned or operated the Southwestern Site Area or who arranged for disposal or transport for disposal of hazardous substances at the Southwestern Site Area. The Respondents therefore may be liable under Section 107(a) of CERCLA, 42 U.S.C. Section 9607(a).

e. The conditions described in the Findings of Fact above constitute an actual or threatened "release" of a hazardous substance from each facility as defined by Section 101(22) of CERCLA, 42 U.S.C. § 9601(22).

f. The removal action required by this Settlement Agreement is necessary to protect the public health, welfare, or the environment and, if carried out in compliance with the

terms of this Settlement Agreement, will be considered consistent with the NCP, as provided in Section 300.700(c)(3)(ii) of the NCP.

VI. SETTLEMENT AGREEMENT AND ORDER

11. Based upon the foregoing Findings of Fact, Conclusions of Law, Determinations, and the Administrative Record for the Southwestern Site Area, it is hereby Ordered and Agreed that Respondents shall comply with all provisions of this Settlement Agreement, including, but not limited to, all attachments to this Settlement Agreement and all documents incorporated by reference into this Settlement Agreement.

VII. DESIGNATION OF CONTRACTOR, PROJECT COORDINATOR, AND ON-SCENE COORDINATOR

12. Respondents shall retain one or more contractors to perform the Work and shall notify EPA of the name(s) and qualifications of such contractor(s) within five days of the Effective Date. Respondents shall also notify EPA of the name(s) and qualification(s) of any other contractor(s) or subcontractor(s) retained to perform the Work at least five days prior to commencement of such Work. EPA retains the right to disapprove of any or all of the contractors and/or subcontractors retained by Respondents. If EPA disapproves of a selected contractor, Respondents shall retain a different contractor and shall notify EPA of that contractor's name and qualifications within three days of EPA's disapproval. The proposed contractor must demonstrate compliance with ANSI/ASQC E-4-1994, "Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs" (American National Standard, January 5, 1995), by submitting a copy of the proposed contractor's Quality Management Plan ("QMP"). The QMP must be prepared in accordance with "EPA Requirements for Quality Management Plans (QA/R-2)" (EPA/240/B0-1/002), or equivalent documentation as required by EPA. Any decision not to require submission of the contractor's QMP should be documented in a memorandum from the OSC and Regional QA personnel to the Site file.

13. Within five days after the Effective Date, Respondents shall designate a Project Coordinator who shall be responsible for administration of all actions by Respondents required by this Settlement Agreement and shall submit to EPA the designated Project Coordinator's name, address, telephone number, and qualifications. To the greatest extent possible, the Project Coordinator shall be present on Site or readily available during Site work. EPA retains the right to disapprove of the designated Project Coordinator. If EPA disapproves of the designated Project Coordinator, Respondents shall retain a different Project Coordinator and shall notify EPA of that person's name, address, telephone number, and qualifications within three days following EPA's disapproval. Receipt by Respondents' Project Coordinator of any notice or communication from EPA relating to this Settlement Agreement shall constitute receipt by all Respondents.

14. EPA has designated Brad Bradley of the Remedial Response Branch, as its On-Scene Coordinator ("OSC"). Except as otherwise provided in this Settlement Agreement, Respondents shall direct all submissions required by this Settlement Agreement to OSC at 77 West

Jackson Boulevard (SR-6J), Chicago, IL 60604 by certified or express mail. Respondents must also send a copy of all submissions to Janet Carlson at 77 West Jackson Boulevard (C-14J), Chicago, Il 60604. EPA and Respondents shall have the right, subject to Paragraph 13, to change their respective designated OSC or Project Coordinator. Respondents shall notify EPA 2 days before such a change is made. The initial notification may be made orally, but shall be promptly followed by a written notice.

VIII. WORK TO BE PERFORMED

15. Respondents shall perform, at a minimum, the following actions:

a. Determine the nature and extent of asbestos contamination at and near the Southwestern Site Area approximately delineated in Attachment 1. Respondent Johns Manville has previously sampled and analyzed soil samples at Site 3 using methodologies that are "not inconsistent with the National Contingency Plan." At a minimum, Respondents will further investigate Site 3 by visually inspecting borings or excavations below a depth of three feet at a representative number of locations. At a minimum, Respondents shall sample soil in unpaved areas in one foot depth intervals down to a depth of three feet below the ground according to a sampling grid with an area no greater than 1225 square feet and a length to width ratio of no greater than 2:1 in the Southwestern Site Area (except Site 3). Respondents shall analyze the soil samples for asbestos using Polarized Light Microscopy (PLM) CARB Level A (analytical sensitivity of 0.25% asbestos). Respondents shall also analyze a sample, at random interval depths, from 10% of the soil sample locations via Transmission Electron Microscopy (TEM) CARB Level B (analytical sensitivity of 0.1% asbestos). Due to the possible presence of building materials presumed or confirmed as containing ACM that may prevent or hinder the advancement of a geoprobe, Respondents may at their option, propose to excavate 3-foot deep holes with a backhoe or similar equipment and collect samples at appropriate depths from the sidewalls of the excavations. Respondents may also, at their option, choose to declare a particular sampling location and interval above actionable levels, without analysis, if visible ACM is found in the sample. For areas west of the property line of JM's former manufacturing facility, Respondents shall initially limit sampling to the upland areas adjacent to the JM property line. Absent the presence of visible ACM, the extent of contamination investigation shall not extend beyond areas where the sample results indicate asbestos levels below the analytical sensitivity of the PLM CARB Level A laboratory method. If asbestos contamination is encountered at 3 feet, Respondents shall conduct additional sampling below 3 feet to determine the extent of contamination for the remaining areas.

b. Within 60 days after the Effective Date, Respondents shall submit to EPA for approval (with a copy to the State) an Extent of Contamination Work Plan, or at Respondents' option, a set of plans for any combination of Sites, for performing the removal sampling activities identified in Paragraph 15.a. Respondents shall prepare a Quality Assurance Project Plan as part of the Work Plan. The QAPP for the JM Waukegan NPL Site activities was approved pursuant to the following QAPP Guidance: "EPA Requirements for Quality Assurance Project Plans (QA/R-5)" (EPA/240/B-01/003, March 2001), and "EPA Guidance for Quality Assurance Project Plans (QA/G-5)" (EPA/600/R-98/018, February 1998). Respondents may use the existing QAPP for the JM Waukegan NPL Site as a template under this Settlement Agreement. For activities that are

outside the scope of the QAPP approved for the JM Waukegan NPL Site, Respondents shall develop a new QAPP in accordance with the Uniform Federal Policy for Implementing Environmental Quality Systems (UFP-QS), the Uniform Federal Policy for Quality Assurance Project Plans (UFP-QAPP) Manual, the UFP-QAPP Workbook, and the UFP-QAPP Compendium. The U.S. EPA Office of Solid Waste and Emergency Response (OSWER) approved the UFP-QS (Final, Version 2, March 2005). The Extent of Contamination Work Plan shall provide a description of, and an expeditious schedule for, the actions required by this Settlement Agreement.

c. Within 150 days of EPA approval or approval with modification of the Extent of Contamination Work Plan, Respondents shall complete the sampling activities required by the Extent of Contamination Work Plan and shall prepare and submit an Engineering Evaluation Cost Analysis Study (EE/CA) in accordance with U.S. EPA's "Guidance on Conducting Non-Time-Critical Removal Action Under CERCLA" to EPA for review and approval (with a copy to the State). The EECA shall contain: source, nature, characterization (including a risk evaluation) and extent of contamination for the Southwestern Site Area; identification and analysis of removal objectives; identification of ARARs; identification and analysis of alternatives for removal of the asbestos in the Southwestern Site Area; and comparative analysis of removal action alternatives according to long term and short term effectiveness, implementability and cost of the proposed alternative. The EECA shall evaluate the excavation and offsite disposal of all asbestos containing material above background levels in the Southwestern Site Area as one of the removal action alternatives.

d. Respondents, the State, and, if required by the NCP and CERCLA, the public, will be provided an opportunity to comment on the response action proposed by EPA for the Southwestern Site Area. EPA will include the EPA approved EECA in the Administrative Record for the Southwestern Site Area. EPA may select a response action for the Southwestern Site Area pursuant to an Action Memorandum or other decision document.

e. Within 120 days after receiving EPA's notice to proceed, Respondents shall submit to EPA for approval (with a copy to the State) a Removal Action Work Plan for performing EPA's selected response action for the Southwestern Site Area in accordance with EPA's Action Memorandum or other decision document for the Southwestern Site Area. The Removal Action Work Plan shall provide a description of, and an expeditious schedule for such action.

f. Following EPA approval of the Removal Action Work Plan, the Respondents shall initiate and implement the Removal Action in accordance with the EPA approved Removal Action Work Plan and the schedule therein.

g. During all removal activities, Respondents shall allow no visible emissions in the work areas. The presence of visible emissions in any work area shall result in immediate cessation of all work activities in said area until such time as the visible emissions can be controlled.

h. Pursuant to the Removal Action Work Plan, during removal activities, Respondents shall conduct air sampling and analysis for asbestos using PCM as specified in Appendix A of OSHA Standard 1926.1101 (Asbestos) or NIOSH Method 7400. If fiber concentrations exceed 0.01 f/cc, a recount shall be conducted of the same sample using TEM ISO 10312 methodology. In

addition, random air samples shall be analyzed using TEM ISO 10312 methodology as specified in the Removal Action Work Plan. An action level of concentrations exceeding 0.01 f/cc (PCM Equivalent) will be used during removal activities. In the event of any exceedance of the action level or background level, whichever is higher, work practices must immediately be reviewed and adjusted until said exceedance ceases.

i. Within 90 days of completion of all construction activities, Respondents shall prepare and submit a summary report of the removal action.

16. Review of Plans.

a. EPA may approve, disapprove, require revisions to, or modify all plans under this Settlement Agreement including the Extent of Contamination Work Plan, EECA and the Removal Action Work Plan in whole or in part. If EPA requires revisions, Respondents shall submit a revised Extent of Contamination Work Plan, revised EECA or revised Removal Action Work Plan within 30 days of receipt of EPA's notification of the required revisions unless extended in writing by EPA. Respondents shall implement the Extent of Contamination Work Plan and the Removal Action Work Plan as approved in writing by EPA in accordance with the schedule approved by EPA. Once approved, or approved with modifications, the Work Plans, the schedule, and any subsequent modifications shall be incorporated into and become fully enforceable under this Settlement Agreement.

b. Respondents shall not commence any Work except in conformance with the terms of this Settlement Agreement. Respondents shall not commence implementation of the Extent of Contamination Work Plan and Removal Action Work Plan developed hereunder until receiving written EPA approval pursuant to Paragraph 16(a). Respondents shall notify U.S. EPA at least 48 hours prior to performing any on site work pursuant to the U.S. EPA approved work plan.

17. Health and Safety Plan. The Health and Safety Plan ("HSP") will be included in the Extent of Contamination Work Plan. This plan shall be prepared in accordance with EPA's Standard Operating Safety Guide (PUB 9285.1-03, PB 92-963414, June 1992). Respondents may use the existing HSP for the JM Waukegan NPL site as a template. In addition, the plan shall comply with all currently applicable Occupational Safety and Health Administration ("OSHA") regulations found at 29 C.F.R. Part 1910. If EPA determines that it is appropriate, the plan shall also include contingency planning. Respondents shall incorporate all changes to the plan recommended by EPA and shall implement the plan during the pendency of the removal action.

18. Quality Assurance and Sampling.

a. All sampling and analyses performed pursuant to this Settlement Agreement shall conform to EPA direction, approval, and guidance regarding sampling, quality assurance/quality control ("QA/QC"), data validation, and chain of custody procedures. Respondents shall ensure that the laboratory used to perform the analyses participates in a QA/QC program that complies with the appropriate EPA guidance. Respondents shall follow, as appropriate, "Quality Assurance/Quality Control Guidance for Removal Activities: Sampling QA/QC Plan and Data Validation Procedures" (OSWER Directive No. 9360.4-01, April 1, 1990),

as guidance for QA/QC and sampling. Respondents shall only use laboratories that have a documented Quality System that complies with ANSI/ASQC E-4 1994, "Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs" (American National Standard, January 5, 1995), and "EPA Requirements for Quality Management Plans (QA/R-2) (EPA/240/B-01/002, March 2001)," or equivalent documentation as determined by EPA. EPA may consider laboratories accredited under the National Environmental Laboratory Accreditation Program ("NELAP") as meeting the Quality System requirements.

b. Upon request by EPA, Respondents shall have such a laboratory analyze samples submitted by EPA for QA monitoring. Respondents shall provide to EPA the QA/QC procedures followed by all sampling teams and laboratories performing data collection and/or analysis.

c. Upon request by EPA, Respondents shall allow EPA or its authorized representatives to take split and/or duplicate samples. Respondents shall notify EPA not less than 3 business days in advance of any activity requiring sample collection, unless shorter notice is agreed to by EPA. EPA shall have the right to take any additional samples that EPA deems necessary. Upon request, EPA shall allow Respondents to take split or duplicate samples of any samples it takes as part of its oversight of Respondents' implementation of the Work.

19. Post-Removal Site Control. In accordance with the Work Plan schedule, or as otherwise directed by EPA, Respondents shall submit a proposal for post-removal site control consistent with Section 300.415(l) of the NCP and OSWER Directive No. 9360.2-02. Upon EPA approval, Respondents shall implement such controls and shall provide EPA with documentation of all post-removal site control arrangements.

20. Reporting.

a. Respondents shall submit a written progress report to EPA concerning actions undertaken pursuant to this Settlement Agreement monthly, on the 10th day of each month following receipt of EPA's approval of the Extent of Contamination Work Plan until submission of the summary report identified in 15(i), unless otherwise directed in writing by the OSC. These reports shall describe all significant developments during the preceding period, including the actions performed and any problems encountered, analytical data received during the reporting period, and the developments anticipated during the next reporting period, including a schedule of actions to be performed, anticipated problems, and planned resolutions of past or anticipated problems.

b. Respondents shall submit to EPA 2 copies of all plans, reports or other submissions required by this Settlement Agreement, or any approved work plan. Upon request by EPA, Respondents shall submit such documents in electronic form.

c. Respondents who own or control property at the Southwestern Site Area shall, at least 30 days prior to the conveyance of any interest in real property at the Southwestern Site Area, give written notice to the transferee that the property is subject to this Settlement Agreement and written notice to EPA and the State of the proposed conveyance, including the

name and address of the transferee. Respondents who own or control property at the Sites 3, 4, 5 and 6 also agree to require that their successors comply with the immediately proceeding sentence and Sections IX (Site Access) and X (Access to Information).

21. Final Report. Within 60 calendar days after completion of all Work required by this Settlement Agreement, Respondents shall submit for EPA review and approval a final report summarizing the actions taken to comply with this Settlement Agreement. The final report shall conform, at a minimum, with the requirements set forth in Section 300.165 of the NCP entitled "OSC Reports." The final report shall include a good faith estimate of total costs or a statement of actual costs incurred in complying with the Settlement Agreement, a listing of quantities and types of materials removed off-Site or handled on-Site, a discussion of removal and disposal options considered for those materials, a listing of the ultimate destination(s) of those materials, a presentation of the analytical results of all sampling and analyses performed, and accompanying appendices containing all relevant documentation generated during the removal action (e.g., manifests, invoices, bills, contracts, and permits). The final report shall also include the following certification signed by a person who supervised or directed the preparation of that report:

"Under penalty of law, I certify that to the best of my knowledge, after appropriate inquiries of all relevant persons involved in the preparation of the report, the information submitted is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

22. Off-Site Shipments.

a. Respondents shall, prior to any off-Site shipment of Waste Material from the Southwestern Site Area to an out-of-state waste management facility, provide written notification of such shipment of Waste Material to the appropriate state environmental official in the receiving facility's state and to the On-Scene Coordinator. However, this notification requirement shall not apply to any off-Site shipments when the total volume of all such shipments will not exceed 10 cubic yards.

i. Respondents shall include in the written notification the following information: 1) the name and location of the facility to which the Waste Material is to be shipped; 2) the type and quantity of the Waste Material to be shipped; 3) the expected schedule for the shipment of the Waste Material; and 4) the method of transportation. Respondents shall notify the state in which the planned receiving facility is located of major changes in the shipment plan, such as a decision to ship the Waste Material to another facility within the same state, or to a facility in another state.

ii. The identity of the receiving facility and state will be determined by Respondents following the award of the contract for the removal action. Respondents shall provide the information required by Paragraph 22(a) and 22(b) as soon as practicable after the award of the contract and before the Waste Material is actually shipped.

b. Before shipping any asbestos containing material (or other hazardous substances, pollutants, or contaminants, if any) from the Southwestern Site Area to an off-site

location, Respondents shall obtain EPA's certification that the proposed receiving facility is operating in compliance with the requirements of CERCLA Section 121(d) (3), 42 U.S.C. § 9621(d) (3), and 40 C.F.R. §300.440 and which is properly licensed to accept asbestos or asbestos containing material. Respondents shall only send asbestos containing material (or other hazardous substances, pollutants, or contaminants, if any) from the Southwestern Site Area to an off-site facility that complies with the requirements of the statutory provision and regulation cited in the preceding sentence.

IX. SITE ACCESS

23. If the Southwestern Site Area, or any other property where access is needed to implement this Settlement Agreement, is owned or controlled by any of the Respondents, such Respondents shall, commencing on the Effective Date, provide EPA, the State, and their representatives, including contractors, with access at all reasonable times to the Southwestern Site Area, for the purpose of conducting any activity related to this Settlement Agreement.

24. Where any action under this Settlement Agreement is to be performed in areas owned by or in possession of someone other than Respondents, Respondents shall use their best efforts to obtain all necessary access agreements within 30 days after the Effective Date, or as otherwise specified in writing by the OSC. Respondents shall immediately notify EPA if after using their best efforts they are unable to obtain such agreements. For purposes of this Paragraph, "best efforts" includes the payment of reasonable sums of money in consideration of access. Respondents shall describe in writing their efforts to obtain access. EPA may then assist Respondents in gaining access, to the extent necessary to effectuate the response actions described herein, using such means as EPA deems appropriate. Respondents shall reimburse EPA for all costs and attorney's fees incurred by the United States in obtaining such access, in accordance with the procedures in Section XV (Payment of Response Costs).

25. Notwithstanding any provision of this Settlement Agreement, EPA and the State retain all of their access authorities and rights as well as all of their rights to require land/water use restrictions", including enforcement authorities related thereto, under CERCLA, RCRA, and any other applicable statutes or regulations.

X. ACCESS TO INFORMATION

26. Respondents shall provide to EPA and the State, upon request, copies of all documents and information within their possession or control or that of their contractors or agents relating to activities at the Southwestern Site Area or to the implementation of this Settlement Agreement, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Work. Respondents shall also make available to EPA and the State, for purposes of investigation, information gathering, or testimony, their employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

27. Respondents may assert business confidentiality claims covering part or all of the documents or information submitted to EPA and the State under this Settlement Agreement to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b). Documents or information determined to be confidential by EPA will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies documents or information when they are submitted to EPA and the State, or if EPA has notified Respondents that the documents or information are not confidential under the standards of Section 104(e) (7) of CERCLA or 40 C.F.R. Part 2, Subpart B, the public may be given access to such documents or information without further notice to Respondents.

28. Respondents may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Respondents assert such a privilege in lieu of providing documents, they shall provide EPA and the State with the following: 1) the title of the document, record, or information; 2) the date of the document, record, or information; 3) the name and title of the author of the document, record, or information; 4) the name and title of each addressee and recipient; 5) a description of the contents of the document, record, or information; and 6) the privilege asserted by Respondents. However, no documents, reports or other information created or generated pursuant to the requirements of this Settlement Agreement shall be withheld on the grounds that they are privileged.

29. No claim of confidentiality shall be made with respect to any data, including, but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other documents or information evidencing conditions at or around the Southwestern Site Area.

XI. RECORD RETENTION

30. Until 10 years after Respondents' receipt of EPA's notification pursuant to Section XXIX (Notice of Completion of Work), each Respondent shall preserve and retain all non-identical copies of records and documents (including records or documents in electronic form) now in its possession or control or which come into its possession or control that relate in any manner to the performance of the Work or the liability of any person under CERCLA with respect to the Southwestern Site Area, regardless of any corporate retention policy to the contrary. Until 10 years after Respondents' receipt of EPA's notification pursuant to Section XXVIII (Notice of Completion of Work), Respondents shall also instruct their contractors and agents to preserve all documents, records, and information of whatever kind, nature or description relating to performance of the Work.

31. At the conclusion of this document retention period, Respondents shall notify EPA and the State at least 90 days prior to the destruction of any such records or documents, and, upon request by EPA or the State, Respondents shall deliver any such records or documents to EPA or the State. Respondents may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Respondents assert such a privilege, they shall provide EPA or the State with the following: 1) the title of the document, record, or information; 2) the date of the document, record, or information; 3)

the name and title of the author of the document, record, or information; 4) the name and title of each addressee and recipient; 5) a description of the subject of the document, record, or information; and 6) the privilege asserted by Respondents. However, no documents, reports or other information created or generated pursuant to the requirements of this Settlement Agreement shall be withheld on the grounds that they are privileged.

32. Each Respondent hereby certifies individually that to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents or other information (other than identical copies) relating to its potential liability regarding the Southwestern Site Area since notification of potential liability by EPA or the State or the filing of suit against it regarding the Southwestern Site Area and that it has fully complied with any and all EPA requests for information pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. § § 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927.

XII. COMPLIANCE WITH OTHER LAWS

33. Respondents shall perform all actions required pursuant to this Settlement Agreement in accordance with all applicable local, state, and federal laws and regulations except as provided in Section 121(e) of CERCLA, 42 U.S.C. § 6921(e), and 40 C.F.R. § § 300.400(e) and 300.415(j). In accordance with 40 C.F.R. § 300.415(j), all on-Site actions required pursuant to this Settlement Agreement shall, to the extent practicable, as determined by EPA, considering the exigencies of the situation, attain applicable or relevant and appropriate requirements ("ARARs") under federal environmental or state environmental or facility siting laws.

XIII. EMERGENCY RESPONSE AND NOTIFICATION OF RELEASES

34. In the event of any action or occurrence during performance of the Work which causes or threatens a release of Waste Material from the Southwestern Site Area including Sites 3, 4, 5 and 6 that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, Respondents shall immediately take all appropriate action. Respondents shall take these actions in accordance with all applicable provisions of this Settlement Agreement, including, but not limited to, the Health and Safety Plan, in order to prevent, abate or minimize such release or endangerment caused or threatened by the release. Respondents shall also immediately notify the OSC or, in the event of his/her unavailability, the Regional Duty Officer, USEPA Region 5 Emergency Planning and Response Branch at (312) 353-2318 [Emergency Planning and Response Branch], of the incident or Site conditions. In the event that Respondents fail to take appropriate response action as required by this Paragraph, and EPA takes such action instead, Respondents shall reimburse EPA all costs of the response action not inconsistent with the NCP pursuant to Section XV (Payment of Response Costs).

35. In addition, in the event of any release of a hazardous substance from the Southwestern Site Area, Respondents shall immediately notify the OSC at (312) 353-2318 and the National Response Center at (800) 424-8802. Respondents shall submit a written report to EPA within 7 days after each release, setting forth the events that occurred and the measures taken or to

be taken to mitigate any release or endangerment caused or threatened by the release and to prevent the reoccurrence of such a release. This reporting requirement is in addition to, and not in lieu of, reporting under Section 103(c) of CERCLA, 42 U.S.C. § 9603(c), and Section 304 of the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. § 11004, et seq.

XIV. AUTHORITY OF ON-SCENE COORDINATOR

36. The OSC shall be responsible for overseeing Respondents' implementation of this Settlement Agreement. The OSC shall have the authority vested in an OSC by the NCP, including the authority to halt, conduct, or direct any Work required by this Settlement Agreement, or to direct any other removal action undertaken at the Southwestern Site Area. Absence of the OSC from the Southwestern Site Area shall not be cause for stoppage of work unless specifically directed by the OSC.

XV. PAYMENT OF RESPONSE COSTS

37. Payment for Past Response Costs.

a. Within 30 days after the Effective Date, Respondents shall pay to EPA $8,953.40 for Past Response Costs. Payment shall be made to U.S. EPA by Electronic Funds Transfer ("EFT") in accordance with current EFT procedures that U.S. EPA Region 5 will provide Respondents, and shall be accompanied by a statement identifying the name and address of the party(ies) making payment, the Site name, U.S. EPA Region 5, the Site/Spill ID Number 05A5 Operable Unit 3 and Operable Unit 4, and the EPA docket number for this action.

b. At the time of payment, Respondents shall send notice that such payment has been made to:

Brad Bradley
United States Environmental Protection Agency
Region 5, C-14J
77 West Jackson Boulevard
Chicago, IL 60604

Janet Carlson
United States Environmental Protection Agency
Region 5, C-14J
77 West Jackson Boulevard
Chicago, IL 60604

c. The total amount to be paid by Respondents pursuant to Paragraph 37(a) shall be deposited in the Johns Manville Special Accounts for 05A5 03 and 05A5 04 within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Southwestern Site Area, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

38. Payments for Future Response Costs.

a. Respondents shall pay EPA all Future Response Costs not inconsistent with the NCP. On a periodic basis, EPA will send Respondents a bill requiring payment that includes an itemized cost summary. Respondents shall make all payments within 30 days of receipt of each bill requiring payment, except as otherwise provided in Paragraph 40 of this Settlement Agreement.

b. Payment shall be made to U.S. EPA by Electronic Funds Transfer ("EFT") in accordance with current EFT procedures to be provided to Respondents by U.S. EPA Region 5. Payment shall be accompanied by a statement identifying the name and address of the party(ies) making payment and EPA Site/Spill ID number as identified in the billing according to the following site ID:

05A5 03 (Site 3 Parking lot and adjacent area)
05A5 04 (Western boundary area: Site 4 and Site 5 and adjacent area)
05A5 06 (Greenwood Ave: Site 6 and adjacent area)

c. At the time of payment, Respondents shall send notice that payment has been made to.

Brad Bradley
United States Environmental Protection Agency
Region 5, C-14J
77 West Jackson Boulevard
Chicago, IL 60604

Janet Carlson
United States Environmental Protection Agency
Region 5, C-14J
77 West Jackson Boulevard
Chicago, IL 60604

d. The total amount to be paid by Respondents pursuant to Paragraph 38(a) shall be deposited in the Johns Manville Special Accounts for 05A5 03 (Parking lot and adjacent area); 05A5 04 (Western boundary area: Site 4 and Site 5 and adjacent area); 05A5 06 (Greenwood Ave: Site 6 and adjacent area) within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Southwestern Site Area, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

39. In the event that the payment for Past Response Costs is not made within 30 days of the Effective Date, or the payments for Future Response Costs are not made within 30 days of Respondents' receipt of a bill, Respondents shall pay Interest on the unpaid balance. The Interest on Past Response Costs shall begin to accrue on the Effective Date and shall continue to accrue until the date of payment. The Interest on Future Response Costs shall begin to accrue on the date of the bill and shall continue to accrue until the date of payment. Payments of Interest made under this Paragraph shall be in addition to such other remedies or sanctions available to the United States by virtue of Respondents' failure to make timely payments under this Section, including but not limited to, payment of stipulated penalties pursuant to Section XVIII.

40. Respondents may dispute all or part of a bill for Future Response Costs submitted under this Settlement Agreement, if Respondents allege that EPA has made an accounting error, or if Respondents allege that a cost item is inconsistent with the NCP. If any dispute over costs is resolved before payment is due, the amount due will be adjusted as necessary. If the dispute is not

resolved before payment is due, Respondents shall pay the full amount of the uncontested costs to EPA as specified in Paragraph 38 on or before the due date. Within the same time period, Respondents shall pay the full amount of the contested costs into an interest-bearing escrow account. Respondents shall simultaneously transmit a copy of both checks to the persons listed in Paragraph 38(c) above. Respondents shall ensure that the prevailing party or parties in the dispute shall receive the amount upon which they prevailed from the escrow funds plus interest within 5 days after the dispute is resolved.

XVI. DISPUTE RESOLUTION

41. Unless otherwise expressly provided for in this Settlement Agreement, the dispute resolution procedures of this Section shall be the exclusive mechanism for resolving disputes arising under this Settlement Agreement between the Respondents and EPA. The Parties shall attempt to resolve any disagreements concerning this Settlement Agreement expeditiously and informally.

42. If Respondents object to any EPA action taken pursuant to this Settlement Agreement, including billings for Future Response Costs, they shall notify EPA in writing of their objection(s) within 10 days of such action, unless the objection(s) has/have been resolved informally. EPA and Respondents shall have 10 days from EPA's receipt of Respondents' written objection(s) to resolve the dispute through formal negotiations (the "Negotiation Period"). The Negotiation Period may be extended at the sole discretion of EPA.

43. Any agreement reached by the parties pursuant to this Section shall be in writing and shall, upon signature by both parties, be incorporated into and become an enforceable part of this Settlement Agreement. If the Parties are unable to reach an agreement within the Negotiation Period, an EPA management official at the Remedial Branch Chief level or higher will issue a written decision on the dispute to Respondents. EPA's decision shall be incorporated into and become an enforceable part of this Settlement Agreement. Respondents' obligations under this Settlement Agreement shall not be tolled by submission of any objection for dispute resolution under this Section. Following resolution of the dispute, as provided by this Section, Respondents shall fulfill the requirement that was the subject of the dispute in accordance with the agreement reached or with EPA's decision, whichever occurs.

XVII. FORCE MAJEURE

44. Respondents agree to perform all requirements of this Settlement Agreement within the time limits established under this Settlement Agreement, unless the performance is delayed by a force majeure. For purposes of this Settlement Agreement, a force majeure is defined as any event arising from causes beyond the control of Respondents, or of any entity controlled by Respondents, including but not limited to their contractors and subcontractors, which delays or prevents performance of any obligation under this Settlement Agreement despite Respondents' best efforts to fulfill the obligation. Force majeure does not include financial inability to complete the Work, increased cost of performance, or a failure to attain performance standards/action levels.

45. If any event occurs or has occurred that may delay the performance of any obligation under this Settlement Agreement, whether or not caused by a force majeure event, Respondents shall notify EPA orally within 24 hours of when Respondents first knew that the event might cause a delay. Within two days thereafter, Respondents shall provide to EPA in writing an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; Respondents' rationale for attributing such delay to a force majeure event if they intend to assert such a claim; and a statement as to whether, in the opinion of Respondents, such event may cause or contribute to an endangerment to public health, welfare or the environment. Failure to comply with the above requirements shall preclude Respondents from asserting any claim of force majeure for that event for the period of time of such failure to comply and for any additional delay caused by such failure.

46. If EPA agrees that the delay or anticipated delay is attributable to a force majeure event, the time for performance of the obligations under this Settlement Agreement that are affected by the force majeure event will be extended by EPA for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the force majeure event shall not, of itself, extend the time for performance of any other obligation. If EPA does not agree that the delay or anticipated delay has been or will be caused by a force majeure event, EPA will notify Respondents in writing of its decision. If EPA agrees that the delay is attributable to a force majeure event, EPA will notify Respondents in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure event.

XVIII. STIPULATED PENALTIES

47. Respondents shall be liable to EPA for stipulated penalties in the amounts set forth in Paragraphs 48 and 49 for failure to comply with the requirements of this Settlement Agreement specified below, unless excused under Section XVII (Force Majeure). "Compliance" by Respondents shall include completion of the activities under this Settlement Agreement or any work plan or other plan approved under this Settlement Agreement identified below in accordance with all applicable requirements of law, this Settlement Agreement and any plans or other documents approved by EPA pursuant to this Settlement Agreement and within the specified time schedules established by and approved under this Settlement Agreement.

48. Stipulated Penalty Amounts - Work.

a. The following stipulated penalties shall accrue per violation per day for any noncompliance identified in Paragraph 48(b):

Penalty per Violation per Day	Period of Noncompliance
$2,000.00	1st through 14th day
$4,000.00	15th through 30th day

$10,000.00	31st day and beyond

b. Compliance Milestones. Failure to conduct the work in accordance with paragraph 15, the Extent of Contamination Work Plan, the Removal Action Work Plan, any other EPA approved work plans and the schedules contained therein. Failure to submit a timely or adequate EECA in accordance with paragraph 15.

49. Stipulated Penalty Amounts - Reports. The following stipulated penalties shall accrue per violation per day for failure to submit timely or adequate reports or other written documents pursuant to Paragraphs 15, 16, 17, 19 and 20:

Penalty per Violation per Day	Period of Noncompliance
$1,000.00	1st through 14th day
$2,000.00	15th through 30th day
$4,000.00	31st day and beyond

50. All penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs, and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. However, stipulated penalties shall not accrue: 1) with respect to a deficient submission under Section VIII (Work to be Performed), during the period, if any, beginning on the 31st day after EPA's receipt of such submission until the date that EPA notifies Respondents of any deficiency; and 2) with respect to a decision by the EPA Management Official at the Remedial Branch Chief level or higher, under Paragraph 42 of Section XVI (Dispute Resolution), during the period, if any, beginning on the 21st day after the Negotiation Period begins until the date that the EPA management official issues a final decision regarding such dispute. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Settlement Agreement.

51. Following EPA's determination that Respondents have failed to comply with a requirement of this Settlement Agreement, EPA may give Respondents written notification of the failure and describe the noncompliance. EPA may send Respondents a written demand for payment of the penalties. However, penalties shall accrue as provided in the preceding Paragraph regardless of whether EPA has notified Respondents of a violation.

52. All penalties accruing under this Section shall be due and payable to EPA within 30 days of Respondents' receipt from EPA of a demand for payment of the penalties, unless Respondents invoke the dispute resolution procedures under Section XVI (Dispute Resolution). All payments to EPA under this Section shall be paid by certified or cashier's check(s) made payable to "EPA Hazardous Substances Superfund," shall be mailed to U.S. Environmental Protection Agency, Region 5 Superfund Receivable, P.O. Box 371099M, Pittsburgh, PA 15251 , shall indicate that the payment is for stipulated penalties, and shall reference the EPA Region and Site/Spill ID Number 05A5 Operable Unit 3 and 4, the EPA Docket Number, and the name and address of the party(ies) making payment. Copies of check(s) paid pursuant to this Section, and any accompanying transmittal letter(s), shall be sent to EPA as provided in Paragraph 37.

53. The payment of penalties shall not alter in any way Respondents' obligation to complete performance of the Work required under this Settlement Agreement.

54. Penalties shall continue to accrue during any dispute resolution period, but need not be paid until 15 days after the dispute is resolved by agreement or by receipt of EPA's decision.

55. If Respondents fail to pay stipulated penalties when due, EPA may institute proceedings to collect the penalties, as well as Interest. Respondents shall pay Interest on the unpaid balance, which shall begin to accrue on the date of demand made pursuant to Paragraph 52. Nothing in this Settlement Agreement shall be construed as prohibiting, altering, or in any way limiting the ability of EPA to seek any other remedies or sanctions available by virtue of Respondents' violation of this Settlement Agreement or of the statutes and regulations upon which it is based, including, but not limited to, penalties pursuant to Sections 106(b) and 122(l) of CERCLA, 42 U.S.C. §§ 9606(b) and 9622(l), and punitive damages pursuant to Section 107(c)(3) of CERCLA, 42 U.S.C. § 9607(c)(3). Provided, however, that EPA shall not seek civil penalties pursuant to Section 106(b) or 122(l) of CERCLA or punitive damages pursuant to Section 107(c)(3) of CERCLA for any violation for which a stipulated penalty is provided herein, except in the case of a willful violation of this Settlement Agreement. Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this Settlement Agreement.

XIX. COVENANT NOT TO SUE BY EPA

56. In consideration of the actions that will be performed and the payments that will be made by Respondents under the terms of this Settlement Agreement, and except as otherwise specifically provided in this Settlement Agreement, EPA covenants not to sue or to take administrative action against Respondents pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. § 9606 and 9607(a), for performance of the Work and for recovery of Past Response Costs and Future Response Costs. This covenant not to sue shall take effect upon receipt by EPA of the Past Response Costs due under Section XV of this Settlement Agreement and any Interest or Stipulated Penalties due for failure to pay Past Response Costs as required by Sections XV and XVIII of this Settlement Agreement. This covenant not to sue is conditioned upon the complete and satisfactory performance by Respondents of the Work and their obligations under this Settlement Agreement, including, but not limited to, payment of Future Response Costs pursuant to Section XV. This covenant not to sue extends only to Respondents and does not extend to any other person.

XX. RESERVATIONS OF RIGHTS BY EPA

57. Except as specifically provided in this Settlement Agreement, nothing herein shall limit the power and authority of EPA or the United States to take, direct, or order all actions necessary to protect public health, welfare, or the environment or to prevent, abate, or minimize an actual or threatened release of hazardous substances, pollutants or contaminants, or hazardous or

solid waste on, at, or from the Southwestern Site Area including Sites 3, 4, 5 and 6. Further, nothing herein shall prevent EPA from seeking legal or equitable relief to enforce the terms of this Settlement Agreement, from taking other legal or equitable action as it deems appropriate and necessary, or from requiring Respondents in the future to perform additional activities pursuant to CERCLA or any other applicable law.

58. The covenant not to sue set forth in Section XIX above does not pertain to any matters other than those expressly identified therein. EPA reserves and this Settlement Agreement are without prejudice to, all rights against Respondents with respect to all other matters, including, but not limited to:

a. claims based on a failure by Respondents to meet a requirement of this Settlement Agreement;

b. liability for costs not included within the definitions of Past Response Costs or Future Response Costs;

c. liability for performance of response action other than the Work;

d. criminal liability;

e. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;

f. liability arising from the past, present, or future disposal, release or threat of release of Waste Materials outside of the Southwestern Site Area; and

g. liability for costs incurred or to be incurred by the Agency for Toxic Substances and Disease Registry related to the Southwestern Site Area.

XXI. COVENANT NOT TO SUE BY RESPONDENTS

59. Respondents covenant not to sue and agree not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to the Work, Past Response Costs, Future Response Costs, or this Settlement Agreement, including, but not limited to:

a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund established by 26 U.S.C. § 9507, based on Sections 106(b) (2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. § 9606(b) (2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claim arising out of response actions at or in connection with the Southwestern Site Area, including any claim under the United States Constitution, the State Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; or

c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. § 9607 and 9613, relating to the Southwestern Site Area including Sites 3, 4, 5 and 6.

Except as provided in Paragraph 61 (Waiver of Claims), these covenants not to sue shall not apply in the event the United States brings a cause of action or issues an order pursuant to the reservations set forth in Paragraphs 58 (b), (c), and (e) - (g), but only to the extent that Respondents' claims arise from the same response action, response costs, or damages that the United States is seeking pursuant to the applicable reservation.

60. Nothing in this Agreement shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

XXII. OTHER CLAIMS

61. By issuance of this Settlement Agreement, the United States and EPA assume no liability for injuries or damages to persons or property resulting from any acts or omissions of Respondents. The United States or EPA shall not be deemed a party to any contract entered into by Respondents or their directors, officers, employees, agents, successors, representatives, assigns, contractors, or consultants in carrying out actions pursuant to this Settlement Agreement.

62. Except as expressly provided in Section XXI, and Section XIX (Covenant Not to Sue by EPA), nothing in this Settlement Agreement constitutes a satisfaction of or release from any claim or cause of action against Respondents or any person not a party to this Settlement Agreement, for any liability such person may have under CERCLA, other statutes, or common law, including but not limited to any claims of the United States for costs, damages and interest under Sections 106 and 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607.

63. No action or decision by EPA pursuant to this Settlement Agreement shall give rise to any right to judicial review, except as set forth in Section 113(h) of CERCLA, 42 U.S.C. § 9613(h).

XXIII. CONTRIBUTION

64. a. The Parties agree that this Settlement Agreement constitutes an administrative settlement for purposes of Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), and that Respondents are entitled, as of the Effective Date, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. § 9613(f) (2) and 9622(h) (4), for "matters addressed" in this Settlement Agreement. The "matters addressed" in this Settlement Agreement are the Work, Past Response Costs and Future Response Costs.

b. The Parties agree that this Settlement Agreement constitutes an administrative settlement for purposes of Section 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B), pursuant to which Respondents have, as of the Effective Date, resolved their liability to the United States for the Work, Past Costs and Future Costs.

c. Except as provided in Section XXI, nothing in this Settlement Agreement precludes the United States or Respondents from asserting any claims, causes of action, or demands against any persons not parties to this Settlement Agreement for indemnification, contribution, or cost recovery. Nothing herein diminishes the right of the United States, pursuant to Sections 113(f)92) and (3) of CERCLA, 42 U.S.C. § 9613(f)(2)(3), to pursue any such persons to obtain additional response costs or response action and to enter into settlements that give rise to contribution protection pursuant to Section 113(f)(2).

XXIV. INDEMNIFICATION

65. Respondents shall indemnify, save and hold harmless the United States, its officials, agents, contractors, subcontractors, employees and representatives from any and all claims or causes of action arising from, or on account of, negligent or other wrongful acts or omissions of Respondents, their officers, directors, employees, agents, contractors, or subcontractors, in carrying out actions pursuant to this Settlement Agreement. In addition, Respondents agree to pay the United States all costs incurred by the United States, including but not limited to attorneys fees and other expenses of litigation and settlement, arising from or on account of claims made against the United States based on negligent or other wrongful acts or omissions of Respondents, their officers, directors, employees, agents, contractors, subcontractors and any persons acting on their behalf or under their control, in carrying out activities pursuant to this Settlement Agreement. The United States shall not be held out as a party to any contract entered into by or on behalf of Respondents in carrying out activities pursuant to this Settlement Agreement. Neither Respondents nor any such contractor shall be considered an agent of the United States.

66. The United States shall give Respondents notice of any claim for which the United States plans to seek indemnification pursuant to this Section and shall consult with Respondents prior to settling such claim.

67. Respondents waive all claims against the United States for damages or reimbursement or for set-off of any payments made or to be made to the United States, arising from or on account of any contract, agreement, or arrangement between any one or more of Respondents and any person for performance of Work on or relating to the Southwestern Site Area including Sites 3, 4, 5 and 6, including, but not limited to, claims on account of construction delays. In addition, Respondents shall indemnify and hold harmless the United States with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between any one or more of Respondents and any person for performance of Work on or relating to the Southwestern Site Area, including, but not limited to, claims on account of construction delays.

XXV. INSURANCE

68. At least 7 days prior to commencing any on-Site work under this Settlement Agreement, Respondents shall secure, and shall maintain for the duration of this Settlement Agreement, comprehensive general liability insurance and automobile insurance with limits of 1 million dollars, combined single limit. Within the same time period, Respondents shall provide EPA with certificates of such insurance and a copy of each insurance policy. In addition, for the duration of the Settlement Agreement, Respondents shall satisfy, or shall ensure that their contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision of worker's compensation insurance for all persons performing the Work on behalf of Respondents in furtherance of this Settlement Agreement. If Respondents demonstrate by evidence satisfactory to EPA that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering some or all of the same risks but in an equal or lesser amount, then Respondents need provide only that portion of the insurance described above which is not maintained by such contractor or subcontractor.

XXVI. FINANCIAL ASSURANCE

69. In order to ensure the full and final completion of the Work, Respondents shall establish and maintain a performance guarantee for the benefit of EPA in the amount of $300,000 (hereinafter "Estimated Cost of the Work") in one or more of the following forms, which must be satisfactory in form and substance to EPA:

a. A surety bond unconditionally guaranteeing payment and/or performance of the Work that is issued by a surety company among those listed as acceptable sureties on Federal bonds as set forth in Circular 570 of the U.S Department of the Treasury;

b. One or more irrevocable letters of credit payable to or at the direction of EPA, that is issued by one or more financial institutions (1) that has the authority to issue letters of credit and (ii) whose letter-of-credit operations are regulated and examined by a U.S. Federal or State agency;

c. A trust fund established for the benefit of EPA that is administered by a trustee (i) that has the authority to act as a trustee and (ii) whose trust operations are regulated and examined by a U.S. Federal or State agency;

d. A policy of insurance that (i) provides EPA with acceptable rights as a beneficiary thereof; and (ii) is issued by an insurance carrier (a) that has the authority to issue insurance policies in the applicable jurisdiction(s) and (b) whose insurance operations are regulated and examined by a State agency;

e. A demonstration that one or more of the Respondents satisfy the requirements of 40 C.F.R. Part 264.143(f) with respect to the Estimated Cost of the Work, provided that all other requirements of 40 C.F.R. Part 264.143(f) are satisfied;

f. A written guarantee to fund or perform the Work executed in favor of EPA by one or more of the following: (1) a direct or indirect parent company of a Respondent, or (ii) a company that has a "substantial business relationship with at least one of Respondents; provided, however, that any company providing such a guarantee must demonstrate to the satisfaction of EPA that is satisfies the financial test requirements of 40 C.F.R. Part 264.143(f) with respect to the Estimate Cost of the Work that it proposes to guarantee hereunder.

70. Respondents have selected, and EPA has approved, initial Performance Guarantees in the following forms. Within thirty days after the effective date of this AOC, Respondent Johns Manville shall deposit an additional $260,000 into the US Bank Manville Sales Corporation EPA Escrow Account No. 77315030 that was established under the First Amended Consent Decree in United States v. Manville Sales Corp. (now Johns Manville), Case 88C 630 (N.D. Ill.). Within thirty days after the effective date of this AOC, Respondent Commonwealth Edison shall issue an irrevocable letter of credit payable to or at the direction of EPA in the amount of $40,000, by one or more financial institutions (1) that has the authority to issue letters of credit and (ii) whose letter-of-credit operations are regulated and examined by a U.S. Federal or State agency;

If at any time during the effective period of this AOC, the Respondents provide a Performance Guarantee for completion of the Work by means of a demonstration or guarantee pursuant to Paragraph 69(e) or (f) above, such Respondent shall also comply with the other relevant requirements of 40 C.F.R. Sections 264.143(f), 264.151(f) and 264.151(h)(1) relating to these methods unless otherwise provided in this AOC, including but not limited to: (i) the initial submission of required financial reports and statements from the accountant; (ii) the annual re-submission of such reports and statements within ninety days after the close of each such entity's fiscal year; and (iii) the notification of EPA within ninety days after the close of any fiscal year in which such entity no longer satisfies the financial test requirements set forth at 40 C.F.R. Section 264.143(f)(1). For purposes of the Performance Guarantee methods specified in this Section XIII, references in 40 C.F.R. Part 264, Subpart H, to "closure," "postclosure" and "plugging and abandonment" shall be deemed to refer to the Work required under this AOC, and the terms "current closure cost estimate", "current closure cost estimate", "current post-closure cost estimate" and "current plugging and abandonment cost estimate" shall be deemed to refer to the Estimated Cost of the Work. In the event that EPA determines at any time that the financial assurances provided pursuant to this Section are inadequate, Respondents shall, within 30 days of receipt of notice of EPA's determination, obtain and present to EPA for approval one of the other forms of financial assurance listed in Paragraph 69 of this Section. Respondents' inability to demonstrate financial ability to complete the Work shall not excuse performance of any activities required under this Settlement Agreement.

71. If, after the Effective Date, Respondents can show that the estimated cost to complete the remaining Work has diminished below the amount set forth in Paragraph 69 of this Section, Respondents may, on any anniversary date of the Effective Date, or at any other time agreed to by the Parties, reduce the amount by the appropriate fraction of $300,000 provided under this Section. Respondents shall submit a proposal for such reduction to EPA, in accordance with the requirements of this Section, and may reduce the amount of the security upon approval by EPA. In the event of a dispute, Respondents may reduce the amount of the security in accordance with the written decision resolving the dispute. Upon EPA's issuance of a Notice of Completion of

Work under Paragraph 76, any remaining portion of the $260,000 (including accrued interest on the $260,000) in Escrow Account No. 773150 shall revert to Respondent Johns Manville and any remaining portion of Respondent Commonwealth Edison's $40,000 letter of credit shall be returned.

72. Respondents may change the form of financial assurance provided under this Section at any time, upon notice to and approval by EPA, provided that the new form of assurance meets the requirements of this Section. In the event of a dispute, Respondents may change the form of the financial assurance only in accordance with the written decision resolving the dispute.

XXVII. MODIFICATIONS

73. The OSC may make modifications to any plan or schedule in writing or by oral direction. Any oral modification will be memorialized in writing by EPA promptly, but shall have as its effective date the date of the OSC's oral direction. Any other requirements of this Settlement Agreement may be modified in writing by mutual agreement of the parties.

74. If Respondents seek permission to deviate from any approved work plan or schedule, Respondents' Project Coordinator shall submit a written request to EPA for approval outlining the proposed modification and its basis. Respondents may not proceed with the requested deviation until receiving oral or written approval from the OSC pursuant to Paragraph 73.

75. No informal advice, guidance, suggestion, or comment by the OSC or other EPA representatives regarding reports, plans, specifications, schedules, or any other writing submitted by Respondents shall relieve Respondents of their obligation to obtain any formal approval required by this Settlement Agreement, or to comply with all requirements of this Settlement Agreement, unless it is formally modified.

XXVIII. NOTICE OF COMPLETION OF WORK

76. When EPA determines, after EPA's review of the Final Report, that all Work has been fully performed in accordance with this Settlement Agreement, with the exception of any continuing obligations required by this Settlement Agreement, including post-removal site controls, payment of Future Response Costs, and record retention, EPA will provide written notice to Respondents. If EPA determines that any such Work has not been completed in accordance with this Settlement Agreement, EPA will notify Respondents, provide a list of the deficiencies, and require that Respondents modify the Work Plan if appropriate in order to correct such deficiencies. Respondents shall implement the modified and approved Work Plan and shall submit a modified Final Report in accordance with the EPA notice. Failure by Respondents to implement the approved modified Work Plan shall be a violation of this Settlement Agreement.

XXIX. SEVERABILITY/INTEGRATION/APPENDICES

77. If a court issues an order that invalidates any provision of this Settlement Agreement or finds that Respondents have sufficient cause not to comply with one or more provisions of this Settlement Agreement, Respondents shall remain bound to comply with all provisions of this Settlement Agreement not invalidated or determined to be subject to a sufficient cause defense by the court's order.

78. This Settlement Agreement and its appendices constitute the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Settlement Agreement. The parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Settlement Agreement. The following appendices are attached to and incorporated into this Settlement Agreement:

Attachment 1: Map - Southwestern Site Area including Sites 3, 4, 5 and 6

XXX. NOTICES

79. Whenever, under the terms of this Administrative Agreement and Order on Consent, notice is required to be given by one party to another, such correspondence shall be directed to the following individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing:

As to U.S. EPA

Regional Counsel
Attn: Janet Carlson, Johns Manville staff attorney
U.S. EPA, Mail Code C14J
77 W. Jackson Blvd
Chicago, IL 60604

Director, Superfund Division
Attn: Brad Bradley, Johns Manville RPM
U. S. EPA, Mail Code 6J
77 W. Jackson Blvd
Chicago, IL 60604

As to the State of Illinois

Illinois Environmental Protection Agency
Attn: Manager, Federal Site Remediation Section
Division of Remediation Management
1021 Grand Avenue East
Springfield, IL 62794-9276

Chief, Environmental Bureau North
Illinois Attorney General's Office
100 W. Randolph Street
Chicago, Illinois 60601

As to Johns Manville:

Brent A. Tracy
Associate General Counsel
Johns Manville
717 17th Street (80202)
P.O. Box 5108
Denver, CO 80217-5108
(303) 978-3268 FAX

As to Commonwealth Edison Company:

John VanVranken
Exelon Law Department
10 S. Dearborn
Chase Tower, 49th Floor
Chicago, Il 60603

XXXI. EFFECTIVE DATE

80. This Settlement Agreement shall be effective 3 days after the Settlement Agreement is signed by the Superfund Division Director or his delegatee.

It is so ORDERED and Agreed this day of , 200 .

BY: Richard C Karl DATE: 6-11-07

Richard C. Karl, Director
Superfund Division
Region 5
U.S. Environmental Protection Agency

EFFECTIVE DATE:

The undersigned representatives of Respondents certify that they are fully authorized to enter into the terms and conditions of this Order and to bind the parties they represent to this document.

Agreed this 23rd day of May, 2007.

For Respondent Johns Manville

By Brent A Trapp

Title Sr. Environmental Counsel

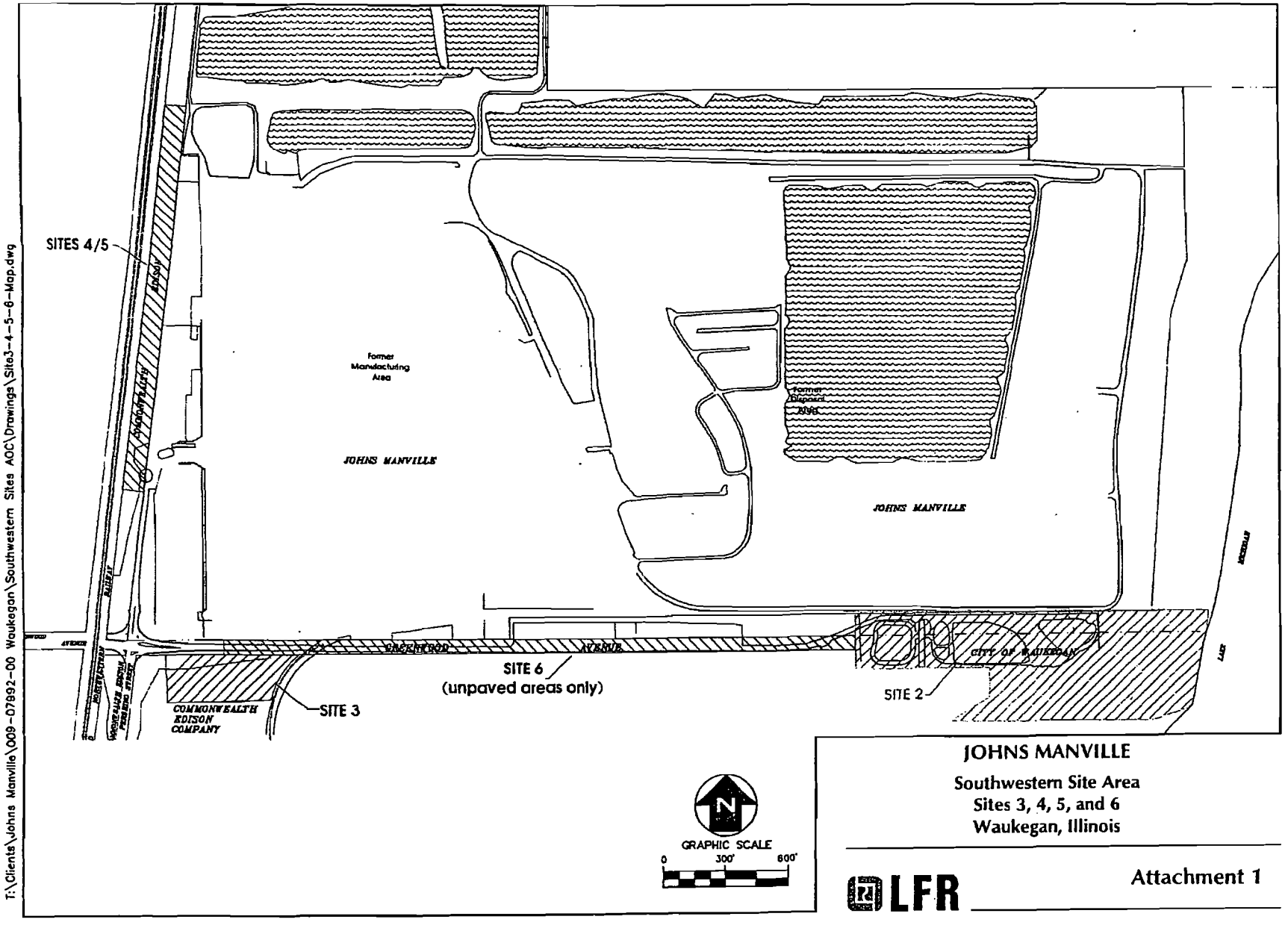
The undersigned representatives of Respondents certify that they are fully authorized to enter into the terms and conditions of this Order and to bind the parties they represent to this document.

Agreed this 23rd day of May, 2007

For Respondent Commonwealth Edison Company

By Neena Hemmady

Title Manager Environmental



JOHNS MANVILLE

Southwestern Site Area
Sites 3, 4, 5, and 6
Waukegan, Illinois

LFR

Attachment 1

JM001282

Exh. 62-35

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Exelon Law Department
10 S. Dearborn St.
Chase Tower, 49th Floor
Chicago, IL 60603

9590 9402 2163 6193 4666 23

2. Article Number *(Transfer from service label)*
7016 2070 0000 2623 1818

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X
☐ Agent
☐ Address

B. Received by *(Printed Name)*
C. Date of Delive

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
☐ Adult Signature
☐ Adult Signature Restricted Delivery
☑ Certified Mail®
☐ Certified Mail Restricted Delivery
☐ Collect on Delivery
☐ Collect on Delivery Restricted Delivery
☐ Insured Mail
☐ Insured Mail Restricted Delivery (over $500)
☐ Priority Mail Express®
☐ Registered Mail™
☐ Registered Mail Restri Delivery
☑ Return Receipt for Merchandise
☐ Signature Confirmatio
☐ Signature Confirmatio Restricted Delivery

PS Form 3811, July 2015 PSN 7530-02-000-9053 Domestic Return Recei

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:	)	
	)	
JOHNS MANVILLE, a Delaware corporation,	)	
	)	
Complainant,	)	**PCB No. 14-3**
	)	**(Citizens Enforcement)**
v.	)	
	)	
ILLINOIS DEPARTMENT OF TRANSPORTATION	)	**Hearing Officer Halloran**
	)	
Respondent.	)	

THIRD PARTY COMMONWEALTH EDISON COMPANY'S APPLICATION FOR NON-DISCLOSURE AND FOR PROTECTIVE ORDER REGARDING CONFIDENTIAL AND PRIVILEGED INFORMATION

Exhibit 2 to ComEd's Application for Non-Disclosure and for Protective Order

ILLINOIS POLLUTION CONTROL BOARD
December 15, 2016

JOHNS MANVILLE,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 14-3
	)	(Citizens Enforcement - Land)
ILLINOIS DEPARTMENT OF TRANSPORTATION,	)	
	)	
	)	
Respondent.	)	

SUSAN BRICE AND LAUREN CAISMAN, BRYAN CAVE LLP, APPEARED ON BEHALF OF JOHNS MANVILLE; and

EVAN MCGINLEY AND ELLEN O'LAUGHLIN, ASSISTANT ATTORNEYS GENERAL, APPEARED ON BEHALF OF ILLINOIS DEPARTMENT OF TRANSPORTATION.

INTERIM OPINION AND ORDER OF THE BOARD (by J.A. Burke):

Johns Manville (JM) claims that the Illinois Department of Transportation (IDOT) violated the Environmental Protection Act (Act) by burying asbestos waste during road construction in Waukegan, Lake County. After lengthy discovery and a five-day hearing, the Board finds that IDOT violated the Act by open dumping waste along the south side of Greenwood Avenue.

JM entered into a consent order with the United States Environmental Protection Agency (USEPA) to clean up property neighboring its facility. JM alleges that IDOT exacerbated the scope of the cleanup during road construction in the 1970s. According to JM, IDOT dispersed and buried asbestos in fill. The Board specifically addresses two areas of IDOT's construction: building a detour road and reconstructing Greenwood Avenue.

The Board finds that JM has not proven that asbestos waste is present along the detour road in fill IDOT placed. However, the Board finds that IDOT did place asbestos waste in fill material when reconstructing Greenwood Avenue. IDOT also continues to control a parcel south of Greenwood where asbestos waste is located. IDOT therefore violated the Act by causing or allowing open dumping of waste, conducting an unpermitted waste disposal operation, and illegally disposing waste.

The Board also finds that the record is insufficient to determine the appropriate relief to address IDOT's open dumping. JM seeks an estimated $3,582,000 from IDOT to reimburse JM's cleanup costs. However, JM has not finalized this amount or shown that it is reasonable. The Board therefore directs the hearing officer to hold an additional hearing.

PROCEDURAL HISTORY

JM started this case over three years ago. To prepare for hearing, the parties conducted extensive discovery, including written discovery and depositions. The current version of the complaint is the third amended complaint (Compl.) filed on August 12, 2016, to which IDOT has answered (Ans.) and asserted defenses. The Board held five days of hearing in May and June 2016 (Tr.; Exh.), and received no public comment. JM filed its post-hearing brief (JM Br.); IDOT filed its post-hearing brief (IDOT Br.); JM filed its reply (JM Reply); and IDOT moved to file a sur-reply. The Board grants both parties' motions to file briefs in excess of 50 pages, and grants IDOT's motion for leave to file its sur-reply.

After post-hearing briefs were due, JM filed a status report changing its requested relief. Rather than ordering IDOT to participate in future cleanup, JM instead asks that the Board order IDOT to reimburse JM for cleanup completed at the site. IDOT responded, asking that the Board deny leave to file the status report. Below, the Board considers the status report as a motion to amend the complaint and grants the motion.

FACTS

Below, the Board first describes the properties involved in this case including JM's manufacturing facility and so-called "Site 3" and "Site 6." The Board then finds facts about asbestos sampling and cleanup at Site 3 and Site 6.

JM Facility

JM owned and operated a facility in Waukegan that manufactured items such as roofing materials, pipe insulation, Transite pipe, packing and friction materials, gaskets, and brake shoes. Compl. at ¶ 6; Ans. at ¶ 6; Tr. May 23 at 42-43 (Clinton). Some of the items contained asbestos. *Id.* For example, JM manufactured asbestos-containing (typically 20-30%) concrete Transite pipe ranging in diameter from 2 to 48 inches and in length from 10 to 12 feet. Tr. May 23 at 43-44 (Clinton). JM ceased operations at its facility in 1998, and conducted remediation there. Compl. at ¶¶ 8, 9; Tr. May 23 at 44 (Clinton). The JM facility is located at the northeast corner of the intersection of Greenwood Avenue and Pershing Road. Compl. at ¶ 13. Greenwood runs east to west, and Pershing runs north to south.

Site 3 and Site 6

The complaint concerns two off-site areas near the JM facility known as Site 3 and Site 6. Both sites are south of the JM facility.

Site 3 is a generally rectangular property located at the southeast corner of Greenwood Avenue and Pershing Road. Compl. at ¶ 13; Ans. at ¶ 13. Commonwealth Edison (ComEd) owns Site 3. Compl. at ¶ 11; Tr. May 23 at 34 (Clinton). In 1956, ComEd gave JM access to Site 3 to use as a parking lot. Exh. 50; Tr. May 23 at 49 (Clinton); Compl. at ¶ 20; Ans. at ¶ 20. The parking lot was rectangular and located in the northcentral part of Site 3. Exh. 53A (1961 aerial); Tr. May 23 at 51-52 (Clinton).

Site 6 has a linear shape comprised of the unpaved area along the north and south sides of Greenwood Avenue. Exh. 62 (AOC) at 7; Compl. at ¶ 14; Ans. at ¶ 14. The western boundary is the point where Greenwood rises to reach Pershing Road, roughly 400 feet east of Pershing. Exh. 62 (AOC) at 7. Site 6 runs east along Greenwood to the entrance for the Waukegan Generating Station. Tr. May 23 at 33 (Clinton); Tr. May 23 at 90 (Ebihara).

In September 1971, IDOT awarded a contract to Eric Bolander Construction Co. for road construction involving Greenwood Avenue and Pershing Road (Amstutz project). Exh. 20 (Notice to Bidders); Exh. 25 (IDOT Memo). The Amstutz project included raising Greenwood over railroad tracks and the Amstutz Expressway. Compl. at ¶ 22; Ans. at ¶ 22. IDOT standard specifications and construction plans were discussed in depth at the hearing. *See* Exh. 19 (1971 IDOT specifications); Exh. 21 (IDOT Plans). The project covered more than 2,000 feet along Greenwood and overlapped with approximately 300 feet of the western portion of Site 6. *See* Exh. 21A at 1, 8, 23 (IDOT Plans). IDOT also constructed a detour road extending from Pershing to Greenwood. Exh. 21A (IDOT plans); Compl. at ¶ 24; Ans. at ¶ 24. This detour road passed diagonally through Site 3 from the southwest to the northeast; the detour road also passed through a portion of Site 6 where the road connected with Greenwood. Ans. at ¶¶ 25-27.

Soil Sampling at Site 3 and Site 6

Asbestos-containing material (ACM),[1] as well as asbestos fibers from this material, has been found on property near JM's facility, including Site 3 and Site 6. Compl. at ¶¶ 9, 15-18. Since 1998, three companies (ELM Consulting, LFR Inc., and AECOM) sampled soil to identify where ACM is located. JM's expert witness, Douglas Dorgan, and IDOT's expert witness, Steven Gobelman, relied on these investigations. Exh. 6 at 34 (Dorgan report); Exh. 8 at 18 (Gobelman report).

In 1998, ELM investigated Site 3. Exh. 57 (ELM report). ELM visually inspected the site surface and found 74 suspected ACM fragments. *Id*. at 23. ELM removed this surficial ACM from the site. *Id.* ELM described 65 of the suspected ACM fragments as Transite pipe[2] and the remaining as concrete, felt paper, tar paper, roofing material, or insulation. *Id.* at 177-179. ELM characterized this surficial suspected ACM as located "throughout Site 3 with the

[1] Illinois and federal regulations define ACM as material containing more than 1% asbestos. 225 ILCS 207/5 (2014); 40 C.F.R. § 61.141. JM's consultants variously reported asbestos content using analytical thresholds of 1.0%, 0.25%, and 0.1%. ELM used the 1.0% threshold. Exh. 57 at 14 (ELM report). Subsequently, USEPA required analysis using polarized light microscopy to 0.25% and transmission electron microscopy (TEM) to 0.10%. Exh. 62 at 9 (AOC).

[2] W.D. Clinton, a JM engineer, testified that asbestos-containing Transite pipe is darker grey than non-asbestos concrete pipe and it would be difficult for a lay person to discern the difference. Tr. May 23 at 43-44. T. Ebihara, a JM consultant, testified that Transite pipe has a darker color, the fiber structure can be seen within a broken edge, and the press or mold makes a visible pattern on the surface. Tr. May 23 at 72-73. He also stated that LFR and AECOM workers would be able to tell the difference between Transite and non-asbestos pipe. *Id.*

exception of the south-central portion of the Site" and that description is consistent with Figure 14 of the ELM report depicting locations of the 74 suspected ACM fragments. *Id.* at 23, 45, 535.

At Site 3, ELM also collected 48 soil core samples drilled to a depth of 4 feet. Exh. 57 (ELM report) at 35. In boring logs, ELM described visible ACM as Transite, insulation, and raw material. *Id.* at 191-196, 289, 300. Samples from 16 locations contained asbestos—6 being located on Site 3 along Greenwood Avenue at 50-foot intervals. *Id.* at 541 (Fig. 20). The remaining locations were elsewhere on Site 3. *Id.*

In 2008, LFR Inc. (later known as Arcadis) sampled soil on Site 3 and Site 6. Exh. 63 (LFR report). At Site 3, LFR dug test pits at 14 locations to determine whether asbestos was present below 3 feet. *Id.* at 13. LFR did not observe visually suspect ACM below 3 feet. *Id.* at 15. Two test pits, one located on the former detour road near Greenwood Avenue and one located on the western portion of the former parking lot, contained visually suspect ACM above 3 feet. *Id.* In boring logs, LFR described these samples as Transite. *Id.* at 112, 115.

At Site 6, LFR collected more than 200 soil samples from 88 locations along unpaved shoulders on the north and south sides of Greenwood Avenue. Exh. 63 (LFR report) at 22. Underground utilities, including natural gas, telecommunication, and fiber optic, were present along the sampling areas. *Id.* at 535. LFR visually identified ACM at 28 locations along Greenwood. *Id.* at 22, 64-68 (Table 4), 86 (Fig. 10). LFR described visually suspect ACM as Transite, fibrous sludge, roofing material, fibrous material, and brake shoes. *Id.* at 64-68 (Table 4), 285-300 (App. D). Of these 28 locations, eight were on the south side of Greenwood along the border with Site 3. *Id.* at 86 (Fig. 10).

Also in 2008, LFR excavated soil along the south side of Greenwood Avenue, and west of Site 6, to expose two electric lines. Exh. 74 (LFR letter report). LFR removed soil to 7 feet below the surface. *Id.* at 2. Starting from the surface, LFR reported that the top 3.5 to 4 feet consisted of "topsoil and clay-rich fill material" and the layer below was granular fill. *Id.* LFR observed pieces of Transite pipe in the clay layer and concluded that this pipe was in a layer placed by IDOT during construction. *Id.*

In 2013, AECOM performed two rounds of sampling at Site 3 to delineate asbestos in soil within a 25-foot corridor centered on the 20-foot natural gas line generally running east-west through the center of Site 3. Exh. 66 at App. H (AECOM report). In May 2013, AECOM installed nine hydraulic excavation points and 18 test pits. *Id.* at 771. Using polarized light microscopy, seven samples detected asbestos and all were at 0.25% or lower. *Id.* In August 2013, AECOM advanced 17 soil borings to maximum depth of 9 feet and collected 126 soil samples. *Id.* at 772. One sample showed asbestos content of 0.25%. *Id.*

Asbestos Cleanup at Site 3 and Site 6

JM entered into an administrative order on consent (AOC) with USEPA in 2007, requiring JM to investigate and remove asbestos from areas near JM's facility, including Site 3 and Site 6. Exh. 62 (AOC) at 9-10; Compl. at ¶ 10; Ans. at ¶ 10. IDOT is not a party to the AOC. Compl. at ¶ 31; Ans. at ¶ 31.

USEPA selected remedies to address asbestos in soil at Site 3 and Site 6. Compl. at ¶ 42; Ans. at ¶ 42. In general, USEPA required excavation and disposal of soil containing asbestos, backfill with clean soil, and controls where asbestos remained in the soil. Compl. at ¶ 47, 49; Ans. at ¶ 47, 49. JM recently informed the Board that it mostly completed this work in late 2016. Status Report at 2. JM estimates spending $3,582,000 in investigation and remediation costs. *Id.* at 3.

VIOLATIONS AND DEFENSES

JM contends that IDOT dispersed and buried ACM waste during road construction on what is now known as Site 3 and Site 6. Accordingly, USEPA required JM to perform a more extensive cleanup than if IDOT had not built its project. Based on this, JM alleges two counts against IDOT for violating the Act.

Count I is for violations of Sections 21(a), (d), and (e) of the Act beginning in the 1970s and continuing as long as ACM waste remains. JM alleges that IDOT violated Section 21(a) by open dumping waste, Section 21(d) by conducting unpermitted waste disposal, and Section 21(e) by illegally disposing waste. The Board finds IDOT open dumped ACM waste violating Section 21(a) of the Act. Similarly, because the disposal site was not a permitted waste disposal facility, IDOT violated Sections 21(d) and 21(e), which prohibit disposing waste at an unauthorized site. IDOT's open dumping occurred along the south side of Greenwood Avenue on Site 6 and the northeast portion of Site 3, as identified by specific sampling locations below.

Count II is for violating the 1970 versions of these provisions. The Board finds it unnecessary for JM to plead violations of historic provisions of the Act, because current Sections 21(a), (d), and (e) apply to IDOT's construction activities in the 1970s and the continuing presence of ACM waste.

Count I - Section 21(a)
Open Dumping

Section 21(a) of the Act prohibits any person from open dumping waste. 415 ILCS 5/21(a) (2014). Specifically, the Act provides:

> No person shall:
>
> (a) Cause or allow the open dumping of any waste. *Id.*

A person open dumps by consolidating refuse (meaning waste) at a disposal site that does not meet the requirements of the Act. 415 ILCS 5/3.305, 3.385 (2014). Nothing in the record shows that either Site 3 or Site 6 is a permitted waste disposal site. As unpermitted facilities, neither Site 3 nor Site 6 meets the requirements of the Act for waste disposal.

The Board finds that IDOT violated Section 21(a) of the Act because IDOT open dumped ACM waste. The Board first addresses two preliminary issues: IDOT is subject to

Section 21 and ACM found on the sites is waste. The Board then addresses three arguments as to whether IDOT, through its own conduct, open dumped ACM waste at the sites by: (i) building the former detour road; (ii) reconstructing Greenwood Avenue; and (iii) restoring Site 3 after construction. *See* Compl. at ¶ 67; JM Br. at 21. JM also asserts that IDOT allowed open dumping, regardless of who deposited ACM waste, by owning or controlling the right-of-way for Greenwood. Compl. at ¶ 12; JM Br. at 38-42.

IDOT Is Subject to Section 21

Section 21(a) prohibits "persons" from open dumping. The Act defines "persons" to include State agencies such as IDOT. *See* 415 ILCS 5/3.315 (2014). Illinois state agencies are required to comply with the Act. 415 ILCS 5/47(a) (2014). The Board finds IDOT may be enforced against for violating the Act. *See* Boyd Brothers, Inc. v. Abandoned Mined Lands Reclamation Council, PCB 94-311, slip op. at 3 (Feb. 16, 1995).

ACM Found on Site 3 and Site 6 Is Waste

Section 21(a) prohibits open dumping waste. Waste includes discarded material. 415 ILCS 5/3.535 (2014). ACM present at Site 3 and Site 6 was discarded and constitutes waste. On the surface of Site 3, ACM included Transite pipe, felt paper, tar paper, roofing material, and insulation. Exh. 57 (ELM report) at 177-179. Below the surface at Site 3, ACM includes Transite, insulation, and raw material. *Id.* at 289, 300. Below the surface at Site 6, ACM includes Transite, fibrous sludge, roofing material, fibrous material, and brake shoes. Exh. 63 (LFR report) at 22, 64-68 (Table 4), 285-372 (App. D). These materials were abandoned at the sites and serve no useful purpose. When formerly useful materials such as Transite pipe were abandoned on the sites, they were removed from the economic mainstream and became waste. *See* Alternative Fuels, Inc. v. IEPA, 215 Ill. 2d 219, 233 (2004) (materials stored without the likelihood of being returned to the economic mainstream are waste).

Building Former Detour Road

JM contends that IDOT crushed and buried ACM in building the former detour road. The former detour road crossed Site 3 and connected with Greenwood Avenue on Site 6. JM's expert used IDOT's construction plans and prior environmental reports to show that ACM is buried in IDOT-deposited materials along the former detour road. The Board finds JM has not proven that IDOT is responsible for ACM waste along the former detour road.

JM's expert reviewed IDOT's plans to determine where IDOT placed fill in constructing the detour road. JM and IDOT agree that IDOT's plans (Exh. 21A at 23) specified that 1,102 cubic yards of fill was needed for the entire detour road and there would be 5,148 cubic yards of excavated material (referred to as "cut") as part of the construction activities, which could be used as fill. Exh. 16 at 6 (Dorgan rebuttal); Exh. 8 at 7, 10 (Gobelman report). For the portion of Site 3 on which the detour road would be built, the then-existing surface elevation varied from 587.5 feet at the southwest corner to 588.5 feet over most of Site 3. Exh. 21A at 23 (IDOT plans); Exh. 6 at 8 (Dorgan report). The proposed elevation for the detour road was 590 feet all the way to Greenwood. Exh. 21A at 23; Tr. May 24 at 287 (Gobelman). Further, IDOT's plans

did not specify removal of unsuitable material for the detour road. *Id.*; Exh. 16 at 6 (Dorgan rebuttal); Exh. 8 at 7, 10 (Gobelman report). It follows then that no cut was needed for the detour road on Site 3 because it was already below the desired level.

Some amount of material was needed to bring the detour road up to 590 feet. JM's expert concluded that up to 2.5 feet of fill was needed along the detour road. Exh. 16 at 6 (Dorgan rebuttal). IDOT contends that needed fill would have been taken from the 5148 cubic yards of available cut. Tr. May 24 at 290 (Gobelman). Both conclusions are supported by the record. The Board finds that the southwest corner of Site 3 required 2.5 feet of fill, the remaining length of the detour road required minimal fill to bring it up to 590 feet, and that IDOT used available cut for this fill. *See* Exh. 21A at 23; JM Reply at 5 (Exh. 21A "indicates that the elevation of the land across the entire stretch of Detour Road A is consistently at or near 590 feet" and the former parking lot was not higher than surrounding land).

IDOT also placed fill in constructing the intersection where the detour road connected with Greenwood Avenue on Site 6. Initially, it is helpful to understand that IDOT's plans used a system for marking points along each road at 100-foot intervals. These points were called stations. Measured along Greenwood, the intersection with the detour road was east of Station 7. Measured along the detour road, the intersection with Greenwood was at Stations 14 to 15. Exh. 21A at 23 (IDOT plans). As discussed above, IDOT's plans illustrated a profile of the detour road. *Id.* From Station 14 to 15, IDOT's plans showed that fill was needed to raise the detour road approximately two feet to connect to Greenwood. *Id.*; Tr. June 23 at 190 (Gobelman).

The Board turns next to the question of whether any ACM has been found within fill placed by IDOT for the detour road. JM's expert notes that ACM analysis detected asbestos in samples along the former detour road. Exh. 6 at 27 (Dorgan report). The samples on Site 3 were taken within 3 feet below the surface; at the time of sampling, the surface level was 587.5 feet, *i.e.*, below the 590-foot elevation of the detour road. *Id.* IDOT removed the detour road at the end of construction and restored the surface level on Site 3. Tr. June 23 at 156 (Gobelman). Accordingly, any fill placed by IDOT on Site 3 during construction was removed and the samples were taken below the fill level.

JM's expert depicted these Site 3 samples as a cross-section to illustrate the depth of ACM in soil. Exh. 6 at 27 (Figure 4) (corrected version, *see* Tr. May 23 at 200-205). He concluded that ACM waste is within fill material placed by IDOT. *Id*. However, IDOT would have needed to excavate below 587.5 feet and place fill below 587.5 feet to be responsible for ACM at this depth. The record does not show excavation to the depth of these samples. Rather, the record shows that IDOT's work along the detour road on Site 3 was above the depth where ACM is now found.

On the cross-section, JM's expert drew a dotted line beneath the sample depths at approximately 583 feet and titled it "approximate depth of fill material." Exh. 6 at 27 (Dorgan Report) (Figure 4). At hearing, he explained that he determined the depth of fill material from IDOT's plans or boring logs. Tr. May 23 at 200. As detailed above, however, IDOT's plans did not provide for excavation or fill to 583 feet. Turning to the boring logs for these samples, consultants described a predominantly sand and gravel substrate. Exh. 57 at 311 (ELM report);

Exh. 66 at 800, 801 (AECOM report). There was no other testimony or explanation in the record that this was IDOT-placed fill material. ACM detected below 587.5 feet along the former detour road on Site 3 is below IDOT's activities.

Similarly, JM has not proven that ACM waste is located in fill placed by IDOT to connect the detour road to Greenwood Avenue on Site 6. JM's expert depicted these Site 6 samples as a cross-section to illustrate the depth of ACM in the soil. Exh. 6 at 27 (Figure 4). He opined that ACM is located within material placed by IDOT. *Id.* At hearing, JM's expert produced additional cross-sections along the south side of Greenwood. Tr. May 23 at 216-220, 297-302 (Dorgan); Exh. 84 (Dorgan cross-section). One of the cross-sections is on Site 6 and illustrates depth of ACM in the soil. *Id.* Two ACM samples were taken at this intersection. *Id.* JM's expert also prepared cross-sections perpendicular to Greenwood for these two samples. *Id.* at 2. Again, JM used the cross-sections to assert that ACM materials are within IDOT-placed fill. Tr. May 23 at 218-220, 304 (Dorgan). In particular, cross-sections H and I illustrate depth of ACM found in soil samples 5S and 6S. Exh. 84 at 2.

However, JM's depictions show that ACM is below the current surface level of approximately 588.5 feet. Exh. 6 at 27; Exh. 84. This is the same surface elevation prior to IDOT's construction in this area. *Id.*; Exh. 21A at 23. Accordingly, ACM detected at this level is below IDOT's activities. Furthermore, JM's expert depicts ACM continuing to below 586 feet in this area and nothing in IDOT's plans shows excavation to this depth. Exh. 84. Therefore, the Board finds that ACM in the area where the former detour road connected to Greenwood is not attributable to IDOT's activities.

Based on the above, the Board finds JM has not proven that ACM waste found along the former detour road is present in material IDOT placed. Therefore, JM failed to prove that IDOT open dumped ACM waste in constructing the detour road.

Reconstructing Greenwood Avenue

JM contends that IDOT deposited ACM waste in reconstructing Greenwood Avenue. Again, JM's expert used IDOT's plans to show that ACM is buried in IDOT-deposited material and correlated that to where ACM was found. The Board finds IDOT open dumped by depositing ACM waste along Greenwood.

Initially, the Board clarifies the area along Greenwood Avenue relevant to the complaint and this argument. As defined by USEPA, Site 6 is the unpaved area along the north and south sides of Greenwood. Exh. 62 (AOC) at 7. The western boundary is the point where Greenwood rises to reach Pershing Road (*id.*) and is Station 9+22 along Greenwood (meaning 22 feet west of Station 9) on IDOT's construction plans. Exh. 6 at 15 (Dorgan report). Moving east, IDOT's plans for pavement work on Greenwood covered Station 9+22 to Station 7. Exh. 21A at 8, 72 (expressly providing that the construction limit was at Station 7). Continuing east, IDOT's plans also provide for the detour road to connect to Greenwood east of Station 7 (discussed above). *Id.* at 23. This point where the detour road met Greenwood is also on Site 6.

As to the portion of Greenwood Avenue between Stations 9+22 to the west and Station 7 to the east, the parties disagree as to the amount of material IDOT removed and replaced during construction. According to IDOT, this portion of Greenwood was rebuilt at the same level as the prior road and little fill was needed. IDOT Br. at 17. IDOT's expert explained that IDOT's plans called for excavating existing pavement. Tr. May 24 at 299 (Gobelman). The elevation began to increase at Station 9. *Id.* The amount of fill needed for this section (Station 9 to 9+22) of the embankment above then-existing ground was approximately one foot. Tr. May 25 at 169 (Gobelman); Exh. 21A at 72-73 (IDOT plans).

JM's expert opined that IDOT excavated this portion of Greenwood Avenue to an elevation of 585 feet and replaced that material. Tr. May 23 at 213-14 (Dorgan). Thus, material now found above 585 feet was placed by IDOT. *Id.* The Board agrees. The record, including IDOT's plans and IDOT's expert's testimony, supports JM's position. *See* Exh. 21A at 72 (IDOT plans); Tr. June 23 at 193-196 (Gobelman).

The Board finds that IDOT excavated down to 585 feet and replaced the excavated material up to approximately 590 feet. Exh. 21A at 72 (IDOT plans). IDOT's plans included drawings for Stations 7+60, 8, and 9. *Id.* For each station, the plans specified the elevations of the existing and proposed road, an amount of unsuitable material to be removed, and an amount of porous granular fill, as well as cut and fill areas. *Id*. IDOT's plans showed the existing pavement at these stations and excavation to 585 feet. *Id.* The plans also showed soil profiles for these stations indicating "black cindery fill" below the existing pavement and unsuitable material to be removed below the cinder layer. *Id*. at 26. The replacement material included porous granular material, fill, and pavement. Tr. June 23 at 193-196 (Gobelman).

The Board turns next to whether any ACM has been found within material placed by IDOT on Greenwood Avenue between Stations 9+22 and 7. At hearing, JM's expert produced cross-sections along the south side of Greenwood. Tr. May 23 at 216-220, 297-302 (Dorgan); Exh. 84 (Dorgan cross-section). One of the cross-sections is on Site 6 and illustrates ACM within 3 feet of the surface. *Id.* It illustrates types of buried ACM, including Transite, roofing material, and fibrous sludge. *Id.* JM's expert also prepared a series of cross-sections perpendicular to Greenwood. *Id.* at 2. JM uses the cross-sections to show that IDOT placed fill above 585 feet and ACM materials are within IDOT-placed fill. Tr. May 23 at 218-220, 304 (Dorgan).

Based on the above, the Board finds that ACM waste is located in material placed by IDOT to reconstruct Greenwood Avenue. Specifically, IDOT is responsible for ACM waste found in samples 1S, 2S, 3S, and 4S. IDOT open dumped by depositing ACM waste along Greenwood. IDOT therefore violated Section 21(a) by open dumping ACM waste at these locations. *See* 415 ILCS 5/21(a) (2014).

Restoring Site 3 after Construction

JM contends that IDOT deposited ACM waste when it restored Site 3 after construction. JM Br. at 21. Specifically, IDOT removed the detour road (discussed above), filled ditches and culverts, and generally spread and buried ACM in soil. The Board finds that IDOT is

responsible for ACM waste found on the north portion of Site 3 along Greenwood Avenue and the south portion of Site 6 at locations specified below. However, the record contains insufficient information to find IDOT liable for ACM waste found elsewhere on Site 3.

IDOT's plans called for a ditch along the south side of Greenwood Avenue. The plans included cross-sections showing the ditch starting at Station 9 running west along the embankment. Exh. 21A at 72-81. At Station 9, the center of the ditch was 45 feet south of the center of Greenwood. *Id.* Moving west, as the embankment rises, the cross-sections for Greenwood showed the ditch farther away from Greenwood. *Id.* at 73. Another page of IDOT's plans showed the ditch starting farther east, near Station 7. Exh. 21A at 8. JM's expert depicted this ditch as running along the northern portion of Site 3 starting at Station 7. Exh. 16 at 18 (Dorgan rebuttal); Tr. June 24 at 212 (Dorgan testifying that ditch started at Station 9).

At hearing, JM's expert opined that IDOT filled the Greenwood Avenue ditch after construction. Tr. June 24 at 213-214 (Dorgan). IDOT's plans show that the bottom of the ditch was at an elevation of 584 feet. Exh. 21A at 72-73. JM's expert used ACM samples taken in or near the ditch to opine that ACM is present in IDOT-placed material there. Exh. 6 at 17 (Dorgan report). In a cross-section, he illustrated soil samples along the northern edge of Site 3 in, next to, and near the ditch. Exh. 6 at 28 (Figure 5). At hearing, he testified that three of the samples were near the ditch. Tr. June 24 at 214 (Dorgan). Other samples showed no ACM. Exh. 6 at 28 (Figure 5). Also at hearing, JM's expert produced additional cross-sections showing the presence of ACM waste in IDOT-placed materials. Exh. 84 (Dorgan) (cross-sections B and D). Because this ACM is located in materials placed by IDOT during construction, the Board finds that IDOT is responsible for ACM found at sample locations B3-25, B3-16, and B3-15. *See also* Exh. 57 at 97-100 (ELM report).

As to the ditch south of the detour road, IDOT's plans called for a ditch between Stations 10 and 12 along that road. Exh. 21A at 23. JM's expert depicted this ditch in his rebuttal report. Exh. 16 at 18 (Figure 2). He testified that ACM was found near this ditch; however, the samples he identified were located on the former detour road and were addressed by the Board above. *See* Tr. June 24 at 216 (Dorgan). The Board finds this ditch was present during IDOT's construction and IDOT restored this area to the surface level after construction. However, JM has not shown that ACM waste was found in soil samples taken from this area. Further, as discussed above regarding the detour road, JM has failed to prove that ACM found in samples along the former detour road are attributable to IDOT's construction.

JM also argues that IDOT installed a temporary culvert under the detour road on Site 3 and would have needed to remove the culvert and restore the area with fill. JM Reply at 17. JM's expert testified that a culvert was located near the ditch along the former detour road (Tr. June 24 at 216 (Dorgan)) and identified its location on an exhibit at hearing (Tr. May 24 at 51 (marking culvert on Exh. 16-17)). IDOT's expert also testified that a culvert was located under the former detour road on Site 3, but he disputed whether restoring the culverts after construction would require fill. Tr. June 23 at 159-160 (Gobelman). The record supports that a culvert was constructed under the former detour road on Site 3, but does not show that any ACM waste has been detected in that area.

Control over Greenwood Avenue Right-of-Way

JM also argues that, regardless of who deposited ACM waste, IDOT owns or controls the right-of-way along Greenwood Avenue and is responsible for allowing ACM waste there.[3] Compl. at ¶ 12; JM Br. at 38-42. As to a portion of the Greenwood right-of-way (Parcel 0393), the Board finds that IDOT controls that parcel and continues to allow ACM waste in the soil.

Section 21(a) creates liability for a person who causes or allows open dumping. An alleged polluter may be liable because he controls the pollution or he controls the premises where pollution occurred. People v. Davinroy, 249 Ill. App. 3d 788, 793 (5th Dist. 1993). Above, the Board discussed IDOT's liability for open dumping caused by its construction activity at the sites. Now, the Board considers whether IDOT is liable by allowing open dumping at property it controls, whether or not caused by IDOT's construction.

JM argues that IDOT has control over the right-of-way for Greenwood Avenue, making IDOT liable for ACM waste found there. JM uses "right-of-way" to mean both sides of Greenwood. On the south side, JM means the existing right-of-way for the then-existing Greenwood plus an additional right-of-way IDOT acquired for the Amstutz project (Parcel 0393). *See, e.g.,* Compl. at ¶ 12; JM Reply at 16. On the north side, JM means the existing right-of-way. *Id.* In JM's view, the south right-of-way includes portions of Site 3 and Site 6 and the north right-of-way includes portions of Site 6. Compl. at ¶ 12. In response, IDOT maintains that it holds a right-of-way on Parcel 0393, which is not within Site 6, and a right-of-way on the north side of Greenwood, which does not lie within Site 3 or Site 6. Ans. at ¶ 12. The Board examined the record to make sense of the parties' statements.

In 1971, ComEd granted IDOT the right to use ComEd property for the Amstutz project. *See* Exh. 41 (1971 grant). This grant was re-recorded in 1974 and 1984. Exh. 42 (1974 grant); Exh. 43 (1984 grant). The grant gave IDOT the "right to use" ComEd property "for highway purposes only." Exh. 43 at 2-5. Parcel 0393 is covered by the grant and runs along the "south line" of Greenwood Avenue from Pershing Road east approximately 643 feet. *Id.* at 3. Parcel 0393 is illustrated on Exhibit 15 and a portion of it covers the north edge of Site 3. Exh. 15 (IDOT plat). While JM later claimed Exhibit 15 is "inherently unreliable" (JM Reply at 19, n. 6), JM's post-hearing brief cited Exhibit 15 as depicting the parcel's contours (JM Br. at 9) and JM used this exhibit at hearing to identify the parcel (Tr. May 24 at 63-65 (Blaczek)).

In addition, Parcel 0393 is identified in IDOT's plans consistent with Exhibit 15. *See, e.g.*, Exh. 21A at 27. IDOT used Parcel 0393 to build the embankment raising Greenwood Avenue (Tr. May 25 at 48 (Stumpner)) and the parcel appears to follow that contour. The northern edge of Parcel 0393 ends at the pre-existing right-of-way for Greenwood and what is

[3] JM also contends that a temporary easement for Parcel E393—property not identified in JM's complaint—gave IDOT control over the detour road during construction, making IDOT liable for ACM waste dumped there. JM Br. at 39. However, as discussed, the Board cannot determine from the record that ACM present in soil along the former detour road was deposited there during IDOT's construction or removal of the former detour road, and therefore does not find IDOT responsible for ACM waste in that area.

now Site 3's north edge. Parcel 0393 does not extend into Site 6. Parcel 0393 is owned by ComEd, which as noted above conveyed to IDOT the right to use the parcel. ComEd did not convey any area of the pre-existing right-of-way in the grant.

Based on the above, the Board finds that a portion of Parcel 0393 falls on Site 3 but no part of Parcel 0393 falls on Site 6. While JM's complaint and post-hearing briefs take a broader view of IDOT's Greenwood right-of-way to include the pre-existing right-of-way, Parcel 0393, and possibly other parcels, the record only contains sufficient information to analyze IDOT's interest in Parcel 0393. The Board also notes that the JM expert's opinions were limited to Parcel 0393 and IDOT's interest in that parcel. Exh. 18 (Fortunato report). With that clarification, the Board continues to JM's argument on IDOT's interest in Parcel 0393.

JM contends that ComEd's grant gave IDOT an ownership interest in Parcel 0393 during the project and today – namely, a permanent easement. As support, JM cites the testimony of an attorney JM used as an expert witness and numerous statements by witnesses at hearing. *See, e.g.* Tr. June 24 at 123 (Stoddard stating right-of-way was a permanent easement). IDOT acknowledges that it retains an interest in this parcel, but not an ownership interest.

Whether IDOT's interest is an ownership interest is not the relevant question under Section 21. Section 21(a) creates liability for a person who causes or allows open dumping. Above, the Board found that IDOT *caused* open dumping in certain areas. The question here is whether IDOT, by controlling Parcel 0393 where ACM waste is now present, *allowed* open dumping. *See* Phillips Petroleum Co. v. PCB, 72 Ill. App. 3d 217, 220 (2nd Dist. 1979) (transporter had sufficient control over railcars to be liable for pollution due to train derailment). Ownership can result in sufficient control over the location of open dumping to result in responsibility even if the owner did not actually open dump. Meadowlark Farms v. PCB, 17 Ill. App. 3d 851, 861 (5th Dist. 1974) (current owner liable for pollution seeping from waste pile created by prior owner). Other forms of control over a site may also result in liability. *See* McDermott v. Metropolitan Sanitary District, 240 Ill. App. 3d 1, 26 (1st Dist. 1992) (an easement interest rendered holder liable for failure to maintain a property).

The Board finds that IDOT's interest in Parcel 0393 gave and continues to give it control over open dumping on that property. *See* Davinroy, 249 Ill. App. 3d at 793. For example, an IDOT witness stated that removal of the Greenwood Avenue embankment requires IDOT approval. Tr. May 25 at 54 (Stumpner). Another IDOT witness testified that IDOT can do what is necessary to maintain the property for highway purposes, public safety, and traffic flow. Tr. June 24 at 118-119 (Stoddard). Furthermore, as long as Parcel 0393 is being used for highway purposes, as it is today, IDOT's interest in the parcel continues. *Id.* at 121-122.

ACM waste has been found in samples located on Parcel 0393 (B3-25, B3-15, B3-16, B3-50) and a sample appearing to be on the border of the parcel (B3-45). JM claims that ACM was found in 18 locations "within easement parcels," but most of these samples were located off Parcel 0393 and one sample did not exist. *See* JM Br. at 39. IDOT contends that no Transite pipe was found on Parcel 0393, but this statement ignores asbestos found in soil samples on the parcel. *See* IDOT Br. at 22.

IDOT continues today to hold an interest in Parcel 0393. Part of Parcel 0393 falls on Site 3. IDOT's interest in Parcel 0393 therefore gives it the right to control a portion of Site 3. Within that portion of Site 3, ACM waste is present in the soil. By continuing to control the portion of Parcel 0393 falling within Site 3, IDOT continues to allow ACM waste in that soil. Above, the Board found that IDOT is responsible for ACM found at sample locations B3-25, B3-16, and B3-15 due to its road construction. Additionally, the Board finds that IDOT allowed open dumping through its control over Parcel 0393 at sample locations B3-25, B3-16, B3-15, B3-50, and B3-45 (to the extent sample B3-45 falls on Parcel 0393) on Site 3. *See* Exh. 57 at 97-100 (ELM report).

Board Summary on Section 21(a)

The Board finds that IDOT caused open dumping of ACM waste along the south side of Greenwood Avenue within Site 6 (1S-4S) and adjacent areas along the north edge of Site 3 (B3-25, B3-16, and B3-15). Additionally, IDOT allowed open dumping on Parcel 0393 (B3-25, B3-15, B3-16, B3-50, and B3-45 (to the extent sample B3-45 falls on Parcel 0393)). The Board therefore finds that IDOT violated Section 21(a) of the Act.

Count I - Section 21(d)
Unpermitted Waste Disposal

Section 21(d) of the Act prohibits any person from conducting waste disposal without a permit. 415 ILCS 5/21(d) (2014). Specifically, the Act provides:

> No person shall: . . .
>
> (d) Conduct any waste-storage, waste-treatment, or waste-disposal operation:
>
> (1) without a permit granted by the Agency; [or]
>
> (2) in violation of any regulations or standards adopted by the Board under this Act . . . . *Id.*

ACM found at the sites is waste and neither site is covered by a waste disposal permit. IDOT violated Section 21(d) because it disposed asbestos waste without a permit, in the locations specified above.

Count I - Section 21(e)
Illegal Waste Disposal

Section 21(e) of the Act prohibits disposal, storage, and abandonment of waste, except at a facility meeting the Act's requirements. 415 ILCS 5/21(e) (2014). The Act provides:

No person shall: . . .

(e) Dispose, treat, store or abandon any waste . . . except at a site or facility which meets the requirements of this Act and of regulations and standards thereunder. *Id.*

Again, ACM found at the sites is waste and neither site is covered by a permit. IDOT violated Section 21(e) because it disposed asbestos waste at locations specified above, which are not permitted for waste disposal.

Count II - Historic Section 1021

Sections 21(a), (d), and (e) of the Act did not exist when IDOT's construction started in 1971. Accordingly, in count II, JM alleges that IDOT violated corresponding provisions in historic Section 1021 of the 1970 version of the Act. Specifically, JM alleges that IDOT violated Section 1021(b) prohibiting open dumping of refuse, Section 1021(e) prohibiting refuse disposal without a permit, and Section 1021(f) prohibiting disposal of refuse except at a proper disposal facility. Compl. at ¶¶ 89-91, citing IL ST CH 111½ ¶ 1021(b), (e), (f) (1970). The Board finds that it is unnecessary for JM to plead violations of historic Section 1021 because Sections 21(a), (d), (e) apply retrospectively to IDOT's construction activities in the 1970s.

When determining whether an amended statute applies, the Illinois Supreme Court follows the Landgraf approach set forth by the United States Supreme Court. People v. J.T. Einoder, Inc., 2015 IL 117193, ¶ 29 (2015), citing Landgraf v. USI Film Products, 511 U.S. 244 (1994). Under this approach, the first step is to determine whether the legislature stated that the amendment is to be applied prospectively or retrospectively. Einoder, 2015 IL 117193, ¶ 29. If the legislature did not state its intent, the court must determine whether applying the amendment retrospectively would have an impermissible retroactive impact. *Id.* An amended statute has a retroactive impact if the amendment impairs rights a party possessed when he acted, increases a party's liability for past conduct, or imposes new duties as to transactions already completed. *Id.* at ¶ 30. If a retroactive impact is found, the court must presume that the legislature did not intend that the amendment be so applied. *Id.*

Here, Sections 21(a), (d), and (e) may be applied retrospectively to IDOT's construction activities in the 1970s. Following the Supreme Court's roadmap, the Board initially notes that the legislature did not state in Section 21 whether amendments creating the current language apply retrospectively or prospectively. Accordingly, the Board next analyzes whether applying the current language would have an impermissible retroactive impact.

Comparing the 1970 version with the current language of Section 21, the substantive requirements of the two versions have remained the same from 1970 to today. Section 1021(b), (e), (f) correspond to Sections 21(a), (d), and (e) as follows:

Current Version	1970 Version
21(a) No person shall . . . Cause or allow the open dumping of any waste.	1021(b) No person shall . . . Cause or allow the open dumping of any other refuse . . .

21(d)(1) No person shall . . . Conduct any waste-storage, waste-treatment, or waste-disposal operation . . . without a permit . . .	1021(e) No person shall . . . Conduct any refuse-collection or refuse-disposal operations . . . without a permit.
21(e) No person shall . . . Dispose, treat, store or abandon any waste . . . except at a site . . . which meets the requirements of this Act . . .	1021(f) No person shall . . . Dispose of any refuse . . . except at a site . . . which meets the requirements of this Act . . .

The two versions of the Act prohibit the same conduct. The changes essentially substitute "refuse" in the old language with "waste" in the new. In Illinois, "refuse" means "waste." EPA v. PCB, 219 Ill. App. 3d 975, 979 (5th Dist. 1991). This is supported by definitions of both terms. Historic Section 1003 of the Act defined "refuse" as "any garbage or other discarded solid materials." IL ST CH 111½ ¶ 1003(k). "Waste" is currently defined in part as "garbage . . . or other discarded material." 415 ILCS 5/3.535 (2014). This word change, as well as the renumbering, are not substantive and do not create new liabilities. Accordingly, the Board finds no retroactive impact in applying current Sections 21(a), (d), and (e) to IDOT's construction activities in the 1970s. The Board therefore dismisses count II as unnecessary.

Defenses

In this section, the Board explains why IDOT's six defenses do not apply.

Five-Year Statute of Limitation

IDOT contends that JM's complaint is untimely and barred by a five-year statute of limitation. Ans. at 41. Specifically, IDOT argues that JM is barred by the five-year deadline for "civil actions not otherwise provided for" in Section 13-205 of the Illinois Code of Civil Procedure (735 ILCS 5/13-205 (2014)). *Id.* JM filed this case on July 8, 2013 and, according to IDOT, the five-year period expired before July 8, 2008. The Board finds, however, that no limitation period applies because IDOT's violations continue each day until the contamination is remedied.

JM brings its complaint under the citizen suit provision of Section 31(d) of the Act to enforce Section 21 of the Act. 415 ILCS 5/21, 31(d) (2014). The Act does not contain an express limitation period on bringing this claim. IDOT argues that the Board has acknowledged that the five-year limit in Section 13-205 may apply, citing Caseyville Sports Choice v. Seiber, PCB 08-30, slip op. at 2 (Oct. 16, 2008). In Caseyville, the Board denied a respondent's motion to dismiss based on a statute of limitation, finding that, when taking complainant's allegations as true, the Board was unconvinced that the statute of limitation barred the action. Caseyville, PCB 08-30, slip op. at 3. The Board relied on Barge-Way, where the Board denied a motion for summary judgment based on a statute of limitation because of a factual dispute as to when the injury was discovered. *See* Union Oil Co. of California v. Barge-Way Oil Co., PCB 98-169, slip op. at 4 (Feb. 15, 2001).

The five-year period does not begin to run, however, if IDOT's actions continue to violate the Act. Under Illinois civil procedure, if a wrong involves repeated injurious behavior by the same actor, the plaintiff's cause of action does not accrue until the date the acts cease.

Belleville Toyota, Inc. v. Toyota Motor Sales, USA, Inc., 199 Ill. 2d 325, 345 (2002). Here, IDOT's road construction began in 1971 and ended in 1976. During that project, IDOT encountered ACM waste and deposited it in the above identified areas on Site 3 and Site 6. As long as ACM waste remains in those locations, IDOT continues to violate Section 21 by allowing ACM waste to remain on the property.

The Act imposes liability for such continuing violations. For example, Section 42 provides an initial penalty as well as a penalty for each day a violation continues. 415 ILCS 5/42 (2014). The Board routinely calculates and orders penalties based on the number of days contamination remains on a property. *E.g.*, People v. ESG Watts, PCB 96-233, slip op. at 23 (Feb. 5, 1998) (calculating number of days that contamination exceeded groundwater standards); People v. Patrick Roberts Land Trust, PCB 01-135, slip op. at 6 (Sep. 19, 2002) (factoring length of time respondent ignored State remediation requests where landfill had already been closed two decades earlier); People v. J&S Companies, Inc., PCB 06-33, slip op. at 5 (Aug. 17, 2006) (factoring time from open dumping until clean up).

Here, IDOT deposited ACM waste in areas it filled along Greenwood Avenue in the 1970s. This waste remains today in the soil. Thus, asbestos contamination has continued from the time IDOT deposited it until now. The waste has also been deposited in a way that it can be further dispersed in the environment. Asbestos fibers from ACM may become airborne and inhaled. Exh. 65 at 4 (USEPA Enforcement Action Memorandum). This could be through human activity disrupting the site (*id*.), or through natural freeze/thaw cycles (*id.* at 8).

Section 33(a) of the Act further supports the Board's conclusion that IDOT's violation continues today. *See* 415 ILCS 5/33(a) (2014). Under that provision, an alleged violator cannot avoid liability by complying with the Act "except where such action is barred by any applicable State or federal statute of limitation." *Id.* This statutory language allows that there are circumstances where a violator corrects a violation and sufficient time passes to bar later enforcement. Here, IDOT has not corrected the violation. IDOT open dumped ACM waste and the waste remains. Accordingly, no statute of limitation applies.

The Illinois Supreme Court's finding in People v. AgPro, Inc. does not contradict the Board's finding that IDOT's violations continued as long as asbestos contamination remained. 214 Ill. 2d 222 (Feb. 3, 2005); *see also* Einoder, 2015 IL 117193. In AgPro, defendants operated a fertilizer and pesticide business. After the business closed, sampling at the site showed soil and groundwater contamination. The Attorney General brought an enforcement action seeking a court order forcing defendants to clean up the facility. The Court found that a prior version of Section 42(e) of the Act (authorizing injunctions to restrain violations of the Act) did not authorize a cleanup order where the pollution already occurred. AgPro, 214 Ill. 2d at 227. The Attorney General argued that the contamination caused by defendants is a continuing violation which can be restrained by an injunction. *Id.* at 232. Focusing on Section 42(e), the Court found that even if a violation continues, the Court could not order cleanup due to the restrictive language in former Section 42(e). Here, the Board is not limited by language such as the former Section 42(e) because the Board is not applying that section. The Court also focused on injunctive relief, which is not sought here. Furthermore, asbestos is a toxic material that has no

safe exposure level. The continued presence of asbestos in soil presents an ongoing exposure threat as long as it remains.

Board Jurisdiction

IDOT contends that the Board does not have authority to order JM's requested relief. IDOT presents two arguments. First, USEPA approval would be necessary to order IDOT to participate in the cleanup. Ans. at 42; IDOT Br. at 54. The Board does not address this argument because JM no longer seeks to have IDOT participate in the cleanup.

Second, IDOT argues that, to the extent JM seeks monetary relief, only the Illinois Court of Claims can order it. IDOT Br. at 55, IDOT Sur-reply at 10-11. It is true that the Court of Claims holds exclusive jurisdiction over claims against the State founded upon State law. 705 ILCS 505/8(a) (2014). However, Illinois courts have allowed actions against a State agency where Illinois statute specifically contemplates the State as a party. People v. Randolph, 35 Ill. 2d 24, 31 (1966); Martin v. Giordano, 115 Ill. App. 3d 367, 369 (4th Dist. 1983). As noted above, Section 21(a) prohibits "persons" from open dumping, and the Act defines "persons" to include State agencies. 415 ILCS 5/3.315 (2014). The legislature's consent to the State's liability under the Act is therefore "clear and unequivocal." Martin, 115 Ill. App. 3d at 369. The Board is the proper forum to hear citizen suits alleging violations of the Act. 415 ILCS 5/31(d) (2014) ("Any person may file with the Board a complaint . . . against any person allegedly violating this Act . . . ."). This includes allegations against a State agency. *See* Boyd Brothers, PCB 94-311, slip op. at 6 (citizen complainant alleged state entity violated Act by allowing discharge of mine effluent). It follows then that the Board has authority to enforce the Act against a State agency and award relief allowed by the Act.

Equitable Defenses

IDOT asserts three defenses against JM's equitable claims for a mandatory injunction: unclean hands, waiver, and laches. The Board does not address these defenses because JM no longer seeks to have IDOT participate in the cleanup.

Failure to Join Necessary Parties

IDOT contends that JM failed to name necessary parties, namely USEPA and ComEd, as respondents in this action. Ans. at 43-44. According to IDOT, the Board cannot order IDOT to participate in the USEPA-ordered cleanup without USEPA and ComEd present in this action. *Id.* Again, the Board also does not address this argument because JM no longer seeks to have IDOT participate in the cleanup.

RELIEF

To address IDOT's open dumping violations, the Board finds it appropriate to order relief. Below, the Board begins by analyzing the factors listed in Section 33(c) of the Act relating to the reasonableness of IDOT's actions. 415 ILCS 5/33(c) (2014). The Board then considers JM's status report—stating that it only seeks reimbursement of JM's cleanup costs—

and explains its authority to order cost recovery to a private party such as JM. The Board concludes with JM's request for sanctions against IDOT.

Section 33(c) Factors

In ordering relief, the Board considers facts and circumstances bearing on the reasonableness of IDOT's actions. Specifically, the Board must consider five statutory factors. 415 ILCS 5/33(c) (2014). Based on the Board's analysis of the Section 33(c) factors, the Board finds it appropriate to order relief to address IDOT's open dumping.

Character and Degree of Injury or Interference

As detailed above, ACM was found on the surface of the sites, and is present in soil. Improperly handling ACM waste endangers public health, welfare, and property. USEPA found that removing ACM waste from the site is necessary to protect public health, welfare, or the environment. Exh. 62 at 7 (AOC). The waste has also been deposited in a way that it can be further dispersed in the environment. As noted, asbestos fibers from ACM may become airborne and inhaled. Exh. 65 at 4 (USEPA Enforcement Action Memorandum). This could be through human activity disrupting the site (*id*.), or through natural freeze/thaw cycles (*id.* at 8). ACM waste and asbestos fibers on site pose a threat to the environment, as well as public health. To the extent ACM waste was placed by IDOT, the Board weighs this factor against IDOT.

Social and Economic Value of Pollution Source

JM contends that there is no social or economic value in a pollution source that has been discarded. JM Br. at 48. IDOT argues that road improvements have social and economic value. IDOT Br. at 42. The Board agrees that road improvements have social and economic value, but there is no value in disposing ACM waste to construct roads. The Board therefore weighs this factor against IDOT.

Suitability to Area in Which Located

JM contends that the sites were not permitted for waste disposal and, therefore, the sites were unsuitable for disposing ACM waste there. JM Br. at 49. IDOT agrees that disposing ACM waste is unsuitable on the sites, but contends that it was not responsible for disposing ACM waste there. IDOT Br. at 42. As explained above, the Board finds IDOT responsible for the ACM waste disposed along the south side of Greenwood Avenue. Because ACM waste is unsuitable to the area, the Board weighs this factor against IDOT.

Technical Practicability and Economic Reasonableness

Compliance with the Act is technically practical and economically reasonable. USEPA already has found that removing asbestos is technically feasible and costs are proportional to overall effectiveness of removal. Nothing in the record shows that compliance with the Act is technically impractical or economically unreasonable. As stated by USEPA, "[c]omplete

removal is relatively simple." Exh. 65 at 17 (USEPA Enforcement Action Memorandum). The Board weighs this factor against IDOT.

Subsequent Compliance

ACM waste and asbestos remain in soil at Site 3 and Site 6. IDOT has not taken any steps to comply with the Act. The Board therefore weighs this factor against IDOT.

JM's Status Report on Cleanup

JM recently informed the Board, through a filing styled as a status report, that it no longer seeks to force IDOT to participate in the USEPA-mandated cleanup at Site 3 and Site 6. Rather, JM seeks reimbursement for cleanup costs. IDOT responded that the Board should deny leave to file the status report because, according to IDOT, the report contains no new information, is vague, and seeks monetary relief that the Board may not grant. The Board already explained why it can grant such relief, and the status report contains new information relevant to the relief sought. The Board considers the status report as a motion to amend the complaint and, for these reasons, grants the motion.

Previously, in its complaint, JM requested the following relief:

> Requiring [IDOT] to participate in the future response action 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 . . . . Compl. at 20.

Although the complaint included a catchall request for other relief the Board deems appropriate, JM did not request a civil penalty and did not request reimbursement of its costs. *Id.*

However, in its post-hearing brief, JM requested $685,000 to recover investigation costs incurred after 2012, when USEPA issued the enforcement action memorandum. JM Br. at 6. JM qualifies this request by stating that it only seeks these costs "if the Board were to find that JM can seek past costs without running afoul of any affirmative defense." *Id.*

Sometime in late 2016, JM completed a cleanup on Site 3 and Site 6. JM estimates the cost of this work is $2,897,000 but does not identify the final cost. In addition, JM previously spent $685,000 in investigation and remediation costs. JM now asks the Board to order IDOT to reimburse JM's costs of $3,582,000 ($2,897,000 + $685,000). JM no longer seeks IDOT's participation in the cleanup.

Private Cost Recovery

The Act does not expressly allow the Board to order a violator to reimburse cleanup costs to a private party. *Compare* 415 ILCS 5/22.2(f) (2014) (State or local government may obtain reimbursement of costs spent to address release of hazardous substance or pesticide). The Act does specify other forms of relief. Specifically, the Board may order a violator to cease and desist from violations, impose civil penalties according to Section 42, revoke a permit, or require

a performance bond to assure that a violation is corrected. 415 ILCS 5/33(b) (2014). Section 33(a) of the Act also requires the Board to issue final orders "as it shall deem appropriate under the circumstances." 415 ILCS 5/33(a) (2014).

Using this appropriateness requirement, the Board first recognized its authority to order reimbursement for cleanup costs in Lake County Forest Preserve District v. Ostro, PCB 92-80 (Mar. 31, 1994). In Ostro, the Board found that the prior property owner open dumped 55-gallon paint barrels. Ostro, PCB 92-80, slip op. at 7. The Board ordered the prior owner to investigate and remediate contamination. *Id.* at 12. The Board also found it had authority under the Act to order the prior owner to reimburse the current owner's cleanup costs. *Id.* at 13. The Board then ordered additional hearing on the amount spent. *Id.* The Board explained that Section 33 of the Act gives it broader authority than circuit courts in enforcing the Act. *Id.* Also, awarding cleanup costs furthers the Act's purposes by encouraging prompt remediation. *Id.*

In further support, the Board cited People v. Fiorini, 143 Ill. 2d 318, 574 N.E.2d 612 (1991). There, the Attorney General brought an enforcement action against owners of a dump site. The owners then sued other entities who generated the waste at the dump site. On a motion to dismiss the complaint against the generators, the Illinois Supreme Court allowed the claim to proceed and declined to hold that the remedy would not be available under appropriate facts.

Following Ostro, the Board consistently has allowed private cost recovery claims to survive procedural challenges such as motions to dismiss. However, the Board has not reached the merits in these cases or ordered reimbursement after Ostro. *See*, *e.g.*, Caseyville Sport Choice v. Seiber, PCB 08-30 (Feb. 3, 2011).

In the absence of Illinois court opinions[4], the federal district court has considered whether Illinois law allows reimbursement of cleanup costs. In early cases after Ostro, the federal court denied motions to dismiss and allowed cost recovery claims to proceed. For example, in Midland Life Insurance Co. v. Regent Partners, Midland cleaned up contamination from a former industrial dry cleaning operation. 1996 WL 604038 (N.D. Ill. Oct. 17, 1996). Midland alleged open dumping violations under Section 21 of the Act and sought to recover its cleanup costs. After reviewing the Board's decision in Ostro, among other opinions, the court found an implied right for private parties to recover cleanup costs under the Act. *See also* Singer v. Bulk Petroleum Corp., 9 F. Supp. 2d 916, 925 (N.D. Ill. 1998); Krempel v. Martin Oil Marketing, Ltd., 1995 WL 733439 (N.D. Ill. Dec. 8, 1995).

The federal court changed course in Chrysler Realty Corp. v. Thomas Indus., 97 F. Supp. 2d 877 (N.D. Ill. 2000). There, the court dismissed a cost recovery action brought under the Act. The court first concluded that the Act does not contain an express right of action for a private party to recover its costs. *Id.* at 879. The court then considered whether a right of action can be implied from the Act. *Id.* The court relied on a then-recent Illinois Supreme Court decision in Fisher v. Lexington Health Care Inc., 188 Ill. 2d 455 (1999), setting the standard for finding an implied private right of action in an Illinois statute. Applying that standard, the court concluded

[4] *But see* NBD Bank v. Krueger Ringier, Inc., 292 Ill. App. 3d 691 (1st Dist.1997) (affirmed dismissal of cost recovery count in tort action to address petroleum contamination).

that the Illinois Supreme Court would not find in the Act an implied right allowing private parties to recover cleanup costs. This is because the Act already provides for citizen enforcement before the Board and State enforcement. The federal district court has consistently applied this analysis in later cost recovery cases. *See* Neumann v. Carlson Environmental, Inc., 429 F. Supp. 2d 946 (N. D. Ill. 2006); Great Oak LLC v. Begley Co., 2003 WL 880994 (N.D. Ill. Mar. 5, 2003); Norfolk Southern Ry. v. Gee Co., 2001 WL 710116 (N.D. Ill. June 25, 2001).

Indeed, the Act provides for citizen enforcement under Section 31(d), which allows a person to file with the Board a complaint against any person violating the Act. 415 ILCS 5/31(d) (2014). This cause of action under the Act must be brought at the Board and not circuit court or federal court. Available court opinions do not address citizen suits brought to the Board. JM, however, filed a complaint with the Board under Section 31(d). Specifically, JM alleges violations of Section 21 of the Act for open dumping. Unlike the federal cases, JM did not file a private suit for cost recovery under the Act in federal court. None of the federal cases, therefore, supports an argument to deny reimbursement for JM's costs.

An administrative agency such as the Board is a creature of statute and any authority claimed by the Board must be found in the Act. *See* Granite City Division of National Steel Co., *et al.* v. PCB, 155 Ill.2d 149, 171 (1993). In JM's citizen suit, Section 33 of the Act dictates what type of relief the Board has authority to order. Section 33(a) requires the Board to issue orders it deems appropriate. 415 ILCS 5/33(a) (2014). The Board continues to find it appropriate that a party recover the cost of performing cleanup as a result of another party's violations. Section 2(b) of the Act states that the Act's purpose is to restore and protect the environment and assure that adverse effects on the environment are borne by those who cause them. 415 ILCS 5/2(b) (2014). Reading the Act to allow a private party to recover cleanup costs furthers the intent of the Act by encouraging prompt cleanup and ensuring that the responsible party pays for its share.

Sanctions

JM requests that the Board sanction IDOT for false and misleading representations. JM Br. at 58. Specifically, JM asks that the Board preclude IDOT from offering defenses regarding liability associated with Parcel 0393, and award JM attorney fees attributable to IDOT's misrepresentations. *Id.*

The Board may order sanctions against any person that unreasonably fails to comply with any Board order, hearing officer order, or provision of the Board's procedural rules. 35 Ill. Adm. Code 101.800(a). The Board considers factors including: severity of the failure to comply; history of the proceeding; delay or prejudice in the proceeding; and bad faith by the offending person. 35 Ill. Adm. Code 101.800(c). The Board is precluded from awarding attorney fees as a sanction. ESG Watts, Inc. v. PCB, 286 Ill. App. 3d 325, 339 (3rd Dist. 1997); 35 Ill. Adm. Code 101.800(b) (types of sanctions Board may impose). The Board does not find any bad faith in IDOT's interpretations of its right-of-way interests. Similarly, both parties sought extensions throughout this proceeding and neither the Board nor the hearing officer found bad faith on the part of either party in prolonging this proceeding. The Board finds no bad faith now and denies JM's request for sanctions against IDOT.

Additional Hearing

As explained above, the Board finds that IDOT caused and allowed open dumping of ACM waste. Specifically, IDOT caused open dumping of ACM waste along the south side of Greenwood Avenue within Site 6 (1S-4S) and adjacent areas along the north edge of Site 3 (B3-25, B3-16, and B3-15). IDOT continues to allow open dumping as long as ACM waste remains in these locations. Additionally, IDOT allowed open dumping on Parcel 0393 (B3-25, B3-15, B3-16, B3-50, and B3-45 (to the extent sample B3-45 falls on Parcel 0393)).

JM seeks reimbursement of $3,582,000 from IDOT. However, JM's status report provides no detail as to what work it performed on Site 3 and Site 6. Further, JM only provides estimated costs and not the actual amount spent. The Board, therefore, is unable to determine the reasonable costs that may be attributable to IDOT. The Board notes that the requirement of Section 58.9(a) of the Act to determine IDOT's proportionate share of JM's costs does not directly apply because the sites are subject to a USEPA order. *See* 415 ILCS 5/58.1(a)(iv) (2014), 58.9(a); *see also* 35 Ill. Adm. Code Part 741.

Having found violations, and made the above determinations as to the Section 33(c) factors and the availability of cost recovery, the Board finds that further hearing is necessary. The Board directs the hearing officer to conduct a hearing for evidence on the following issues:

1. The cleanup work performed by JM in the portions of Site 3 and Site 6 where the Board found IDOT responsible for ACM waste present in soil.

2. The amount and reasonableness of JM's costs for this work.

3. The share of the JM's costs attributable to IDOT.

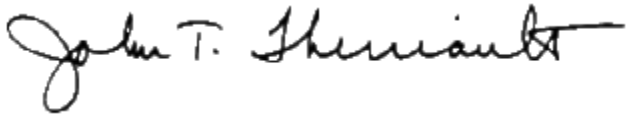
After this hearing is completed, the Board will enter its final order awarding cleanup costs as the Board deems appropriate under the facts and circumstances.

CONCLUSION

The Board finds that IDOT caused open dumping of ACM waste along the south side of Greenwood Avenue within Site 6 and adjacent areas along the north edge of Site 3. IDOT allows open dumping to continue as long as ACM waste remains at these locations. The Board further finds that IDOT allowed open dumping of ACM waste on the portion of Site 3 within Parcel 0393. The Board therefore finds that IDOT violated Section 21(a) of the Act. 415 ILCS 21(a) (2014). IDOT also violated Section 21(d) by conducting an unpermitted waste disposal operation, and Section 21(e) by illegally disposing waste. 415 ILCS 5/21(d), (e) (2014). The Board dismisses the alleged violations of historic Section 1021 of the Act because those allegations are unnecessary. Due to the incomplete record on cleanup costs, the Board directs the hearing officer to conduct a hearing on this issue.

IT IS SO ORDERED.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above interim opinion and order on December 15, 2016, by a vote of 4-0, Member Santos voted Present.



John T. Therriault, Clerk
Illinois Pollution Control Board

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:	)	
	)	
JOHNS MANVILLE, a Delaware corporation,	)	
	)	
Complainant,	)	**PCB No. 14-3**
	)	**(Citizens Enforcement)**
v.	)	
	)	
ILLINOIS DEPARTMENT OF TRANSPORTATION	)	**Hearing Officer Halloran**
	)	
Respondent.	)	

THIRD PARTY COMMONWEALTH EDISON COMPANY'S APPLICATION FOR NON-DISCLOSURE AND FOR PROTECTIVE ORDER REGARDING CONFIDENTIAL AND PRIVILEGED INFORMATION

Group Exhibit 3 to ComEd's Application for Non-Disclosure and for Protective Order

ILLINOIS POLLUTION CONTROL BOARD
June 27, 2017

JOHNS MANVILLE, a Delaware corporation,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 14-3
	)	(Citizens Enforcement)
ILLINOIS DEPARTMENT OF TRANSPORTATION,	)	
	)	
	)	
Respondent.	)	

HEARING OFFICER ORDER

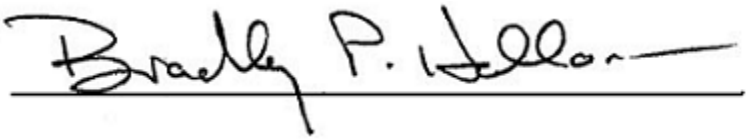
On June 27, 2017, all parties participated in a telephonic status conference with the hearing officer. With the agreement of the parties, Commonwealth Edison (ComEd), a non-party and recipient of discovery subpoenas from the Illinois Department of Transportation (IDOT), also participated.

Lengthy queries and objections were entertained from all participants regarding ComEd's written motion to quash, IDOT's written response, IDOT's second subpoena served on ComEd and concerns about the possibility of a revised discovery schedule. IDOT and ComEd suggested that further discussion regarding the subpoenas may be fruitful and narrow the issues involved. Johns Manville (JM) requested that they be involved in the discussions. IDOT and ComEd had no objection to JM participating. The parties and ComEd were directed to initiate discussions in an attempt to resolve any outstanding issues pertaining to the subpoenas served on ComEd.

Any and all due dates for discovery and response times for the parties and ComEd are held in abeyance and any revised due dates will be discussed at the next status conference.

The parties or their legal representatives are directed to participate in a telephonic status conference with the hearing officer on July 11, 2017, at 10:30 a.m. The telephonic status conference must be initiated by the complainant, but each party is nonetheless responsible for its own appearance.

IT IS SO ORDERED.



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Hearing Officer
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Chicago, Illinois 60601
312.814.8917
Brad.Halloran@illinois.gov

CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing order were e-mailed on June 27, 2017, to each of the persons on the attached service list.

It is hereby certified that a true copy of the foregoing order was e-mailed to the following on June 27, 2017:

Don Brown
Illinois Pollution Control Board
James R. Thompson Center
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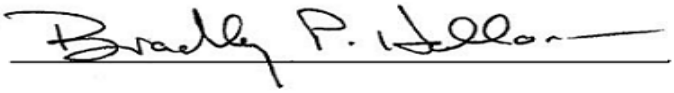
Chicago, Illinois 60601



Bradley P. Halloran
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@ Consents to electronic service

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ILLINOIS POLLUTION CONTROL BOARD
July 12, 2017

JOHNS MANVILLE, a Delaware corporation,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 14-3
	)	(Citizens Enforcement)
ILLINOIS DEPARTMENT OF TRANSPORTATION,	)	
	)	
	)	
Respondent.	)	

HEARING OFFICER ORDER

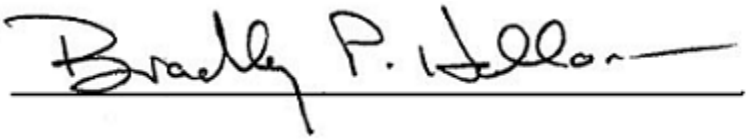
On July 11, 2017, all parties participated in a telephonic status conference with the hearing officer. With the agreement of the parties, Commonwealth Edison (ComEd), a non-party and recipient of discovery subpoenas from the Illinois Department of Transportation (IDOT) also participated.

ComEd and IDOT stated that they have had productive discussions and have narrowed the scope of discovery as to ComEd. It appears, however, that ComEd is reluctant to provide a privilege log regarding unspecified discovery it alleges is privileged in one way or another. *See eg*. Timber Creek Homes, Inc. v. Village of Round Lake Park, Round Lake Park Village Board and Groot Industries, Inc., PCB 14-99, (May 12, 2014) (privilege log). Section 130 of the Board's procedural rules regarding non-disclosable information was also discussed. ComEd and IDOT continue discussions in an attempt to reach a resolve.

Any and all due dates for discovery and response times for the parties and ComEd are held in abeyance and any revised due dates will be discussed at the next status conference.

The parties or their legal representatives are directed to participate in a telephonic status conference with the hearing officer on July 19, 2017, 2017, at 10:30 a.m. The telephonic status conference must be initiated by the complainant, but each party is nonetheless responsible for its own appearance.

IT IS SO ORDERED.



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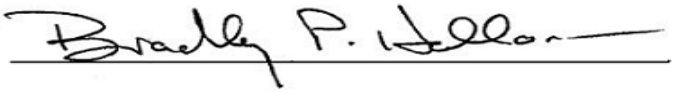
CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing order were e-mailed on July 12, 2017, to each of the persons on the attached service list.

It is hereby certified that a true copy of the foregoing order was e-mailed to the following on July 12, 2017:

Don Brown
Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph St., Ste. 11-500
Chicago, Illinois 60601



Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
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@ Consents to electronic service

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PCB 2014-003
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Chicago, IL 60654

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:	)	
	)	
JOHNS MANVILLE, a Delaware corporation,	)	
	)	
Complainant,	)	**PCB No. 14-3**
	)	**(Citizens Enforcement)**
v.	)	
	)	
ILLINOIS DEPARTMENT OF TRANSPORTATION	)	**Hearing Officer Halloran**
	)	
Respondent.	)	

THIRD PARTY COMMONWEALTH EDISON COMPANY'S APPLICATION FOR NON-DISCLOSURE AND FOR PROTECTIVE ORDER REGARDING CONFIDENTIAL AND PRIVILEGED INFORMATION

Exhibit 4 to ComEd's Application for Non-Disclosure and for Protective Order

Sigel, Gabrielle

From: Sigel, Gabrielle
Sent: Tuesday, July 18, 2017 10:27 AM
To: 'McGinley, Evan'
Cc: 'Brice, Susan'; Bandza, Alexander J.; O'Laughlin, Ellen; 'Dougherty, Matthew D.'; Caisman, Lauren (lauren.caisman@bryancave.com)
Subject: RE: IDOT Subpoena to ComEd

Evan: ComEd and IDOT have agreed regarding the scope of documents which ComEd is being requested to produce in this *JM v. IDOT* litigation ("Agreed Scope Documents"). This email confirms that agreement regarding Scope and states the procedures by which ComEd will be seeking to obtain protection from production of any Agreed Scope Documents.

Agreed Scope Documents in Response to IDOT Subpoena(s)

ComEd and IDOT agreed to limit the scope of IDOT's May 2017 subpoena *duces tecum*, served upon ComEd and its counsel, and all future subpoenas, if any, as follows:

A. IDOT agrees to limit its request for documents from ComEd to the following: 1) documents of any payments made by ComEd to Johns Manville, relative to ComEd's obligations under the 2007 Administrative Settlement Agreement and Order on Consent ("Settlement Agreement"), which payments, if any, involve either or both Site 3 or Site 6 of the Southwestern Site Area; and 2) any agreements between ComEd and Johns Manville with respect to addressing ComEd's obligations under the Settlement Agreement, which agreements, if any, involve either or both Site 3 or Site 6 of the Southwestern Site Area (collectively, the "Agreed Scope Documents").

B. In this litigation, IDOT will not serve subpoenas or otherwise make any other requests for documents to ComEd, any of its employees, or any of its corporate representatives, once the ComEd Agreed Scope Documents, if any, have been produced, if so required after resolution of the confidentiality, attorney-client privilege, attorney work product, joint defense/common interest protections from disclosure in discovery (collectively, "Privileges"), discussed below.

Procedures regarding ComEd Seeking Protection from Disclosure in Discovery or Otherwise Due to Privileges

Pursuant to Sections 7 and 7.1 of the Act, Sections 101.614, 101.616(a), 101.622(d) of the Board General Rules, Section 130.400 *et seq.* of the Board's rules regarding Identification And Protection Of Trade Secrets And Other Non-Disclosable Information, Illinois Supreme Court Rules, and Illinois common law, ComEd will seek from the Board an applicable order protecting ComEd from having to disclose in discovery or otherwise Agreed Scope Documents, due to Privileges (as defined above) that ComEd asserts apply to such Agreed Scope Documents. ComEd will do so by submitting to the Board, for its *in camera* review, pursuant to the legal authority referenced herein:

(1) any Agreed Scope Documents, for which ComEd seeks an applicable order protecting ComEd from having to disclose in discovery or otherwise, based on the above-defined Privileges;

(2) a privilege log for any such Agreed Scope Documents; and

(3) ComEd's bases for asserting that the Board should issue an applicable order protecting ComEd from having to disclose in discovery or otherwise Agreed Scope Documents, due to the above-defined Privileges.

See also, *e.g., Timber Creek Homes, Inc. v. Village of Round Lake Park, Round Lake Park Village Board and Groot Industries, Inc.*, PCB 14-99 (May 12, 2014); *KCBX Terminals Co. v. IEPA*, PCB No. 14-110 (Apr. 8, 2014); *Sierra Club v Midwest Generation, LLC*, PCB No. 13-15 (Oct. 6, 2014; Jan. 15, 2015; Feb. 1, 2017); *Illinois v. Packaging Personified, Inc.*, PCB No. 04-16 (May 31, 2013).

By agreeing to the Agreed Scope Documents and outlining the procedures above, ComEd is not making any representations or admissions that Agreed Scope Documents exist or are within ComEd's possession, custody or control, or that any Agreed Scope Documents, if required by the Hearing Officer to be produced despite ComEd's objections and assertions regarding the above-defined Privileges, are relevant or admissible for any purposes in the hearing in this case or otherwise.

I understand that JM will be communicating separately regarding the protection of its interests.

Gay Sigel

From: McGinley, Evan [mailto:emcginley@atg.state.il.us]
Sent: Friday, July 14, 2017 12:02 PM
To: Sigel, Gabrielle <GSigel@jenner.com>
Cc: 'Brice, Susan' <Susan.Brice@bryancave.com>; Bandza, Alexander J. <ABandza@jenner.com>; O'Laughlin, Ellen <EOLaughlin@atg.state.il.us>; 'Dougherty, Matthew D.' <Matthew.Dougherty@Illinois.gov>; Caisman, Lauren (lauren.caisman@bryancave.com) <lauren.caisman@bryancave.com>
Subject: IDOT Subpoena to ComEd

Gay:

Having reviewed the Hearing Officer's July 12th order and the cases cited therein, as well as his February 1, 2017 order in *Sierra Club v. Midwest Generation*, PCB 13-15, it appears to us that the ball is in ComEd's court regarding next steps on the privilege issue. Please advise as to how ComEd intends to proceed.

Regards,

Evan J. McGinley
Assistant Attorney General
Environmental Bureau
69 West Washington Street, Suite 1800
Chicago, IL 60602
312.814.3153 (phone)
312.814.2347 (fax)
emcginley@atg.state.il.us

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:	)	
	)	
JOHNS MANVILLE, a Delaware corporation,	)	
	)	
Complainant,	)	**PCB No. 14-3**
	)	**(Citizens Enforcement)**
v.	)	
	)	
ILLINOIS DEPARTMENT OF TRANSPORTATION	)	**Hearing Officer Halloran**
	)	
Respondent.	)	

THIRD PARTY COMMONWEALTH EDISON COMPANY'S APPLICATION FOR NON-DISCLOSURE AND FOR PROTECTIVE ORDER REGARDING CONFIDENTIAL AND PRIVILEGED INFORMATION

Confidential/Privileged Document

Exhibit 6 to ComEd's Application for Non-Disclosure and for Protective Order

FOR IN CAMERA REVIEW; NON-DISCLOSABLE INFORMATION

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:	)	
	)	
JOHNS MANVILLE, a Delaware corporation,	)	
	)	
Complainant,	)	**PCB No. 14-3**
	)	**(Citizens Enforcement)**
v.	)	
	)	
ILLINOIS DEPARTMENT OF TRANSPORTATION	)	**Hearing Officer Halloran**
	)	
Respondent.	)	

THIRD PARTY COMMONWEALTH EDISON COMPANY'S APPLICATION FOR NON-DISCLOSURE AND FOR PROTECTIVE ORDER REGARDING CONFIDENTIAL AND PRIVILEGED INFORMATION

Group Exhibit 7 to ComEd's Application for Non-Disclosure and for Protective Order

2012 WL 3783200 (Ill.Pol.Control.Bd.)

Illinois Pollution Control Board

State of Illinois

AMERICAN DISPOSAL SERVICE OF ILLINOIS, INC., PETITIONER
v.
COUNTY BOARD OF MCLEAN COUNTY, ILLINOIS; HENSON DISPOSAL, INC.; AND TKNTK, LLC, RESPONDENTS

PCB 11-60
August 28, 2012

(Third-Party Pollution Control Facility Siting Appeal)

HEARING OFFICER ORDER

***1** On July 30, 2012, respondent County Board of McLean County (County) filed objections to petitioner's interrogatories and document requests with the Board's Clerk. The objections had been provided to respondents and the hearing officer at an earlier date, thus explaining the July 24, 2012 motion filed by respondents Henson Disposal Inc. (Henson) and TKNTK, LLC (TKNTK) to adopt the County's objections as if filed on their own behalf. On August 10, 2012, petitioner filed a response to the objections. Respondents agreed to petitioner's motion for extension of time to respond. For the reasons set forth below, the objection to interrogatory 3 is sustained in part, the objection to interrogatory 9 is sustained, and the remaining objections to interrogatories and document requests are overruled. Respondents have 28 days to respond to petitioner's interrogatory and document requests.

Background

On March 22, 2011, petitioner appealed the County's decision to grant siting approval for Henson. First, petitioner claims that the County did not have proper jurisdiction because the pre-filing notice failed to meet the requirements of Section 39.2 of the Environmental Protection Act (Act). 415 ILCS 5/39.2(b)(2010). Second, petitioner claims that the County's approval is not supported by the record, and is against the manifest weight of the evidence. Specifically, Henson did not meet Criteria 1 through 9, and the County incorrectly determined that criterion 4 was not applicable. Third, petitioner claims that the local siting review was fundamentally unfair due to, at a minimum, the unavailability of the public record.

On April 20, 2011, respondents Henson and TKNTK filed a motion to strike and dismiss, arguing, among other things, that the petition was not factually sufficient. On February 16, 2012, the Board denied the motion.

Objections to Interrogatories

During the July 23, 2012 status conference, respondents clarified that there was no objection to interrogatories 1, 2, and 5. This was reiterated in petitioner's response to the objections.

Interrogatory 3

Interrogatory 3 asks respondents for the basis of its defense to the assertion that jurisdiction did not vest with the County due to insufficiency of the pre-filing notice. Subsections (a) through (f) ask for information on filing dates and identification of persons entitled to notice.

Respondents object on grounds that disclosure of the basis of its defense calls for theories, mental impressions, or litigation plans that are not subject to discovery pursuant to Illinois Supreme Court Rule 201(b). With respect to the identification of notice recipients and the dates of service, respondents argue that the questions are irrelevant and beyond the scope of discovery because all information related to notices are contained in the record. Henson has already advised the Board that it did not have additional information to add to the record on this issue.

***2** Petitioner responds that the basis of defense does not fall under the work product privilege, and even if there is a litigation plan, respondents should disclose and list that document as an item not being produced, identifying the privilege. Also, the issue of who should have received notice, what was done to identify those people, and whether and when notice was served is relevant to the jurisdictional issue and should be disclosed.

Without additional information, it is reasonable to conclude that respondents' basis for its defense to the pre-filing notice allegation may constitute a privileged theory or litigation plan, thus this portion of the objection is sustained. However, subsections (a) through (f) seek factual answers that are subject to discovery, thus this portion of the objection is overruled.

Interrogatory 4

Interrogatory 4 asks what measures were taken to ensure that the public record from the Henson siting application was available for review at the County Clerk's Office. Respondents object due to vagueness as to what constitutes the public record.

Petitioner responds that it is clear that they are asking for the local-level record on the siting application. Alternatively, insert "the record as required by Section 39.2 of the Act, including, but not limited to the hearing record as provided in Section 33-11 of the County Code.

Respondents' objection is overruled.

Interrogatories 6, 7, 8, 9 and 10

Interrogatories 6, 7, 8, and 10 seek information about all communications between the respondents during the relevant time period pertaining to the siting application, the host agreement, and the performance agreement.

Respondents argue that the communications are not relevant to the issues raised in the appeal, namely, defects in pre-filing notice; siting approval not supported by the record; and fundamental unfairness, due to at minimum, the unavailability of the public record. Respondents also argue that the requests are overly broad because petitioner seeks every communication regardless of content.

Petitioner responds that any communication between the County and Henson during the siting process is *ex parte* and discoverable as part of a fundamental fairness inquiry. It is not for respondents to decide what content is appropriate.

On appeal of a decision to grant or deny a siting application, the Board generally confines itself to the record developed by the County. 415 ILCS 5/40.1(b). However, the Board will hear new evidence relevant to the fundamental fairness of the proceedings where such evidence lies outside the record. Land and Lakes Co. v. PCB, 319 Ill.App.3d 41, 48, 743 N.E. 2d 188, 194 (3d Dist. 2000). The existence of *ex parte* contacts, prejudgment of adjudicative facts and the introduction

of evidence are important, but not rigid, elements in assessing fundamental fairness. American Bottom Conservancy v. Village of Fairmont City, PCB 00-200 (Oct. 19, 2000).

***3** The Board's procedural rules provide that all relevant information and information calculated to lead to relevant information is discoverable. 35 Ill. Adm. Code 101.616(a). When a fundamental fairness issue is raised before the Board, discovery is needed to uncover evidence that is presumably unknown to the party propounding the discovery. Fox Moraine, LLC v. United City of Yorkville, PCB 07-146 (Hearing Officer Order, Sept. 20, 2007).

In this instance, respondents do not object on grounds that the discovery requests are unduly burdensome. Rather, respondents argue that the requests do not relate to the petition's specific example of fundamental unfairness, i.e. the unavailability of the public record. However, without the ability to discover events that may have transpired between Henson and the County behind closed doors, petitioner could not allege fundamental unfairness with more specificity. The fact that fundamental unfairness was alleged is sufficient for petitioner to request discovery relevant to that issue. With respect to the objection that the request is overly broad, it seems unlikely that there would be communications between the respondents that would not relate to the siting application or the agreements. Thus, the objections to interrogatories 6, 7, 8, and 10 are overruled.

Interrogatory 9 seeks information about communications between the County Board members and their staff concerning the siting application, performance agreement and host agreement. Respondent only objects on grounds of relevance in that the communications do not relate to the issues alleged in the appeal.

Without more information, it is unclear how communications between the County Board members and its own staff would be relevant to uncovering fundamental fairness issues or other issues. The County Board members and staff would be remiss if they had not internally debated the pros and cons of siting approval, but that does not make their internal discussions unfair to the public process. The communications are not considered *ex parte*. Thus, the objection to interrogatory 9 is sustained.

Interrogatories 11 and 12

Interrogatory 11 asks why Philip Dick executed another Certification of Siting Approval, and the date, if any, of the County's approval for the change. Interrogatory 12 asks for the basis for the change to the Certification of Siting Approval. Respondents argue that actions taken by a County staff member with respect to the Certification of Siting Approval are not subject to review and are not relevant to issues petitioner raised in appeal. Petitioner responds that the interrogatories are relevant, and that petitioner has a right to investigate fundamental fairness issues outside the record.

These questions seek factual explanations for unusual actions taken in this siting approval, and are thus relevant to petitioner's claims. Therefore, the objections to interrogatories 11 and 12 are overruled.

Document Requests

***4** Document request 1 seeks all documents reviewed, used or relevant to respondents' answers to interrogatories. Document request 5 seeks all documents related to the host county agreement. Document request 6 seeks all documents related to the performance agreement.

Respondents object to these requests because they seek information outside the record, and are overly broad. Petitioner responds that request 1 is very traditional; and requests 5 and 6 seek documents related to the host county agreement and performance agreement, both of which appear to have been negotiated behind closed doors during the siting process.

Document request 2 seeks all documents related to Henson's pre-filing notice. Respondents object to request 2 because all documents related to the pre-filing notice are contained in the county record. Petitioner responds that, if there are no other documents, then that should be stated.

Respondents are directed to disclose the documents requested, or state that they do not exist. Documents outside the record may be used to refute evidence in the record, thus these documents are discoverable.

The Board's procedural rules provide that parties may seek Board review of discovery rulings pursuant to 35 Ill. Adm. Code 101.616(e).

IT IS SO ORDERED.

Carol Webb
Hearing Officer

2012 WL 3783200 (Ill.Pol.Control.Bd.)

End of Document

2008 WL 4817554 (Ill.Pol.Control.Bd.)

Illinois Pollution Control Board

State of Illinois

FOX MORAINE, LLC, PETITIONER
v.
UNITED CITY OF YORKVILLE, CITY COUNCIL, RESPONDENT
KENDALL COUNTY, INTERVENOR

PCB 07-146
October 30, 2008

(Pollution Control Facility Siting Appeal)

HEARING OFFICER ORDER

***1** On September 24, 2008, the petitioner, Fox Moraine, LLC, (Fox Moraine) filed the following motions: 1) Motion to Compel Answers to Deposition Questions, 2) Motion to Compel Production of Transcripts and Videos and 3) Motion to Compel Disclosure of Roth Report. Also on September 24, 2008, the respondent, United City of Yorkville, City Council (Yorkville) filed four Motions *in limine*. On September 29, 2008, the respondent filed its responses to the petitioner's motions. Also on September 29, 2008, the petitioner filed its responses to respondent's motions *in limine*. On October 1, 2008, the parties were directed to file their respective replies, if any, on or before October 7, 2008. On October 7, 2008, the parties filed their respective replies.

The hearing in the above-captioned matter was scheduled for October 6, 7 and 8, 2008. However, those hearing dates were cancelled on October 1, 2008, because the parties requested an opportunity to reply to the various motions that were filed and review the rulings rendered. The petitioner has filed an additional waiver of the statutory decision date to and including April 16, 2009. By agreement, the hearing dates were rescheduled to December 16, 17 and 18, 2008. Due to the time constraints and the number of pleadings, this order will briefly summarize the respective motions and rule accordingly.

This order first sets out the procedural status of the case. The parties' arguments on each motion or issue are summarized and followed by the ruling on each. In summary, Fox Moraine's motions to compel answers to discovery questions, production of transcripts and video tapes, and to compel disclosure of the Roth report are each denied. Yorkville's motion *in limine* # 2 is granted, but motions *in limine* # 1, # 3, and # 4 are denied.

Procedural Status of the Case

On June 27, 2007, Fox Moraine filed a petition for review asking the Board to review the May 24, 2007, decision of Yorkville's decision on petitioner's proposed siting of a pollution control facility in Yorkville, Kendall County. Petitioner appealed to the Board on the grounds that 1) Yorkville's decision was fundamentally unfair, alleging bias and prejudice on the part of various and unnamed council members, and 2) Yorkville's findings regarding certain criteria were against the manifest weight of the evidence. On September 23, 2008, Fox Moraine filed its First Amended Petition for Review. On September 26, 2008, Fox Moraine filed its Second Amended Petition for review. To date, the Board has not addressed these filings.

Kendall County was granted intervenor's status by the Board on August 23, 2007. The County has not participated in the briefing of any issues discussed in this order.

Fox Moraine's Motion To Compel Answers To Deposition Questions

***2** On September 24, 2008, Fox Moraine filed a Motion to Compel Answers to Depositions Questions (Mot. re Dep. Ques.) regarding deponents Jason Leslie and Wally Werderich. Attached to the motion are deposition excerpts from Leslie and Werderich labeled as Exhibit A. It appears the catalyst for Fox Moraine's questions at the depositions of Leslie and Werderich and the premise for its motion to compel is Fox Moraine's claim that some or all of the aldermen did not know what they were voting on regarding the individual siting criteria. Mot. re Dep. Ques. at 3. Fox Moraine claims that:

> During the deliberations on May 23 and May 24, 2007, there was never a vote on whether any individual statutory siting criteria had been proven, nor were there any written prepared finding of facts adopted. The individual aldermen did not universally express opinions with regard to each siting criterion. Additionally, there was never any vote to adopt, endorse, or incorporate any particular expression of personal opinion on the evidence from any particular alderman. Mot. re Dep. Ques. at 2.

Yorkville suggests a review of the questions asked of Fox Moraine's attorney of deponents Leslie and Werdrich reflects an attempt by Fox Moraine to flesh out feelings, intentions, and beliefs of the deponents regarding siting criteria. Mot. re Dep. Ques. at Exhibit A. Yorkville objected and directed the respective deponents not to answer stating the questions invaded the deliberative process privilege. *Id.* at 3.

Fox Moraine cites to People of the State of Illinois ex rel. Joseph Birkett v. City of Chicago, 184 Ill. 2d 521, 705 N.E.2d 48 (1998), for its proposition that there is no deliberative process privilege which protects public officials from disclosures. Mot. re Dep. Ques. at 3. In the alternative, Fox Moraine argues that the questions posed did not invade the privilege. Fox Moraine states that "the questions merely asked the aldermen what they believed to be the facts and more relevantly what they believed that they were voting on." *Id.* at 4. Fox Moraine continues and states that "[p]etitioner has the right to know how the aldermen intended to vote and whether the record, which purports to be a denial on all but two criteria, is an accurate reflection of their intentions." *Id.*

Yorkville's Response

On September 29, 2008, Yorkville filed its response to Fox Moraine's motion to compel answers to deposition questions (Resp. re Dep. Ques.). Yorkville states that its City Council heard over 125 hours of evidence relating to Fox Moraine's application. On May 23, 2007, the City Council met to deliberate on whether to grant or deny the application and when deliberations ended, the City Council voted to have a resolution consistent with its deliberations drafted for its vote the next day. On May 24, 2007, the City Council adopted the resolution denying the application. Resp. re Dep. Ques. at 2. Yorkville argues that the objected to questions propounded by petitioner seek information irrelevant to the issues before the Board and that the questions improperly sought to invade the mind of the decision-makers. *Id.* at 1.

***3** In particular, Yorkville alleges that:

> As its first basis for suggesting that questioning the Council members is proper, Fox Moraine implies that there is a possibility that the Council's decision may not have complied with statutory requirements, but its suggestions are both legally and factually unfounded. Fox Moraine suggests that the Council did not-but was required to-deliberate on each criterion set forth in 415 ILCS 5/39.2(a) prior to voting. Moreover, Fox Moraine suggests that the Council should have had the final written decision in front of it before voting on the application. Resp. re Dep. Ques. at 2.

Citing case law, Yorkville argues that a Council need not discuss each criterion separately or have the final written product in-hand before it votes. Resp. re Dep. Ques. at 2-3.

Yorkville also states that a plethora of case law supports its additional argument that the courts and the Board "have consistently refused to allow questioning into the thought process of either the decision-making body as a whole or individual decision-makers. Resp. re Dep. Ques. at 4.

Finally, Yorkville distinguishes Birkett and opines that Birkett does not address adjudicatory roles of a county board or municipality deciding a landfill application. Instead, Yorkville argues that:

> the discovery request in Birkett asked for documents and communications relating to applications for airport modifications and plans or discussions regarding future airport plans. Here, Fox Moraine has pointedly asked not for documents or communications but to examine individual Council members about their processes and beliefs relating to the Council's vote. Resp. re Dep. Ques. at 7.

Fox Moraine's Reply

On October 7, 2008, Fox Moraine filed its reply (Reply re Dep. Ques.). In essence, Fox Moraine continues it argument that the questions that were asked at the depositions was an attempt to confirm whether or not the Council members knew what they were voting for on May 24, 2007, and that without answers, Fox Moraine cannot determine whether the resolution that was later executed was consistent with the findings expressed and the votes cast by the Council members on May 24, 2007.

Fox Moraine states that:

> as a threshold matter, many of the questions at issue in this motion do not seek to elicit information about the deliberative process at all. Other questions could be read as seeking information about the deliberative process, however, such questions should be allowed because this is a case in which the very process itself is at issue. Finally, and perhaps more importantly, the deliberative process itself was conducted in an open public forum, before an audience, and was transcribed in its entirety by a court reporter. By conducting the deliberative process in full public view, the City Council waived any privilege as to that process that might otherwise be argued to exist in Illinois. Reply re Dep. Ques.at 1.

Fox Moraine culls many of the deposition questions at issue from its motion to compel and incorporates then in the body of the reply in its attempt to better illustrate that the questions were posed simply to ask for clarification of the votes cast for the statutory criteria and what it was the members believed they were voting on May 24, 2007, not to ask why a particular deponent decided to vote a particular way. Reply re Dep. Ques. at 2. Fox Moraine also represents that some of the questions arguably do seek information as to why the Council members voted as they did, but since there is no deliberative process privilege that applies here, the questions were improperly objected to. *Id.* at 4.

Discussion And Ruling

***4** For the reasons stated below, Fox Moraine's motion to compel answers to deposition questions is denied.

The courts have been clear that nothing in Section 39.2 requires "a detailed examination of each bit of evidence or a thorough going exposition of the County Board's mental processes". E & E Hauling, Inc. v. Pollution Control Board, 116 Ill. App.3d 586, 451 N.E.2d 555, 609 (1983) "Rather, the County Board need only indicate which of the criteria, in its view, have or have not been met, and this will be sufficient if the record supports these conclusions so that an adequate review ... may be made." *Id.* Moreover, it is the totality of the County's decision on all of the criteria that is at issue on

review, "and not the votes of individual county board members on individual criteria." City of Rockford v. Winnebago County Board, PCB 88-107, slip op. at 6, (November 17, 1988). Further, there is no requirement that the local decision-maker conduct any debate as long as they have had the opportunity to review the record prior to voting. Slates v. Illinois Landfills, Inc., PCB 93-106, slip op. at 18 (September 23, 1993) (citations omitted). Finally, the Board has held that the integrity of the decision making process requires that the mental processes of the decision-makers be safeguarded, and that a strong showing of bad faith or improper behavior is required before any inquiry into the decision making process can be made. Waste Management of Illinois, v. County Board of Kankakee County, PCB 04-186, slip op. at 27 (January 24, 2008) (citations omitted).

It is undisputed that Yorkville's City Council heard over 24 days of evidence relating to Fox Moraine's landfill application. A review of the May 23 and May 24, 2007, transcripts attached to the respective pleadings reveals that the Council members, including Leslie and Werderich, undertook deliberations and voted on a draft resolution. Case law requires nothing more. In any event, Fox Moraine has failed to make the case that Leslie, Werdich, or any City Council member acted in bad faith or improperly behaved as to allow inquiry into the mental processes of the decision-makers.

Fox Moraine argues that the holding in Birkett, that there is no deliberative process privilege which protects public officials from disclosures, overrules prior precedent. Fox Moraine's reliance on Birkett is misplaced. Birkett simply does not apply to the case at bar, as it does not involve quasi-judicial actions of the sort here.

Yorkville correctly distinguishes Birkett by stating that the discovery requests in Birkett "asked for documents or communications relating to applications for airport modifications and plans or discussions regarding future airport plans, [not examinations regarding Council members] thought processes and beliefs relating to the Council's vote." Resp. re Dep. Ques. at 7. Yorkville correctly notes that in 2005, the appellate court found that the 1998 Birkett decision did not apply to judicial officers. Thomas v. Page, 361 Ill. App. 3d 484, 491, 837 N.E.2d 483, 407) (2005)(judicial officers are entitled to a deliberative process privilege, because "[I]t is well-settled that a judge may not be asked to testify as to his or mental impressions or processes in reaching a judicial decision". 837 N.E. 2d at 405.) In E & E Hauling, the court held that "a County Board's decision to grant or deny permit application was an adjudication, rather than rule making, which leads to our conclusion that the requirement of 'fundamental fairness' in the statute incorporates standards of adjudicative, rather than legislative, due process." 451 N.E.2d at 564, n.1. Accordingly, the judicial deliberative process privilege applies to the quasi-judicial siting decision reached here by Yorkville.

***5** Again, Fox Moraine's motion to compel answers to deposition questions is denied.

Fox Moraine's Motion To Compel Production of Transcripts and Videos and For Sanctions

In its motion to compel production of transcripts and videotapes (Mot. re Tr.), Fox Moraine states that subsequent May 29, 2008, Yorkville produced some of the requested items that were requested by Fox Moraine in its second request to produce, "in which it asked for copies of all videotapes and/or transcripts of City Council, Committee, Board or Agency meetings between September 1, 2006 and June 1, 2007". Mot. re Tr. at 2. In particular, Fox Moraine asserts:

> That on August 27, 2008, counsel for Fox Moraine contacted counsel for the City, advising them of missing transcripts and videos and the incomplete nature of the production. The missing items include videos for four meetings and transcripts for nine meetings. On September 8, 2008, one of the attorneys for the City replied to Fox Moraine advising that transcripts and videos, as the case may be, did not exist for any of the meetings referenced in the August 27th request. Said letter specifically represented that there were no transcripts for city council meetings at which there were no public hearings. Said letter also indicated that videos were missing or not available for certain meetings with no explanation as to why. Said letter lastly alleged that Fox Moraine had the transcripts of the city council meetings of October 24th, October 30th and February 13, 2007. Mot.re Tr. at 3.

In a nutshell, Fox Moraine states that the transcripts for the City Council meetings of October 24, 2006, October 30, 2006 and February 13, 2007 remain missing and that Fox Moraine believes that all of City Council meetings are transcribed and all were videotaped. Fox Moraine alleges that it "does not know what the City is attempting to hide, but the missing videos and transcripts would contain evidence of prejudicial conduct and prejudgment by city council members". Mot.re Tr. at 4. Fox Moraine requests sanctions be imposed on Yorkville "for its wrongful and ingenuous [sic] representations that these materials do not exist." *Id.*

Yorkville's Response

In its response (Resp. re Tr.), Yorkville asserts that it "has produced all of the existing transcripts. Nothing has been withheld." Resp. re Tr. at 3. Yorkville further alleges that although it videotapes many meetings, not all of the meetings are video taped. *Id.* Yorkville confesses that it is not clear why the September 25, 2006 and the February 13, 2007 videos were not made. An affidavit attached to Yorkville's response from Bartholomew Olson, the Assistant City Administrator, supports Yorkville's representation as to the missing videotapes for the September 25, 2006 Plan Commission meeting and the February 13, 2007 City Council meeting.

Yorkville requests that Fox Moraine's motion to compel and for sanctions be denied and that Fox Moraine be admonished to refrain from making further, baseless sanctions motions. Resp. re Tr. at 4.

Fox Moraine's Reply

***6** In its reply (Reply re Tr.), Fox Moraine argues that Yorkville' affidavit only addresses the missing videotapes from the September 25, 2006, meeting and the February 13, 2007, meeting. Fox Moraine believes transcripts from the meetings held on September 25, 2006, October 17, 2006, February 6, 2007 and February 13, 2007 still remain missing or unaccounted for. Further, Fox Moraine suggests, the videotapes from the meetings held on October 17, 2006, and February 6, 2007 remain missing or unaccounted for. Reply re Tr. at 3.

Fox Moraine alleges that the missing and unaccounted for media material will support its allegations of predisposition and bias that caused City Council members to make a political rather than an adjudicatory decision on its application. Reply at 4. For instance, Fox Moraine alleges that the minutes of the February 6, 2007 meeting indicate that the Mayor reported on annexation and zoning of the Fox Moraine parcel. Reply re Tr. at 3.

Discussion And Ruling

In summary, Fox Moraine's motion to compel production of transcripts and videos is denied.

In some circumstances, the Board will hear new evidence relevant to the fundamental fairness of the proceedings where such evidence lies outside the record. Land and Lakes Co. v. PCB, 319 Ill. App.3d 41, 48, 743 N.E.2d 349, 356 (1993). Public hearing before a local governing body is the most critical stage of the site approval process. Land and Lakes Co. v. PCB, 245 Ill. App.3d 631, 616 N.E.2d 349, 356 (1993). The manner in which the hearing is conducted, the opportunity to be heard, whether *ex parte* contacts existed, prejudgment of adjudicative facts, and the introduction of evidence are important, but not rigid, elements in assessing fundamental fairness. American Bottom Conservancy v. Village of Fairmont City, PCB 00-200 (Oct. 19, 2000).

Yorkville states that it has produced all meeting transcripts, and that there were no videotapes to produce. Based on the record presented here, there is simply no additional responsive material this hearing officer can order Yorkville to produce. The motion for sanctions for failure to produce additional material is accordingly moot. *See also* 35 Ill. Adm.

Code 101.800, providing that the Board itself rules on sanctions. The hearing officer trusts that Fox Moraine will take care that any future motions for sanctions are well founded.

Fox Moraine's Motion To Compel Disclosure Of Roth Report

In its motion to compel disclosure of the Roth Report (Mot. re Roth Rep.), Fox Moraine seeks disclosure of a report regarding its landfill application authored by Michael Roth, Yorkville's new city attorney, that was submitted to the City Council members on May 23, 2007.

Petitioner states that on May 23, 2007, the hearing officer, Larry Clark filed a report containing his findings and recommendations, and the City's expert technical staff filed a report authored by attorney Derke Price with its findings and recommendations. Both reports are referenced in the City's final resolution and part of the record. Mot.. re Roth Rep. at 1. Fox Moraine states that the transcript attached to its motion indicates that Roth filed a report with his findings and recommendations on May 23, 2007. Fox Moraine states that the Roth report was not included in the record. *Id.* at 2.

***7** The petitioner asserts that three new City Council members "were sworn in on May 8, 2006 [sic], at which time a new city attorney, Michael Roth was hired by the city council." Mot. re Roth Rept. at 1. "An invoice from Michael Roth's law firm at that time, Wildman, Harrold, Allen and Dixon, attached hereto as Exhibit A, indicates however that various members of that firm were performing legal services for the City related to the landfill siting application as early as April 27, 2007." *Id.*

Fox Moraine argues that there is no privilege applicable to the Roth report, and that as a matter of fundamental fairness is entitled to know all of the materials considered by the city council in making its decision." Mot. re Roth Rep. at 2.

Yorkville's Response

In its response (Resp. re Roth Rep), Yorkville first argues that since Fox Moraine has known about the Roth report for over a year, its belated attempt to secure the Roth report should be denied on that basis alone. Resp.. re Roth Rep at 2. Further, Yorkville cites case law and states that said report is privileged:
Unlike Roth, both Clark and Price were assigned, by ordinance, a role in the application hearing proceedings. Clark, the Hearing Officer, was required to submit a written report of his findings to the Council prior to its deliberations. He did so, and his report became part of the record. Price, too, as the City's Special Counsel, was required to submit any report he produced through public hearing process. Because he prepared a report, that report also became part of the record.

****

The City Attorney, on the other hand, is not assigned any role in the landfill proceeding by the ordinance and had no obligation to write or file any report as part of the proceeding. Roth's memorandum therefore was not a third landfill 'report' under the ordinance or otherwise. It is solely a lawyer's confidential response to his client's request for legal advice-a privileged attorney-client communication. Resp.re Roth Rep. at 3.

Fox Moraine's Reply

In its reply (Reply re Roth Rep.), Fox Moraine states that the minutes of the May 8, 2007 city council meeting "indicate that Michael Roth and his firm (the Wildman firm) were retained as interim City attorney pursuant to a proposal (a copy of which also has never been made available to Fox Moraine) for a maximum of 50 hours per month of legal services at

a fixed fee." Reply re Roth Rep. at 1. Fox Moraine also alleges that "the minutes do not reflect any request for specific services" or advice from Roth, nor is there evidence that any "advice" was requested by the City Council. *Id.* at 2.

Fox Moraine also takes issue with Yorkville's assertion that Fox Moraine should have known of the existence of the Roth report for some period of time, and its belated request should be denied. Fox Moraine states that "[t]he importance of the document has emerged as it became clear that the city council members were considering recommendations and materials which were not part of the public record in making their decision on Fox Moraines siting application". Reply re Roth Rep. at 2. Further, Fox Moraine states that it:

> ***8** is entitled to know as a matter of law what materials were relied upon by city council members in reaching their decision. This is not probing the minds of the decision-makers, but, rather merely determining whether or not the council's decision was based upon the record made in this proceeding as required by law. *Id.*

Discussion And Ruling

In summary, Fox Moraine's motion to compel production of the Roth report is denied. Fox Moraine should have filed this motion to compel earlier. But, the timing of this motion, is of no matter because the Roth report submitted to the City Council on May 23, 2007, is protected under the attorney-client privilege.

"The purpose of the attorney-client privilege is to encourage and promote full and frank consultation between a client and legal advisor by removing the fear of compelled disclosure of information". Consolidation Coal Co. v. Bucyrus-Erie, 89 Ill.2d 103, 117-18, 432 N.E.2d 250, 256 (1991); Waste Management, Inc., v. International Surplus Lines Insurance Company, 144 Ill.2d 178, 196, 579 N.E.2d2d 322, 329-330 (1991). "Material prepared by or for a party in preparation for trial is subject to discovery only if it does not contain or disclose the theories, mental impressions, or litigation plans of the party's attorney". Waste Management, 579 N.E.2d at 781, citing 134 Ill.2d R. 201(b)(2).

Fox Moraine concedes that Michael Roth and his firm were hired to assist Yorkville in petitioner's landfill application and proceedings. To that end and, as Yorkville asserts, the Roth report is privileged communication because it was Michael Roth's confidential response to Yorkville's request for legal advice regarding Fox Moraine's landfill application.

Again, Fox Moraine's motion to compel the Roth report is denied.

Yorkville Motion *In Limine* # 1: Alleged Bias of Council Members

In its first motion *in limine* (Mot. Lim. # 1), Yorkville asserts that the petitioner has waived any and all allegations of bias and prejudice on the part of seven Council members because of petitioner's failure to object at the local siting hearing. Yorkville appears to agree that questioning the Council members regarding *ex parte* contacts is proper Mot. Lim. # 1 at 3. but that Fox Moraine has preserved the ability to raise fairness issues only as to Mayor Burd and Member Spears. Specifically, the motion seeks to:

> Exclude from hearing on this matter the following information: any and all arguments or statements, questions, testimony, or evidence of any kind from petitioner Fox Moraine and its counsel and from any other party, that refer to, directly or indirectly, the alleged bias, predisposition, or unfairness of any City Council Member other than Mayor Burd and Member Spears. Mot. Lim. # 1 at 1.

Yorkville contends that ample precedent supports its contentions that Fox Moraine has waived any ability to raise issues about the balance of the city council members. Mot. Lim. # 1 at 4-5.

Fox Moraine's Response

***9** In its response to the first motion *in limine* (Resp. Mot. Lim. # 1) Fox Moraine correctly states that this issue has been fully briefed and ruled upon in a September 20, 2007, hearing officer order. Fox Moraine states that it "reiterates, repeats and reincorporates its response filed August 30, 2007, to Yorkville's motion for protective order." Resp. Mot. Lim. # 1 at 1. Fox Moraine also addresses Yorkville's waiver arguments, maintaining that caselaw supports its right to raise fairness issues concerning persons other than Mayor Burd and Member Spears. *Id.* at 2-3.

Yorkville's Reply

Yorkville, in its reply (Reply Mot. Lim. # 1) continues with its waiver argument and Fox Moraine's failure to timely move to disqualify certain Council members. In support thereof, Yorkville points to deposition testimony in support of its contention that Fox Moraine failed to timely act on its early knowledge or suspicions of fairness concerns regarding various council members. Reply Mot. Lim. # 1 at 4-5.

Discussion And Ruling

In summary, Yorkville's motion *in limine* # 1 is denied.

This issue of inquiry by Fox Moraine into the alleged bias of various council members was previously raised by Yorkville in a motion for protective order concerning discovery; the hearing officer addressed the issue in a September 20, 2007 order finding in favor of Fox Moraine. Basically, Yorkville argued in its motion for a protective order, as it does here, that Fox Moraine has waived any issues regarding possible bias or prejudice against petitioner by seven of the nine member of the City council because it did not object to the member's participation as decision-makers at the local siting hearing. Yorkville's motion for a protective order was denied.

The earlier order found that information regarding possible bias and prejudice is "fair game" for discovery when the issue of fundamental fairness is raised, as Yorkville apparently now agrees. Mot. Lim. # 1 at 3. Further, the order noted that the ultimate determination as to whether the petitioner has waived any issues as to one or more of the council members is a decision for the Board, and not the hearing officer, to make. Yorkville as not appealled the September 20, 2007, hearing officer order.

Based on the materials obtained in discovery as appended to the parties' filings and cited in the pleadings on this motion, it is clear that potential evidence concerning fundamental fairness issues involving various city council members exists. Yorkville's arguments are not persuasive that Fox Moraine should be prevented from presenting relevant information at hearing.

For the reasons set forth herein and in the September 20, 2007, hearing officer order, Yorkville's motion *in limine* # 1 is denied.

Yorkville Motion *In Limine* # 2: City Council Member's Decisionmaking Processes

In its second motion *in limine* (Mot. Lim. # 2), Yorkville raises a "decisionmaking process" issue not unlike one raised in one of Fox Moraine's motions to compel. Yorkville moves the hearing officer to exclude, at hearing, the following information:

> ***10** Any and all arguments, statements, questions, testimony, or evidence of any kind from Petitioner Fox Moraine and its counsel and from any other party, that refer to, directly or indirectly, the decision making process of the Members of the Yorkville City Council, including the reasons why they voted the way they did regarding the Fox Moraine landfill application. Mot. Lim. # 2 at 1.

Yorkville contends that any such inquiry would run afoul of the requirement that the mental processes of the decision-makers be safeguarded. Mot. Lim. # 2 at 2-4.

Fox Moraine's Response

In its response to the second motion *in limine* (Resp. Mot. Lim. # 2), Fox Moraine first claims, as it did in its motion to compel answers to deposition questions, that there is no deliberative process privilege in Illinois applying to municipalities, citing the 1998 Illinois Supreme Court Birkett decision. Resp. Mot. Lim. # 2 at 2. Fox Moraine contends that the 2005 *Thomas* decision applies only to the judicial branch. *Id.* at 3.

Secondly, Fox Moraine argues that, even assuming a deliberative process exists for judicial decisionmakers, "any protection enjoyed by decision-makers must yield where the evidence reveals 'bad faith or improper behavior.'" Resp. Mot. Lim. # 2 at 5. In support, Fox Moraine points to a front page newspaper article attached to Yorkville's Motion *In Limine* # 3 where campaigning Council members, "during the pendency of the siting proceedings, [and] while evidence was still being presented, that, inter *alia*, 'I don't think there is any such thing as a safe, state-compliant landfill'; 'a landfill would be a negative'; and 'it would be a negative addition to the city. I have no question about that.'" *Id.* In sum, Fox Moraine argues there has been a strong showing of bad faith or improper behavior as to allow further inquiry. *Id.* at 6.

Further, Fox Moraine argues that "even if a deliberative process existed, the Council members waived that privilege by deciding to conduct their deliberations publicly, on the record, with a court reporter present to transcribe." Resp. Mot. Lim. # 2 at 6-7.

Fox Moraine contends that council members own admissions open the door for an inquiry into the bases for their decisions: in the transcript of their May 23, 2007 meeting, Council members admitted that they had not actually reviewed the record. Resp. Mot. Lim. # 2 at 7.

Yorkville's Reply

In its reply (Reply Mot. Lim. # 2), Yorkville continues with its argument that the decision in Birkett does not apply to thismatter, and that any statements made by City council members do not amount to a strong showing of prejudgment or bias. Reply Mot. Lim. # 2 at 1-5. Yorkville also dismisses as "inane" Fox Moraine's allegation that the City Council members waived their deliberative process privilege by conducting deliberations on the record. *Id.* at 5.

***11** Finally, Yorkville argues that Fox Moraine misconstrues the City Council members statements that they did not review the record. Reply Mot. Lim. # 2 at 5. Yorkville reminds that the City Council members "sat through approximately 140 hours of testimony and reviewed a mountain of exhibits", and states that since "the City Council members participated in creating the record, they did not have to re-review it in order to render an impartial decision, nor were they required to." *Id.* at 5-6.

Discussion And Ruling

In summary, Yorkville's motion *in limine* # 2 is granted.

As stated above in the ruling herein regarding Fox Moraine's motion to compel answers to depositions, the Board has held that the integrity of the decision making process requires that the mental processes of the decision-makers be safeguarded, and that a strong showing of bad faith or improper behavior is required before any inquiry into the decision making process can be made. Waste Management of Illinois v. County Board of Kankakee County, PCB 04-186, slip

op. at 27 (January 24, 2008). A Council member's mere expression of opinion regarding the landfill does not overcome the presumption of impartiality of the decision-maker. *See* A.R.F. Landfill, Inc., v. Lake County, PCB 87-51 (October 1, 1987). Here, petitioner has failed to make the necessary showing of bad faith so as to overcome the prohibition of inquiring into the mental processes of the Council members.

Petitioner's reliance on Birkett for its proposition that the deliberative process does not exist in Illinois has been addressed above and rejected.

Fox Moraine's argument, without supporting authority, that any deliberative process privilege that may exist has been waived because the open meeting at which deliberations were made was transcribed is likewise rejected. The Board has held that the decision-maker cannot waive the mental process and/or deliberative process privilege. Land and Lakes Company, v. Village of Romeoville, PCB 92-25, slip op. at 6 (June 4, 1992).

Finally, petitioner's allegation that the decisionmaking process need not be protected because certain Council members indicated that they have not reviewed the record is rejected. Yorkville points out that City Council members heard 140 hours of testimony and reviewed a plethora of exhibits. There is no requirement that the decision-makers re-review the record. City of Rockford v. Winnebago County Board, PCB 88-107, slip at 6 (November 17, 1988).

Again, Yorkville's motion *in limine* # 2 is granted.

Yorkville Motion *In Limine* # 3: Election Campaign Statements Re Fox Moraine's Siting Application

In its third motion *in limine* (Mot. Lim. # 3), Yorkville moves the hearing officer to exclude, at hearing, the following information:

> Any and all arguments, statements, questions, testimony, or evidence of any kind from Petitioner Fox Moraine and its counsel and from any other party, that refer to, directly or indirectly, any statements, whether oral or written, made by Yorkville City Council Members during their election campaigns leading up to the April 17, 2007 elections regarding the proposed Fox Moraine landfill. Mot. Lim. # 3 at 1.

***12** Yorkville argues that any statements made by City Council members leading up to the election as reported in various newspaper articles is not relevant and "cannot be used to establish that the proceeding was fundamentally unfair because the fact that Council Members made statements regarding the landfill during their election campaigns does not overcome the presumption that, as administrative officials, they were objective in judging the siting application." Mot. Lim. # 3 at 3. (citing Waste Management of Illinois v. Pollution Control Board, 175 Ill. App.3d 1023, 1040 (1988) "the fact that an administrative official has taken a public position or expressed strong views on an issue before the administrative agency does not overcome the presumption".)

Finally, Yorkville citing the First Amendment to the United States Constitution, U.S. Const. Amend. 1, argues "that the Council Members, as candidates for political office, had a right to express their political views without fear of formal interrogation." Mot. Lim. # 3 at 3.

Fox Moraine's Response

In its response (Resp. Mot. Lim. # 3), Fox Moraine opposes Yorkville's motion. Citing the Illinois Environmental Protection Act and case law, Fox Moraine insists that it has a right to be judged by an unbiased decision-maker and, although it is presumed that decision-makers act objectively in arriving at its decision, the applicant may nevertheless show bias or prejudice if the evidence "might lead a disinterested observer to conclude that the administrative body, or

its members, had in some measure adjudged the facts as well as the law of the case in advance of hearing it." Danko v. Board of Trustees of City of Harvey Pension Bd., 240 Ill. App. 3d 633, 642, 608 N.E.2d 333, 339 (1992). Resp. Mot. Lim. # 3 at 2.

Fox Moraine states that:
Here, by its motion, Yorkville attempts to prevent the Board from hearing the evidence necessary to determine whether Council Member's statements opposing the landfill were such that they would lead a disinterested person to conclude that the decision-makers adjudged the matter in advance of the hearing. Without presentment of that evidence, there is no way to answer this pivotal question. Resp. Mot. Lim. # 3 at 3.

Finally, Fox Moraine argues that the First Amendment does not give decisionmakes a "right to avoid being asked about their public statements". Resp. Mot. Lim. # 3 at 3.

Yorkville's Reply

In its reply (Reply Mot. Lim. # 3), Yorkville points to the holding in Waste Management that even though an "administrative official has taken a public position or expressed strong views on an issue before an administrative agency does not overcome the presumption" that the decision-makers were objective.Resp. Mot. Lim. # 3 at 1-2. Yorkville contends that Fox Moraine has failed to make a showing of strong evidence of bias sufficient to overcome the presumption. *Id.* at 2.

***13** Finally, Yorkville states that in fact the First Amendment does apply to the case at bar to protect inquiry into the decisionmakers election campaign statements. Yorkville discusses certain arguments made to this effect by Fox Moraine's attorney on the issue in another case. Resp. Mot. Lim. # 3 at 2-3.

Discussion And Ruling

In summary, Yorkville's motion *in limine* # 3 is denied.

The Board must consider the fundamental fairness of the procedures used by the respondent in reaching its decision. 415 ILCS 5/40.1(a) (2006). Additional evidence outside the record may be considered in an attempt to demonstrate impartiality. *See* County of Kankakee v. City of Kankakee, Town and Country Utilities, Inc., and Kankakee Regional Landfill, LLC., PCB 03-31, 03-33, 03-35 (cons.) (Jan. 23, 2003). The Board has also held that "an applicant can probe facts relevant to fundamental fairness." Land and Lakes Company et al. v. Village of Romeoville, PCB 92-25, slip at 6 (June 4, 1992).

Fox Moraine has persuasively demonstrated that it must be allowed to inquire at hearing as to the statements made, in the words of Yorkville's motion "by Yorkville City Council Members during their election campaigns leading up to the April 17, 2007 elections regarding the proposed Fox Moraine landfill". Fox Moraine may not ultimately present enough evidence to overcome the presumption in favor of any decisionmaker's impartiality. But under the circumstances of here, Fox Moraine cannot be precluded from attempting to make any case it may have.

Again, Yorkville's motion *in limine* # 3 is denied.

Yorkville Motion *In Limine* # 4: Law Firm Invoice

In its fourth motion (Mot. Lim. # 4), Yorkville moves the hearing officer to exclude, at hearing, the following information:

> any and all arguments, statements, questions, testimony, or evidence of any kind from Petitioner Fox Moraine and its counsel and from any other party, that refer to, directly or indirectly the invoice of Wildman Harrold that was inadvertently produced in this appeal.

Yorkville had previously sought the return of this inadvertently produced invoice, but in a March 27, 2008 order the hearing officer denied a motion to compel the return of the invoice.

Yorkville represents that it "incorporates by reference the arguments made in support of its Motion to Compel Return of Document Inadvertently Disclosed, which was filed with the Board on or around November 8, 2007." Mot.Lim. # 4 at 1. Yorkville additionally appears to question whether the invoice amounts to "relevant evidence". *Id.* at 1-2.

Fox Moraine's Response

In its response (Resp. Mot. Lim. # 4), Fox Moraine too notes that this invoice was previously the subject an earlier motion by respondent and that it was addressed and denied by a March 27, 2008 hearing officer order.. Fox Moraine represents that it re-alleges all of the arguments made in its response brief to that motion. Resp. Mot. Lim. # 4 at 1. Fox Moraine then devotes 6 pages arguing additional relevance of the invoice, suggesting that it is "relevant as circumstancial, if not direct, evidence of predisposition and bias" for various reasons. *Id.* at 1-2.

Yorkville's Reply

***14** In its reply (Reply Mot. Lim. # 4), Yorkville attempts to refute Fox Moraine's allegations and reiterates that the invoice "is not relevant to any issue in this appeal, and should not be part of the evidence at hearing or the record going forward." Reply at 1. Yorkville concedes that its privilege claims regarding the invoice has been rejected pursuant to the hearing officer order dated March 27, 2008, and that it "intends to appeal it, if necessary." Reply Mot. Lim. # 4 at 1, n.1.

Discussion And Ruling

In summary, Yorkville's motion *in limine* # 4 is denied.

The March 27, 2008, hearing officer order did not reach the relevance issues presented in the motion in limine. In summary, that order provided:

> The invoice at issue here was originally provided by Yorkville to Fox Moraine outside the Board's discovery process, in pursuit of monies due Yorkville under its Landfill Siting Ordinance. Had this document not been included in response to discovery requests in the Board's action, the hearing officer would agree with Fox Moraine that the Board has no jurisdiction to entertain the motion at all. But, as Yorkville's motion is in the nature of a motion for protective order as part of the Board's discovery process, the hearing officer reluctantly concludes that the motion is properly before him and the Board. *See, e.g.* Saline County Landfill, Inc. v. IEPA, PCB 04-117 (May 6, 2004) (ruling on protective order concerning attorney-client privilege issues).

For the reasons expressed ..., the hearing officer finds that the invoice is not properly within the scope of either the attorney-client or work product privileges. And, even if the privileges applied to the invoice, any such privilege would be considered waived under Illinois case law. Fox Moraine, LLC v. United City of Yorkville, City Council: Kendall County, Intervenor. PCB 07-146, slip op. at 8 (hearing officer order March 27, 2008).

This order does not revisit the issues of privileges ruled on in the March 27, 2008 order. As to the relevance issues, this order finds that Fox Moraine has made a sufficient showing in its filing that the invoice may be relevant to issues of fundamental fairness, including predisposition and bias of decisionmakers. Under the circumstances of here, Fox Moraine cannot be precluded from attempting to make any case it may have.

Again, Yorkville's motion *in limine* # 4 is denied for the reasons set forth above and for the reasons set forth in the March 27, 2008, hearing officer order.

IT IS SO ORDERED

Bradley P. Halloran
Hearing Officer

2008 WL 4817554 (Ill.Pol.Control.Bd.)

End of Document

Geraci v. Amidon

Appellate Court of Illinois, Second District

December 23, 2013, Order Filed

No. 2-12-0023

Reporter
2013 IL App (2d) 120023-U *; 2013 Ill. App. Unpub. LEXIS 2917 **; 2013 WL 6836581

PETER F. GERACI, Plaintiff-Appellant/Cross-Appellee, v. R. WILLIAM AMIDON, LEGAL HELPERS, P.C., d/b/a Macey and Aleman, P.C.; THOMAS MACEY, JEFFREY ALEMAN, RICHARD GUSTAFSON, SHOBHANA KASTURI, Defendants-Appellees/Cross-Appellants (Joseph P. Doyle, d/b/a Dupagebankruptcylawyer.com, Defendant).

Notice: THIS ORDER WAS FILED UNDER *SUPREME COURT RULE 23* AND MAY NOT BE CITED AS PRECEDENT BY ANY PARTY EXCEPT IN THE LIMITED CIRCUMSTANCES ALLOWED UNDER *RULE 23(e)(1)*.

Subsequent History: Appeal denied by *Geraci v. Amidon (Handler), 2014 Ill. LEXIS 741, 380 Ill. Dec. 506, 8 N.E.3d 1048 (Ill., 2014)*

Related proceeding at *Geraci v. Macey, 2016 U.S. Dist. LEXIS 89240 (N.D. Ill., July 11, 2016)*

Prior History: **[**1]** Appeal from the Circuit Court of Du Page County. No. 10-CH-4854. Honorable Bonnie M. Wheaton, Judge, Presiding.

Disposition: Reversed in part, affirmed in part and vacated in part; cross-appeal dismissed; cause remanded.

Core Terms

Amidon, trade secret, trial court, software, source code, prg, files, gap, functions, copied, misappropriation, programs, database, discovery, opined, appointment, economic value, parties, amend, defendants', argues, rwalib, partial, bankruptcy law, motion to dismiss, summary judgment, dismissed claim, codes, denial of motion, secret

Judges: JUSTICE SCHOSTOK delivered the judgment of the court. Presiding Justice Burke and Justice McLaren concurred in the judgment.

Opinion by: SCHOSTOK

Opinion

ORDER

[*P1]

Held: The trial court erred in granting the defendant's motion for summary judgment on the plaintiff's complaint. We reverse and remand for additional proceedings. The defendants' cross-appeal for fees is premature.

[*P2] This action was brought by the plaintiff, Peter F. Geraci, against the defendants, R. William Amidon; Legal Helpers P.C., Thomas Macey, Jeffrey Aleman, Richard Gustafson, and Shobhana Kasturi (collectively, the "Legal Helpers defendants"); and Joseph Doyle, to recover damages for alleged violations of the Illinois Trade Secrets Act (Act) (*765 ILCS 1065/1 et seq.* (West 2010)), in misappropriating bankruptcy law practice management software owned by the plaintiff. The plaintiff also alleged claims against Amidon for breach of contract. The trial court granted summary judgment in favor of all the defendants on the issue of trade secret **[**2]** misappropriation. The trial court also denied the Legal Helpers defendants' motion for attorney fees under *section 5* of the Act (*765 ILCS 1065/5* (West 2010)). The plaintiff appeals from the order granting summary judgment and the Legal Helpers defendants cross-appeal from the order denying their motion for attorney fees. We reverse in part, affirm in part, vacate in part, and remand for additional proceedings.

[*P3] BACKGROUND

[*P4] On August 25, 2010, the plaintiff filed this suit against defendants seeking damages and injunctive relief. The plaintiff claimed that his bankruptcy law practice management software, Geraci Automated Program (GapC), was a trade secret and that it had been misappropriated by the defendants. He alleged that Amidon, a former employee, copied and disseminated the software and source code to the remaining defendants by creating similar law practice management software for them. The plaintiff asserted claims under the Act against all the defendants and, additionally, asserted a breach of contract claim against Amidon.

[*P5] On October 5, 2010, the Legal Helpers defendants moved to dismiss, pursuant to *section 2-619(a)* of the Code of Civil Procedure (Code) (*735 ILCS 5/2-619(a)* **[**3]** (West 2010)), the plaintiff's claim against them on the ground that the plaintiff had released any pre-October 13, 2003 claims in a settlement agreement reached by the parties in a previous suit. Specifically, in June 2003, the plaintiff asserted a claim against the Legal Helpers defendants, in Cook County Case No. 03-CH-9763, arguing that they had improperly used his "infotapes" trademark. The case was settled on October 13, 2003, when the parties entered into the following settlement agreement and release:

> "[The plaintiff] and each of his present and former affiliates, employees, agents, representatives, insurers, attorneys, creditors, successors and assigns in consideration of the payment and promises and agreements contained herein, shall, and do hereby waive, release, relinquish and forever discharge [the Legal Helpers defendants] and all of their present and former affiliates, officers, directors, employees, agents, representatives, insurers, attorneys, successors, and assigns from any and all claims, demands, lawsuits, causes of action, obligations, duties, responsibilities, liabilities and damages of whatever nature or source, whether in law or in equity, monetary or injunctive, **[**4]** known or unknown, asserted or unasserted, including, without limitation, claims for losses, damages, expense, punitive damages, injunctive relief, attorneys fees and costs, which they now has [sic], or ever had, or may have in the future, based upon, arising from or related to the use or publication of the terms set forth in Paragraph 1(c), and the alleged damages and all matters and disputes that were or could have been asserted in [the plaintiff's] Complaint and Verified Petition for Preliminary Injunction. [The plaintiff] represents and warrants that all matters and disputes that were, or could have been, asserted in his Complaint and Verified Petition for Preliminary Injunction have been fully compromised, adjourned, settled and will be dismissed with prejudice, and that no further or other claims are outstanding with respect thereto."

Paragraph 1(c) stated that the Legal Helpers defendants agreed to cease and refrain from "referring to in any manner anything containing "info tapes," "infotapes," "bankruptcy information tapes," "informational tapes," "bankruptcy tapes," "our tapes," "divorce tapes," or any combination of "info" and "tapes."

[*P6] On October 15, 2010, following a hearing, **[**5]** the trial court granted the Legal Helpers defendants' motion to dismiss the claim. The trial court noted that the language of the release was "broad and general and all inclusive and totally encompassing as one could possibly put into a release." The trial court found that, because the parties to the 2003 settlement agreement were sophisticated business people as well as attorneys, they could be "charged with knowledge of the import of the documents that they sign." The trial court found that the allegations of the plaintiff's complaint fell within the broad language of the 2003 release. The trial court further noted that the release only applied to pre-October 13, 2003, claims and thus granted the plaintiff leave to file an amended complaint, limiting the claims to post-October 13, 2003, conduct.

[*P7] On October 29, 2010, the plaintiff filed an amended verified complaint. The plaintiff limited the claims to the acts or omissions that occurred on or after October 13, 2003. In his complaint, the plaintiff alleged that his GapC software and "highly refined methods of doing business as a consumer bankruptcy practice" had been built up at a great cost over many years and provided an economic **[**6]** and strategic advantage over his competitors. The plaintiff also alleged that he hired Amidon in 1996 to provide computer programming services. As a condition of employment, Amidon signed a confidentiality and non-compete agreement that precluded him from divulging, to anyone, any information about the plaintiff's computer systems and software.

[*P8] The plaintiff further alleged that Amidon created GapC, on behalf of and for the benefit of the plaintiff, and that it was based on the plaintiff's years of

experience as a bankruptcy practitioner. GapC was used to set appointments, manage client information, access creditor and trustee information, generate forms, manage litigation, and generate pleadings. It allowed the plaintiff to provide client services in a cost-effective manner.

[*P9] In October 2006, the plaintiff fired Amidon after discovering that Amidon possessed copies of the GapC software and source code. As a result of his termination, Amidon had signed exit agreements acknowledging that GapC belonged to the plaintiff and agreeing that he would not sell, reengineer, or in any way transfer GapC to any other party.

[*P10] The plaintiff further alleged that, in October 2009, he learned that Amidon **[**7]** had installed or sold GapC software to the Legal Helpers defendants and defendant Doyle. The plaintiff alleged that the defendants either knew or had reason to know that Amidon had acquired the software by improper means. The plaintiff also alleged that Amidon himself was marketing similar bankruptcy law practice management software under the name "BestClient." In July 2010, the plaintiff was informed by a former employee of Legal Helpers that Legal Helpers had employed Amidon from 2001 to 2003, while Amidon was still employed by the plaintiff. Former employees of Legal Helpers had also told the plaintiff that it was common knowledge that the Legal Helpers management software belonged to the plaintiff and that the software was so similar to GapC, that no training was necessary to use it.

[*P11] Based on the foregoing, the plaintiff asserted claims under the Act against Amidon (count 1), Doyle (count 2), Legal Helpers (count 3), Macey (count 4), Aleman (count 5), Gustafson (count 6) and Kasturi (count 7). Geraci also asserted a breach of contract claim against Amidon (count 8) and sought injunctive relief (count 9).

[*P12] On September 15, 2010, Legal Helpers filed a motion to require the plaintiff **[**8]** to identify his trade secrets with particularity. Legal Helpers argued such disclosure would narrow the scope of discovery, permit resolution of the case through a dispositive motion, prevent the plaintiff from conducting a fishing expedition into his competitor's computer capabilities, and prevent the plaintiff from tailoring his trade secret claim based on discovery. On September 17, 2010, the trial court granted the motion and ordered the plaintiff to identify his alleged trade secrets. The plaintiff subsequently identified his trade secret as the entire GapC source code and its architecture, features, functions, reports, procedures, hot keys, data base tables and activity codes. The plaintiff identified the foregoing as individual trade secrets and every combination of the whole as a combination trade secret.

[*P13] On October 5, 2010, Legal Helpers filed a motion to compel, arguing that the plaintiff had not identified his alleged trade secrets with any particularity. On October 8, 2010, the trial court granted the motion and ordered the plaintiff to identify the alleged trade secrets and combination trade secrets with greater particularity and to "identify the portions of source code **[**9]** that are tied to various functions, features, keys, etc." that the plaintiff believed were individual or combination trade secrets.

[*P14] On October 15, 2010, the plaintiff filed a supplemental interrogatory response, explaining in further detail why the entire GapC source code and all related details were trade secrets, individually and in combination. The plaintiff contended that his expert had opined that a person having ordinary skill in the art of computer software engineering could adequately identify what was being claimed as a trade secret from the information provided by the plaintiff. On November 5, 2010, the trial court found that the disclosure was sufficient. The trial court noted that the main issue was whether the Legal Helpers bankruptcy law practice management software, LH-1, was based on the GapC software, which might be a trade secret, and that experts would need to look at the entire source code to make that determination. The case proceeded to discovery on the basis of this order.

[*P15] Also on November 5, 2010, the trial court denied the plaintiff's motion to appoint a special master. The plaintiff had argued that the case involved technical, complex issues that might be **[**10]** outside the trial court's practical experience. The trial court found that expert witnesses would suffice to educate the court as to the necessary issues.

[*P16] On May 12, 2011, the plaintiff filed a motion for reconsideration of the trial court's October 15, 2010, dismissal of all pre-October 13, 2003, claims. In that motion, the plaintiff argued that a general release was not applicable to an unknown claim and that the intention of the parties controlled the scope and effect of a release. The plaintiff further argued that discovery had revealed that none of the parties were aware of a possible trade secret misappropriation claim at the time of the October 13, 2003, release. On June 15, 2011, the

trial court denied the motion to reconsider. The trial court stated:

> "If this had been brought within 30 days on the argument that the release was a specific release rather than a general release, I probably would have granted it ***."

The trial court acknowledged that it had misapplied the law, but stated that seven months was untimely for a motion to reconsider based on misapplication of the law. The trial court also noted that other bases for granting the motion to reconsider, such as new evidence **[**11]** or new legal authority, did not exist. The trial court stated that it did not want to grant the motion because it was too late to "throw open all of the discovery."

[*P17] On June 9, 2011, the Legal Helpers defendants filed a motion for summary judgment, arguing that: GapC was not a trade secret, there was no evidence of misappropriation, and there was no evidence to sustain any claim against the individual defendants. The Legal Helpers defendants argued that both GapC and LH-1 were created with "Zachary," a basic database management software, and therefore did not qualify as a trade secret. On July 8, 2011, Amidon filed a partial motion for summary judgment. Therein, Amidon alleged that he had independently developed BestClient after the plaintiff terminated his employment. BestClient did not share code, data structures, menus, forms, or the appearance of any of the plaintiff's software.

[*P18] Evidence Presented in Connection with the Motions for Summary Judgment

[*P19] Aleman, Macey, Gustafson, Kasturi Affidavits

[*P20] There was evidence that Amidon placed certain GapC-related materials onto Legal Helper's server in the spring of 2006. No one at Legal Helpers knew why Amidon would have done so. By 2006, LH-1 **[**12]** had been operating for eight years and had been running in its current form for several years. These defendants contended that GapC was never incorporated or used in LH-1. The defendants were not aware of GapC being on Legal Helpers server until it was revealed during discovery in this case. Aleman, Gustafson, and Kasturi were all former employees of the plaintiff's.

[*P21] Macey D epos ition

[*P22] Macey stated that he started Legal Helpers in December 1993. In 2011, Legal Helpers employed about 300 attorneys. Kasturi, Gustafson, and Aleman were all partners in the Chicago office. He hired Kasturi in 1998 or 1999 and Gustafson about 2001. Macey stated that he went to law school with Kevin Chern. He hired Chern and Aleman in 1997. At the time he hired Chern, he knew Chern was working for the plaintiff. Based on information gathered from Chern, he believed the plaintiff was using SalesCTRL at that time. Chern recommended that Macey call Amidon for help with his computers. Macey did so and Amidon starting working for Legal Helpers in 1997. Amidon worked on an hourly basis, when there was work to do. He paid Amidon about $50 per hour. He knew that Amidon was also working for the plaintiff. He believed **[**13]** that Amidon did the same work for the plaintiff—hooking up printers and general computer work. He did not know that Amidon was working on law practice management software for the plaintiff. He did not know how much he paid Amidon in 1997. He would have paid him by check and he no longer had any of those records. They started developing LH-1 in 1998 and it was functional by 1999 or 2000. Amidon was the one who developed LH-1 for Legal Helpers, with input from Macey, Chern, and later Aleman. Macey had no idea how Amidon developed LH-1. He believed he paid Amidon somewhere between 15 and 30 thousand dollars for the development of LH-1.

[*P23] Amidon Deposition

[*P24] Amidon stated that he started working for the plaintiff in February 1996. At that time, the plaintiff was using SalesCTRL as the practice management software. He worked for the plaintiff for almost 11 years. He started working on GapC at the end of 1997 or early 1998. He used tools such as Zachary, Clipper, and Another Dimension to create the GapC software. He created GapC by combining SalesCTRL and Chap7..13. The plaintiff did not participate in the creation of GapC. Amidon stated he was fired because the plaintiff accused him of having **[**14]** disks of the GapC source code in his possession. However, it was standard procedure for him to have such disks. He did a backup every day and took a disk home for "disaster recovery." He destroyed all the disks at home the day he was terminated. He did later find one disk, which he returned to the plaintiff.

[*P25] Chern offered him the job at Legal Helpers. He worked with Chern at the plaintiff's firm. Amidon believed he started working for Legal Helpers at the end of 1996 or early 1997. He continued to work for Legal Helpers until 2009. He did not speak with Macey until the first day he started work at Legal Helpers. At that time, Legal Helpers was using SalesCTRL. When he performed work for Legal Helpers, he would give a

verbal invoice and he would be paid. There was no written documentation. He does not know how much he was paid by Legal Helpers over the years and he had no records. He could not recall if he ever filed 1099s.

[*P26] Legal Helpers began using LH-1 in 1998 or 1999. He stopped working on LH-1 in 1999 or 2000. At that time, it was pretty much complete and only minor things may have changed. To the best of his memory, he believed he was writing LH-1 before he started working on GapC. **[**15]** Amidon had no recollection one way or the other as to whether he took code from LH-1 or GapC and used it in the other program. BestClient was a contact management system. It could be used in a bankruptcy environment but could also be used in doctors' offices or other law offices. It was written for a Windows environment, but it was not a Windows version of LH-1. When he used "gap" in his written code, it had nothing to do with GapC. He used "gap" scattered throughout all the code he had written for the past 30 years. "Gap" stood for "gay and proud."

[*P27] Donnay Affidavit

[*P28] Legal Helpers submitted the affidavit of Richard Donnay. Donnay was retained as an expert in software development and programming. Donnay examined both GapC and LH-1. Based on his education and experience (including familiarity with Clipper and Zachary), Donnay concluded that (1) both programs were rudimentary applications that could be easily duplicated; (2) as of October 13, 2003, both programs were fully operational; (3) as of that same date, there were significant differences between the two programs; (4) because of the differences, it would have been impossible for any amount of code to have been copied from GapC and **[**16]** transferred into LH-1 during the post-October 13, 2003 time period; and (5) there was no evidence that any source code from GapC was incorporated into LH-1 after October 13, 2003.

[*P29] With respect to his first conclusion, Donnay stated that both programs were created using a product called Zachary that was specifically designed to allow users "to create basic database management applications for their businesses." The majority of the source code in both programs was generated by Zachary. The little amount of code that was written by Amidon was rudimentary. The "architect" of GapC and LH-1 was Zachary, not Amidon. Donnay was very familiar with Zachary because he had sold Zachary nationwide to businesses in the mid-1990s.

[*P30] Zachary was designed to allow an unsophisticated user to create a database management application. Zachary could be used for any type of business. Zachary prompts the user to identify the appropriate fields to be used in the database, information for those fields, what fields should be linked to other fields, etc. This is called the metadata. Once the metadata is entered, Zachary generates the necessary code to create the fields and display them on the screen. Because the **[**17]** code is generated by Zachary, many Zachary-generated database management applications have very similar codes. Donnay stated that the plaintiff's use of Zachary in the bankruptcy field was not unique or unusual and that others in the same field could create a very similar product.

[*P31] Donnay stated that little of the source code was written by Amidon. Of the 137 program files in the GapC source code and the 125 program files in the LH-1 source code, only a handful were written by Amidon. Both GapC and LH-1 were used to manage client information and to monitor dates and deadlines. Although GapC performed some functions that LH-1 did not, such as creating bankruptcy petitions and electronic filing, those functions were not original or unobvious. Donnay, in contrast to the plaintiff's expert (Richard Weyand), did not believe that functions contained in function.prg or rwalib.prg files in GapC's source code were trade secrets because they were basic software functions used in many other programs. The combinations of functions within the two programs, such as the use of "Crystal Reports" and "tools" from Amidon's tool kit, was obvious and common. The use of activity codes and hot keys used **[**18]** by GapC and LH-1 were basic. Donnay stated that, because it was built on a DOS platform, GapC was virtually obsolete from the time it was created. Donnay believed that a competent user could create one of these Zachary-based applications in a few weeks.

[*P32] Regarding his second conclusion, that both programs were fully operational by October 13, 2003, Donnay stated that it was obvious that LH-1 could not have been developed by a misappropriation of GapC at some point after October 13, 2003. Although both parties made changes to their respective programs after October 2003, the changes did not alter the basic structure or core functionality of the applications.

[*P33] Regarding his third conclusion, that both programs had significant differences by October 13, 2003, Donnay noted that GapC allowed a user to generate a bankruptcy petition online and filed it with the

court. LH-1 did not have these functions. As a result of the differences, it would have been very difficult to move any source code or data from one program to the other.

[*P34] As to his fourth conclusion, Donnay stated that a comparison of the 2006 version of GapC and the 2009 version of LH-1 showed that the source codes contained many different **[**19]** program files. LH-1 used 61 program files that were not in GapC. There were 73 program files unique to GapC. Of the 125 files in LH-1 and the 137 files in GapC, only 64 program files were contained in both the GapC and LH-1 source code. The majority of those files were either Zachary files or Zachary-generated files, which would be very similar. In total, only 25% of the code in LH-1 and GapC was common. Donnay stated that this was a very low percentage and confirmed that LH-1 was not a copy of GapC. He further stated that this percentage was misleadingly high because 58 of the 64 program files that appeared in both programs were either Zachary or Zachary-generated files; only four program files in both were authored by Amidon: rwalib.prg, function.prg, dbpurge.prg, and p4dups.prg.

[*P35] Rwalib.prg stood for "R. William Amidon's library" and was a "toolkit" file. It was common for computer software professionals to develop "toolkit" files during their careers and to use these files in all their jobs. The rwalib.prg files in GapC and LH-1 only have 5% similarity. Of the several parts of rwalib.prg in GapC that Weyand identified as trade secrets, those parts (1) do not appear in LH-1, (2) **[**20]** serve common and basic functions, (3) are different in the two programs, and (4) were created prior to October 13, 2003.

[*P36] "Function.prg" was a very common name for a source code file that was used as a "catch-all" file for miscellaneous code. Amidon used it to hold 153 different functions in GapC and 197 different functions in LH-1. Many of the functions were different. Weyand conceded that 136 of the 153 functions in function.prg of GapC were not trade secrets. Donnay found that the remaining 17 functions were (1) not present in LH-1; (2) basic and common functions not unique to either program; and (3) in existence prior to October 13, 2003.

[*P37] Dbpurge.prg was used to purge information from various databases. The LH-1 version of this file was last updated in 2002, and there was no evidence that it was ever used or updated after October 13, 2003. "P4dups.prg" was used to search for duplicate database records. This file was in use in LH-1 before October 13, 2003, and was last updated in 2000.

[*P38] With respect to his final conclusion, Donnay found it "very clear" that GapC was not copied into LH-1. Donnay explained that by October 13, 2003, the two programs had such significant differences that **[**21]** misappropriation would have been difficult, if not impossible. Furthermore, comparisons of their source code showed that both programs were on their own development trajectories by October 13, 2003. At no time after October 13, 2003, was there any material or meaningful insertion of GapC source code into LH-1, or vice versa. Donnay knew of Weyand's suggestion that the LH-1 function.prg file may have been copied from GapC at some point after January 23, 2004. Donnay found this extremely unlikely. He noted that there were about 258 pre-October 13, 2003, comments that were unique to one file or the other, and by that date, the two files were very different from each other. As such, if one function.prg file was copied to the other at any point after October 13, 2003, the person doing the copying would have had to go in and backfill all of the 258 unique comments, and all the unique functions and code. This made it highly impractical and unlikely that any copying occurred.

[*P39] About 222 comments were added to LH-1 function.prg after October 13, 2003. About 214 comments were added to GapC function.prg after that same date. Of all those comments, only one comment appeared in both. However, the **[**22]** comment was a routine and common-sense modification to the programs. It could just have easily been copied from LH-1 to GapC. Regardless, it was related to a function that Weyand acknowledged was not a trade secret.

[*P40] Donnay similarly concluded that there could not have been any copying of the rwalib.prg files because the files in each program were too different. After October 13, 2003, there were about 61 comments entered into the GapC rwalib.prg file and about 76 comments entered into the LH-1 rwalib.prg file. Only six of those comments appear to be identical and relate to work being done to conform the two programs to changes in the bankruptcy code. The comments were not material to the function of rwalib.prg or the overall application. Donnay acknowledged that Weyand had noted that there were numerous GapC files on Legal Helpers servers. Donnay stated that there was no evidence that the GapC files were ever made a part of LH-1 during the relevant time period. Donnay also noted that Weyand took issue with certain metadata contained in several databases that bear the name "Zfree" and suggested that the metadata was used in creating or running LH-1. Donnay stated that such a suggestion

[23]** was wrong because the Zfree databases were Zachary databases that were meant to assist a user in running certain reports. LH-1 never used those databases. Instead, LH-1 used a third-party product, Crystal Reports, to run reports on data in LH-1.

[*P41] Donnay stated that hot keys are not trade secrets. Further, the 10 hot keys identified by Weyand as trade secrets were already being used by Legal Helpers in 2003. Thus, Legal Helpers' use of those hot keys could not be the result of post-October 13, 2003, theft or copying from GapC. GapC's activity codes were not trade secrets because they were not unusual, complex, difficult or unobvious.

[*P42] Expert Report of Leonard A. Dozois

[*P43] In his expert report, Leonard Dozois stated that he was a multi-talented IT professional. From June 1991 through October 1999, he was the owner, President, and Chief Technical Officer of Zachary Software, Inc. Zachary was designed to eliminate the need for a software programmer to hand write original source code for a database management application. Zachary was designed to allow the user to insert outside source code in logical locations to allow for additional functionality. Both GapC and LH-1 were non-original, obvious, **[**24]** expected and intended uses of Zachary. Because both were developed using Zachary, the source code and the screens should look very similar, if not the same. The majority of the source code for both GapC and LH-1 was either Zachary copyrighted code, Zachary-generated code, or third-party copyrighted or generated code. However, there was a small amount of source code that originated from Amidon, such as the source code found in function.prg and rwalib.prg. It was unclear whether this code was written by Amidon or copied from other sources. He opined that an experienced Zachary user, working with a competent bankruptcy attorney and using Zachary, could develop database management systems similar to GapC and LH-1 "within two or three weeks at a relatively inexpensive cost."

[*P44] The Plaintiff's Affidavit

[*P45] The plaintiff stated that he directed the development of proprietary bankruptcy law practice management software, beginning in 1987 with the customization of SalesCTRL and since with continued development of various versions referred to as Gap, Gap2, GapC and Gap4 (collectively referred to as Gap). The expense, effort, and time devoted to developing Gap was in excess of several million dollars **[**25]** over 20 years. Before he had Gap, there was no available bankruptcy law practice management software on the market. At the time of his affidavit, he was still unaware of another piece of software similar to Gap, except for Legal Helpers LH-1 and Amidon's BestClient. The plaintiff believed that Gap was the single most important aspect to the management of his high-volume law practice and was the main reason the law practice was able to expand across multiple states. The plaintiff believed that Gap provided a competitive advantage because it allowed him to manage a multiple-location bankruptcy law practice in a cost-effective manner.

[*P46] The plaintiff further stated that he never authorized any duplication of Gap. He protected the secrecy of Gap by restricting access to it and requiring those who use it to sign confidentiality agreements. Amidon, Aleman, Gustafson, Kasturi, and Chern all executed confidentiality agreements when hired by the plaintiff. Gap was not fully developed by October 13, 2003, at the time he entered into a settlement agreement and release with the defendants related to the infringement of his "infotapes" trademark. He did not release the defendants from his claims **[**26]** regarding trade secret misappropriation because he did not know about it at the time and did not learn of it until the time he filed this suit. Prior to his termination, Amidon had been working on Gap4, a windows-based version of the Gap software. The plaintiff believed that Amidon used his Gap software to create "BestClient" which Amidon began to market seven months after his termination.

[*P47] Preliminary Expert Report of Richard F. Weyand

[*P48] In his preliminary expert report, Weyand stated that he had over 34 years' experience in the computer industry and had provided expert technical analysis in litigation concerning the alleged misappropriation of trade secrets embodied in computer software. Weyand concluded that GapC in whole and certain components within it were trade secrets. He determined that a significant portion of LH-1 (source code, metadata, and database files) was identical to GapC, that the two were divergent versions of the same software package, and that LH-1 was copied from GapC.

[*P49] Weyand further opined that the plaintiff's trade secrets had economic value from not being known to others. He noted that the plaintiff had used these alleged trade secrets to run his law practice **[**27]** for 15 years, that he had not found a publicly available substitute, and that he developed GapC at considerable

expense. Weyand noted that the plaintiff's opinion in this matter was to be trusted and that the plaintiff believed that GapC was a key to his successful practice. Weyand further noted that LH-1 had been used by Legal Helpers since 1999.

[*P50] With respect to not being generally known, Weyand concluded that the pieces of source code written by Amidon were not generally known in the trade because it was not published or widely disseminated. While general database management items (client information, appointment dates, billing, etc.) would not be a trade secret, Weyand opined that the processing of bankruptcy-specific items such as court dates, judges, filings, etc. would require the writing of necessary software and therefore qualify as a trade secret as being "not generally known." Weyand acknowledged that GapC was written using third-party tools such as Clipper, Click!, Zachary, AD2, FoxPro, and Crystal Reports. However, the use of these products did not render GapC "generally known in the trade."

[*P51] With respect to reasonable security measures, Weyand noted that the plaintiff used **[**28]** password protection, security tokens, security suites and network administration tools, locked the computer server in a separate room, and used employment and confidentiality agreements. The security measures were reasonable under the circumstances. With respect to difficulty of duplication, Weyand stated:

> "First, let us note that the software development here is not dependent on some technical breakthrough. That is, there is no uncertainty about the ability of another team of programmers to develop a similar bankruptcy law practice management package completely independently of access or information from various versions of Plaintiff Geraci's GAP software. Given access to a bankruptcy law practitioner of Plaintiff Geraci's experience and insight to provide the product requirements, a programming team would be able to complete such an assignment with something like the same amount of effort and the same amount of cost."

Weyand further noted, however, that the programming effort would take several years and cost in excess of one million dollars.

[*P52] Weyand opined that GapC, including its source code, metadata, database files, and database architecture, was a combination trade secret. Weyand **[**29]** also stated that the negative know-how trade secrets (knowledge of what does not work), set forth in the plaintiff's supplemental responses to the defendants' first set of interrogatories were also trade secrets.

[*P53] Weyand stated that function.prg appeared in GapC and LH-1 and was written by programmers. GapC's function.prg had 10,282 lines of code. Weyand concluded that 75% of the function.prg file of GapC appeared in the same file of LH-1. The function.prg files also contained identical typographical errors, suggesting that the statistics were "not simply a remarkable case of parallel development." He further noted that references to "gap" in the GapC code were simply missing in the LH-1 code, with a double space where "gap" was. This suggested that the LH-1 code was modified to remove references to "gap," but the leading and following spaces both remained. Additionally, there were comments written in both files. The earliest comment read "bill amidon–December 1996." In 1996, Amidon worked for the plaintiff but not for Legal Helpers. Weyand opined that this showed that the GapC code was copied and became the starting point for LH-1. The earliest comment appearing in LH-1 and not GapC **[**30]** was February 3, 1999. This, therefore, was the time at which LH-1 diverged from GapC. Amidon had begun working for Legal Helpers prior to this date. The last comment appearing in both files was dated January 23, 2004. Weyand opined that on that date, GapC was again copied and transferred into LH-1. Amidon was working for the plaintiff and Legal Helpers at that time.

[*P54] Weyand further opined that 66 files contained in the TEMP folder of LH-1 were copies of the files of the same name in the "gap.zip" file of GapC as they existed between March 18 and 28, 2006. Further, the "temp function.prg" file of LH-1 was a copy of the GapC "gap.zip function.prg" as it existed between March 17 and April 7, 2006. The database architecture of LH-1 and GapC descended from a common database architecture "ancestor file" (previous version), and had been independently modified forward from that point. The extent and similarities in the activity codes of the two programs indicated that LH-1 was based on and developed with access to GapC software. The metadata-based report generation package of LH-1 was copied from GapC. Weyand noted that eight of the hot key assignments in LH-1 were identical to those used in **[**31]** GapC and that this was an occurrence of such low probability that one of them had to have been made with the benefit of access to another.

[*P55] Supplemental and Rebuttal Expert Report of Richard F. Weyand

[*P56] Weyand stated that after his initial report, Legal Helpers produced additional LH-1 files amounting to 467MB. Legal Helpers originally produced LH-1 files totaling 15.76GB. In the original files produced, "gap" did not appear in any file names. In the additional files produced, "gap" appeared in 54% of the file names. This suggested to Weyand that Legal Helpers consciously eliminated files containing "gap" in the file names from their original production.

[*P57] Weyand stated that 1080 of the files in the gap.zip file of LH-1 were identical to the files of the same name in GapC's gap.zip file. An analysis of the gap.zip files indicates that the gap.zip file of GapC was copied to Legal Helpers between March 24 and 28, 2006. In his opinion, the GapC software was copied to Legal Helpers by Amidon on multiple occasions, including at least once between March 24 and 28, 2006. Weyand opined that the majority (75 of 102) of the activity codes used in LH-1 were identical to those used in GapC. He reiterated **[**32]** his opinion that this showed that LH-1 was based on and developed with access to GapC software.

[*P58] In rebuttal to the expert report of Dozois, Weyand opined that Zachary tools were designed to allow a programmer to create a database management application by inserting outside source code in logical locations to allow for additional functionality. Function.prg and rwalib.prg were examples of such outside source code. Weyand explained that although Dozois stated that GapC and LH-1 were obvious and intended uses of Zachary, Dozois did not say that function.prg and rwalib.prg were not trade secrets. Weyand argued that simply because Amidon used Zachary the way it was intended to be used, did not render his work product, GapC, obvious or expected or not a trade secret. Weyand noted that Dozois said programs such as GapC or LH-1 could be written "within two or three weeks at a relatively inexpensive cost." Weyand opined that this assertion defied common sense. The industry standard for software productivity was 10 lines of source code per programmer per day. Function.prg, which is 10,282 lines of code, would require four years to write and rwalib.prg, which had 2,639 lines of code, would take **[**33]** another year. Weyand noted that the plaintiff employed Amidon for ten years to develop the GapC software. If it were that easy to write such a program, Amidon would have done that, rather than copying GapC and transporting it to Legal Helpers.

[*P59] Weyand also provided rebuttal to the expert opinions of Donnay. Weyand noted that Donnay argued that function.prg and rwalib.prg were "commonly known" and not "unique" or "unobvious." Weyand explained that the creation of a cola-flavored soft drink, with the use of a sweetener and caramel coloring, would also be obvious. However, that would not make the formula for Coke not a trade secret.

[*P60] Weyand Deposition

[*P61] Weyand acknowledged that he was not an attorney and did not have legal training. Weyand stated that he did not analyze the differences in functionalities between GapC and LH-1. He did not try to identify functions that LH-1 had that GapC did not have or vice versa. Weyand was not familiar with and never used Clipper. Weyand never used Zachary and had done nothing to familiarize himself with Zachary. As part of his analysis in this case, he had not looked at practice management software generally used in the industry. He had not spoken with **[**34]** other bankruptcy practitioners to ask what their office needs were or how they ran their offices. He did not know what software other bankruptcy practices used. He did not know how the business processes used by the plaintiff differed from other bankruptcy firms. He did not know why GapC was unique as compared to other commercially available bankruptcy management software. As far as he knew, there could be other products available with similar functions to GapC.

[*P62] With respect to rwalib.prg and function.prg, he did not know whether these functions related to ordinary common needs that would occur in any reasonably large commercial bankruptcy practice. During the course of this suit, he only spoke to the plaintiff once, over the phone. He did not typically communicate with clients because he did not want them influencing his determinations. He did not analyze whether GapC was nonobvious. Because he had not analyzed other bankruptcy law firms, he could not say whether GapC was unique. He had never done a side by side comparison of GapC and LH-1 to determine what was unique in either of them. It would not impact his decision if he were to learn that GapC had important functions that were **[**35]** not present on LH-1 and never had been present on LH-1. He did not do a functional analysis of p4dups or dbpurge.

[*P63] Weyand stated that the combination trade secret was the combination of Clipper, Zachary, AD2 environment, the activity codes, the function.prg code, the rwalib.prg code, the dbpurge.prg code, all of the

code that Amidon wrote, and all of the database configurations. Weyand acknowledged that there was nothing remarkable about Clipper, Zachary, and AD2 being used all together. With respect to the activity code list, he considered things that were specific to a bankruptcy law practice management software to be more likely to be a trade secret. He acknowledged that he did not talk to other bankruptcy practitioners to determine what activity codes they used and therefore did not know whether the plaintiff's activity codes were unique or commonplace. Nonetheless, it was his expert opinion that the plaintiff gained an economic advantage over his competitors because of the specific activity codes that the plaintiff used. This conclusion was based on the deposition testimony and actions of the litigants in this matter. Weyand acknowledged that he had not done any analysis to determine **[**36]** whether any of the activity codes had economic value to the plaintiff's firm or whether the codes were used by others in the legal industry. With respect to hot keys, *e.g.,* using F7 to pull up an accounting screen, one economic advantage would be if one of the plaintiff's attorney was hired by another firm that used the same hot keys, the attorney would not have to learn a new system. In determining the economic value of GapC, he relied, to a certain extent, on the plaintiff's words and actions.

[*P64] Remaining Procedural History

[*P65] On August 19, 2011, following argument, the trial court entered summary judgment in favor of the Legal Helpers defendants. The trial court determined that GapC was not a trade secret. The trial court found that Zachary was the common ancestor of LH-1 and GapC but that both had evolved into completely separate programs. The trial court further found that the commonalities in the two programs were either generated by Zachary or were things that did not consist of trade secrets. Finally, the trial court found that there was no evidence of any economic advantage of secrecy so as to transform GapC into a trade secret.

[*P66] On that same date, the trial court granted Amidon's **[**37]** motion for partial summary judgment. The trial court found that GapC was not a trade secret, there was no commonality in the source code of GapC and BestClient, and that, even if GapC was a trade secret, there was no evidence of economic value.

[*P67] During the hearing on the motions for summary judgment, the Legal Helpers defendants pointed out that the plaintiff had not re-pled any of his pre-October 13, 2003 claims and had, therefore, waived any right to appeal the October 15, 2010, dismissal order. On August 23, 2011, the plaintiff filed a motion for leave to amend his complaint for the express purpose of preserving his claims for pre-2003 conduct. On September 30, 2011, the trial court denied that motion, but made a finding that the plaintiff had adequately preserved his claims. On October 20, 2011, the plaintiff filed a motion for leave to file a second-amended complaint. The purpose of the amendments was to conform the pleadings to the proofs by identifying each of the contracts breached by Amidon, and to add a cause of action against Amidon for fraudulent misrepresentation. On October 25, 2011, the trial court denied that motion. On October 31, 2011, the plaintiff voluntarily dismissed **[**38]** his breach of contract claim against Amidon.

[*P68] On November 30, 2011, the Legal Helpers defendants filed a motion for fees under *Section 5* of the Act (*765 ILCS 1065/5* (West 2010)), arguing that the plaintiff had prosecuted his claims in "bad faith." Following testimony and argument, the trial court denied the motion as to Legal Helpers. The trial court determined that the plaintiff's pre-suit investigation gave him a reasonable ground for filing suit and that the claims against Legal Helpers were not prosecuted in bad faith. However, the trial court found that the plaintiff prosecuted the claims against the individual Legal Helpers defendants in bad faith. Nonetheless, the trial court denied the motion with respect to all five Legal Helpers defendants, unless the four individual defendants could show that they had incurred attorney fees, individually. The trial court granted the individual Legal Helpers defendants 30 days to file a motion to demonstrate that they had incurred individual attorney fees. No such motion was filed.

[*P69] On December 29, 2011, the plaintiff and defendant Doyle filed an agreed motion vacating and setting aside any orders entered in favor of Doyle and against the plaintiff **[**39]** and dismissing defendant Doyle with prejudice. On January 4, 2012, the trial court entered an order in accordance with the motion. Thereafter, the plaintiff filed this appeal.

[*P70] ANALYSIS

[*P71] Appeal

[*P72] The plaintiff raises nine arguments on appeal. The plaintiff argues that the trial court erred in (1) granting summary judgment to the Legal Helpers defendants; (2) granting summary judgment to Amidon

on the trade secret claims; (3) denying his September 2011 motion to amend his complaint to preserve his pre-October 13, 2003, claims; (4) granting the Legal Helpers defendants' partial motion to dismiss on October 15, 2010; (5) denying his motion to appoint a special master; (6) ordering, in response to the plaintiff's motion to compel the payment records of Legal Helpers to Amidon, that only 1099s be produced, rather than all payment records; (7) failing to compel production of the defendants Joint Defense Agreement (JDA); (8) ordering him to identify his trade secrets with greater particularity; and (9) denying his October 2011 motion to amend his complaint, to conform the pleadings to the proofs on his breach of contract claim against Amidon. We will address these arguments in turn.

[*P73] 1. Motion **[**40]** for Summary Judgment In Favor of Legal Helpers Defendants

[*P74] On appeal, the plaintiff argues that the trial court erred in granting summary judgment to the Legal Helpers defendants. A motion for summary judgment is properly granted where the pleadings, depositions, admissions, and affidavits, when viewed in the light most favorable to the nonmoving party, establish that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *735 ILCS 5/2-1005* (West 2010); *Gaylor v. Village of Ringwood, 363 Ill. App. 3d 543, 546, 842 N.E.2d 1241, 299 Ill. Dec. 889 (2006)*. "In determining whether a genuine issue as to any material fact exists, a court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent." *Adams v. Northern Illinois Gas Co., 211 Ill. 2d 32, 43, 809 N.E.2d 1248, 284 Ill. Dec. 302 (2004)*. A triable issue precluding summary judgment exists where material facts are disputed or where the material facts are undisputed but reasonable persons might draw different inferences from the undisputed facts. *Id.* We review the grant of summary judgment *de novo*. *Ioerger v. Halverson Construction Co., Inc., 232 Ill. 2d 196, 201, 902 N.E.2d 645, 327 Ill. Dec. 524 (2008)*.

[*P75] A trade **[**41]** secret "is one of the most elusive and difficult concepts in the law to define" and, therefore, the existence of a trade secret is generally a question of fact. *Learning Curve Toys, Inc. v. Playwood Toys, Inc., 342 F. 3d 714, 723 (7th Cir. 2003)* (quoting *Lear Siegler, Inc. v. Ark–Ell Springs, Inc., 569 F. 2d 286, 288 (5th Cir.1978))*. As such, the question of whether certain information constitutes a trade secret ordinarily is best "resolved by a fact finder after full presentation of evidence from each side." *Id.*

[*P76] Under Illinois law, a trade secret is defined as:

> "information, including but not limited to, technical or non-technical data, a formula, pattern, compilation, program, device, method, technique, drawing, process, financial data, or list of actual or potential customers or suppliers, that:
> (1) is sufficiently secret to derive economic value, actual or potential, from not being generally known to other persons who can obtain economic value from its disclosure or use; and
>
> (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy or confidentiality." *765 ILCS § 1065/2(d)* (West 2010).

To succeed on a claim for trade secret misappropriation under **[**42]** the Act, the plaintiff must establish (1) that he had a trade secret, and (2) that the secret was misappropriated. *Thermodyne Food Service Products, Inc. v. McDonald's Corp., 940 F. Supp. 1300, 1304 (N.D. Ill. 1996)*. To establish the existence of a trade secret, the plaintiff must show that: (1) the information is sufficiently secret to derive economic value; (2) the information is not within the realm of general skills and knowledge of the relevant industry; and (3) the information cannot be readily duplicated without involving considerable time, effort, or expense. *Computer Care v. Service Systems Enterprises, Inc., 982 F. 2d 1063, 1072 (7th Cir. 1992)*. "Information that is derived from public sources, but requires laborious accumulation, culling, and/or analysis of the public information can still qualify as a trade secret." *United States Gypsum Co. v. LaFarge North America, Inc., 508 F. Supp. 2d 601, 624 (N.D. Ill. 2007)*.

[*P77] A. Trade Secret

[*P78] In general, software may qualify for trade secret protection. See *765 ILCS 1065/2(d)* (West 2010) (defining a trade secret as information such as a computer program); *Computer Care v. Service Systems Enterprises, Inc., 982 F. 2d 1063, 1074 (7th Cir. 1992)*; **[**43]** *ISC-Bunker Ramo Corp. v. Altech, Inc., 765 F. Supp. 1310, 1323 (N.D. Ill. 1990)*. Courts consider the following facts as significant in determining whether a trade secret exists:

> "'(1) [T]he extent to which the information is known outside of [the plaintiff's] business; (2) the extent to which it is known by employees and others involved in [the plaintiff's] business; (3) the extent of

> measures taken by [the plaintiff] to guard the secrecy of the information; (4) the value of the information to [the plaintiff] and to [the plaintiff's] competitors; (5) the amount of effort or money expended by [the plaintiff] in developing the information; [and] (6) the ease or difficulty in which the information could be properly acquired or duplicated by others.'" *Strata Marketing Inc. v. Murphy, 317 Ill. App. 3d 1054, 1068, 740 N.E.2d 1166, 251 Ill. Dec. 595 (2000)* (quoting *ILG Industries Inc. v. Scott, 49 Ill.2d 88, 93, 273 N.E.2d 393 (1971)*).

[*P79] In the present case, there is evidence that the plaintiff made efforts to maintain the secrecy of GapC. In his affidavit, the plaintiff testified that he required all his employees to sign confidentiality agreements, he did not allow the code to be taken offsite, only high level employees had access to the code, **[**44]** he kept his server and code under lock and key, and he had password protection on his computers. Such steps have been found sufficient to demonstrate reasonable efforts to keep source code secret under the Act. See *BondPro Corporation v. Siemens Power Generation, Inc., 463 F. 3d 702, 709 (7th Cir. 2006)* (holding that employee confidentiality agreements and keeping the alleged trade secret under lock and key were measures a reasonable jury could find sufficient); see also *Computer Associates, International v. Quest Software, Inc., 333 F. Supp 2d 688, 696 (N.D. Ill. 2004)*. Although employees and former employees knew about the plaintiff's software, they did not have access to copies of the source code.

[*P80] The plaintiff also provided evidence that GapC was sufficiently secret to derive economic value. It could be reasonably inferred from the evidence that the parties believed that such software provided economic value as they were all attempting to procure such software for their law practices. Further, the plaintiff testified in his affidavit that the software was the single most important aspect of managing and growing his high-volume multi-jurisdictional law practice. The plaintiff testified **[**45]** that there was no integrated bankruptcy law practice database management software on the market. He had developed it at great expense over a number of years. The record also reveals that Chern signed a separation agreement from Legal Helpers on March 15, 2005. In a schedule attached to that agreement, "LH-1 Source Code" was identified as a "trade secret." It could therefore be inferred that Legal Helpers believed that there was at least some economic value to maintaining the secrecy of such software. Additionally, when Chern went to work for Legal Helpers, he recruited Amidon to develop a bankruptcy law practice management software. From this, it could be inferred that Chern/Legal Helpers believed there was economic value to getting the same software that the plaintiff was using. If not, Macey could have hired any other programmer to work at Legal Helpers.

[*P81] Further, there was evidence that the software was not within the realm of the general skills and knowledge of the industry. The plaintiff testified in his affidavit that before he developed GapC, and it predecessor software, there was no similar law practice management software on the market. At the time of his affidavit in January **[**46]** 2011, the plaintiff said he was still not aware of another piece of software featuring the same functions required by his law firm and provided in GAP, except for LH-1 and Amidon's "BestClient."

[*P82] The defendants argue that GapC was within the general knowledge of the industry because it was created using Zachary, performed only routine functions, and could be easily duplicated. However, in *Minnesota Mining and Manufacturing Co. v. Pribyl, 259 F. 3d 587 (7th Cir. 2001)*, the Seventh Circuit held that a plaintiff had a valid trade secret in its operations-and-procedures manual, even though most of the information it contained was publicly available:

> "In order to be considered a trade secret, a pattern, technique, or process need not reach the level of invention necessary to warrant patent protection. A trade secret can exist in a combination of characteristics and components, each of which, by itself, is in the public domain, but the unified process, design and operation of which, in unique combination, affords a competitive advantage and is a protectable secret." *Id. at 595-96*.

The court further noted that:

> "There is no doubt that within the 500-plus pages of manuals at issue, there are a **[**47]** host of materials which would fall within the public domain. *** Yet, *** that compilation *** may be considered a trade secret.
>
> Contrary to defendants' suggestion, 3M *** is seeking to prevent Accu-Tech from using and disclosing a process which it took the company six years and considerable income to perfect. These manuals and processes, even if comprised solely of materials available in the public domain, have been created by combining those materials into a unified

system which is not readily ascertainable by other means." *Id.*

Accordingly, even if portions of GapC were created using Zachary and could be considered within the general knowledge in the industry, the compilation in certain portions of the source code or the source code as a whole could still be a trade secret. See also *ISC-Bunker Ramo Corp., 765 F. Supp. at 1322* (the effort of compiling useful information is entitled to trade secret protection even if the information is otherwise generally known).

[*P83] There was also evidence that GapC was not easily duplicated. The plaintiff stated that he had developed GAP over a period of twenty years at a cost in excess of several million dollars, "including what [he] paid Mr. Amidon for **[**48]** over 10 years, in addition to what [he] spent on other programmers, software, hardware, and networking to get GAP to work property [sic]." Although Legal Helpers' experts opined that GapC and LH-1 could be easily duplicated, Weyand opined that it would take years and a considerable expense to create similar software from scratch. Further, while the Legal Helpers defendants argue that LH-1 and GapC was common software used in the industry, they did not provide any evidence that other similar software was in use or on the market. As such, there is a genuine question of material fact on this issue.

[*P84] The defendants also argue that they were entitled to summary judgment on any claim involving GapC's individual components, namely, hot keys, functions and features, activity codes, negative know-how, database architecture, database table names/contents, reports, relationship of procedures, and the GapC user guide. However, Weyand opined that many, although not all, of the plaintiff's identified individual trade secrets met the statutory definition of a trade secret. In opposition to this, the defendants point only to the competing expert evidence set forth by Donnay and Dozois. These competing **[**49]** expert opinions create a factual dispute that is not appropriate for summary judgment. See *Kodish v. Oakbrook Terrace Fire Protection Dist., 604 F. 3d 490, 505 (7th Cir.2010)* (the court cannot weigh competing facts on summary judgment).

[*P85] B. Misappropriation

[*P86] Under the Act, a "misappropriation" in pertinent part is: "Disclosure or use of a trade secret of a person without express or implied consent by another person who *** at the time of disclosure or use, knew or had reason to know that knowledge of the trade secret was *** acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use." *765 ILCS 1065/2(b)(2)(B)(II)* (West 2010). Whether a trade secret has been misappropriated is generally a question of fact. *Cerner Corp. v. Visicu, Inc., 667 F. Supp. 2d 1062, 1077 (W.D. Mo. 2009)*.

[*P87] In the present case, the plaintiff presented sufficient evidence of misappropriation to survive a motion for summary judgment. There was evidence of misappropriation both before and subsequent to October 13, 2003. Weyand opined that the source codes of GapC and LH-1 were 25% the same. He further noted that 75% of the custom code in function.prg was identical and that LH-1 was copied **[**50]** from GapC. Weyand noted that there were identical typographical errors in the source code and that there were obvious attempts to obscure the copying of the source code through the changing of names and comments to remove references to "gap." Weyand opined that the GapC software had been transported to Legal Helpers by Amidon on multiple occasions. He believed that on January 23, 2004, GapC was again copied and transferred into LH-1. This also occurred at least once between March 24 and 28, 2006. Amidon was working for the plaintiff and Legal Helpers at these times. Weyand also opined that the function.prg file of the plaintiff's source code was copied and transferred to LH-1 at some point after January 23, 2004. He stated that the "temp function.prg" of LH-1 was a copy of the "gap.zip function.prg" of GapC as it existed between March 17 and April 7, 2006. Further, during discovery, a complete copy of the GapC source code was found on the server at Legal Helpers in a file entitled gap.zip. When confronted by the plaintiff in October 2006, Amidon admitted that he regularly took copies of GapC home with him.

[*P88] The Legal Helpers defendants note that *section 7* of the Act states that "[f]or **[**51]** purposes of this Act, a continuing misappropriation constitutes a single claim." They argue that this is fatal to the plaintiff's claim because LH-1 was already operational in its current form by October 13, 2003. The defendants note that, in his deposition, Weyand stated that he was not aware of any fundamental difference in LH-1 before and after October 13, 2003. Nonetheless, Weyand's expert opinion was sufficient to establish a question of fact as to whether any misappropriation, either little or great, occurred both before and after October 13, 2003.

[*P89] The defendants also argue that the trial court properly entered summary judgment in favor of Macey, Aleman, Gustafson, and Kasturi because there was no evidence that they knew about, participated in, encouraged, or aided any misappropriation, misuse, copying or dissemination of GapC. Pursuant to the statute, misappropriation includes the use of a trade secret, without consent, by a person who knew or had reason to know that the trade secret was derived or acquired through improper means. *765 ILCS 1065/2(b)(2)(B)* (West 2010). There was evidence that Aleman, Kasturi, and Gustafson were former employees of the plaintiff and used either **[**52]** GapC or some previous version of it while working for the plaintiff. Since there are genuine questions of fact as to the identical nature of GapC and LH-1, there is also a genuine question of fact as to whether these defendants knew about the alleged trade secret misappropriation when using the software at Legal Helpers. As to Macey, he knew that Amidon was working for the plaintiff when he hired Amidon and knew that he was hiring Amidon to do the same type of work. Chern, who worked for the plaintiff, recommended Amidon to Macey. Macey and Chern went to law school together. Soon thereafter, Chern himself left the plaintiff's law firm and joined Legal Helpers as a profit-sharing partner. Chern was employed by Legal Helpers to help Macey grow the law firm. These circumstances certainly raise a question of fact as to whether Macey knew about any alleged trade secret misappropriation.

[*P90] Accordingly, because there are questions of fact as to whether GapC was a trade secret and whether it was misappropriated under the Act, we reverse the grant of summary judgment in favor of the Legal Helpers defendants.

[*P91] 2. Partial Summary Judgment as to Defendant Amidon

[*P92] The plaintiff next argues that the **[**53]** trial court erred in granting partial summary judgment to Amidon as to the trade secret claim against him (count 1). The plaintiff's claim against Amidon included two separate instances of trade secret misappropriation: (1) Amidon's alleged disclosure and use of GapC in creating LH-1; and (2) Amidon's disclosure and use of GapC to create, market, and sell software known as BestClient. Based on the foregoing analysis, it is clear that there are genuine questions of fact as to whether Amidon disclosed and used GapC while creating LH-1. Accordingly, summary judgment was improper on that prong. The question then is whether there was a genuine question of fact as to whether Amidon misappropriated GapC when creating BestClient.

[*P93] In Weyand's preliminary expert report, he opined that the BestClient software must have been in development for some "significant" time before Amidon was fired by the plaintiff. The plaintiff's Gap4 and BestClient were both Windows-based bankruptcy law practice management software. Weyand found that there were similarities in the two programs and opined that they were not independently developed. Rather, the similarities indicated that Amidon's BestClient software **[**54]** was based on and developed with access to the plaintiff's software.

[*P94] "It is clear that an employee may take with him, at the termination of his employment, general skills and knowledge acquired during his tenure with the former employer. It is equally clear that the same employee may not take with him confidential particularized plans or processes developed by his employer and disclosed to him while the employer-employee relationship exists, which are unknown to others in the industry and which give the employer advantage over his competitors." *Schulenburg v. Signatrol, Inc., 33 Ill. 2d 379, 387, 212 N.E.2d 865 (1965)*.

[*P95] In *Affiliated Hospital Products, Inc. v. Baldwin, 57 Ill. App. 3d 800, 373 N.E.2d 1000, 15 Ill. Dec. 528 (1978)*, the defendant worked for the plaintiff corporation on a design for the construction of hypodermic needles. *Id. at 801*. Following the defendant's termination, the defendant developed a competitive process. *Id.* In so doing, the evidence showed that the defendant used the plaintiff's confidential and proprietary drawings. *Id. at 802*. The defendant was able to design a competitive process in eight to ten weeks by using the plaintiff's drawings, which took five years to develop. *Id. at 807*. The trial court denied **[**55]** the plaintiff's request for a preliminary injunction, and the reviewing court reversed that determination. *Id. at 809*. The reviewing court noted that the defendant was entitled to use his expertise gained during his employment with the plaintiff, but he was not allowed to use the actual drawings that belonged to the plaintiff. *Id.* The reviewing court further noted that whether the defendant could have independently developed the process was not relevant because he did not; rather, he referred to confidential information. *Id.*

[*P96] In the present case, Weyand's expert opinion and the fact that BestClient was marketed so soon after Amidon's termination, raise a genuine question of

material fact as to whether BestClient was developed independently or with the use of the plaintiff's alleged trade secrets. The trial court granted summary judgment on the basis that there was no common source code between GapC and BestClient. This was because GapC is a DOS-based program while BestClient is a Windows-based program. Nonetheless, "although a product appears to be a new or modified product, a violation of the Act occurs if the modification or new product was substantially derived from another's trade **[**56]** secret." *Thermodyne, 940 F. Supp. at 1308*. Accordingly, the trial court erred in granting Amidon's motion for partial summary judgment.

[*P97] 3. September 2011 Motion for Leave to File Second Amended Complaint

[*P98] On August 23, 2011, the plaintiff filed a motion for leave to file a second-amended complaint. The purpose of the motion was to add a footnote to specifically preserve his pre-October 13, 2003, claims. On September 30, 2011, the trial court denied the motion but entered an order finding that the plaintiff had adequately preserved his previously-dismissed claims.

[*P99] As a general rule, a trial court should exercise its discretion liberally in favor of allowing amendments to pleadings if doing so would further the ends of justice. *Alpha School Bus Co. v. Wagner, 391 Ill. App. 3d 722, 748, 910 N.E.2d 1134, 331 Ill. Dec. 378 (2009)*. The decision to grant leave to amend a complaint rests within the sound discretion of the trial court, and we will not reverse such a decision absent an abuse of that discretion. *I.C.S. Illinois, Inc. v. Waste Management of Illinois, Inc., 403 Ill. App. 3d 211, 219, 931 N.E.2d 318, 341 Ill. Dec. 710 (2010)*. A trial court abuses its discretion when it makes an error of law. *Najas Cortes v. Orion Securities, Inc., 362 Ill. App. 3d 1043, 1047, 842 N.E.2d 162, 299 Ill. Dec. 423 (2005)*. **[**57]** Whether a dismissed claim has been preserved for review is strictly a question of law. *People v. Gutierrez, 2012 IL 111590, ¶ 16, 962 N.E.2d 437, 356 Ill. Dec. 752*.

[*P100] "The rules governing the preservation of dismissed claims for purposes of appellate review are clear and well settled." *Bonhomme v. St. James, 2012 IL 112393, ¶ 17, 970 N.E.2d 1, 361 Ill. Dec. 1*. Following the entry of an order dismissing a complaint, if a party files an amended complaint that is complete in itself and does not refer to or adopt the prior pleading, the party has waived any challenge to the order dismissing the prior complaint. *Foxcroft Townhome Owners Association v. Hoffman Rosner Corp., 96 Ill.2d 150, 154-55, 449 N.E.2d 125, 70 Ill. Dec. 251 (1983)*.

[*P101] However, a party can avoid waiver and preserve his dismissed claims for appellate review by filing an amended pleading that realleges, incorporates by reference, or refers to the dismissed counts. *Vilardo v. Barrington Community School District 220, 406 Ill. App. 3d 713, 719, 941 N.E.2d 257, 346 Ill. Dec. 699 (2010)*. A "simple paragraph or footnote" is sufficient for this purpose. *Tabora v. Gottlieb Memorial Hospital, 279 Ill. App. 3d 108, 114, 664 N.E.2d 267, 215 Ill. Dec. 870 (1996)*. A party is not precluded from filing subsequent amendments to preserve dismissed claims. See *Foxcroft, 96 Ill. 2d at 154* ("we perceive no undue **[**58]** burden in requiring a party to incorporate in its *final* pleading all allegations which it desires to preserve for trial or review" (emphasis added)); see also *Barnett v. Zion Park District, 171 Ill. 2d 378, 665 N.E.2d 808, 216 Ill. Dec. 550 (1996)* (holding that the plaintiff had waived appellate review of previously dismissed claims by failing to "reallege or otherwise incorporate those [claims] in her third, fourth, or fifth amended complaint").

[*P102] In the present case, the plaintiff did not specifically state either in a paragraph or a footnote of his amended complaint that he wished to preserve his claims to the extent they were based on pre-2003 conduct. The claims were, therefore, not properly preserved. Accordingly, the trial court erred as a matter of law (*Gutierrez, 2012 IL 111590, ¶ 16, 962 N.E.2d 437, 356 Ill. Dec. 752)*, and thereby abused its discretion (*Najas Cortes, 362 Ill. App. 3d at 1047*), when it determined that the claims were properly preserved. The trial court should have allowed the plaintiff to amend his complaint to preserve his claims.

[*P103] 4. Partial Motion to Dismiss due to October 13, 2003 Release

[*P104] The plaintiff next argues that the trial court erred in granting the Legal Helpers defendants' partial motion to dismiss based on the October **[**59]** 13, 2003, release. The plaintiff further argues that the trial court erred in denying his motion to reconsider, which was filed seven months later. The 2003 release resolved a trademark infringement lawsuit between the parties. The plaintiff argues that the trial court erred in granting the partial motion to dismiss either because (1) the release was a specific release; or (2) the release was a general release that was inapplicable to the unknown trade secret claims.

[*P105] The Legal Helpers defendants argue that the plaintiff waived this issue because he filed an amended complaint and did not replead his pre-October 13, 2003, claims. Alternatively, they argue that the trial court did not err in granting their partial motion to dismiss because both LH-1 and GapC had been running for five years at the time of the 2003 settlement and, therefore, claims relating thereto were within the contemplation of the parties at the time they agreed to the release.

[*P106] At the outset, we address the Legal Helpers defendants' waiver argument. As noted above, the trial court abused its discretion in failing to allow the plaintiff to amend his complaint to preserve his pre-October 13, 2003 claims. The amendment **[**60]** should have been allowed and, therefore, the issue is not waived. See *Gaylor v. Campion, Curran, Rausch, Gummerson and Dunlop, P.C., 2012 IL App (2d) 110718, ¶ 81, 980 N.E.2d 215, 366 Ill. Dec. 415* (McLaren, J., specially concurring) (because the plaintiff had attempted to file an amended pleading to preserve his dismissed claims, appellate review of those claims was not waived). Although the majority in *Gaylor* held that appellate review of dismissed claims was waived even though the plaintiffs had attempted to file an amended pleading to preserve those claims, we find that case distinguishable. In *Gaylor,* the plaintiffs did not attempt to amend their complaint to preserve their dismissed claim for appellate review. *Id. at ¶ 43*. Rather, they were essentially asking the trial court to reconsider its earlier dismissal order. *Id.* In the present case, the plaintiff was clearly asking the trial court to allow him to preserve his dismissed claims in compliance with *Foxcroft* and the trial court failed to allow him to do so based on an erroneous determination that his dismissed claims were adequately preserved. Moreover, *Foxcroft* requires that a party incorporate in its *final* pleading all allegations which it desires to preserve **[**61]** for trial or review. *Foxcroft, 96 Ill. 2d at 154*. Here, the plaintiff's amended complaint was presented well in advance of trial. Under these circumstances, the plaintiff has not waived appellate review of his dismissed claims.

[*P107] "[A] motion to dismiss under *section 2-619(a)* of the Code [citation] admits the legal sufficiency of the complaint, but asserts affirmative matter outside the complaint that defeats the cause of action." *Kean v. Wal–Mart Stores, Inc., 235 Ill. 2d 351, 361, 919 N.E.2d 926, 336 Ill. Dec. 1 (2009)*. We review *de novo* the dismissal of a complaint pursuant to *section 2-619*. *Id.*

[*P108] In the present case, the trial court acknowledged that it had misapplied the law when it granted the Legal Helpers defendants' partial motion to dismiss. We agree. If the language of the agreement was interpreted as a specific release, it would only have applied to the trademark infringement claims at issue, not the presently alleged trade secret violations. If interpreted as a general release, it is well settled that a general release is not applicable to unknown claims. *Farm Credit Bank of St. Louis v. Whitlock, 144 Ill. 2d 440, 448, 581 N.E.2d 664, 163 Ill. Dec. 510 (1991)*. At the time the trial court granted the partial motion to dismiss, there was no evidence **[**62]** that the parties knew of the alleged trade secret violations when they entered the 2003 settlement agreement and release. Moreover, during discovery in this case, the plaintiff stated that he was not aware of the alleged trade secret violations until shortly before he filed this suit. Aleman stated that, at the time the 2003 release was negotiated, he was not aware of any disputed issue other than the "infotapes" trademark infringement. Gustafson stated that during settlement negotiations leading up to the 2003 settlement agreement and release, there were no discussions regarding GapC or LH-1. Accordingly, the present trade secret allegations were not within the contemplation of the parties in 2003 and, therefore, the 2003 release, whether specific or general, did not bar these claims. *Clear-Vu Packaging, Inc. v. National Union Fire Insurance Co., 105 Ill. App. 3d 671, 674, 434 N.E.2d 365, 61 Ill. Dec. 212 (1982)* (the language of a release cannot be interpreted so broadly as to defeat a valid claim not then in the minds of the parties). The trial court erred in granting the Legal Helpers defendants' partial motion to dismiss.

[*P109] Furthermore, the trial court erred in denying the plaintiff's motion to reconsider. The trial **[**63]** court acknowledged that it had erred in granting the partial motion to dismiss, but denied the motion to reconsider because of the seven month delay in the filing of the motion and because it did not wish to "throw open all of the discovery" at that point in the proceedings. While the motion could have been brought sooner, the trial court abused its discretion when it realized it made a mistake and refused to correct it. See *Hernandez v. Pritikin, 2012 IL 113054, ¶ 42, 981 N.E.2d 981, 367 Ill. Dec. 253* (recognizing that circuit court has inherent power to review, modify, or vacate interlocutory orders while the court retains jurisdiction over the entire controversy). At the time the motion to reconsider had been brought, a trial date had not been set and the proceedings were not so advanced that the delay caused by additional discovery would outweigh correcting the court's mistake concerning the release. On remand, the trial court shall allow the plaintiff to amend his complaint to include the

improperly dismissed claims.

[*P110] 5. Motion to Appoint a Special Master

[*P111] The plaintiff next argues that the trial court abused its discretion in denying his motion to appoint a special master. In denying the motion, the trial court found **[**64]** that it did not have the authority to make such an appointment. The plaintiff argues that the trial court does have the authority to appoint a neutral attorney or computer expert to advise the trial court in technical matters relating to the parties' computer source codes.

[*P112] The trial court did not err in denying the plaintiff's motion for appointment of a special master. In 1962, an amendment to article VI of our State constitution, which became effective January 1, 1964, abolished the offices of fee officers and masters in chancery as a part of our judicial system. *Carey v. Elrod, 49 Ill. 2d 464, 469, 275 N.E.2d 367 (1971)*; see also *Jenner v. Wissore, 164 Ill. App. 3d 259, 265, 517 N.E.2d 1220, 115 Ill. Dec. 534 (1988)* (noting that the office of master in chancery has been abolished and suggesting that the trial court should not have appointed a special master to review a college's expenditures in light of an allegation that the college had unlawfully used its funds); *Hurst v. Papierz, 16 Ill. App. 3d 574, 579, 306 N.E.2d 532 (1973)* (noting that the trial court should not allow a master or other fee officer to conduct an accounting as to the amount the plaintiff was wrongfully denied of an interest in a joint venture but should itself conduct the accounting). **[**65]** *Section 8 of Article VI of the Illinois Constitution* now provides that "[t]here shall be no fee officers in the judicial system." *Ill. Const. Art. 6, Section 14*.

[*P113] In arguing that the appointment of a special master is not improper, the plaintiff relies on *Anderson v. Anderson, 42 Ill. App. 3d 781, 786, 356 N.E.2d 788, 1 Ill. Dec. 506 (1976)*. In *Anderson,* the reviewing court held that the trial court did not err in appointing a commissioner in a partition action. The reviewing court noted that such an appointment was in direct compliance with *section 6 of the Partition Act*. *Id. at 785* (citing Ill. Rev. Stat., 1973, ch. 106, par. 49). The court further reasoned that such an appointment was not in conflict with the constitutional provision prohibiting fee officers because the commissioner was "but a ministerial adjunct of the court who performs a nonjudicial function." *Id. at 786*. The reviewing court stated that the prohibition of fee officers applied to judicial or quasi-judicial officers, but not to lesser administrative assistants. *Id.* In support, the court pointed to statutes which authorize the trial court to appoint individuals to perform ministerial tasks, "such as receivers in foreclosure proceedings (Ill. Rev. **[**66]** Stat., 1975, ch. 95, pars. 22b.57, 23.6-5, 23.6-6); receivers in corporate liquidations (ch. 32, par. 157.87); conservators (ch. 3, par. 113); trustees (ch. 148, par. 44); guardians (ch. 3, par. 133), and guardians ad litem (ch. 3, par. 67). See, generally, ch. 110A, par. 61(c)(11)." *Id. at 787*.

[*P114] We find the defendant's reliance on *Anderson* unpersuasive. In *Anderson,* there was a statute authorizing the appointment of a commissioner in a partition action. *Id. at 785*. In the present case, the Act does not have a provision authorizing the appointment of a special master. Accordingly, the trial court did not err in denying the plaintiff's motion.

[*P115] 6. Motion to Compel Payment Records

[*P116] On March 4, 2011, the plaintiff filed a motion to compel payment records, seeking records of the amounts paid by Legal Helpers to Amidon for his work on LH-1 and the amount of time Amidon and Legal Helpers spent developing LH-1. On March 22, 2011, the trial court ordered Amidon to produce his 1099 forms received from Legal Helpers but denied the remaining relief sought in the motion. The plaintiff argues that the trial court abused its discretion. Specifically, the plaintiff argues that the amount of time that **[**67]** Amidon spent developing LH-1 and the amount of money he was paid by Legal Helpers go to the "heart of the issue of economic advantage." He further argues that the payment records are relevant to establish whether Legal Helpers knew that Amidon was using GapC in developing LH-1, *i.e.,* if Amidon produced a complex software system with minimal effort, and to establish damages.

[*P117] Issues of discovery are within the trial court's discretion, and the trial court's discovery rulings will not be disturbed absent an abuse of discretion. *Janda v. U.S. Cellular Corp., 2011 IL App (1st) 103552, ¶ 96, 961 N.E.2d 425, 356 Ill. Dec. 329*. An abuse of discretion occurs where no reasonable person would take the view adopted by the trial court. *Id.*

[*P118] As the plaintiff argues, the amount paid by Legal Helpers to Amidon could shed light on the economic value to Legal Helpers and whether or not the software was easily duplicated, which is relevant to establishing a trade secret. Additionally, to establish a

trade secret, the plaintiff must show, in part, that the information is sufficiently secret to derive economic value. *Computer Care, 982 F. 2d at 1072*. Economic value is relevant to both parties. See *Mangren Research and Development Corp. v. National Chemical Co., Inc., 87 F. 3d 937, 942 (7th Cir. 1996)* **[**68]** (holding that to qualify as a "trade secret," information must be sufficiently secret to impart economic value to both its owner and its competitors because of its secrecy). As such, any evidence of the economic value of the LH-1 software, would be relevant to establish the economic value of GapC because of their similarity.

[*P119] We cannot say the trial court abused its discretion in ordering the defendants to produce only the 1099s for Amidon, rather than all accounting and development records. If the defendants had produced 1099s, it would have given the plaintiff the information he wanted. Amidon did state in his response to interrogatories that he was paid $100 per hour for development work on LH-1. Accordingly, if the plaintiff knew how much Legal Helpers paid Amidon, he could calculate how much time was spent, approximately, on LH-1. However, it is unclear from the record whether any 1099s were actually produced. If not produced, the trial court may, on remand, revisit the issue based on further motion of the parties. *Hernandez, 2012 IL 113054, ¶ 42, 981 N.E.2d 981, 367 Ill. Dec. 253*.

[*P120] 7. Motion to Compel Production of a Joint Defense Agreement

[*P121] On February 9, 2011, the plaintiff filed a motion to compel the disclosure **[**69]** of the Legal Helpers defendants' Joint Defense Agreement (JDA). On June 15, 2011, the trial court denied the motion. The plaintiff argues that because the Legal Helpers defendants failed to establish that the JDA was privileged, the motion to compel should have been granted. The plaintiff notes that when the trial court denied his motion, it did so without making a finding as to whether the JDA was privileged pursuant to the work product doctrine. The plaintiff does not challenge the defendants' "common interest," just the lack of a finding as to whether the JDA contained privileged information.

[*P122] Discovery orders are reviewed for an abuse of discretion. *Janda, 2011 IL App (1st) 103552 at ¶ 96*. In the present case, in denying the motion, the trial court stated that it had reviewed the JDA, that the parties to the JDA had a similar interest and that their cooperation under the JDA appeared to be entirely proper.

[*P123] Material which is otherwise privileged is discoverable if it has been disclosed to a third party. *Allendale Mutual Insurance Co. v. Bull Data Systems, Inc., 152 F.R.D. 132, 139 (N.D. Ill. 1993)*. However, the privilege is not waived if the third party shares a common interest with **[**70]** the disclosing party which is adverse to the party seeking discovery. *Id.* As stated, the plaintiff does not challenge that a common interest exists. The plaintiff only challenges whether a privilege exists. Applicability of a privilege is reviewed *de novo. Cangelosi v. Capasso, 366 Ill. App. 3d 225, 227, 851 N.E.2d 954, 303 Ill. Dec. 767 (2006)*.

[*P124] Material prepared by or for a party in preparation for trial is subject to discovery unless it contains or discloses theories, mental impressions, or litigation plans of the party's attorney. 134 Ill.2d R. 201(b)(2). This exception to discovery is known as the work product doctrine. The work-product doctrine is designed to protect the right of an attorney to thoroughly prepare his case and to preclude a less diligent adversary attorney from taking undue advantage of the former's efforts. See *Hickman v. Taylor, 329 U.S. 495, 511, 67 S. Ct. 385, 91 L. Ed. 451 (1947)*. In the present case, the JDA was prepared in anticipation of litigation and contains the thought processes of the attorney, including defense strategies and theories. It is therefore privileged under the work product doctrine. *McNally Tunneling Corp. v. City of Evanston, Illinois, No. 00-C-6979, 2001 U.S. Dist. LEXIS 17090, 2001 WL 1246630, *4 (N.D. Ill. 2001)* (holding that **[**71]** joint defense agreement prepared in anticipation of litigation was privileged under the work product doctrine). Although, "the privilege may be overcome if the party seeking discovery demonstrates that it has both a substantial need for the material and that it would suffer undue hardship if required to obtain the information in some other way" (*id.*), the plaintiff has not shown either of these. Accordingly, the JDA is protected by the work product doctrine.

[*P125] 8. Motion Requesting Specific Identification of Trade Secrets

[*P126] The plaintiff also argues that the trial court erred on October 8, 2010, when it ordered him to "identify [his] trade secrets with greater particularity and [to] identify the portions of the source code that are tied to the various functions, features, keys, etc. that [the plaintiff] contends are trade secrets. Such response shall also identify the combinations that [the plaintiff] contends are trade secrets." The plaintiff contends that this order resulted in the ultimate defeat of his claim for

a combination trade secret because the trial court did not consider his source code as a whole.

[*P127] The trial court entered three orders on this point. On September 17, 2010, it **[**72]** ordered the plaintiff to disclose his trade secrets via responses to the defendants' interrogatory. On October 8, 2010, the trial court granted a motion to compel, and ordered that the plaintiff disclose his trade secrets with greater particularity. On November 5, 2010, the trial court denied another motion to compel and found that the plaintiff had identified his trade secrets with sufficient particularity. Generally, discovery rulings are reviewed for an abuse of discretion. *DeFilippis v. Gardner, 368 Ill. App. 3d 1092, 1095, 859 N.E.2d 197, 307 Ill. Dec. 197 (2006)*.

[*P128] In the present case, we cannot say that the trial court abused its discretion in granting the motion to compel and ordering the plaintiff to identify his trade secrets with particularity. A plaintiff that does not identify its trade secrets with sufficient specificity risks dismissal of the claim. *Nilssen v. Motorola, Inc., 963 F. Supp. 664, 672 (N.D. Ill. 1997)*; *Composite Marine Propellers, Inc. v. Van der Woude, 962 F. 2d 1263, 1266 (7th Cir. 1992)* (is not enough to point to broad areas of technology and assert that something there must have been secret and misappropriated; the plaintiff must show concrete secrets). To the extent the plaintiff argues **[**73]** that the trial court failed to consider his source code as a combination trade secret, the record belies that assertion. On November 5, 2010, the trial court found that the plaintiff had adequately identified his alleged trade secrets and that it would consider whether LH-1 was a product of or derived from GapC in some form. The trial court further noted that the experts would need to look at the source codes, as a whole, to make that determination.

[*P129] 9. October 2011 Motion for Leave to File Second Amended Complaint

[*P130] On October 25, 2011, the plaintiff filed another motion to amend his complaint to conform the pleadings to the proofs. The plaintiff argues that, during discovery, he learned that Amidon (1) was employed by himself and Legal Helpers simultaneously from 1996 to 2006; (2) was also employed by Doyle in 2006; (3) licensed bankruptcy practice management software known as BestClient and sold it while employed by the plaintiff; and (4) a copy of the plaintiff's software files were located on Legal Helpers' servers. Based on this information, the plaintiff wanted to amend the complaint to identify each of the six contracts breached by Amidon and to add a cause of action for fraudulent **[**74]** misrepresentation. At the time the motion was filed, the plaintiff and Amidon were preparing for trial on the breach of contract count against Amidon.

[*P131] We need not reach this issue. Whether the trial court abused its discretion in failing to grant the motion to amend is moot. See *In re J.T., 221 Ill. 2d 338, 349-50, 851 N.E.2d 1, 303 Ill. Dec. 103 (2006)* (an issue is moot where no actual controversy is presented, or where intervening events foreclose the reviewing court from granting effectual relief to the complaining party). Here, after the trial court denied the motion to amend, the plaintiff voluntarily dismissed his breach of contract claims against Amidon. After voluntarily dismissing his claims (on October 31, 2011), the plaintiff had the opportunity to refile his breach of contract claim within one year and to include his amendments within that pleading.

[*P132] Cross-Appeal

[*P133] On cross-appeal, the Legal Helpers defendants argue that the trial court erred in denying their motion for fees under *Section 5* of the Act (*765 ILCS 1065/5* (West 2010)). Based on our determination, reversing summary judgment and remanding for additional proceedings in the trial court, we find the Legal Helpers defendants' request for fees to be **[**75]** premature. *Jewish Hospital v. Boatmen's National Bank, 261 Ill. App. 3d 750, 770, 633 N.E.2d 1267, 199 Ill. Dec. 276 (1994)*. Accordingly, we vacate the trial court order denying the motion for fees. The defendants may raise the issue again after final disposition of the case in the trial court. *Id.*

[*P134] CONCLUSION

[*P135] In summary, we reverse the grant of summary judgment in favor of the Legal Helpers defendants and Amidon. We hold that the trial court erred in granting the Legal Helpers defendants' partial motion to dismiss based on the 2003 release, in denying the plaintiff's motion to reconsider that order, and in denying the plaintiff's September 2011 motion to amend his complaint to preserve his dismissed claims. We affirm the denial of the motions to appoint a special master and to compel production of the JDA, the trial court's order requiring the plaintiff to identify his trade secret with particularity, and the trial court's ruling on the plaintiff's motion to compel the payment records of Amidon. We deny, as moot, the plaintiff's request to review the trial court's ruling on his October 2011 motion

to file a second amended complaint. We vacate the trial court's order denying the motion for fees, and dismiss as premature **[**76]** the Legal Helpers defendants' cross-appeal for fees.

[*P136] For the foregoing reasons, the judgment of the circuit court of Du Page County is reversed in part, affirmed in part, vacated in part and remanded for additional proceedings not inconsistent with this order. The cross-appeal is dismissed.

[*P137] Reversed in part, affirmed in part and vacated in part; cross-appeal dismissed; cause remanded.

ILLINOIS POLLUTION CONTROL BOARD
December 6, 1984

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Complainant,	)	
v.	)	PCB 79-145
CELOTEX CORPORATION and PHILIP CAREY COMPANY,	)	
Respondents.	)	

ORDER OF THE BOARD (by B. Forcade):

On November 15, 1984, Respondents, the Celotex Corporation and Philip Carey Company ("Celotex") filed a motion for reconsideration of a November 8, 1984 Board Order denying Celotex's application for non-disclosure. On November 21, 1984, the Illinois Environmental Protection Agency ("Agency") filed an objection to the Celotex motion for reconsideration and a petition to the Board for a special Board meeting to decide Celotex's motion for reconsideration. Celotex filed a response to the petition, and a reply to the Agency objection on December 4, 1984.

Celotex's motion for reconsideration provides an inadequate basis for Board reconsideration of its November 8, 1984 order. Celotex's assertion that the issue of whether the material in question is subject to discovery was not properly before the Board is clearly erroneous. Celotex, itself, raised the discovery issue when it denied discovery requested by the Agency based on the attorney-client privilege and the work-product doctrine. The hearing officer's Orders of October 5 and 15 referred the discovery issue to the Board. After examining the document in question, the Board determined that the information was discoverable under Illinois case law and statute. The Board reaffirms that holding here.

The issue of whether a document is discoverable and whether a document in the Board's files is subject to public scrutiny are clearly separate issues; both were properly before the Board. The hearing officer has all necessary authority to rule on discovery issues, including <u>in camera</u> inspections and protective orders to prevent public disclosure of discovery material secured by parties, Section 103.200(c). However, only the Board may rule on whether information <u>in the Board's files</u> may be witheld from public scrutiny.

Since Celotex's claim for non-disclosure was premised on

attorney-client and attorney work product privileges, disposition of the discovery issue necessarily disposes of the non-disclosure issue. As pointed out in the November 8, Order, Section 7(d) of the Act also requires disclosure. Celotex responded to Complainant's statement No. 7 regarding "materials disposed of at the landfill at issue," not by denying the existence of such information, but by claiming confidentiality. Celotex's current argument is that the Board had no basis for concluding the confidential documents pertained to material "being placed or to be placed in landfills." The connection between "materials disposed of" and "substances being placed" seems clear to the Board. The Board's November 8 Order was a Final Order on the issue of non-disclosure under Section 7 of the Act and the 35-day time clock runs from that date. However, under Section 103.240, Celotex's 35 day clock starts anew as of today's Order.

The Agency has stated, in its petition requesting a special Board meeting, that Celotex has withheld the information found to be discoverable subsequent to the Board's November 8, 1984 Order. Since a Board Order compelling production of information is not stayed by a motion for reconsideration 35 Ill. Adm. Code 103.140(h), any failure to timely produce such information would be a violation of the Board's Order. The Board is unable to see any purpose that will be achieved by holding a special Board meeting and the Agency's petition is denied.

On November 15, 1984, in an unrelated filing, the Agency submitted an application for non-disclosure, motion to file instanter, and the subject material in an envelope labelled "Not Subject to Disclosure." In accordance with 35 Ill. Adm. Code 101.107(c)(3), the subject material has been afforded confidential status pending a prompt ruling by the Board. Celotex filed an opposition to the application and motion on November 26, 1984 and the Agency filed a response on December 4, 1984.

This issue arose from a discovery request by Celotex for production of the "brochure" prepared by the Agency and submitted to the Attorney General which describes in detail certain evidentiary material, legal theories and strategies. The Board has reviewed the subject document in camera. The brochure, dated September 15, 1978, is the documentary mechanism by which the Agency referred the case material that became PCB 79-145 to the Attorney General. The cover letter of the brochure requests that the Attorney General review the material contained within and decide whether an enforcement action should be filed before the Board. The brochure outlines general background information about the Celotex facility, Agency regulatory history concerning the facility, a listing of alleged violations of the Act and regulations, a table listing specific pieces of evidence that prove specific alleged violations, a list of potential witness that could be utilized in an enforcement action, and a proposed remedy for such violations.

The Agency attorney states by affidavit that the material in question is privileged against production in a judical proceeding

under the attorney-client privilege. The attorney also describes the general nature of the material, who prepared the material and in what context, and lists eight people who are familiar with the subject material; each of whom are either Agency technical or legal staff or assistant attorneys general. Celotex argues that the Agency has not sufficiently alleged the elements of the attorney-client privilege. The Board is presented with two issues, whether the referral brochure is discoverable material and whether the material may be disclosed to the public under Section 7 of the Act and 35 Ill. Adm. code 101.107.

The Board finds that the referral brochure is not subject to discovery as it conforms with the elements of the attorney-client privilege as outlined by the Illinois Supreme Court in People v. Adam, 51 Ill. 2d 46, 280 N.E.2d 205 (1972). There the court outlined the "essentials of its creation and continued existance" as follows:

> "'(1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are at his instance permanently protected, (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived.' 8 Wigmore, Evidence, Sec. 2292 (McNaughton Rev. 1961)" 280 N.E.2d at 207.

While the attorney-client relationship between two agencies of government such as the Illinois Environmental Protection Agency and the Attorney General has some unique aspects, it is generally analagous to more typical attorney-client relationships. The Agency submitted the brochure to the Attorney General in anticipation of legal advice regarding a potential enforcement suit. The Attorney General was consulted in his capacity as constitutionally designated legal representative of the Agency. The communication, in the form of the referral brochure, related to the purpose of legal advice regarding that potential enforcement suit. The brochure was kept confidential. Only a limited number of Agency and Attorney General staff were allowed to view the document. The communication was made by the Agency in its capacity as a legal client to the Attorney General and the Agency has endeavored to keep the document from being disclosed by the Attorney General and has not waived the privilege. The brochure is therefore not subject to discovery. The decision regarding application of the privilege disposes of the statutory disclosure issue. Because the brochure is privileged against introduction in a judicial proceeding under the attorney-client privilege, the brochure is also protected from public disclosure under Section 7(a)(2) of the Act.

The Celotex "Motion for Reconsideration of Board Order Denying Celotex Discovery," dated November 15, 1984, is denied.

The Celotex "Motion to Strike Hearing Officer Order Regarding

Site Inspection," dated November 27, 1984, is denied. Any possible prejudice to Celotex was cured by the hearing officer's Order dated December 3, 1984, which the Board has reviewed in light of Celotex's December 5 motion and declines to strike.

The Celotex "Motion to Board to Bar Certain Witnesses' Testimony at the Hearing," dated November 30, 1984 is denied to the extent that it requests the Board to rule on the issues. The conduct of the hearing is primarily the province of the hearing officer, 35 Ill. Adm. Code Part 103, Subpart F. All motions, except dismissal, must be directed to the hearing officer, Section 103.140(e). Only in the most unusual of circumstances will the Board entertain a motion within the scope of the hearing officer, absent a referral pursuant to Section 103.140(f). No such circumstances are presented here. The parties are encouraged to clearly delineate whether a motion is directed to the Board or to the hearing officer to aid in proper docketing of motions.

The Agency on December 3, 1984, filed "An Emergency Motion for Continuance of Hearing." Paragraph 2 of that request clearly presents unusual circumstances; the motion is granted.

Hearing must be held in this matter not later than January 28, 1985. The hearing officer can make such adjustments to any pre-hearing schedules as justice requires.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 6th day of December, 1984 by a vote of 6-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board