

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

|                            |   |              |
|----------------------------|---|--------------|
| In the Matter Of:          | ) |              |
|                            | ) |              |
| JOHNS MANVILLE, a Delaware | ) |              |
| corporation,               | ) |              |
|                            | ) |              |
| Complainant,               | ) | PCB No. 14-3 |
|                            | ) |              |
| v.                         | ) |              |
|                            | ) |              |
| ILLINOIS DEPARTMENT OF     | ) |              |
| TRANSPORTATION,            | ) |              |
|                            | ) |              |
| Respondent.                | ) |              |

**NOTICE OF FILING**

To: See Attached Service List

PLEASE TAKE NOTICE that on December 21, 2018, I caused to be filed with the Clerk of the Pollution Control Board of the State of Illinois, *Complainant's Reply in Support of its Motion for Sanctions*, a copy of which is attached hereto and herewith served upon you via e-mail. Paper hardcopies of this filing will be made available upon request.

Dated: December 21, 2018

Respectfully submitted,

BRYAN CAVE LEIGHTON PAISNER LLP

Attorneys for Johns Manville

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| <b>Complainant,</b>                            | ) | <b>PCB No. 14-3</b> |
|  | ) |                     |
| <b>v.</b>                                      | ) |                     |
|  | ) |                     |
| <b>ILLINOIS DEPARTMENT OF TRANSPORTATION,</b>  | ) |                     |
|  | ) |                     |
| <b>Respondent.</b>                             | ) |                     |

**COMPLAINANT JOHNS MANVILLE’S REPLY IN SUPPORT OF ITS MOTION FOR SANCTIONS**

Complainant JOHNS MANVILLE (“JM”) hereby submits its Reply in Support of its Motion for Sanctions (“Motion”). In support of its Motion, JM states as follows:

**1. IDOT’s Failure To Disclose The Numerous Changes Made In The Supplemental Report Warrants Sanctions.**

IDOT persists in claiming that the Supplemental Report was served to “correct *an* error”—singular—in its expert’s admittedly “erroneous” and flawed initial opinions. (Response, pp. 1, 2, 3, 6, 7, 14 (emphasis added).) In doing so, IDOT understates its procedural improprieties and violation of the Hearing Officer’s discovery orders. What IDOT *neglects* to address in its 18-page Response or the attached Affidavit of Steven Gobelman, however, is that the “surprising” (Response, p. 11) Supplemental Report makes *many* changes to its Base Map and thus Mr. Gobelman’s opinions.

Mr. Gobelman, in fact, made numerous modifications to his Base Map that both he and IDOT failed to identify in the Supplemental Report, and which they continue to ignore. (*See* Motion, p. 10 and “JM Overlap Map”.)<sup>1</sup> This can only be construed as an attempt to circumvent the Hearing Officer’s April 19, 2018 Order to run roughshod over IDOT’s clear discovery

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<sup>1</sup> IDOT’s Response does not dispute or even discuss the JM Overlay Map.

obligations, which required IDOT to disclose *all* of its expert's opinions months ago. The JM Overlay Map, coupled with a visual comparison of the two versions of Mr. Gobelman's Base Map (Initial Report and Supplemental Report, Exhibit 1), reveal at least *ten*, non-disclosed, major differences between the Base Map in the Initial Report and the one in the Supplemental Report: (1) Mr. Gobelman moved the entire northern border of Site 3 (not just the border of Parcel No. 0393) several feet south so that it no longer lines up with Site 6; (2) Mr. Gobelman moved the location of borings B3-26, B3-25, B3-16, B3-15, B3-50 and B3-45 several feet to make them fit with the rest of his opinions; (3) Mr. Gobelman moved the location of the northeast excavation several feet south and shifted it east; (4) Mr. Gobelman altered the northwestern border of Site 3; (5) Mr. Gobelman moved Station 7 along Greenwood west so that it no longer aligns with Parcel No. 0393; (6) Mr. Gobelman added station numbers along Greenwood; (7) Mr. Gobelman moved the *center* line of Greenwood Avenue to the southern edge of Greenwood Avenue; (8) Mr. Gobelman made State Plane Coordinate 2083100 transect the northeast excavation in a different spot; (9) Mr. Gobelman included additional lines on the north side of Site 6 and at the northern border of Site 3 for reasons that are unclear; and (10) Mr. Gobelman used a completely different Google image to prepare the Base Map. (*Id.*; *compare also* Gobelman Exhibit 1 in Initial Report (Motion, Exhibit A) *with* Gobelman Exhibit 1 in Supplemental Report (Motion, Exhibit B).)<sup>2</sup>

IDOT tries to minimize its untimely disclosure of new expert opinions and its violation of the Hearing Officer's discovery orders by essentially arguing that its expert should be given a second bite at the apple to change factual inaccuracies and opinions. IDOT attempts to hide behind the guise of Illinois Supreme Court Rule 213(i). (Response, p. 2.) Rule 213(i), however,

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<sup>2</sup> Thus, Mr. Gobelman's Affidavit swearing that there was only one "significant change" to his report (Response, Ex. A, ¶ 4) is demonstrably false.

does not give IDOT free reign to circumvent previously established discovery deadlines. Allowing IDOT to change its expert's opinions wholesale at this juncture would be a perversion of the discovery process at JM's considerable expense. Mr. Gobelman should not be permitted to engage in the same sort of opinion-shifting that was pervasive throughout the first hearing of this case. (*See* Motion, pp. 6-7 (*citing e.g.*, JM's Brief in Support of Objections, JM's Post-Hearing Brief, and JM's Post-Hearing Brief Reply).)

**2. Sanctions Should Be Imposed To Avoid Further Prejudice To JM.**

IDOT exalts that the Supplemental Report now increases the amount of uncontested damages from \$489,891 to \$600,060—what IDOT says represents “an increase of over 20% additional costs” (Response, p. 6)—and then uses this fact as an excuse to evade compliance with its discovery obligations and Hearing Officer orders. While IDOT calls this “highly pertinent” (Response, p. 2), it is not, particularly where the parties are still *millions* of dollars apart in their opinions on IDOT's cost liability.<sup>3</sup>

Omitted from IDOT's Response is any mention or consideration of the substantial—not “minimal” (*see* IDOT Response, p. 11)—time and expense JM incurred in preparing to depose and in depositing IDOT's expert in the first instance and that Mr. Dorgan (JM's expert) incurred in rebutting what he thought were Mr. Gobelman's opinions.<sup>4</sup> (*See* Motion, p. 13 (“If Mr. Gobelman is allowed to identify these opinions and discuss them at hearing, much of JM's prior work is rendered futile and it will have to begin expert discovery anew.”) (collecting cases).)

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<sup>3</sup> IDOT cites just one case where a supplemental report that lowered liability was found to be prejudicial (Response, p. 11 (*citing Berkheimer v. Hewlett-Packard Co.*, 12-cv-9023, 2016 WL 3030170 (N.D. Ill. May 25, 2016))); this does not mean, however, that an untimely, later report that increases liability is automatically not prejudicial.

<sup>4</sup> If “no effort on Johns Manville's part was required to bring Mr. Gobelman's revised opinions to light” (*see* Response, p. 12), IDOT could have sought to “supplement” Mr. Gobelman's report far sooner. There was no reason to wait until after Mr. Gobelman was deposed and after Mr. Dorgan served his October 25, 2018 rebuttal report (Motion, Exhibit C).

IDOT ignores that JM will be forced to spend more time and money understanding, addressing, and rebutting the Supplemental Report that does not just correct a “mistake,” but instead contains an entirely new set of opinions.

IDOT’s service of the Supplemental Report—after IDOT’s expert was deposed, after JM’s expert prepared a rebuttal report, after expert report deadlines had passed, and on the virtual eve of the close of discovery—is far from “mundane” as IDOT contends. (Response, p. 1.) Rather, as explained below, the Supplemental Report is another example of IDOT’s shifting expert opinions in this case, particularly as it relates to expert disclosures and testimony. (*See* Motion, pp. 6, 15, Exhibits G, H.) Regardless of IDOT’s irrelevant (and repeated) argument that the Supplemental Report finds IDOT responsible for more of JM’s costs than IDOT’s expert initially opined, JM *has been* and *will be* prejudiced if the Supplemental Report is not stricken or excluded from use in this matter and if IDOT is permitted to continually change its expert’s opinions throughout the remainder of this case. IDOT cannot reasonably argue the contrary. (*See* Motion, pp. 12-13.)

**3. Because The Supplemental Report Contains New Opinions, Sanctions Are Warranted.**

IDOT maintains that the Supplemental Report “does not represent any sort of new opinion” or “new reasons for [Mr. Gobelman’s] opinions.” (Response, p. 8.) To the contrary, Mr. Gobelman’s Supplemental Report fundamentally changes Mr. Gobelman’s core opinions. In the Initial Report, Mr. Gobelman opined that the map used by Mr. Dorgan (and, among others, the USEPA and the Board at the first hearing) was wrong. More specifically, Mr. Gobelman opined that “the locations of Sites 3 and 6 were not consistently located on the various figures” [the Atwell Survey, Mr. Dorgan’s Report, the AECOM Final Report] and thus he “had to create a base map (Gobelman Figure 1) locating Sites 3 and 6, as well as the location of the IPCB

referenced soil sampling locations and areas remediated” to correct these errors. (Initial Report, p. 3.) Importantly, he opined that the northern border of Site 3 was along a fence line he could see in a Google Image. (Initial Report, p. 4; Transcript of Gobelman Deposition (“Gobelman Dep.”), excerpts attached hereto as **Exhibit 1**, pp. 12:20-13:5 (testifying that he “used the fence line” to indicate in his figures the “boundary of the northern area of Site 3”).) Mr. Gobelman marked this fence line with little “x”s on his Base Map. Ultimately, he used his Base Map, which is inconsistent with the maps used as evidence in the first hearing as well as the maps blessed by USEPA, to form all of his damages opinions. (Initial Report, pp. 7-17 and all Figures; Gobelman Dep., pp. 61:18-63:16; 64:16-65:14; 66:9-68:19; 71:12-73:4.)

Since the Base Map serves as the foundation for Mr. Gobelman’s opinions on where JM performed work and where key soil borings are located, each small change on the Base Map impacts how Mr. Gobelman defines the “IDOT Areas of Responsibility” and how he calculates the associated damages for which IDOT is liable. (Initial Report, §§ 5.2, 5.3.) Every change in the Base Map alters the *bases/reasoning* for Mr. Gobelman’s damages opinions, a point he admits (but IDOT denies in its Response) when he says in his Supplemental Report that his correction of the location of Parcel No. 0393 forced him to revise all of his figures and his cost allocations. (Supplemental Report, p. 1; *see also* Response, Ex. A, ¶ 5.)

The Supplemental Report is another example of IDOT’s shifting expert opinions in this case.<sup>5</sup> (*See* Motion, pp. 6, 15, Exhibits G, H.)<sup>6</sup> If the Supplemental Report is allowed to be used, Mr. Gobelman’s testimony will necessarily need to diverge from the opinions offered in his

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<sup>5</sup> While IDOT claims that JM “recycles arguments it has previously made in the earlier phases of this case which have, for all intents and purposes, been rejected by the Board” (Response, pp. 1, 4 n.1), the Board never addressed the ever-changing nature of Mr. Gobelman’s opinions and testimony. The Board only declined to find “bad faith in IDOT’s interpretations of its right-of-way interests.” (Interim Opinion, p. 21.)

<sup>6</sup> As such, IDOT’s argument regarding the applicability of cases JM cited (*see* Response, p. 13) is wrong.

Initial Report and during his deposition in September 2018, and from IDOT's contention that only one allegedly clerical change was made. This is a slippery slope and, without sanctions, Mr. Gobelman will likely continue to change his opinions throughout the remainder of the case, placing the Board and JM in the untenable position of having to address conflicting testimony from a single witness on various subjects. This is what happened repeatedly at the last hearing.<sup>7</sup> (*See id.*)

If an expert is allowed to constantly change his opinions because the expert and attorneys on the other side show him that he is wrong (as Mr. Dorgan and JM have been doing with Mr. Gobelman), litigation would never end. The potential for disruption caused by a "supplemental" and untimely expert report, like IDOT's, has been explained as follows:

While [plaintiff] argues that [defendant] is not prejudiced as a result of the untimely expert report and is willing to open discovery to allow [defendant] to re-depose [the expert], that proposal does not cure the problem \*\*\* [T]o rule otherwise would frustrate the purpose of the [] rule, which is the "elimination of unfair surprise to the opposing party and the conservation of resources." \*\*\* Should the Court allow the supplemental expert report, it would be bound to reopen discovery to allow [defendant] time for its own expert to review the new report and formulate new opinions. Additionally, because [the expert] offers new opinions in her supplemental report . . . [defendant] would have a right to take a new deposition of this expert. The new deposition testimony might well lead to [defendant] having to modify its prior report or retain a new expert or experts to counter the opinion testimony being offered in [the expert's] revised report . . . All of this would contribute to delay in the ultimate disposition of this case, would thwart the Court's case management plan, and might even threaten the existing trial date.

*Beller v. U.S.*, 221 F.R.D. 689, 693-95 (D. N.M. 2003) (quoting *Sylla-Sawdon v. Uniroyal Goodrich Tire Co.*, 47 F.3d 277, 284 (8th Cir. 1995)). (*See also* Motion, pp. 12-13.) Indeed, to

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<sup>7</sup> At the first hearing, Mr. Gobelman would offer a new opinion each time JM exposed the flaws of a previous opinion. (*See, e.g.*, Motion, Exhibit H (identifying, among other examples, instance in which Mr. Gobelman changed his testimony and opinions regarding IDOT using excess cut and fill materials containing ACM in embankments after extensive questioning by JM and where Mr. Gobelman ultimately conceded that he offered differing opinions and that excess cut from detour roads could have been used by IDOT in constructing embankments).)



allow Mr. Gobelman to rely on his Supplemental Report, “would create a system where preliminary [expert] reports could be followed by supplementary reports and there would be no finality to expert reports, as each side, in order to buttress its case or position, could ‘supplement’ existing reports and modify opinions previously given.” See *Quapaw Tribe of Okla. v. Blue Tee Corp.*, No. 03-cv-846, 2010 WL 3909204, \*4 (N.D. Okla. Sept. 29, 2010) (quoting *Cook v. Rockwell Int’l Corp.*, 580 F. Supp. 2d 1071, 1169 (D. Colo. 2006)).

Put simply, the Supplemental Report contains new opinions and new bases for opinions that drastically change the disputed issues in what was supposed to be a narrow second phase of this case. (See e.g., Motion, pp. 3, 10-11.) Yet unlike in *Gapinski v. Gujrati* (cited by IDOT, Response, p. 7),<sup>8</sup> where supplemental expert opinions were disclosed based on new information requested by the opposing side (a recut of biopsy tissue), see 2017 IL App (3d) 150502, ¶¶ 9-10, 42, no newly discovered information prompted IDOT’s expert’s changed opinions, a point IDOT does not dispute. JM’s Motion should be granted.

**4. Any Duty To Supplement Does Not Justify Or Excuse The Supplemental Report.**

The duty to supplement an expert report does not “permit an expert to correct mistakes based on information that was available to the expert well in advance of the issuance of his report,” as here. *Sloan Valve Co. v. Zurn Indus., Inc.*, No. 10-cv-204, 2013 WL 3147349, \*4 (N.D. Ill. June 19, 2013) (denying motion for leave to supplement/amend expert report).<sup>9</sup> Nor

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<sup>8</sup> IDOT’s citation to *Schuler v. Mid-Central Cardiology* (Response, p. 8) is also inapposite. There, a court order set an expert disclosure deadline of sixty days before trial. 313 Ill. App. 3d 326, 329 (Ill. App. Ct. 2000). While the expert disclosure at issue was served days earlier, it was not file-stamped until after the sixty-day deadline; this was the timeliness question decided by the court. *Id.* at 330, 333 (“[W]e find that defendants’ disclosure served via facsimile and regular mail 61 days before trial was permissible.”). Here, in contrast, the Hearing Officer’s April 19, 2018 Order required IDOT to disclose its expert report by August 22, 2018 (Motion, Exhibit E), but IDOT did not serve the Supplemental Report until almost four months later.

<sup>9</sup> IDOT contends that *Sloan Valve* is “distinguishable.” (Response, p. 14.) But there is no meaningful difference between that case and this one as it relates to JM’s Motion. In *Sloan Valve*, the expert sought to supplement his report regarding an “inadvertent error in the way [he] reported [the other expert’s figures].” *Id.* Mr. Gobelman is

does a duty to supplement “license parties to freely circumvent deadlines established.” *Bryther v. City of Mobile*, Case No. 04-cv-404, 2005 WL 1588223, \*1 (S.D. Ala. June 17, 2005). But that is precisely what Mr. Gobelman has done. Apparently realizing that Mr. Dorgan’s map was actually not wrong, but rather his Base Map was wrong, Mr. Gobelman made significant changes to his Base Map based upon information that he has known *since the last hearing*. The Supplemental Report is not, in fact, a “supplement” and should be stricken.

While IDOT claims that it acted promptly in serving the new report, IDOT was tellingly silent with the Hearing Officer and JM regarding IDOT’s intentions in doing so. Despite that IDOT’s expert purportedly “realized” that his initial report was wrong (Response, Ex. A, ¶ 3) and revised his report (or at least portions thereof) by October 30, 2018 (*id.*, ¶ 4), IDOT remained mum regarding its preparation of, or intent to serve, the Supplemental Report, representing to the Hearing Officer—that same day—that IDOT was complying with, and on track to meet, all deadlines. (Motion, Exhibit F.) IDOT then de-railed discovery, waiting a full week before serving the Supplemental Report on JM, but not serving any type of Certificate of Service upon the Hearing Officer (as has been the parties’ custom and practice throughout this years-long proceeding). This, once again, violates the Hearing Officer’s discovery orders and abuses the discovery process. *See also, e.g., Quapaw Tribe*, 2010 WL 3909204, at \*5 (holding that there is an “appearance” of bad faith when a party makes untimely expert disclosures “when it knew well in advance that [the experts] would be providing new reports and failed to notify [the other party] or seek leave of court to submit expert reports out of time”).

Though IDOT contends that the “interests of justice require” IDOT be allowed to present the Supplemental Report to “meaningfully defend itself at hearing” (Response, p. 10), IDOT

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similarly (purportedly) seeking to correct an error in how, in his opinion, key features of the Sites should have been plotted in his Initial Report. The court found that the *Sloan Valve* expert had not established good cause to supplement his report and struck it. *Id.* The Board should find the same here.

offers no justification for such an assertion. IDOT and its expert had ample opportunity to review all available materials and information, reach any opinions, and to verify the supposed accuracy of those opinions. Fact discovery was complete as of May 16, 2018, when IDOT took its last fact witness deposition. IDOT's initial expert report was not due or served until *three months* after the close of fact discovery and more than one month after JM's expert, Mr. Douglas Dorgan, served his opening report. That IDOT's expert chose not to ensure his Initial Report was correct does not entitle IDOT to serve a "supplement," let alone without leave. Precluding IDOT from presenting the Supplemental Report is an issue of IDOT's "own making." (Response, p. 14.)

JM's Motion should be granted and the Supplemental Report must be stricken or excluded from being introduced in this matter in any form. *See, e.g., Bray Gillespie IX, LLC v. Harford Fire Ins. Co.*, No. 07-cv-326, 2008 WL 2477619, \*3 (M.D. Fla. June 18, 2008) (striking plaintiff's supplemental expert reports filed after the deadline in the court's case management and scheduling order); *Shalley v. City of Phil.*, No. 94-cv-5883, 1996 WL 210795, \*\*2-3 (E.D. Pa. Apr. 30, 1996) (striking "supplemental" report that was served after expert report deadline on the last day of discovery, which denied defendant opportunity to respond). In the alternative, IDOT and Mr. Gobelman should not be permitted to offer any opinions related to the changes made in the Supplemental Report that were not expressly identified in the Supplemental Report as a change (*i.e.*, any opinions other than the singular change to the location of Parcel No. 0393 and the damages calculations caused by the movement of Parcel No. 0393). Mr. Gobelman and IDOT should also be precluded from offering any new or substantively changed opinions in another report or at hearing in this matter, except to the extent completely new facts become known to the parties.

WHEREFORE, Complainant JOHNS MANVILLE respectfully requests that the Board enter an Order granting its Motion and request for relief as outlined in that Motion.

Dated: December 21, 2018

Respectfully submitted,

BRYAN CAVE LEIGHTON PAISNER LLP

Attorneys for Complainant Johns Manville

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**EXHIBIT 1**

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In The Matter of: )  
 )  
 JOHNS MANVILLE, a Delaware Corporation, )  
 )  
 Complainant, ) PCB No. 14-3  
 ) (Citizen Suit)  
 vs. )  
 )  
 ILLINOIS DEPARTMENT OF TRANSPORTATION, )  
 )  
 Respondent. )

The discovery deposition of **STEVEN L. GOBELMAN**, called by the Complainant for examination, taken pursuant to Notice, the provisions of the Illinois Code of Civil Procedure, and the Rules of the Supreme Court of the State of Illinois, before Mary Ann Casale, a Certified Shorthand Reporter for the State of Illinois, taken at 161 North Clark Street, Suite 4300, Chicago, Illinois, on the 2nd day of October, 2018, at 9:33 a.m.

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I N D E X

|                          |                    |
|--------------------------|--------------------|
| <u>WITNESS</u>           | <u>EXAMINATION</u> |
| STEVEN L. GOBELMAN       |                    |
| Examination By Ms. Brice | 4                  |

E X H I B I T S

|                     |               |
|---------------------|---------------|
| <u>NUMBER</u>       | <u>MARKED</u> |
| GOBELMAN EXHIBITS   |               |
| Exhibit No. 1       | 5             |
| Exhibit No. 2       | 6             |
| Group Exhibit No. 3 | 35            |
| Exhibit No. 4       | 89            |
| Exhibit No. 5       | 99            |
| Exhibit No. 6       | 110           |
| Exhibit No. 7       | 142           |
| Exhibit No. 8       | 143           |
| Exhibit No. 9       | 153           |
| Exhibit No. 10      | 165           |
| Exhibit No. 11      | 165           |
| Exhibit No. 12      | 165           |

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On behalf of the Respondent.

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(Witness sworn.)

STEVEN L. GOBELMAN,  
 called as a witness herein, having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MS. BRICE:

Q. Good morning, Mr. Gobelman

A. Morning.

Q. Could you please state your name for the record.

A. Steven Gobelman.

Q. And your current employer?

A. Andrews Engineering, Inc.

Q. And where is that located?

A. Springfield, Illinois.

Q. You have had your deposition taken before, as we all know, correct?

A. Yes.

Q. So, rules of the road, please just let me finish my question before you answer it. If you don't understand a question, feel free to ask me to restate it, if it's confusing. If you need to take a break, feel free to take a break.

A. Okay.

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1 description of the invoice cost to JM.  
 2 A. Correct. I'm not disputing.  
 3 Q. Okay. How about Exhibit C, which is the  
 4 material from Mr. Peterson concerning the same  
 5 issues of costs?  
 6 (Witness peruses document.)  
 7 THE WITNESS: I'm not disputing those  
 8 costs.  
 9 BY MS. BRICE:  
 10 Q. Okay, great.  
 11 And D, the Manikas invoice table, are  
 12 you disputing this table in any way?  
 13 (Witness peruses document.)  
 14 THE WITNESS: E?  
 15 MR. MCGINLEY: D.  
 16 THE WITNESS: No.  
 17 BY MS. BRICE:  
 18 Q. And I take it the same answer, as you're  
 19 not disputing E which are payment records; is that  
 20 correct?  
 21 A. Correct.  
 22 Q. Okay. Great.  
 23 But what you are disputing is Exhibit F,  
 24 right, the --

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1 BY MS. BRICE:  
 2 Q. You can answer the question.  
 3 A. I know.  
 4 I dispute that -- that there isn't an  
 5 accurate map that show these things. And I don't  
 6 know the basis from which he drew this.  
 7 Q. Okay. Other than that. Is there  
 8 anything that you're disputing about the accuracy  
 9 of this document?  
 10 MR. MCGINLEY: Objection; vague and  
 11 ambiguous.  
 12 (Witness peruses document.)  
 13 MR. MCGINLEY: Susan, just so we're  
 14 clear, you're asking about the accuracy of  
 15 "this document" being Figure 3, Figure 4  
 16 or --  
 17 MS. BRICE: I said Figure 3 in the  
 18 question, yeah.  
 19 THE WITNESS: Oh, Figure 3 in question  
 20 only?  
 21 BY MS. BRICE:  
 22 Q. Well, it's going to -- I'm going to have  
 23 to ask the same question --  
 24 A. I thought you said 3 and 4. That's why

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1 A. Yes.  
 2 Q. -- the cost allocation attribution  
 3 tables? Okay.  
 4 A. Correct.  
 5 Q. Perfect. I'm glad we got that all  
 6 sorted out.  
 7 A. We're done.  
 8 Q. Almost.  
 9 Other than what's expressly stated in  
 10 your report, are there any other aspects of  
 11 Mr. Dorgan's report that you are disputing?  
 12 A. Only as it relates to the -- how the  
 13 costs were allocated.  
 14 Q. Okay. If you can turn to Figures 3  
 15 and 4 of Mr. Dorgan's report.  
 16 (Witness peruses document.)  
 17 BY MS. BRICE:  
 18 Q. Are you there?  
 19 A. Yeah.  
 20 Q. Are you disputing anything concerning  
 21 the accuracy concerning Figure 3 in Mr. Dorgan's  
 22 report?  
 23 MR. MCGINLEY: Objection; vague and  
 24 ambiguous.

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1 I was --  
 2 Q. Oh, I'm sorry.  
 3 So if you're answering as to both  
 4 Figure 3 and 4, that's fine -- I mean, let me try  
 5 and short-circuit this.  
 6 I think my understanding is you believe  
 7 that the location of the northern boundary of  
 8 Site 3 is further north, is that correct, than it  
 9 is on Mr. Dorgan's, at least Figure 1; is that  
 10 right?  
 11 MR. MCGINLEY: I'm sorry.  
 12 Figure 1 now?  
 13 MS. BRICE: Well, that's the one that  
 14 he talks about all the time in his report.  
 15 He doesn't talk about Figure 2 or 3 in his  
 16 report.  
 17 THE WITNESS: So you want me to look at  
 18 1? I'm confused.  
 19 BY MS. BRICE:  
 20 Q. Okay. In Figure 1, in Dorgan Figure 1,  
 21 my understanding is -- and we'll get into detail on  
 22 this -- is that your predominant problem with  
 23 Figure 1 is that you believe the northern boundary  
 24 of Site 3 is actually located further to the north;

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1 is that correct?

2 A. Well, my representation of my figures

3 hadn't -- the boundary of the northern area of

4 Site 3 is -- I used the fence line that's

5 associated with it.

6 Q. Sure.

7 A. I didn't represent whether it was

8 northern -- I didn't compare to determine whether

9 or not that line was north of that. To me it was a

10 meaningless -- it's meaningless to the process of

11 where the line is or isn't as far as whether it's

12 north of there or not.

13 Q. It's meaningless in the --

14 A. I don't think it -- I don't think it

15 gives -- it doesn't have any function.

16 Q. Okay.

17 A. I never looked at and compared whether

18 or not his line is accurate or not. I didn't

19 compare that process.

20 Q. Okay. So what are you disputing about

21 Figure 1?

22 A. The main dispute that I have with

23 Figure 1 and any of the figures that I don't have

24 there is no information that shows where -- how

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1 said?

2 A. And the source material, how did they

3 come up with it --

4 Q. Okay.

5 A. -- just because it's in their system...

6 Q. Okay. Would that be the same issue with

7 respect to Figure 3 and Figure 4?

8 A. Yes.

9 Q. And no other specific problems with

10 respect to Figure 3 or Figure 4?

11 (Witness peruses document.)

12 THE WITNESS: No. I don't notice

13 anything.

14 BY MS. BRICE:

15 Q. Okay. Great. Thank you. And we'll get

16 back to all of that.

17 All right. So I want to switch topics.

18 What expertise are you relying on in

19 offering these opinions?

20 A. Well, my experience in dealing with

21 evaluating costs on highway authority agreements

22 that I have done dealing with my work with EPA.

23 Q. Have you ever done a CERCLA cost

24 evaluation -- pardon me. Let me rephrase that.

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1 those lines were drawn and how it's tied to

2 anything.

3 Q. Okay. Let's -- I can represent that

4 this came from AECOM's materials in its original

5 CAD drawings off of everything.

6 So if I tell you that, does that resolve

7 your problem with Figure 1?

8 A. No.

9 Q. No.

10 Why?

11 A. Because it doesn't represent what was --

12 in overlying this with the surveys with other

13 things in the final report that shows what the GPS

14 coordinates are. So the corners, they don't

15 represent -- they don't all match up, so they

16 should all match up if they're all accurate --

17 Q. Okay.

18 A. -- if it's the same -- so -- because

19 it's the same numbers. So when they don't match

20 up, then something's not tied together.

21 Q. Okay. We'll get to that later.

22 But your problem with Figure 1 is he

23 doesn't identify the source material within which

24 he used to create the figure? Is that what you

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1 Do you have any experience doing cost

2 allocations under CERCLA or State law?

3 A. Not specifically regarding State

4 allocation, right. I'd say no.

5 Q. Do you have any experience in allocating

6 costs as between two particular parties?

7 A. Yes.

8 Q. In the context of a legal dispute?

9 A. In the context of legal documents.

10 Q. Okay. I understand that because,

11 obviously, when you're doing highway authority

12 agreements you're giving people costs. I'm talking

13 about the in the context of a legal dispute.

14 Do you have any experience in allocating

15 costs to one party with respect to liability is

16 allocated this much liability versus another party

17 is allocated this much liability?

18 A. Not in a court setting.

19 Q. In any other setting?

20 MR. MCGINLEY: Objection; asked and

21 answered.

22 THE WITNESS: In context with dealing

23 with other legal documents --

24

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1 A. No.

2 Q. What's the proper methodology for  
3 creating a base map?

4 A. To accurately depict what's on the site  
5 or accurately depict what's there.

6 Q. I know.  
7 But how do you do it, like physically?  
8 What are the steps that you do to create a base  
9 map?

10 A. Well, depending on the process of what  
11 you're looking at, it could be looking at property  
12 boundaries, legal descriptions, if it's a full  
13 property. If it's not a full property, and it's  
14 just a portion of a site, then it would have to be  
15 with going out there and surveying or using some  
16 GPS to mark boundaries or mark a line or something  
17 like that, layout.

18 Q. Are you saying that the board's interim  
19 order was wrong because it relied upon maps that  
20 had an incorrect Site 3 boundary?

21 MR. MCGINLEY: Objection; misstates the  
22 witness's testimony.

23 MS. BRICE: It's a question.

24 THE WITNESS: No.

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1 not a boring is 5 feet off or 10 feet off, it  
2 doesn't necessarily change -- would have changed  
3 the board's ruling.

4 Q. Okay. But you're saying the evidence  
5 that they were relying on was not correct, is that  
6 right, the maps?

7 MR. MCGINLEY: Objection;  
8 mischaracterizes the witness's testimony.  
9 BY MS. BRICE:

10 Q. Based upon your opinion in this report,  
11 your current report, you're saying that the maps  
12 the board was using to render its opinion were not  
13 accurate?

14 A. If you're utilizing my base map, then  
15 yes, those maps would -- I would have deemed them  
16 as being inaccurate.

17 Q. Okay. How did you create this base map,  
18 and step by step? I'd really like to know, like,  
19 how did you create it?

20 A. Provided in the report, Appendix D --

21 Q. D?

22 A. D as in dog.  
23 So as we had discussed, coming up,  
24 looking at everybody else's lines that didn't

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1 BY MS. BRICE:

2 Q. No. You're not saying that it's wrong.  
3 So the maps that the board used to  
4 render its decision were correct?

5 A. I'm not saying that either.

6 Q. Okay. So what are you saying?

7 A. What are you asking?

8 Q. You know, you're saying that the maps  
9 that the board used to render its opinion, you  
10 disagree with those maps, right?

11 A. At this time I disagree that the maps  
12 may not be truly representative of the actual...

13 Q. So then do you disagree with the board's  
14 opinion that was based, in part, on those maps?

15 A. No.

16 Q. No.  
17 How can you reconcile that?

18 A. Because the board's ruling is based upon  
19 the maps as they apply. It's relative but it -- to  
20 what was provided to them, so --

21 Q. Right. But now you're saying those maps  
22 are wrong.

23 A. I'm saying that those maps necessarily  
24 didn't represent the actual location, so whether or

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1 match, I decided to look at -- well, then can I  
2 create something that I would at least be  
3 comfortable with in allocating costs to.

4 So the first step is that I decided that  
5 we would use the Google image that showed the final  
6 layout of the site, in that it depicted the fence  
7 line, and looking at that fence line as the area  
8 depicted in -- for Site 3, with some modifications  
9 that had to be done to it.

10 Q. Okay.

11 A. And then looking then back into the old  
12 reports on how Site 3 was laid out in the  
13 original -- in some of the original investigations  
14 and seeing -- utilizing that base map line, how  
15 it -- how does it work with the other, older stuff.

16 Q. Okay. So with the Google image itself,  
17 you just went on to Google and pulled off the  
18 anymore?

19 A. Yeah. We found that Google had updated  
20 their system to get a more recent map than what we  
21 were using prior in the original hearings' maps.

22 Q. And then what did you do? Did you give  
23 that to your CAD guy? I'm just trying to  
24 understand like procedurally how this is created?

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1 A. Well, my CAD person found when he was --  
2 when we were putting this together, he was pulling  
3 up the new image -- he pulled up a new image when  
4 he was trying to create this map because that's  
5 what we normally do on all our maps. We have a  
6 Google image behind it as the base to show what the  
7 land surface looked like.

8 So he came to me and said, Hey, did you  
9 know there was a new image which is different from  
10 the ones we were using before.

11 And he showed it to me, what that image  
12 looked like. And I said, Well, then let's just go  
13 with -- let's see if we lay out the fence line, how  
14 that lays into everybody else's lines.

15 Q. Where are the Google images that you  
16 were using before?

17 A. The CAD system has access to the Google  
18 imaging, so they can -- when he does these maps he  
19 pulls up the Google images, Google Earth or  
20 whatever you want to, you know --

21 Q. Okay. But at one point he was using  
22 different images?

23 A. He was using an older -- what at that  
24 time was an older image because it wasn't -- I

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1 the Atwell report versus the AECOM final report,  
2 versus your site boundary based upon the fence  
3 line, correct?

4 A. Yes.

5 Q. You're saying these don't line up?

6 A. Yeah. None of them -- yeah, they --

7 Q. So you're saying they're inconsistent?

8 A. Correct.

9 Q. So how can you reconcile creating a base  
10 map using all of these documents that have inherent  
11 inconsistencies based upon your opinion with  
12 respect to their borders?

13 A. That's what lead me to create my own  
14 base map.

15 Q. I know.

16 But how can you reconcile that?

17 A. Well, I reconciled it with looking at  
18 whether or not when I started looking at the older  
19 information was it somewhat consistent with the  
20 information of the older field work that was done.

21 Q. But how do you justify using conflicting  
22 documents to build one map?

23 A. Well, I'm not utilizing their depiction  
24 of Site 3 and building my Site 3.

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1 don't know if it was a 16 or a 17 image that was in  
2 the system. That was the most recent.

3 Q. Did you produce that image?

4 A. No, I think they were produced -- I  
5 can't remember if it was produced on the older -- I  
6 don't know if -- yeah, the maps we used weren't  
7 using a Google image behind them, so -- but it was  
8 in the original map as its base in the CAD system.

9 Q. You say on the map here that you used a  
10 Google image, an IDOT ^ right of way legal  
11 description, a Site 3 location derived from the  
12 AECOM removal action work plan, Revision 2, and  
13 grid and water line locations derived from the  
14 AECOM final report, Figure 2.

15 Do you see that?

16 A. Yes.

17 Q. Now, let's go back to Exhibit -- the one  
18 where you're comparing the blue and the green and  
19 the red. I think it's Figure -- it's in the  
20 appendix. You're right. It's Exhibit 2.

21 Do you see that?

22 A. Yes.

23 Q. So on this document you're saying that  
24 the Site 3 boundaries are different, if you look at

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1 Q. Well, you are. You say that you were  
2 using the AECOM document, and you're using the  
3 final work plan to build your Site 3. You say it  
4 right there in your notes.

5 A. On Figure 1?

6 Q. Yes.

7 A. Yes.

8 Q. Right.

9 So how do you justify using conflicting  
10 documents to create the same map?

11 MR. MCGINLEY: Objection. I think that  
12 misstates his testimony.

13 THE WITNESS: It doesn't -- I'm not  
14 utilizing in my Figure 1 what they depicted  
15 in my Exhibit 2 as being how they were  
16 representing. I wasn't utilizing them.

17 BY MS. BRICE:

18 Q. But you say on Figure 1 you are  
19 utilizing them, so we'll just leave it at that.

20 Okay. Let's go to the -- I want to  
21 go -- Actually, for one second, let's go to the  
22 Atwell survey, which is on Dorgan Exhibit 2. I  
23 think it's on F. It's at the very end, perhaps the  
24 very last document, G. It is G?

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1 Okay. How did you use the -- Well,  
 2 first of all, let me go back.  
 3 You say in your report that you assume  
 4 that the Atwell survey is correct, right?  
 5 A. In my original thought process, yes, I  
 6 would assume that the survey would have been  
 7 accurate.  
 8 Q. Well, you say that in your report  
 9 actually.  
 10 A. Yeah.  
 11 Q. You say that you assume that the Atwell  
 12 survey is correct as to the location of Site 3; is  
 13 that right?  
 14 A. Yes.  
 15 Q. And did you talk to anyone at Atwell to  
 16 understand their sources for the information  
 17 plotted on the survey?  
 18 A. No.  
 19 Q. Okay. And how did you use the Atwell  
 20 survey in Gobelman 1?  
 21 A. Well, it was utilized as -- in lining up  
 22 all the other -- with other things, corroborate  
 23 those locations. It gave me easterns and  
 24 northern. And then in determining what the actual

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1 Q. So you're disputing the accuracy of the  
 2 Atwell survey that you say in your report you  
 3 assume is correct?  
 4 A. I assumed going into it that it was  
 5 correct.  
 6 Q. But you say it in your report --  
 7 A. That --  
 8 Q. -- that you assumed it was correct.  
 9 A. -- I assumed it was correct --  
 10 Q. So with --  
 11 A. -- until we evaluated it.  
 12 Q. But it can't be both ways. You say in  
 13 the report you assumed it was correct and now  
 14 you're saying it's not correct but you didn't say  
 15 that in your report.  
 16 So is it accurate or not accurate, the  
 17 Atwell survey?  
 18 A. I'm saying that I assumed it in my first  
 19 process in dealing with the report -- in coming up  
 20 with my base map I was giving you my process. I  
 21 assumed it was accurate. But I believe it doesn't  
 22 appear accurate in some areas. At least it doesn't  
 23 line up with the other information.  
 24 Q. It doesn't line up with your fence line?

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1 points were at the corners of Site 3, I was  
 2 utilizing the other figure that was in the final  
 3 report that gave the corners northern and easterns.  
 4 And that's what caused the confusion of -- that  
 5 they don't line up.  
 6 Q. But when you go to your exhibit isn't it  
 7 true that the Atwell survey does not line up with  
 8 your fence line? It's actually south of your fence  
 9 line?  
 10 A. I agree.  
 11 Q. So which one is right? Is the Atwell  
 12 survey right or is your fence line right?  
 13 A. I have no opinion on which one I  
 14 think -- there was an error in this survey that we  
 15 couldn't figure out whether it was skewed or  
 16 missing that it didn't have the right spacing that  
 17 was defined by in the final report that the corners  
 18 were -- looked like they were GPS'd in. These are  
 19 the corners of Site 3 with these northering and  
 20 these easterns. And they do not match up on the  
 21 eastern side of this boundary for those corners.  
 22 There is a skewed system. And because of that I  
 23 created the survey -- I didn't create -- I created  
 24 my ^ base map using the ^ fence line as the site.

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1 A. It doesn't line up with the final report  
 2 figure.  
 3 Q. Okay. But it also doesn't line up with  
 4 your fence line; does --  
 5 A. It never -- It was never meant to -- my  
 6 fence line figure was never meant to match up  
 7 perfectly with the Atwell survey.  
 8 Q. Well, of course not, but you were trying  
 9 to depict -- your fence line is trying to depict  
 10 Site 3 boundaries, correct?  
 11 A. My base line was to create a figure that  
 12 I could be comfortable with laying out the rest of  
 13 the site in, and the best representation that we  
 14 have is the physical visual of the fence line.  
 15 Q. Okay. So since the Atwell survey is now  
 16 incorrect -- I'm -- How did you use the Atwell  
 17 survey at all, or do you not use the Atwell survey  
 18 in your report in coming up with Gobelman 1?  
 19 A. I utilized it only in putting together  
 20 how things looked compared to other figures that  
 21 were created to try to get them to line up.  
 22 Q. But look at Gobelman 1. I think you say  
 23 you used the Atwell survey to put in 0393?  
 24 A. I believe it's probably a note that just

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1 went along with all the figures.  
 2 Q. Yeah, but that note is in there on your  
 3 report?  
 4 A. Yes.  
 5 Q. Did you use the Atwell survey to plot  
 6 0393?  
 7 A. To plot 0393?  
 8 Q. Correct?  
 9 A. No.  
 10 Q. No.  
 11 Then why do you say that in here?  
 12 A. I think it lined up with the Atwell but  
 13 I originally had done it through the grant of  
 14 public highways.  
 15 MR. MCGINLEY: Susan, we have been  
 16 going an hour and a half.  
 17 Do you think we can take a  
 18 few-minute break?  
 19 MS. BRICE: Sure.  
 20 (Brief recess.)  
 21 BY MS. BRICE:  
 22 Q. Okay. So, as I understand it, we were  
 23 just talking about the different boundaries of  
 24 Site 3, and you said you tried to confirm your

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1 Q. So it's your understanding that that in  
 2 and of itself is a State plane coordinate?  
 3 A. It's a coordinate of where that point  
 4 is.  
 5 Q. Did it come from the State or did it  
 6 come from GPS?  
 7 A. I assume it was GPS'd in.  
 8 Q. And who would have done that?  
 9 A. I would assume whoever put the map  
 10 together; I mean, whether it was, you know, AECOM  
 11 or Peterson or whoever the at the time.  
 12 Q. And so there's -- in all four corners,  
 13 we see those coordinates, correct?  
 14 A. Correct.  
 15 Q. And below it on the northeast there's  
 16 this in 2083 -- it's either a comma or a .100.  
 17 Do you see that?  
 18 A. Yes.  
 19 Q. And what is that?  
 20 A. That is the coordinate line for -- that  
 21 northern-ing line for that grid.  
 22 Q. And where did that come from? Is that  
 23 the State plane coordinates?  
 24 A. Yeah. It's representing that place,

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1 assumption by looking at Figure 2 of the final  
 2 report, which is I believe in Exhibit D of your  
 3 report. And it's JM0040322.  
 4 Do you have that there?  
 5 A. Yes.  
 6 Q. Okay. So I have a couple questions  
 7 about this.  
 8 You said -- You have been talking about  
 9 the grid coordinates for the four corners.  
 10 Where are the grid coordinates for the  
 11 four corners on this document?  
 12 A. The northern and easterns are arrowed in  
 13 on each corner.  
 14 Q. Okay. So that's the 2083127.1 north and  
 15 122 -- sorry, 1122790.3E, east; is that correct?  
 16 A. That is the coordinate for the  
 17 northeast --  
 18 Q. Okay. So these are GPS coordinates?  
 19 A. -- corner.  
 20 They're State plane coordinates, I  
 21 believe --  
 22 Q. You think that --  
 23 A. The northern and the easterns, as far  
 24 as --

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1 that area in the State plane survey -- not a survey  
 2 but...  
 3 Q. Okay. And you say that you compared the  
 4 Atwell survey to this survey; is that correct?  
 5 A. Yes.  
 6 Q. And how did you do that?  
 7 A. We overlaid one on top of the other.  
 8 Q. Manually?  
 9 A. I believe we took the Atwell survey and  
 10 laid in where Site 3 was and then he just entered  
 11 the coordinates for the corners and then -- and  
 12 looked to see how they lined up to the Atwell.  
 13 Q. Okay. So -- But this isn't a manual  
 14 over- -- I'm not fully understanding.  
 15 Someone is doing this on CAD?  
 16 A. CAD, yes.  
 17 Q. Okay. So take me through the steps of  
 18 what he did exactly.  
 19 (Witness peruses document.)  
 20 THE WITNESS: Well, I'm not sure which  
 21 way it went. I know we had the figure of --  
 22 that final report figure that had the  
 23 corners.  
 24

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1 A. Johns Manville.  
 2 Q. And do you have any other Johns  
 3 Manville-related emails in any other folders?  
 4 A. No.  
 5 Q. Where do you keep all of the hard copy  
 6 documents for Johns Manville?  
 7 A. They're on an external hard drive.  
 8 Q. Did you ever print them all out?  
 9 A. Not print them all out. I printed some  
 10 of the photographs off.  
 11 MS. BRICE: Okay. I think we're done.  
 12 MR. MCGINLEY: No questions.  
 13 Signature reserved.  
 14 FURTHER DEPONENT SAITH NAUGHT.  
 15  
 16  
 17  
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 21  
 22  
 23  
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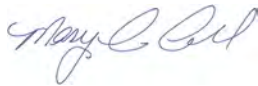
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1 STATE OF ILLINOIS )  
 ) SS:  
 2 COUNTY OF C O O K )  
 3 I, MARY ANN CASALE, a Notary Public  
 4 within and for the County of Cook and State of  
 5 Illinois and a Certified Shorthand Reporter of said  
 6 State, do hereby certify that heretofore, to-wit:  
 7 On October 2, 2018, personally appeared  
 8 before me **STEVEN L. GOBELMAN**, a witness in a case  
 9 now pending and undetermined in the Before the  
 10 Illinois Pollution Control Board wherein Johns  
 11 Manville is the Complainant and the Illinois  
 12 Department of Transportation is the Respondent.  
 13 I further certify that the witness was  
 14 first duly sworn to testify to the truth, the whole  
 15 truth, and nothing but the truth in the cause  
 16 aforesaid; that the testimony then given by the  
 17 said witness was reported stenographically by me in  
 18 the presence of said witness, was thereafter  
 19 converted to the written English word via  
 20 computer-aided transcription, and the foregoing is  
 21 a true and complete transcript of the testimony so  
 22 given by said witness as aforesaid; that the  
 23 signature of the witness to the foregoing  
 24 deposition was not waived.

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1 BEFORE THE ILLINOIS POLLUTION CONTROL BOARD  
 2 In The Matter of: )  
 )  
 3 JOHNS MANVILLE, a Delaware )  
 Corporation, )  
 4 Complainant, ) PCB No. 14-3  
 ) (Citizen Suit)  
 5 vs. )  
 )  
 6 ILLINOIS DEPARTMENT OF )  
 7 TRANSPORTATION, )  
 )  
 8 Respondent. )  
 9 I, STEVEN L. GOBELMAN, state that I have  
 10 read the foregoing transcript of the testimony  
 11 given by me at my deposition on the 2nd day of  
 12 October, 2018, and that said transcript constitutes  
 13 a true and correct record of the testimony given by  
 14 me at said deposition except as I have so indicated  
 15 on the errata sheets provided herein.  
 16  
 17 \_\_\_\_\_  
 18 STEVEN L. GOBELMAN  
 19 No corrections (Please initial) \_\_\_\_\_  
 20 Number of errata sheets submitted \_\_\_\_\_ (pgs.)  
 21 SUBSCRIBED AND SWORN to  
 22 before me this \_\_\_\_\_ day  
 23 of \_\_\_\_\_, 20\_\_\_\_.  
 24 \_\_\_\_\_  
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1 I further certify that the taking of  
 2 this deposition was pursuant to Notice and that  
 3 there were present at the taking of said deposition  
 4 the appearances as hereinbefore noted. I further  
 5 certify that I am not a relative or employee or  
 6 attorney or counsel, nor a relative or employee of  
 7 such attorney or counsel for any of the parties  
 8 hereto, nor interested directly or indirectly in  
 9 the outcome of this action.  
 10 IN TESTIMONY WHEREOF, I have hereunto  
 11 set my hand and affixed my notarial seal this 12th  
 12 day of October, 2018.  
 13  
 14   
 15  
 16  
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