

**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, December 10, 2019, I have filed with the Clerk of the Pollution Control Board IDOT's response to Johns Manville's "Motion for Interlocutory Appeal and Interlocutory Appeal of Hearing Officer's Order Denying Complainant's Motion to Exclude Base Maps and Related Figures and Testimony at Hearing" and have served each person listed on the attached service list with a copy of the same.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

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

I, EVAN J. MCGINLEY, do hereby certify that, today, December 10, 2019, I caused to be served on the individuals listed below, by electronic mail, a true and correct copy of IDOT's response to Johns Manville's "Motion for Interlocutory Appeal and Interlocutory Appeal of Hearing Officer's Order Denying Complainant's Motion to Exclude Base Maps and Related Figures and Testimony at Hearing" on each of the parties listed below:

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	)	
Respondent.	)	

**IDOT'S RESPONSE TO JOHNS MANVILLE'S MOTION FOR INTERLOCUTORY APPEAL OF HEARING OFFICER'S ORDER DENYING COMPLAINANT'S MOTION TO EXCLUDE BASE MAPS AND RELATED FIGURES AND TESTIMONY AT HEARING.**

NOW COMES RESPONDENT, the Illinois Department of Transportation ("IDOT"), through its attorney KWAME RAOUL, Attorney General of the State of Illinois, which herewith responds to Johns Manville's "Motion for Interlocutory Appeal and Interlocutory Appeal of Hearing Officer's Order Denying Complainant's Motion to Exclude Base Maps and Related Figures and Testimony at Hearing ("Interlocutory Appeal"), and states as follows:

**I. INTRODUCTION**

The Board should deny Johns Manville's Motion for Interlocutory Appeal and affirm the Hearing Officer's October 31, 2019 order denying Johns Manville's "Motion to Exclude Base Maps and Related Figures and Testimony at Hearing" ("Motion to Exclude"). There are several reasons why the Board should take these actions. First, Johns Manville's Motion is the latest in a long line of attempts which it has made over the past several years, in an effort to discredit IDOT's expert, Steven Gobelman. Johns Manville's Motion essentially recycles arguments it has previously made about whether Mr. Gobelman has the necessary credentials to testify as an expert witness in this matter. Each time Johns Manville has made these arguments to the Hearing Officer

through motions *in limine* and objections and briefs during the first hearing, the Hearing Officer has categorically rejected Johns Manville's arguments and found Mr. Gobelman to be qualified to testify as an expert witness in this matter. In his October 31<sup>st</sup> Order, the Hearing Officer once again found that Mr. Gobelman was qualified to render opinions about the allocation of Johns Manville's cost with IDOT based on: 1) his prior ruling that Mr. Gobelman possessed the requisite experience to render such opinions; and 2) the Hearing Officer's observations of Mr. Gobelman during his prior testimony in this matter, which took part over four of the five days of hearing before the Board back in May and June 2016. Moreover, the Board relied on Gobelman's expertise and opinions in its Interim Opinion.

Johns Manville's arguments in support of its Motion for Interlocutory Appeal run afoul of two highly relevant points. First, as is clear from the precedent of the Board's cases on motions for interlocutory appeal of Hearing Officer evidentiary rulings, the Board routinely upholds such rulings. Johns Manville's Interlocutory Appeal does not warrant a different result. Second, when analogous issues are presented to this State's appellate courts, appellate courts have held that as a matter of law, a trial court's rulings on the qualifications of an expert witness should not be overturned, absent an abuse of discretion by the trial court. This State's appellate courts have also found that this same principle applies to similar evidentiary questions raised in proceedings before administrative agencies.

Notably, Johns Manville does not argue that the Hearing Officer abused his discretion in ruling on their Motion to Exclude. Rather, it argues only that the Hearing Officer made the wrong ruling on their motion. Ultimately, Johns Manville will not be prejudiced by allowing Mr. Gobelman to testify about his Base Maps. As the Hearing Officer's October 31<sup>st</sup> ruling makes clear, Johns Manville is still free to present objections to Mr. Gobelman's testimony at hearing.

Additionally, even if IDOT is allowed to present Mr. Gobelman's testimony about his Base Maps, the Board, as the trier of fact is free to give as much (or as little) weight and credence to Mr. Gobelman's testimony as it so chooses.

## **II. STATEMENT OF FACTS**

On December 10, 1999, in response to direction from the United States Environmental Protection Agency ("USEPA"), Johns Manville's environmental consultant, ELM Consulting, LLC, issued its "Surface and Subsurface Characterization Site 2 and Site 3, Former Johns Manville Manufacturing Facility, Waukegan, Illinois" ("ELM Report"). The entire text and all figures created for the ELM Report, including maps of Site 3 soil borings, were marked as "DRAFT." (See, generally, Exhibit ("Exh.") 57, ELM Report.)

In 2007, Johns Manville, along with Commonwealth Edison, entered into an Administrative Order on Consent ("AOC") with the United States Environmental Protection Agency, pursuant to which, Johns Manville and Commonwealth Edison were obligated to conduct a removal action for the Southwestern Sites Area of the Johns Manville National Priorities List Site, in Waukegan, IL.

On July 9, 2013, Johns Manville imitated this action with the filing of their "Complaint for Order Compelling Equitable Relief," which specifically sought to obtain an order from the Board which would order IDOT to participate in the USEPA-mandated remediation of Site 3 (which is part of the Southwestern Site Area).

On March 12, 2014, Johns Manville filed a motion seeking leave to file its First Amended Complaint ("FAC"). The complaint was amended primarily to add allegations related to IDOT's then alleged violations of the Environmental Protection Act relative to Site 6 of the Southwestern Site Area. Johns Manville's FAC sought the same relief as had been sought through its initial

complaint, i.e., an order issued by the Board directing IDOT to participate in the USEPA-ordered removal action at Sites 3 and 6.

On February 8, 2016, the parties filed motions *in limine*, pursuant to prior order of the Hearing Officer. Johns Manville's motion *in limine* sought to bar IDOT from presenting any opinion testimony from Steven Gobelman at hearing. Briefly summarized, Johns Manville asserted that "Mr. Gobelman has no expertise on the topics upon which he has been asked to opine[.]" (Exhibit A, Motion *in Limine*, Feb. 08, 2016, ("February 8<sup>th</sup> Motion") at 2.) Further, Johns Manville argued that Mr. Gobelman's opinions failed to satisfy the standards for expert opinions set forth under Illinois Rule of Evidence 702. (February 8<sup>th</sup> Motion at 9-11.)

On February 16, 2016, Johns Manville filed a motion seeking leave to file its Second Amended Complaint ("SAC"). Johns Manville's SAC sought to correct certain allegations in its prior complaint and to add new allegations relating to IDOT's holding of a right of way over portions of Site 3. Johns Manville's SAC sought the same relief as it had originally sought in its initial complaint (i.e., an order compelling IDOT to participate in the removal action called for under the AOC). The SAC was the operational complaint in effect at the time that the Board conducted its first round of hearings in this case in May and June 2016. (A copy of the SAC is attached hereto as Exhibit B.)

On April 26, 2016, the Hearing Officer issued his ruling on both parties' respective motions *in limine*. (Exhibit C, Hearing Officer Order, April 26, 2016 ("April 26<sup>th</sup> Order").) The Hearing Officer denied Johns Manville's motion *in limine* to bar IDOT from presenting opinion testimony from Mr. Gobelman at hearing, finding that he was qualified to testify as an expert on a variety of subjects, owing to, among other things, his vast years of highly relevant experience, and thereby rejected Johns Manville's argument that Mr. Gobelman's opinions failed to satisfy the standard

set forth in Illinois Rule of Evidence 702. (*See*, April 26<sup>th</sup> Order at 5.) Additionally, the Hearing Officer rejected Johns Manville's assertion that Mr. Gobelman's opinions were in any way "speculative." (April 26<sup>th</sup> Order at 5.)

The Board held five days of hearings during May and June 2016. During these hearings, the parties presented evidence relative to the issues framed by Johns Manville's SAC, in particular, whether IDOT was liable for having engaged in open dumping of waste or having deposited, treated, stored, or abandoned waste at Sites 3 and 6. (SAC, ¶¶ 56, 67.) Consistent with the scope of allegations set forth in its Second Amended Complaint, Johns Manville presented evidence and testimony at hearing that IDOT had been responsible for placement of the asbestos-containing materials ("ACM"), which were found within the fill found along the route of detour road which IDOT constructed across the former Johns Manville parking lot on Site 3. (Exhibit D, December 15, 2016 Interim Opinion and Order of the Board ("Interim Opinion") at 1.) Johns Manville further presented evidence that IDOT "place[d] asbestos waste in fill material when reconstructing Greenwood Avenue." (*Id.*) The evidence introduced at hearing and the testimony elicited by Johns Manville's counsel was presented with the goal of bolstering Johns Manville's case for having the Board order IDOT to participate in the USEPA-ordered removal action of Sites 3 and 6. (*Id.* at 2.)

Amongst the exhibits received into evidence at hearing was Exhibit 57, the December 1999 ELM Subsurface Characterization Report. Although marked "DRAFT," Johns Manville made use of the ELM Report at hearing. In one instance Johns Manville's counsel elicited testimony from Johns Manville's expert witness, Douglas Dorgan, regarding Figure 14 in the ELM Report (also marked "DRAFT"), during her direct examination of him. (Exhibit E, Transcript from May 23, 2016 Hearing, pp.223:5-15). During his direct examination, Mr. Dorgan was asked the following questions and gave the following answers:

5 And did you have an occasion to  
6 try and compare this (i.e., Figure 14, p. 57-535) to your figures that you  
7 had put together to see how this matched up  
8 with the location of the roadway and the site?

9 A. We did.

10 Q. What did you discover?

11 A. We found that again similar to the  
12 results of the subsequent investigations that were  
13 presented that there was a strong correlation  
14 of Transite pipe located aligned with Greenwood  
15 Avenue and the Detour Road A.  
(Id.)

Notably, Johns Manville did not present any evidence nor elicit any testimony at these hearing on any map which had been somehow “adopted” by USEPA. Certainly, had Johns Manville done so during these initial hearings, Johns Manville would have cited to this as evidence or testimony in its Motion to Exclude, or its Interlocutory Appeal.

IDOT’s expert witness, Steven Gobelman, testified at length regarding his expert credentials and opinions over all or part of four days of hearing, including the majority of the third day of hearing and all of the fourth day of hearing.<sup>1</sup> During the initial round of hearings in this matter in May and June 2016, Johns Manville continued its attacks on Mr. Gobelman’s expertise and ability to provide opinion testimony, making numerous objections regarding his testimony during the second and third days of hearing.<sup>2</sup>

Following the first three days of hearings in May 2016 the Hearing Officer directed the parties to brief the issue of whether Mr. Gobelman had testified beyond the bounds of his

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<sup>1</sup> See, May 24, 2016 Transcript, pages 236-303, May 25, 2016 Transcript, pages 79-272, June 24, 2016 Transcript (pages 6-309, and June 24 2016 Transcript, pages 6-33. In total, Mr. Gobelman’s testimony covers almost 700 pages of the almost 1,500 transcripts for these hearings. By comparison, the testimony of Johns Manville’s expert witness, Douglas Dorgan, covers just less than 220 pages. By any measure used, Mr. Gobelman testified more extensively than any other witness at hearing.

<sup>2</sup> See, e.g., Exhibit H, May 24, 2016 Transcript, at pp. 281:16-283:17, See also, Exhibit I, May 25, 2016 Transcript, at pp. 84:18 to 86:9, 102:23, 107:7-14 and 142:18 to 143:1.

previously disclosed written opinions. The parties briefed this issue before the resumption of hearings on June 24, 2016 and, on June 21<sup>st</sup>, the Hearing Officer issued a ruling finding that

Mr. Gobelman's testimony has not deviated significantly, if at all, from his properly disclosed opinions . . . That I find Mr. Gobelman's hearing testimony admissible does not, of course, bind the Board in giving it the weight it deems appropriate.

(Exhibit J, Hearing Officer Order of June 21, 2016 at 4.)

On November 30, 2016, Johns Manville filed its "Status Report" in which it advised the Board that it had completed all work that it had been required to perform at the Sites, pursuant to the AOC. Because the relief which Johns Manville had sought (i.e., to have the Board order IDOT to participate in the removal action) was now moot, Johns Manville requested that the Board order IDOT to pay Johns Manville the sum of \$2,897,000 "not only as a means of participating in the remedy or as a cost recovery mechanism," but also as a "sanction" for having allegedly misled the Board at hearing about IDOT's holding a right of way over Parcel 0393. (Exhibit F, Status Report at 4.)

On December 15, 2016, the Board issued its Interim Opinion and Order ("Interim Opinion"). The Interim Opinion found IDOT responsible for having disposed of ACM waste or owning land where ACM waste had been deposited for portions of Sites 3 and 6. (Interim Opinion at 22.) Although the Board found IDOT responsible for ACM waste found on a portion of the two Sites, the Board specifically rejected Johns Manville's assertion that IDOT had ever engaged in any type of bad faith in the arguments it had made to the Board at hearing or in its post-hearing briefs. (Interim Opinion at 21.) The Board then ordered the parties to return to hearing in this matter on three issues, specifically:

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.  
(Interim Opinion, at 22.)

Between December 15, 2016 and the summer of 2019, the parties engaged in extensive written and oral discovery and ultimately conducted expert discovery on the issues identified for hearing by the Board in its Interim Opinion.

On September 13, 2019, pursuant to schedule set forth in Hearing Officer order, the parties filed their respective pre-hearing motions. IDOT filed a motion *in limine* seeking to bar Johns Manville's expert witness, Douglas Dorgan, from testifying. Johns Manville, in turn, filed its Motion to Exclude (collectively, the "Motions *in limine*").

On October 31, 2019, the Hearing Officer issued his rulings on the Motions *in limine*, denying both parties' respective motions. In ruling on IDOT's motion, the Hearing Officer noted: "[i]n the liability phase of this enforcement proceeding, I observed and listened, as a hearing officer, to hours of testimony from Johns Manville's expert Mr. Dorgan." (Exhibit G, October 31<sup>st</sup> Order at 3.) The Hearing Officer also noted that the Board had relied upon Mr. Dorgan's opinion testimony during the course of the initial phase of hearing. (Id.) He went on to note that he: "found him qualified then and I find him qualified now." (Id.)

In denying Johns Manville's Motion to Exclude, the Hearing Officer stated:

Applying the same standard and reasoning used in my ruling regarding the testimony of Mr. Dorgan, I find that Mr. Gobelman has the requisite expertise to use Base Maps to determine areas of liability instead of reports and maps generated by AECOM.  
(Id. at 7.)

Subsequently, on November 14, 2019, Johns Manville filed the underlying Motion for Interlocutory Appeal with the Board.

III. ARGUMENT

A. Johns Manville's Motion for Interlocutory Appeal is a Rehash of Unsuccessful Arguments it has Already Made Regarding Mr. Gobelman's Qualifications as an Expert

Johns Manville has repeatedly cast aspersions regarding Mr. Gobelman's qualifications to serve as an expert witness in this matter, up to and including its current Interlocutory Appeal. Johns Manville, through both of its prior motions, as well as through its Interlocutory Appeal, has repeatedly argued that Mr. Gobelman does not satisfy the criteria set forth under Rule 702 for allowing expert testimony. In the case of both Johns Manville's 2016 motion *in limine*, as well as its recent Motion to Exclude, the Hearing Officer wisely and appropriately rejected Johns Manville's attempts to disqualify Mr. Gobelman from testifying and implicitly found that Mr. Gobelman did satisfy the Rule 702's criteria for the admissibility of expert opinions. (April 26<sup>th</sup> Order at 5, October 31<sup>st</sup> Order at 7.) Moreover, as the Hearing Officer noted in his October 31<sup>st</sup> Order, his basis for finding Mr. Gobelman qualified to testify as an expert rests in no small part on his substantial opportunities to evaluate his qualifications based on the numerous hours of Mr. Gobelman's testimony before the Board during May and June of 2016. (October 31<sup>st</sup> Order at 7.)

Additionally, it must be remembered that the Board relied on Mr. Gobelman's opinions, and not those of Douglas Dorgan, Johns Manville's expert witness, in reaching many of its findings of fact in the Interim Opinion. (*See generally*, Exhibit D, Interim Opinion, at 6-7.)

The motion that Johns Manville has now brought to the Board does not provide it with any valid reason for overturning the Hearing Officer's ruling on their Motion to Exclude. The Board should affirm the Hearing Officer's ruling which is based not only on a sound reading of the relevant law governing admissibility of expert opinions, but perhaps just as importantly, on the

Hearing Officer's extensive understanding of the existing record in this case and Mr. Gobelman's part in that record.

**B. Johns Manville has Failed to Articulate a Sufficient Basis for Reversing the Hearing Officer's Ruling on its Motion to Exclude**

**1. The Board Routinely Upholds its Hearing Officer's Evidentiary Rulings on Motions for Interlocutory Appeals**

It is clear from the Board's prior rulings on motions for interlocutory appeal that the Board routinely upholds Hearing Officer's evidentiary and other rulings. *See, e.g., Sierra Club v. Midwest Generation, LLC*, PCB 13-15, \*2-3 (April 26, 2018) (affirming two hearing officer evidentiary rulings); *Sierra Club*, PCB 13-15, \*2-\*4 (Jan. 25, 2018) (affirming four hearing officer evidentiary rulings); *People of the State of Illinois v. Six M. Corp., Inc.*, PCB 12-35, \*1 (May 3, 2017); and *Zarlenga v. Partnership Concepts*, PCB 92-178, \*1 (Feb. 3, 1994). The frequency with which affirmance occurs indicates that the Board trusts and relies upon its Hearing Officer's rulings on key matters, such as whether Mr. Gobelman has the requisite qualifications to testify as an expert and to testify at hearing about the cost allocation methodology he has developed. Consistent with its past practices, the Board should, once again, affirm its Hearing Officer's October 31<sup>st</sup> Ruling denying Johns Manville's Motion to Exclude.

**2. The Hearing Officer's Ruling Clearly Sets Forth the Basis for His Denial**

As set forth in the Statement of Facts, the Hearing Officer's October 31<sup>st</sup> Order denying Johns Manville's Motion to Exclude is based in no small part on Hearing Officer's opportunities to "observe and listen" to Mr. Gobelman's testimony over the four days on which he testified. And, because Mr. Gobelman provided approximately 40% of the of the testimony that the Board and the Hearing Officer observed and heard during the first phase of the case, the Hearing Officer has had more than ample opportunity to determine whether Mr. Gobelman was qualified to provide

expert testimony in this matter. The Hearing Officer's ruling reflects this fact, as it reasonably and thoroughly establishes the basis of his denial. Given his extensive experience with this case, the Board should defer to the reasoning set forth in Hearing Officer's ruling on the Motion to Exclude and affirm his October 31<sup>st</sup> Ruling.

**3. Given His Depth of Experience Observing and Listening to Mr. Gobelman, the Board Should Affirm the Hearing Officer's Denial of Johns Manville's Motion to Exclude**

Consistent with the Board's tendency to uphold its Hearing Officer's evidentiary rulings on motions for interlocutory appeal, the Board should likewise affirm the Hearing Officer's ruling here. The Hearing Officer has articulated his reasoning for his ruling on Johns Manville's Motion to Exclude. Obviously, Johns Manville does not like the ruling, but that is not sufficient cause to overturn the Hearing Officer's proper denial of their Motion to Exclude. To the extent there are questions about the conclusions and opinions that Mr. Gobelman has reached regarding his cost allocation methodology, those are topics for the Board to deal with after the next round of hearings in this matter. Accordingly, the Board should affirm the Hearing Officer's ruling denying Johns Manville's motion.

**C. Consistent with the Practice of Illinois Appellate Courts, the Board Should Review – and Affirm – the Hearing Officer's Denial of Motion to Exclude Under an Abuse of Discretion Standard**

**1. Appellate Standard of Review for Trial Court's Rulings on Motions *in Limine***

Neither the Board's regulations nor its cases speak to the issue of what showing a movant must make on a motion for interlocutory appeal to the Board, such that a Hearing Officer's ruling on a motion *in limine* will be overturned. But Illinois appellate courts are very clear on the standard of review that should be employed by an appellate court reviewing a trial court's ruling on a motion *in limine*. *Swick v. Liataud*, 169 Ill.2d 504, 521 (1996); *See also, City of Chicago v. Concordia*

*Evangelical Lutheran Church*, 2016 IL App (1<sup>st</sup>) 151864 ¶73. As cases such as *Swick* and *Concordia Evangelical Lutheran Church* make clear, a trial court “has discretion in granting (or denying) a motion *in limine* and a reviewing court will not overturn that ruling, unless discretion was clearly abused.” *Swick*, 169 Ill.2d at 521. A trial court “abuses its discretion when its ruling is ‘arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court.’” *Concordia Evangelical Lutheran Church*, ¶73 (citing *Taylor v. County of Cook*, 2011 IL App (1<sup>st</sup>) 093085, ¶ 23.<sup>3</sup> Such an abuse did not occur in this instance.

**2. The Hearing Officer did not Abuse his Discretion in Denying Johns Manville’s Motion to Exclude**

The Hearing Officer found that “Mr. Gobelman has the requisite expertise to use Base Maps to determine areas of liability instead of reports and maps generated by AECOM[,]” based on his determination that he possessed “vast experience in dealing with remediation and economic considerations.” (Oct. 31<sup>st</sup> Order at 7.) The Hearing Officer also found that given his technical expertise, Mr. Gobelman’s testimony would be of aid to the Board, in its role as trier of fact. (Id.) Given his findings, the Hearing Officer assuredly identified a sufficient rationale for denying the Motion to Exclude and did not engage in any abuse of discretion through its denial. Accordingly, the Board should affirm the Hearing Officer’s denial of the Motion to Exclude.

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<sup>3</sup> The abuse of discretion standard has also been found to apply to proceedings before this State’s administrative agencies, such as the Board. “An administrative agency’s decision regarding the conduct of its hearing and the introduction of evidence is properly governed by an abuse of discretion standard and subject to reversal only if there is demonstrable prejudice to the party.” *Three Angels Broad. Network, Inc. v. Dep’t of Revenue*, 381 Ill. App. 3d 679, 699 (5th Dist. 2008), citing *Wilson v. Dep’t of Prof’l Regulation*, 344 Ill.App.3d 897, 907 (2003) (the Fifth District finding that an administrative law judge had not abuse her discretion when she granted the Department of Revenue’s motions *in limine* to bar plaintiff from presenting the testimony of certain witnesses at hearing).

**3. The Issues Which Johns Manville Has Raised Regarding Mr. Gobelman's Maps Go to Weight and Credibility, not to Admissibility**

Having deemed Mr. Gobelman qualified to provide an expert opinion on allocation of Johns Manville's costs, the question then becomes what weight the Board should ultimately afford those opinions. As the Hearing Officer noted in his October 31<sup>st</sup> Order, his decision to deny Johns Manville's Motion does not tie the Board's hands "in giving [the Base Maps] the weight it deems appropriate." (Oct. 31<sup>st</sup> Order at 7.) Johns Manville will have every opportunity to object to the specific testimony given by Mr. Gobelman at the hearing; testimony which will give significant insight into proper allocation of removal costs.

**D. There are No Set Standards for Allocation of Removal Costs Between Parties**

Notably absent from Johns Manville's Motion to Exclude and its Motion for Interlocutory Appeal are any citations to a prior case where the Board has been called upon to allocate removal or cleanup costs between two or more parties. Nor, despite extensive legal research, is IDOT aware of any cases where the Board has ever approved of any particular method by which such allocations are to be performed. Surely, if such cases existed, the parties would have cited them to the Board in their underlying motions *in limine* (or Johns Manville in its Interlocutory Appeal). Thus, it cannot be the case, as Johns Manville asserts, that Mr. Gobelman has employed an improper method for coming up with his cost allocation. (Interlocutory Appeal at 14-25.) Indeed, for this reason Mr. Gobelman's expert testimony will be necessary to apply an appropriate methodology in this case.

**E. Johns Manville Falsely Asserts That Maps That Were Adopted by the Board During the First Phase of Hearing are Determinative of Issues in the Next Round of Hearings in this Matter**

In its Appeal, Johns Manville reiterates an argument made in its underlying Motion to Exclude, namely, that Mr. Gobelman's Base Maps "are both inaccurate and inconsistent with the

Liability Maps...” (Interlocutory Appeal at 14.) To do this, it asserts for the first time in this Interlocutory Appeal, the notion of “Liability Maps.” (Id.) Besides the obvious problem of only raising the idea of “Liability Map” for the first time in this appeal, the more glaring problem with this assertion is that it totally ignores the reason why the parties introduced maps into evidence during the first round of hearings. In those hearings, the chief issue before the Board was whether or not IDOT was responsible for having deposited ACM waste at Sites 3 and 6. The parties most definitely did not present evidence – including any maps – in order to allocate a portion of Johns Manville’s cleanup costs to IDOT, because the allocation issue did not arise until after the Board issued its Interim Opinion on December 15, 2016 finding IDOT partially responsible for cleanup costs.

As Mr. Gobelman has clearly stated in his underlying report and in deposition testimony, he initially attempted to use maps created for Johns Manville as the underlying map for his ultimate allocation work. Initially, he began using the Atwell survey which was done after all removal work had been completed at the Sites. He did this because he assumed that the survey was correct. (Ex. K, Excerpts from “Expert Rebuttal Report of Steven Gobelman on Damages Attributable to IDOT Based on IPCB Order of December 15, 2016”, §6.1 at 3-4.) Mr. Gobelman then attempted to overlay the same boundaries of the Atwell Survey with Figures 1 and 2 in Johns Manville’s expert’s report, but found that he could not square the site boundaries between all three figures. (Id.)

Given the situation which Mr. Gobelman encountered when he started his work on this project, it was entirely reasonable for him to create a reference Base Map that he believed accurately portrayed the key features of Sites 3 and 6, particularly as those features related to the areas of Sites 3 and 6 that the Board had found IDOT liable for in its Interim Opinion. Also, Johns

Manville's expert, Douglas Dorgan, made no attempt at all to ensure that the maps he used were accurate. Likewise, Mr. Dorgan's CAD drafter, Riah Dunton, made no attempt to verify any of the diagrams that she used to produce the figures in Mr. Dorgan's reports. (Exhibit L, Transcript from the July 24, 2019 Deposition of Riah Dunton, p.48:3-10.) The Hearing Officer found that Mr. Gobelman's work will serve to assist the Board as the trier of fact, including his Base Map. The Board should therefore deny Johns Manville's Interlocutory Appeal.

#### IV. CONCLUSION

The Hearing Officer's October 31<sup>st</sup> Order clearly and reasonably states the reasons why he denied Johns Manville's Motion to Exclude. (Oct. 31<sup>st</sup> Order at 7.) That Board should affirm that order and deny Johns Manville's Interlocutory Appeal. The Hearing Officer's ruling, based as it was on the total record before him on Johns Manville's motion, convinced the Hearing Officer that Mr. Gobelman possesses the requisite qualifications to provide relevant expert testimony on the central issue that the Board and parties will confront during the next round of hearings, namely, how Johns Manville's removal costs should be allocated between it and IDOT. His ruling was not an abuse of discretion; therefore it deserves to be affirmed by the Board by the denial of John Manville's Interlocutory Appeal.

WHEREFORE, Respondent, ILLINOIS DEPARTMENT OF TRANSPORTATION, requests that the Board:

- 1) Deny Johns Manville's Interlocutory Appeal;
- 2) Affirm the Hearing Officer's October 31<sup>st</sup> Order denying Johns Manville's Motion to Exclude, and
- 3) Grant such other relief as the Board deems appropriate.

Respectfully Submitted,

ILLINOIS DEPARTMENT OF TRANSPORTATION

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# EXHIBIT A

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

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

**COMPLAINANT’S MOTION TO EXCLUDE OPINION TESTIMONY OF STEVEN GOBELMAN**

Complainant JOHNS MANVILLE (“JM”) hereby submits its Motion to Exclude the proposed opinion testimony of Respondent ILLINOIS DEPARTMENT OF TRANSPORTATION’S (“IDOT”) proffered expert, Steven Gobelman.

**INTRODUCTION**

This matter centers around a key factual question – did IDOT cause or allow the use, spreading, burial, placing, dumping, disposing of or abandonment of asbestos containing material (“ACM”), including Transite pipe, on certain property during or after its construction work on an expressway in Waukegan, Illinois in the early 1970s (the “Project”). The part of the Project at issue here is generally limited to an area south of the paved portion of Greenwood Avenue and east of Sand Street (now known as Pershing Road) and is comprised of two distinct parcels of land, known as Site 3 and Site 6 (together, the “Sites”). See Exh. 1. This land is just south of JM’s former manufacturing facility in Waukegan. ACM, predominantly in the form of pieces of concrete Transite pipe, has been found both on the surface and buried on Site 3 and Site

6 and the USEPA has ordered that the ACM be removed from the Sites in conformance with a Removal Action Work Plan.

Despite the narrow questions in this case, IDOT seemingly attempts to confuse or distract the Board from the material issues here by proposing to elicit expert opinion testimony from its own employee, Mr. Steven Gobelman, on a variety of subjects over which Mr. Gobelman has no expertise. As an initial matter, while Mr. Gobelman claims to be an “expert,” he offers little in the way of actual opinions. Rather, he characterizes his proposed testimony as merely commentary on the expert report of Mr. Dorgan, submitted on behalf of JM. The Illinois Rules of Civil Procedure, though, do not provide a mechanism for “experts” to offer mere commentary.

Moreover, Mr. Gobelman has no expertise on the topics upon which he has been asked to opine, specifically IDOT’s historical handling of materials in road and bridge construction projects in the 1970s, historical practices involving the installation or maintenance of utilities over the past fifty years, the economic motivations of JM in the 1950s and 1960s and USEPA’s remedial strategy and decision-making processes related to Site 3 and Site 6. Mr. Gobelman is a geological engineer. He is not a historian, an expert in the asbestos or utilities industries, an economist, a businessman, an employee of the USEPA or mind reader. Admittedly, all he has done to become an “expert” on IDOT road and construction practices in the 1970s was to read the file in this one case and to review portions of the IDOT Specifications that were in use at the time. He did not even attempt to speak with anyone who ever worked for IDOT on these types of projects in the 1970s. Accordingly, he lacks the requisite qualifications or expertise to offer the proposed testimony.

Mr. Gobelman’s lack of expertise is further underscored by his utter failure to support his opinions with any evidence. On one hand, Mr. Gobelman claims he is 100% sure regarding what

IDOT did and did not do on the Project in the 1970s. *See* Deposition of IDOT's Expert, Steven Gobelman ("Gobelman Dep.") at 36:12-24, attached as Exh. 2. But, on the other hand, he readily admits he was not involved with the Project, that he never spoke to anyone who was ever involved in the Project and that he has absolutely no idea what actually did happen. *Id.* at 29:14-21; 75:18-76:1; 77:5-18; 187:2-16. He cannot have it both ways. He concedes that "[a]ll I know is what I've picked up through the file regarding that project," *id.* at 33:2-10, and that "I do not know what the contractor did." *Id.* at 77:5-20. Illinois law does not tolerate this type of speculative expert testimony. For these reasons, IDOT should be barred from eliciting any opinion testimony from Mr. Gobelman at the hearing of this case.

#### **FACTUAL BACKGROUND**

Sites 3 and 6, the areas at issue, abut one another, yet they have distinct histories. All or most of Site 3 is and has been owned by Commonwealth Edison ("ComEd") for decades. Pursuant to an access agreement with ComEd, portions of Site 3 were used by JM in the late 1950s and 1960s as an employee parking lot ("Site 3 Parking Lot"). It is undisputed that JM placed concrete Transite pipes, which contained asbestos, on top of the Site 3 Parking Lot to demarcate the parking lot and to be used as curb bumpers for the cars. *See* Exh. 3 (photo depicting Site 3 Parking Lot and curb bumpers). In approximately 1970, IDOT began Project construction. *See* IDOT Answer to Amended Complaint, ¶ 22. The construction involved, among other things, removing the Site 3 Parking Lot features and building a detour road, known as Detour Road A, that cut across the southeastern part of the Site 3 Parking Lot and other portions of Site 3 and Site 6. *See* Exh. 4. At the end of the construction, IDOT was paid a special fee to "obliterate" the detour roads, including Detour Road A, that it had built.

Site 6 is comprised of the southern shoulder and embankment of Greenwood Avenue and is located immediately north of Site 3. *See* Exh. 4. The embankment portion of Site 6 is at least 12 feet high in some areas. *See* Gobelman Dep. at 137:5-21. According to a recent title search and contrary to previous representations by IDOT, the portion of Site 6 at issue is currently owned by the State of Illinois. *See e.g.*, Gobelman Dep. at 39:7-40:1 (“From my -- the information that I have that I found that Waukegan -- City of Waukegan owns the right of way and jurisdiction of the road” and explaining that IDOT purchased the right of way but then at some point turned it over to the City of Waukegan.”); Exh. 5 (title search provided to JM on January 14, 2015) (finding there are “no other deed conveyances or dedications found of record” after the right of way was conveyed to the State).

In assessing this Motion *in Limine*, it is important to keep in mind some undisputed facts:

- Prior to the construction of Detour Road A, the shoulder of Greenwood and the embankments along Greenwood (all parts of Sites 3 and 6) and during the time IDOT was conducting survey work and preparing the engineering drawings, a 1970 aerial photograph shows concrete Transite pipe bumpers on the surface of the Site 3 Parking Lot, including lines marking the outline of the parking lot. *See* Gobelman Dep. at 200:18-201:8; 203:8-24. But after Detour Road A was removed and the shoulder and embankment along Greenwood were built, the concrete Transite pipes are no longer apparent in the photographs.
- IDOT’s resident engineer for the Project admitted in a Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”) Section 104(e) Response to “dealing with asbestos pipe during the project and burying some of it” during construction of the Project. *See* Gobelman Dep. at 235:18-236:18.
- IDOT’s Standard Specifications for Road and Bridge Construction enacted on January 2, 1971 (the “Specifications”), which indisputably applied to the Project, directed IDOT to recycle concrete found at the Project site and ordered that “broken concrete” encountered either be placed in embankments during construction or buried under two feet of earth cover on the Project site as directed by the IDOT Resident Engineer. *See* Gobelman Dep. at 78:21-81:2; excerpts from Specifications at §207.04(a); §202.03; §202.04, attached as Exh. 6.
- Based upon the Project construction documents, the ACM that USEPA has ordered to be removed are located almost exclusively within the zone of fill material IDOT placed on Sites 3 and 6. *See* Gobelman Dep. at 187:2-16.

**EXPERT REPORTS AND OPINIONS**

JM's expert, Mr. Doug Dorgan, offered opinions in his initial expert report addressing the pivotal issue of who caused ACM to be buried, disposed of and abandoned on the Sites. *See* Expert Report of Douglas Dorgan dated March 16, 2015 ("Dorgan Rep."), attached as Exh. 7. Mr. Dorgan determined, among other things, that IDOT is responsible for the placement and dispersion of ACM waste currently found at the Sites and, at a minimum, IDOT used, spread, buried, placed and disposed of this waste throughout Site 3 and portions of Site 6 during its work on the Project. *See* Dorgan Rep. at § 1.1, p. 2. Mr. Dorgan, however, is not claiming to be an expert on IDOT historic road and bridge construction practices or attempting to offer opinions on what IDOT *would have done* back in the 1970s based upon its common practices. By contrast, Mr. Gobelman repeatedly opines that IDOT would or would not have taken certain steps because it was "illogical" or did not make sense in the context of how IDOT constructed roads and bridges in the 1970s. *See, e.g.,* Gobelman Dep. at 76:2-77:1.

In response to Mr. Dorgan's Expert Report, IDOT identified one of its own employees, Mr. Steven Gobelman, as its proffered "expert" and submitted a report entitled "Expert Rebuttal Report of Steven L. Gobelman" ("Gobelman Rep."), attached as Exh. 8. Mr. Dorgan submitted a rebuttal report in response to Mr. Gobelman's Report. *See* "Dorgan Rebuttal Rep.," attached hereto as Exh. 9.

In his own Rebuttal Report, Mr. Gobelman wavered on whether he was actually offering any "opinions" in this case, but said that, to the extent he has any opinions, that they are underlined in his Report.

Q. Okay. Let's look at your report. Where are the opinions found in this report? It seems like you have certain things that are underlined. Are those the opinions or are they somewhere else?

A. Yeah. I would say the underlined portions are sort of the opinions.

Q. Okay. Sort of or they are the opinions?

A. Well, yeah, okay. If you want to -- yeah. I don't necessarily look at them as opinions.

Q. Okay. Well, I --

A. But they were a -- sort of like the, in your realm, the opinions.

Q. Okay. So just for procedural purposes, we need to know exactly what your opinions are because that's what I need to ask you the questions about.

A. Okay.

Q. So other than what is underlined, do you have other opinions in this report?

A. No.

Gobelman Dep. at 35:16-36:14.

The 11 underlined portions of the Report are as follows:

1. “Excavated unstable and unsuitable materials were excavated from Site 3 would not have been placed back on Site 3; there was no room within the right of way for this material to be placed” (“Comment 1”) (Gobelman Rep. at p. 5);
2. “[b]ased upon the record, Johns Manville’s [sic] parking lot was never removed in order to construct Detour A road” (“Comment 2”) (Gobelman Rep. at p. 5);
3. “[a]ny materials on the surface of the parking lot include the Transite® pipes used as curb bumpers would have been cleared in accordance with Article 201.01 of the Standard Specification because this material would have been in the way and removed from the construction project as with any other obstructions” (“Comment 3”) (Gobelman Rep. at p. 6);
4. “[i]t is my opinion that over the years the installation and maintenance of these lines would have disturbed the existing conditions and potential asbestos material could have been buried when these underground utility lines were installed or during maintenance” (“Comment 4”) (Gobelman Rep. at p. 7);
5. “[t]he Department did not use, spread, bury, place and dispose of ACM regarding site 3 and 6, the Department’s only involvement was construction oversight and it was the Contractor’s responsibility to determine how materials will be managed” (“Comment 5”) (Gobelman Rep. at p. 8);
6. “[t]he contractor may have managed asbestos cement pipes (Transite®) at some time along the construction project” (“Comment 6”) (Gobelman Rep. at p. 9);
7. “Mr. Dorgan’s opinion did not take into account the construction projects sequencing of work” and “[b]ased on the sequencing of the Department’s construction project, the Contractor would not have placed any asbestos containing materials into Site 6 from Site 3” (“Comment 7”) (Gobelman Rep. at pp. 11, 13);

8. “[i]t was never specified what types of ACM was used to create the parking lot. Based on the materials found in the test pits and the fact that Johns Manville used Transite® pipes to create curb bumpers and they used ACM to build the parking lot, economics would suggest that Johns Manville would have used all types of ACM material including Transite® pipes to build the employee parking lot” (“Comment 8”) (Gobelman Rep. at p. 7);
9. “Johns Manville would not have any economic motivation to remove broken and unusable Transite® pipes that were used as a curb bumper but would have moved them off the edge of the parking lot” (“Comment 9”) (Gobelman Rep. at p. 9);
10. USEPA’s “remedial strategy are based on protecting all future asbestos exposures” (“Comment 10”) (Gobelman Rep. at p. 13); and
11. “[t]he potential freeze thaw cycles did not play a part in USEPA’s decision making process because the freeze thaw cycles would only come into play if no remedial action was conducted” (“Comment 11”) (Gobelman rep. at p. 13).

Since Mr. Gobelman acknowledges that these are the only “sort of” opinions he has reached, JM moves to exclude them. They are hereafter referred to as the “Comments.”

### **ARGUMENT**

#### **I. IDOT Has Failed to Comply with Rule 213(f)**

Under Illinois Supreme Court Rule 213(f), each party is required to identify controlled expert witnesses and to provide, as to each expert, “(i) the subject matter on which the witness will testify; (ii) the conclusions and opinions of the witness and the bases therefor; (iii) the qualifications of the witness; and (iv) any reports prepared by the witness about the case.”

Pursuant to this Court’s Order setting a deadline for such expert disclosure, IDOT identified Mr. Steven Gobelman as a controlled expert in this case. Oddly, however, Mr. Gobelman claims that his testimony is merely commentary on Mr. Dorgan’s Expert Report, rather than any opinion on the issues in this case. *See* Gobelman Rep. at § 1, p. 1 (“I have been asked by counsel for the Respondent to review and comment on the Expert Report of Douglas G. Dorgan Jr (Mr. Dorgan’s Report) concerning the former Johns Manville Facility Sites 3 and 6

dated March 16, 2015.”) (emphasis added). The Illinois Rules of Civil Procedure, however, do not provide a mechanism for “experts” to offer mere commentary.

The word “opinion” appears only once in the underlined sections of the Gobelman Report. Comment 3 provides: “[i]t is my opinion that over the years the installation and maintenance of these lines would have disturbed the existing conditions and potential asbestos material could have been buried when these underground utility lines were installed or during maintenance.” Gobelman Rep. at 7 (emphasis added). As discussed above, with respect to the rest of his Report, Mr. Gobelman says that he “does not necessarily look at [what is contained in the Report] as opinions.” Gobelman Dep. at 35:16-36:6 (identifying the underlined sections of the Report as “sort of like” his opinions); 64:10-65:12 (denying that he has an opinion on whether JM placed the ACM on the Sites or that IDOT did not place the ACM on the Sites); 66:6-15 (identifying Comment 4 as his only opinion).

But it is entirely unclear whether Comment 4 is an opinion at all, and the scope of the opinion is undefined. While, at most, the text of the opinion suggests that Mr. Gobelman might be opining on the key question of causation — how the ACM came to be buried on Sites 3 and 6 — Mr. Gobelman categorically denies that he is offering an opinion on that topic.

Q. Okay. And does this figure not show that there is asbestos-containing material within that area that was filled by IDOT's contractor, so the area between the unsuitable material and the final grade line?

A. Yes. I think the analytical results show that there was asbestos-containing material found in those borings.

Q. And, again, you believe that got there how?

A. I don't believe I rendered an opinion how it got there.

Q. Okay. Who put it there?

A. I have no idea who put it there ....

*Id.* at 187:2-16.

Rather, according to Mr. Gobelman, Comment 4 is limited to how utility work might have moved around “existing” ACM within the Sites after the ACM was initially buried.

Q: Right. But I want to know what your opinion is. How did it get there? How did the asbestos on Sites 3 and 6 that’s buried on Sites 3 and 6 get there? Are you offering an opinion on that or not?

A: I believe the only opinion that’s in my report had to do with utilities and their being installed through asbestos-containing material and being maintained in asbestos-containing material. (emphasis added).

Q. Okay. But are you saying that that’s how it got there or that’s a possibility?

A. I’m saying that those -- material was there and the installation of utilities would have potentially moved that to a different horizon from which it originally was in.

Q. Okay. Well, how did it get there in the first place?

A. I do not believe in my report I render any opinion on how it was got there other than the factual evidence that was in the reports from Johns Manville.

*Id.* at 66:6-67:3.

Further, as to Comment 4, Mr. Gobelman is unsure about which utilities he is referring to, what time frames he is opining about and whether any maintenance work was ever even done on these utilities. *Id.* at 164:15-167:22; 176:3-23. Consequently, JM is unable to discern from the Gobelman Report or his deposition whether he has actually arrived at any “opinions” and the bases for those opinions as required by Supreme Court Rule 213 despite JM’s repeated attempts to do so via discovery. JM, therefore, requests that Mr. Gobelman not be permitted to testify as to any purported “opinions” or any of the Comments.

**II. Mr. Gobelman Lacks The Knowledge, Skill, Experience, Training, Education, and Expertise to Offer Any Opinions or Comments that Will Assist the Trier of Fact**

Illinois Rule of Evidence 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. Where an expert witness testifies to an opinion based on a new or novel scientific methodology or principle, the proponent of the opinion has the burden of showing the methodology or scientific principle on which the opinion is based is sufficiently established to have gained general acceptance in the particular field in which it belongs.

(emphasis added).

In Illinois, “with regard to expert testimony, it is well settled that “[a] person will be allowed to testify as an expert if his experience and qualifications afford him knowledge that is not common to laypersons, and where his testimony will aid the trier of fact in reaching its conclusions.” *Torres v. Midwest Development Co.*, 383 Ill. App. 3d 20, 26 (1st Dist. 2008) (quoting *Thomson v. Gordon*, 221 Ill.2d 414, 428 (Ill. 2006)). “The critical issue is whether the expert’s legal testimony aids the trier of fact by explaining a factual issue beyond one’s ordinary knowledge.” *Torres*, 383 Ill. App. 3d at 26.

Mr. Gobelman concedes that his testimony only relates “to the IDOT construction process and how it relates to all this.” Gobelman Dep. at 68:8-17. He described the intent of his Report as follows:

What I did is that I reviewed all the historical information and put the pieces together to draw the picture as to what happened out there. Now, in the course of providing the sequence of events that would have occurred, it then takes on rebuttal of certain aspects of his report. But I did not go through his report and try to rebut everything he said.

*Id.* at 43:1-44:2. Using this methodology, Mr. Gobelman plans to offer the Comments to rebut Mr. Dorgan’s Expert Report (*see supra* Expert Reports and Opinions). Mr. Gobelman, however,

is neither qualified to provide his proposed testimony, described more fully below, nor does his proposed testimony assist the trier of fact in analyzing any of the relevant issues in the case.

**1. IDOT Historic Practices (Comments 1-3, 5-8)**

Mr. Gobelman claims that his proposed testimony is based “upon the IDOT construction methodology and how IDOT did its work there . . . my opinions only relate to the IDOT construction process and how it relates to all of this.” Gobelman Dep. at 65:24-68:17. In other words, Mr. Gobelman is reaching conclusions based upon what he believes IDOT’s common practices were in the 1970s. But in order to serve as an expert on this topic, Mr. Gobelman would need to possess special “knowledge, skill, experience, training or education” regarding IDOT’s historic road and bridge construction practices. *People v. Adams*, 404 Ill. App. 3d 405 (1st Dist. 2010) (trial court did not abuse discretion in barring a self-taught “expert” who lacked background and training in the purported field of expertise); *Mulloy v. American Eagle Airlines*, 358 Ill. App. 3d 706 (1st Dist. 2005) (affirming exclusion of safety coordinator for union as expert on grounds that he had “no special training” on the equipment in question and “no familiarity with the training or policies of American Eagle or its employees”); 31A Am. Jur. 2d, Expert and Opinion Evidence §55 (stating that the qualifications of the witness must be pertinent to the matter on which he offers his opinion). He does not.

Mr. Gobelman says he has worked for IDOT since 1993. Gobelman Rep. at Appendix B. He describes his job in general as handling waste issues at IDOT sites. More specifically, he says:

I oversee -- I'm sort of like the environmental technical expert on soil and groundwater issues. I oversee contracts that investigate State right of way and determine what soil contamination or groundwater contamination exist, and then I take all that information that the consultant provides, I write special provisions, I put together pay items and quantities. I insert all that stuff or have

the district insert all that stuff into the contract plan so it can be bid on.

Gobelman Dep. at 37:10-21.

While Mr. Gobelman might be an expert on certain environmental topics, he is no expert on the topics on which he is being asked to opine. When asked whether he was an “expert in how they [IDOT] managed materials in the 1970s,” Mr. Gobelman could not answer the question; he responded that he did not know how “expert” would be defined in that scenario. *Id.* at 59:6-9. He admitted that the only thing he has done to “study how IDOT or its contractors handled materials on road and bridge construction projects in the 1970s” or to “become an expert in how IDOT or its contractors handled materials for road and bridge construction projects in the 1970s” was to read part of the file in this case (some of the Project file is missing and he did not bother to read the USEPA file) and to read portions of the Specifications. *Id.* at 14-2-7; 29:16-21; 59:6-62:3; 136:9-21. What Mr. Gobelman did not do is even more telling. When asked, “[h]ave you ever talked to somebody who did road and bridge construction projects in the 1970s for IDOT or its contractors to ask them how they handled materials?” he responded, “[n]o. I did not.” *Id.* at 62:4-8. Similarly, when questioned about how he reached his conclusions in this case, he said his conclusions are only based upon his review of “the record” (though, as discussed above, Mr. Gobelman did not read this case’s full record). *Id.* at 71:10-15.

One does not become an expert on the historic practices used by a particular entity simply by reading the specifications in place at one given point in time and with respect to one project, particularly when a trier of fact could do this just the same. To become an expert on these types of issues, one would need to, at least, study in detail multiple historical project files from the time period in question and interview persons who were engaged in that type of work at the time. But Mr. Gobelman did not. This does not mean, however, that if Mr. Gobelman were offering

testimony within his area of expertise that he could not rely upon the Specifications to support otherwise admissible opinions. But, here, because Mr. Gobelman lacks expertise on IDOT historic road and bridge construction practices, he cannot bootstrap himself into being an expert on this topic by simply reading the Specifications and the file. *See e.g., Coyne v. Robert H. Anderson & Assocs., Inc.*, 215 Ill. App. 3d 104, 110, 112 (2d Dist. 1991) (reversing judgment on jury verdict, remanding for new trial, and finding reversible error in allowing expert witness to testify on certain subjects where the record showed that the expert's opinions "had nothing to do with his expertise" and where the expert "possessed no knowledge in this area that a lay person does not possess."). Accordingly, he should not be allowed to testify as to Comments relating to IDOT historic practices, namely, in the very least, Comments 1-3, 5-8.

**2. Utility Practices, Economic Motivations and USEPA's Deliberative Process (Comments 4, 8-11)**

Despite being adamant that his proposed comments only "relate to the IDOT construction process," Gobelman Dep. at 65:24-68:17, a cursory review of his Report demonstrates that this is untrue. Mr. Gobelman comments on utility work by other entities, on how "economics" impacted JM's decision making process prior to 1970 and on USEPA's rationale for the remedy it is requiring. *See* Comments 4, 8-11. Mr. Gobelman lacks any expertise to offer these comments. Mr. Gobelman is not a utility worker or an expert on the utility industry. Thus, it is unclear what expertise he possess such that he can opine about utility practices (Comment 4) that might or might not have been used historically at the Sites beyond what is obvious to a layperson.

In the same vein, Mr. Gobelman has no business testifying, and it would be inappropriate to allow him to do so, that "economics would suggest that Johns Manville would have used all types of ACM material including Transite pipes to build the employee parking lot" and that

“Johns Manville would not have any economic motivation to remove broken and unusable Transite pipes that were used as a curb bumper but would have moved them off the edge of the parking lot.” *See* Comments 7-8. Mr. Gobelman is a geological engineer; he is not an economist or otherwise an expert in or on the asbestos products industry or on what motivated certain business decisions in the 1950s and 1960s. As such, he should be precluded from offering any testimony about economic motivations (Comments 8-9).

Perhaps even more alarmingly, Mr. Gobelman purports to know what the USEPA is thinking. He makes two nonsensical comments about the USEPA’s rationale for the remedy it selected. He says that USEPA’s “remedial strategy are based on protecting all future asbestos uses” and that “[t]he potential freeze thaw cycles did not play a part in USEPA’s decision making process because the freeze thaw cycles would only come into play if no remedial action was conducted.” *See* Comments 10-11. It is unclear how Mr. Gobelman can be an expert on USEPA’s reasoning, particularly when Mr. Gobelman does not even purport to possess any unique knowledge, skill, experience, training or education that would permit him to gain insight into USEPA’s motivations, beyond what is stated in its record. Mr. Gobelman never worked for USEPA and does not even purport to have read the USEPA’s file related to this matter (despite its availability to IDOT) and so cannot have a full understanding of the USEPA’s decision-making process. Gobelman Dep. at 14:2-7; 21:22-24; 216:3-6 (discussing failure to review final Remedial Action Work Plan). As such, any testimony in this regard can only be confusing, rather than helpful, to the trier of fact. Accordingly, Mr. Gobelman should be precluded from offering testimony on USEPA thought processes, specifically Comments 10-11.

**III. Gobelman’s Proposed Testimony is Based Solely on Speculation, is Irrelevant, Confusing and a Waste of Time.**

“An expert is only as valid as the basis and reasons for the opinion . . . Expert opinions based on guess, speculation or conjecture are inadmissible.” *Torres*, 383 Ill. App. 3d at 28-29 (barring opinion because it lacked a sufficient factual basis); *Todd W. Musburger., Ltd. v. Meier*, 394 Ill. App. 3d 781, 802 (1st Dist. 2009) (court did not abuse discretion in barring opinion testimony that was contradicted by facts in the record). “If evidence and the inferences sought to be drawn therefrom are so vague or conjectural that they are not helpful in proving or disproving a matter in controversy, the evidence is not probative. Categories of evidence which are of little or no probative value with respect to the factual issues involved in a case are not relevant.” *Moore v. Swoboda*, 213 Ill. App. 3d 217, 238 (4th Dist. 1991); *Mack v. Viking Ski Shop, Inc.*, 2014 IL App (1st) 130768, ¶ 21 (expert evidence regarding causation was insufficiently certain, was speculative and was offered by an expert lacking the qualifications to provide the opinions).

**1. IDOT Historic Practices (Comments 1-3, 5-8)**

As with Comment 4, Mr. Gobelman’s proposed testimony about IDOT’s historic practices are confusing, inconsistent and unsupported by any facts. Mr. Gobelman throws a lot of terms and theories at the wall, hoping one sticks. But when unpacked, they are merely irrelevant and/or unsubstantiated distractions. For example, it is entirely unclear how IDOT’s handling of “unstable and unsuitable material,” which Mr. Gobelman seems to focus on in Comment 1, is relevant to the issues at hand when Mr. Gobelman readily admits that concrete Transite pipes would not be considered “unstable and unsuitable materials,” but rather, would be treated as obstructions. Gobelman Dep. at 126:4-13.

Along the same lines, Mr. Gobelman repeatedly contradicted his own opinions in his deposition, further exposing the lack of any factual support for his opinions. For instance, Mr. Gobelman says that “the Department’s only involvement was construction oversight and it was

the Contractor's responsibility to determine how materials will be managed," *see* Comment 5, but then he unabashedly admits that IDOT was "in control of doing the work" and that IDOT's resident engineer influenced, controlled and was ultimately responsible for how the materials on the Project were handled. *See* Gobelman Dep. at 52:24-53:20; 78:2-7; 126:20-24; 144:1-11; 193:23-194:5. Similarly, when deposed, Mr. Gobelman testified that his comment that "[t]he contractor may have managed asbestos cement pipes (Transite) at some point along the construction project" (Comment 6) referred to the fact that the Specifications permitted the use of certain asbestos-containing pipe in construction projects, so "it [ACM pipe being used by a utility] could have [already] existed [on Site 3 or 6] in the existing right of way." *Id.* at 194:23-195:16. But, when questioned further, he conceded that "I don't think there's anything in the record to say what type of pipes were encountered as part of this construction." *Id.* at 195:17-23. Allowing Mr. Gobelman to continue to repeatedly contradict himself at hearing would be both inefficient and an improper use of the Board's resources.

Despite the fact Mr. Gobelman says he has no opinion on whether IDOT buried the ACM, *supra* at §I, most of his proposed testimony relates to his belief that IDOT cannot be responsible for the ACM buried on Sites 3 and 6 because it purportedly makes no sense in the context of IDOT's historical practices. More specifically, Mr. Gobelman claims that when IDOT encountered concrete Transite pipes on top of the Site 3 Parking Lot, it would have cleared them as obstructions. Gobelman Dep. at 126:4-13. He claims that IDOT would not have crushed the concrete pipe and used it as fill on Sites 3 and 6 because that would be "illogical." *Id.* at 76:2-77:1. He explains that the Site 3 Parking Lot was "considered stable enough, and they didn't want to disturb it, so it would seem very illogical for the contractor to run pipe on top of it and to crush, which could cause damage to the parking lot and could make it unstable." *Id.*

But this theory lacks any factual support. Mr. Gobelman admittedly has no idea what actually happened to the concrete Transite pipes and that he has never spoken to anyone who worked on the Project. *See id.* at 77:5-20, 196:24-197:6. Moreover, he does not cite to any Specification or other historical material that supports his “illogical” conclusion.<sup>1</sup> In fact, he admits that there is no reason why IDOT could not have broken the pipe on part of the Site 3 Parking Lot not being used for the Detour Road and therefore avoided his concern regarding the parking lot’s stability:

Q. Okay. So is there any reason why they couldn't have moved those pipes over to a different part of the parking lot area or a different portion within the right of way and done the crushing there?

A. It's possible, but that would require the contractor was going to have to take his -- make a lot of effort to do that on something that is going to be removed anyway. (emphasis added).

*Id.* at 159:1-9. In fact, a quick scan of the map shows that there was plenty of room on the western part of the parking lot or within the right of way for IDOT to break apart and store the concrete Transite pipes. *See* Exh. 4.

Perhaps most compellingly, the Specifications Mr. Gobelman clings to in his Expert Report make clear that Mr. Gobelman is wrong in his assumption that the concrete Transite pipes encountered on what later became Site 3 were “something that is going to be removed anyway.” *See* Gobelman Dep. at 76:10-77:1. Rather, the Specifications mandate that if such concrete pipes are encountered, the contractor shall break them up and embed them in the embankments or bury them within the right of way, adjacent to the right of way or outside the right of way with the Engineer’s permission – *precisely what JM alleges happened here* in violation of the Illinois Environmental Protection Act. *See id.* at 56:7-16; 126:4-13; 128:4-8 (conceding that IDOT

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<sup>1</sup> Mr. Gobelman’s belief that the Site 3 Parking Lot was sufficiently stable is contradicted by the record. Mr. Gobelman believes the historical file, however, contains a typo. Gobelman Rep. at p. 6.

would have treated the Transite concrete pipe as “concrete” and as an “obstruction”); Specifications at § 201.03 (governing obstructions); Specifications at § 201.08 (providing that obstructions are disposed of in accordance with §202.03).

Section 202.03 of the Specifications states, in pertinent part:

Prior to starting excavation operations, existing oiled earth or bituminous surfaces shall be broken into pieces not to exceed 6 inches in largest dimension, and the larger material either embedded in embankments or disposed of as hereinafter specified. Whenever possible, stones and boulders occurring in the right of way shall be placed in embankments in layers and compacted, in accordance with Section 207. All stones, stumps, boulders, broken rock, broken concrete and related material that cannot be placed in the embankment shall be disposed of at locations designated by the Engineer within the right of way; in borrow sites on or adjacent to the right of way or at other locations outside the wright of way. These materials shall be buried under a minimum of 2 feet of earth cover.

Specifications at §202.03 (emphasis added).

Section 207 of the Specifications, which governs embankment construction, states:

When embankments are constructed with crushed material, broken concrete, stones, or rocks, and earth, such material shall be well distributed ... Pieces of concrete not exceeding 2 square feet for any areas of surface ... may be placed in fills without being broken up, provided they are well embedded ....

Specifications at §207.04 (emphasis added).

The fact that Mr. Gobelman admits that, based on IDOT’s own drawings, broken concrete Transite pipe was found buried within the Site 6 embankment constructed by IDOT and within the zone of fill placed by IDOT on Site 3 demonstrates that his comments that IDOT did not, and could not, have buried the concrete Transite pipe (Comments 1-3, 5-8) cannot withstand Board or judicial scrutiny. Gobelman Dep. at 187:2-16. Such a comment is not only a guess, but a guess without a shred of factual support. Mr. Gobelman’s “guesses,” not befitting of an expert witness, should be excluded from trial.

**2. Utility Practices, Economic Motivation and USEPA Deliberative Process (Comments 4, 8-11)**

Like his comments on IDOT's historic practices, Mr. Gobelman's Comment 4 is speculative. In his deposition, he admitted that he did not know anything about when the utilities were installed, when or whether they were removed or when or whether they were ever maintained (including whether anyone ever needed to dig into ACM contaminated ground):

Q. Okay. Have you looked at any records regarding installation or removal of or maintenance of utilities on Site 3 or Site 6?

A. No, I have not looked at any utilities.

\*\*\*

Q. Okay. Do you know if maintenance was ever done on any of these utilities?

A. I have no indication whether or not there were any leaks or spills that required them to do maintenance.

*Id.* at 176:3-23.

Without knowing this key information, Mr. Gobelman is offering an opinion in a vacuum and devoid of factual support. Stated differently, the predicate for his opinion, that "over the years" the utilities were "installed and maintained," is missing and thus the opinion is nothing more than irrelevant conjecture that cannot assist the trier of fact. This scenario is analogous to *Solis v. BASF Corp.*, 2012 IL App. (1st) 110875. In that case, the appellate court reversed the lower court's admission of expert causation testimony. *Id.* The expert conceded that he did not know if the plaintiff was exposed to the product in question, but opined that if he had been, then the defendant contributed to the injury. *Id.* at ¶ 94. The court ruled that it was improper for the lower court to permit expert testimony about a "wholly speculative link" between the defendant's product and the plaintiff and to opine that "based on that supposed link," the defendant contributed to the plaintiff's injury. *Id.* Like the expert in *Solis*, here, Mr. Gobelman

has no idea whether and when any work was done on the utilities and thus an opinion that such work might have moved ACM around is inadmissible as opinion testimony in light of Gobelman's failure to rely upon or cite factual support.

Mr. Gobelman's comments on JM's "economic motivations" are even more flimsy. Mr. Gobelman baldly asserts that "economics would suggest" that JM would have "used all types of ACM materials" to build the Site 3 Parking Lot. Gobelman Rep. at §7, p. 7. When asked to explain this, he said that "when a company has to build something that they're just providing . . . it's my experience that you will use whatever is readily available to build your parking . . . so that you don't have to expend a lot of funds to build it." Gobelman Dep. at 189:11-190:2. This is not evidence of anything, just more, pure conjecture. Similarly, his statement that JM had no "economic motivation" to remove broken pipes off the Site 3 Parking Lot but "would have moved them off the edge of the parking lot" has no support in the record and lacks any relevance as to who buried the concrete Transite pipes. *See* Comment 9. Mr. Gobelman has no idea what JM would have done in the 1970s in a particular circumstance. Such sheer speculation should not be permitted.

Similarly, Mr. Gobelman's statements about what USEPA might have been thinking when it ordered clean up at the Sites do not belong in a hearing on this matter. *See* Comments 10-11. Mr. Gobelman never spoke to anyone at USEPA about Site 3 or 6 and he admits that he has not even read the USEPA file. Gobelman Dep. at 14:2-7 ("I did not look at the complete file that Illinois EPA or USEPA would have had on everything that was submitted to them."); 21:22-24. In fact, Mr. Gobelman conceded that he has never even seen the USEPA-approved Final Remedial/Removal Action Work Plan that governs the remedy. *Id.* at 216:3-6. Without reviewing the Final Removal Action Work Plan, which discusses the remedy and USEPA's



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**CERTIFICATE OF SERVICE**

I, the undersigned, certify that on February 8, 2016, I caused to be served a true and correct copy of *Complainant's Motion to Exclude Opinion Testimony of Steven Gobelman* upon all parties listed on the Service List by sending the documents via e-mail to all persons listed on the Service List, addressed to each person's e-mail address.

\_\_\_\_\_  
*/s/ Susan Brice*

Susan Brice

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**EXHIBIT 1**



**EXHIBIT 2**

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In The Matter of: )

)

JOHNS MANVILLE, a Delaware )

Corporation, )

) PCB No. 14-3

Complainant, ) (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 10th day of  
July, 2015, at 9:33 a.m.

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On behalf of the Respondent.

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I N D E X

WITNESS	EXAMINATION
STEVEN L. GOBELMAN	
Examination By Ms. Brice	4

E X H I B I T S

NUMBER	MARKED
GOBELMAN EXHIBITS	
Exhibit No. 1	8
Grp Exhibit No. 2	45
Exhibit No. 3	50
Exhibit No. 4	62
Exhibit No. 5	79
Exhibit No. 6	89
Exhibit No. 7	130
Exhibit No. 8	150
Exhibit No. 9	155
Exhibit No. 10	198
Exhibit No. 11	217
Grp. Exhibit No. 12	225
Exhibit No. 13	234

1 MS. BRICE: Do you want to swear in the  
2 witness.

3 (Witness sworn.)

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

7 EXAMINATION

8 BY MS. BRICE:

9 Q. Good morning, Mr. Gobelman.  
10 Could you please state your name for the  
11 record.

12 A. Steven Gobelman.

13 Q. And who is your employer?

14 A. Illinois Department of Transportation.

15 Q. Have you ever been deposed before?

16 A. Yes.

17 Q. How many times?

18 A. Five, six.

19 Q. And what matters were those involved in?

20 A. Most of the matters involved my work at  
21 the Illinois Environmental Protection Agency. One  
22 matter involved a lawsuit which I was deposed as an  
23 expert witness on a neoblastoma [sic] in a coal  
24 gasification lawsuit.

1 Q. Oh, the one down in -- that went to the  
2 Supreme Court, by any chance?

3 A. Taylorville?

4 Q. Yeah.

5 A. Yes.

6 Q. I've read that case.

7 Okay. So I assume you understand the  
8 rules of taking depositions, answering, that sort  
9 of thing.

10 Can I assume that?

11 A. Yes.

12 Q. And if you wasn't to take a break, feel  
13 free to let us know you want to take a break.

14 A. Okay.

15 Q. If you don't understand a question, let  
16 me know, and I'll be happy to rephrase.

17 You said you served as an expert in the  
18 Taylorville case.

19 Have you been an expert in any other  
20 matter --

21 A. No.

22 Q. -- as a witness?

23 A. No.

24 Q. And what was the subject matter of your

1 testimony in the Taylorville case?

2 A. It had to do with remediation, how the  
3 defendant remediated, and I gave expert witness --  
4 or testimony, I should say, on -- my opinions on  
5 how they remediated and things that they did wrong.

6 Q. And what year was that, generally?

7 A. Probably '94, maybe '95, somewhere in  
8 that area.

9 Q. And in the other depositions for which  
10 you testified, did any of them involve expert  
11 testimony?

12 A. No.

13 Q. Did any of them involve construction  
14 projects?

15 A. No.

16 Q. Did any of them involve CERCLA?

17 A. I believe so.

18 Q. And which one was that?

19 A. It was -- I don't remember which ones  
20 they were at the EPA. They all had to do with my  
21 work product that I was doing. Some of it had to  
22 deal with permitting issues. Some of it had to do  
23 with remediations in which I was involved with in  
24 many site remediation program -- well, voluntary

1 cleanup program at that point and some of the  
2 shrapnel type stuff.

3 Q. Okay.

4 A. So some of those sites may have been  
5 CERCLA.

6 Q. Gotcha.

7 What about asbestos? Have you ever  
8 offered an opinion on anything involving asbestos  
9 before?

10 A. I have never been deposed on asbestos.

11 Q. Okay. Today if say "project" or  
12 "Amstutz project," I'm talking about the Amstutz  
13 construction project that is at issue in this  
14 litigation that occurred in the early to mid-1970s.

15 Is that okay with you?

16 A. You're referring to the IDOT  
17 construction project regarding the Amstutz  
18 Expressway?

19 Q. Correct.

20 A. Okay.

21 Q. The one that this litigation is  
22 revolving around.

23 A. Okay.

24 Q. If I say project, I just want to make

1 sure we're all talking about the same thing. I  
2 don't want to have to say "IDOT Amstutz  
3 construction project."

4 Are we on the same page?

5 A. Yes.

6 MS. BRICE: Okay. I'd like to mark  
7 this as Deposition Exhibit 1.

8 THE WITNESS: Can I make a correction?

9 BY MS. BRICE:

10 Q. Sure.

11 A. I don't know if you saw it. If you  
12 noticed in my qualifications, I didn't graduate  
13 from the University of Missouri in 1993. It was  
14 1983.

15 Q. And you're referring here to your expert  
16 report that we're going to mark as Deposition  
17 Exhibit 1?

18 A. Yes.

19 Q. Great, perfect.

20 (Gobelman Exhibit No. 1 marked for  
21 identification.)

22 BY MS. BRICE:

23 Q. Okay. I've marked for the record  
24 Deposition Exhibit 1 which is entitled "Expert

1 Rebuttal Report of Steven L. Gobelman."

2 Is this your report that you prepared

3 Mr. Gobelman?

4 A. Yes.

5 Q. And what did you do to prepare this

6 report?

7 A. I reviewed Ms. Dorgan's expert report  
8 and his bibliography and then acquired information  
9 on my own on the other aspects of the project.

10 Q. Anything else?

11 A. I don't think so.

12 Q. Did you visit the site?

13 A. Yes.

14 Q. And who was with you when you visited  
15 the site?

16 A. Evan and Ellen...

17 MR. MCGINLEY: O'Laughlin.

18 THE WITNESS: O'Laughlin.

19 BY MS. BRICE:

20 Q. And what did you do during your visit?

21 A. I walked around the site, the area, took  
22 some photos.

23 Q. And I noticed some photos that were  
24 produced in response to a subpoena.

1 Are those the photos that you're  
2 referring to that you took during the site visit?

3 MR. MCGINLEY: I'm sorry.

4 Can I clarify for a second?

5 MS. BRICE: Sure.

6 MR. MCGINLEY: They weren't produced in  
7 response to a subpoena. It was a --

8 MS. BRICE: Oh, I'm sorry. You're  
9 right.

10 MR. MCGINLEY: I just want to make sure  
11 that we're talking about the same thing.

12 MS. BRICE: Yes, and I apologize.

13 MR. MCGINLEY: That's fine.

14 BY MS. BRICE:

15 Q. They were produced in response to a  
16 document request.

17 A. Well, without knowing -- seeing what  
18 you're talking about, I supplied photos.

19 Q. Sure.

20 A. And if those were the photos that they  
21 were provided...

22 Q. And what did you find relevant about  
23 your site visit?

24 A. That the site was wet. It appeared that

1 the site was -- you know, had a gray -- it looked  
2 like it was previously over the years. It looked  
3 like there was indication of dumping of material  
4 there.

5 Q. When you say "dumping of material," what  
6 are you referring to?

7 A. There was -- I think one of the photos  
8 showed a picture of an old drum. There were brick  
9 scattered throughout the site.

10 Q. Do you know when that drum and those  
11 bricks were placed on the site?

12 A. No, I do not.

13 Q. And was this on Site 3 or Site 6?

14 A. Well, without knowing exactly where the  
15 boundary of Site 3 ended and the rest of the  
16 property began, I would guess it was probably north  
17 or south of -- yeah, south of Site 3, if I get my  
18 bearings right.

19 Q. So not on the parking lot area of Site --

20 A. Not on the parking lot, no.

21 Q. Okay. And not directly south of that  
22 but probably a little further south on the ComEd  
23 property?

24 A. Possibly.

1 Q. Had you ever been to this site before?

2 A. Not to that site.

3 Q. Why did you hesitate?

4 A. Well, it's sort of a grayish area.

5 There was a project at the Amstutz Expressway in  
6 which IDOT owns the property to the north of that  
7 in which I had been there.

8 Q. And how far away is that from Site 3 and  
9 Site 6?

10 A. Quarter of a mile possibly.

11 Q. And why were you on that part of the  
12 Amstutz Expressway?

13 A. There was a problem with fly dumping,  
14 and IDOT had materials there that EPA had some  
15 concerns with, so I had met with people from our  
16 district office to direct them on what needs to be  
17 removed and what they needed to do.

18 Q. And what do you mean by fly dumping?  
19 Are you referring to --

20 A. Third parties, people dumping material  
21 there.

22 Q. Are you talking about the fly ash at all  
23 that they used in the embankments or --

24 A. No.

1 Q. -- something separate?

2 A. Fly dumping is somebody who just drives  
3 by and tosses.

4 Q. Understand.

5 Did you take any notes during your site  
6 visit?

7 A. No.

8 Q. Did anyone else take notes?

9 A. I am not aware of any notes.

10 Q. You said that you reviewed Mr. Dorgan's  
11 report and some of the materials, and in your  
12 report -- and I think it's here on Page 1 -- you  
13 say that you looked at other historical records  
14 available regarding Sites 3 and 6?

15 A. Right.

16 Q. Which records are you referring to?

17 A. I reviewed the construction file that  
18 was available. I reviewed files that -- that were  
19 provided to me from our chief counsel's office. I  
20 reviewed historic aerial photographs. I reviewed  
21 historical topographical maps.

22 Q. Are all the documents that you reviewed  
23 either listed on your bibliography or provided  
24 pursuant to the document request?

1 A. Yes.

2 Q. Did you look through all of the  
3 documents that Johns Manville produced in this  
4 matter?

5 A. I did not look at the complete file that  
6 Illinois EPA or USEPA would have had on everything  
7 that was submitted to them.

8 Q. Okay. What about the documents that  
9 were produced by Johns Manville itself? Did you  
10 look at all of those documents?

11 A. I do not know what all of those  
12 documents is.

13 Q. The documents that were Bates numbered  
14 with JM on them.

15 A. I reviewed all the documents that were  
16 provided to me. I don't know without you telling  
17 me what documents -- every document that Johns  
18 Manville has produced I can't tell you whether or  
19 not I've reviewed it.

20 Q. Understand. So you don't know if you  
21 reviewed all the documents produced by Johns  
22 Manville.

23 There is some correspondence where you  
24 wanted to take a look at the Waukegan Park District

1 study, or the attorneys thought that you should  
2 take a look at it.

3 Do you know why?

4 A. I asked to look at it because it was  
5 referenced in some of the documents.

6 Q. And what did you find to be significant  
7 in that study?

8 A. I didn't find anything that helped me in  
9 preparing my report.

10 Q. And why did you want to take a look at  
11 the Illinois Revised Statutes from 1973?

12 A. Because it was referenced in the expert  
13 report as far as legal -- regarding the Act, and so  
14 I wanted to see what the Act said back then.

15 Q. And what did the act say back then?

16 MR. MCGINLEY: Objection; vague and  
17 ambiguous.

18 THE WITNESS: Are you supposed to --

19 They told me that the language  
20 regarding Section 21 is different than it is  
21 in the current Environmental Protection Act.

22 BY MS. BRICE:

23 Q. Do you know if it has a -- Strike that.

24 Do you know if the language in the 1973

1 Act would prohibit the same types of activities  
2 that are prohibited in the current Act?

3 MR. MCGINLEY: Objection. I think  
4 that's vague and ambiguous.

5 THE WITNESS: Could you repeat that?

6 MS. BRICE: Could you read that back?

7 (Record read as requested.)

8 THE WITNESS: Anything that would have  
9 been considered wrong in the '73 Act would  
10 still be considered wrong in the current Act.

11 BY MS. BRICE:

12 Q. Understood. But my question was  
13 slightly different.

14 The things that are considered wrong in  
15 the current Act, were they also considered wrong in  
16 the 1973 Act?

17 A. No.

18 Q. And do you have any opinions on that  
19 that you're offering in this case?

20 A. No.

21 Q. Did you look at the IRIS database?

22 A. Yes.

23 Q. And what did you -- What were you  
24 looking for in the IRIS database?

1           A.     I was just looking for background  
2 information of things that the USEPA had posted.

3           Q.     And what did you find?

4           A.     The five-year progress reviews,  
5 references to some other of the final documents. I  
6 think the EEC- -- EECA was there.

7           Q.     Are the historical engineering drawings  
8 contained in the IRIS database?

9                   MR. MCGINLEY:  Objection; vague and  
10 ambiguous.

11                   THE WITNESS:  I don't recall seeing any  
12 historical -- Well, I mean, other than what  
13 was in the reports, I don't see any separate.

14 BY MS. BRICE:

15           Q.     Let me back up.

16                   In general does IDOT's IRIS database  
17 contain historical as-built drawings for projects  
18 that were conducted in the past?

19           A.     Well, now you're confus- -- you said  
20 IDOT's.

21           Q.     Well, I thought the IRIS database --

22           A.     Well, then we're talking about two  
23 separate things.

24           Q.     Oh, okay.  I'm talking about IDOT's IRIS

1 database.

2 A. Meaning Illinois State?

3 Q. It's IRIS when you Google, Illinois

4 Department of Transportation's IRIS database that

5 contains historical records.

6 A. Then I have to strike what I said

7 because I did not review that.

8 Q. Okay. Did you look at any microfiche?

9 A. No.

10 Q. I saw an email where you -- I think it

11 was you who said something I saw in the piles of

12 microfiche or microfilm. You were looking for a

13 document, and you said I thought I saw that in the

14 piles of microfilm.

15 Does that ring a bell?

16 A. Well, most of the -- Okay. I did not

17 look at microfilm, but what we get is a PDF of all

18 the historical information that would have been on

19 the film.

20 Q. Okay. So you looked at a PDF of all the

21 historical information that would have been on the

22 film related to this site?

23 A. Yes, both related to IDOT's, according

24 to their project.

1 Q. Understood.

2 And is this where IDOT keeps its  
3 historical as-built drawings for bridge and road  
4 construction?

5 A. They can be found there. Typically they  
6 would be found at the district offices.

7 Q. And when you said they could be found  
8 there, where is "there"?

9 A. Meaning central office in Springfield.

10 Q. And would they also be on microfilm at  
11 the district office?

12 A. Yes.

13 Q. Do you know if -- Strike that.

14 Do you know where these as-built  
15 drawings were found?

16 A. The plans that were -- The contract  
17 plans that were let were found at the district  
18 office.

19 Q. What about the drawings, you know -- And  
20 I'll bring them out in a bit. But there's the  
21 drawings of -- All the engineering drawings, right?  
22 There's 81 pages of engineering drawings for the  
23 project?

24 A. I believe we're referring to the same

1 thing. That is the bid document drawing, the  
2 engineering drawings.

3 Q. I thought you were talking about the  
4 contract itself. So I'm talking about --

5 A. No. There's two --

6 Q. Right.

7 A. -- separate things that go out with --

8 Q. Understood.

9 A. -- the letting.

10 Q. So I'm talking about the drawings.

11 A. Yes.

12 Q. Do you know where those were found?

13 A. They were found at the district  
14 office -- I should say that is where I obtained my  
15 copy from.

16 Q. So you got an independent set of the  
17 drawings from the district office; is that correct?  
18 They were not provided to you by counsel; is that  
19 right?

20 A. Correct.

21 Q. And why does IDOT retain historical  
22 as-built drawings for bridge and road construction?

23 A. We retain those things so that next  
24 project that comes along can start the design

1 process after based on the previous job that was  
2 done.

3 Q. And why else?

4 A. Well, if there's any disputes, claims,  
5 that may have occurred, through whether it's the  
6 contractor and stuff, then they can use that  
7 information, too.

8 Q. And do you know how far back those  
9 drawings go?

10 A. I would -- I don't know the -- exactly  
11 how long they go. I would surmise they at least go  
12 back to Eisenhower and the federal highway program.  
13 But I would guess since we changed names since  
14 then -- because, I guess, IDOT used to be -- what  
15 was it called before -- public work and that. So I  
16 suspect they possibly could have the plans from the  
17 '30s when things were drawn.

18 Q. Okay. So Eisenhower would be the  
19 1950's?

20 A. '50s, late '50s, yeah, when the  
21 interstate program started.

22 Q. Did you talk to anyone at USEPA with  
23 respect to your work involving this project?

24 A. No.

1 Q. Did you talk to anyone at IEPA?

2 A. No.

3 Q. Did you talk to anyone at Westin

4 Consultants?

5 A. Regarding this particular project?

6 Q. Mm-hmm.

7 A. No.

8 Q. Did you talk to any other consultants

9 regarding this particular project?

10 A. No.

11 Q. Who did you talk to at IDOT?

12 A. The chief counsel.

13 Q. And who else?

14 A. Attorney General's Office.

15 Q. Anyone else?

16 A. Well, I think in the initial meeting

17 that we had prior to me being considered an expert,

18 we talked to people from our Bureau of

19 Construction. I think Tim Kell was there.

20 Q. Okay. And who is Tim Kell?

21 A. He is the acting bureau chief of

22 construction in central office in Springfield.

23 Q. And what happened in that meeting with

24 Tim Kell? What were you talking about?

1           A.     They asked us about what we knew about  
2 the project and construction practices.

3           Q.     And what did you know about the project?

4           A.     I knew the project from the beginning of  
5 the 104(e) response from IDOT, and it was the --  
6 talked about the project back when the original  
7 lawsuit occurred.

8           Q.     And what did you tell them about what  
9 you knew about the project?

10          A.     Well, it's -- most of it's summarized in  
11 the report, but I told them what I knew about the  
12 project was that that was there with Randy Schick  
13 in responding to the 104(e) and that I was also  
14 around when Phil McQuillan was -- put together a  
15 response regarding the initial lawsuit discovery.

16          Q.     And what was the conversation about  
17 IDOT's role in handling asbestos at Site 3 and  
18 Site 6?

19                   MR. MCGINLEY:  Objection; lacks  
20 foundation, vague, and ambiguous.

21                   THE WITNESS:  Could you rephrase that?

22 BY MS. BRICE:

23          Q.     Sure.

24          A.     I'm not sure I understand what you're

1 saying.

2 Q. You said you were at a meeting and you  
3 were talking about the history of project and the  
4 lawsuits; is that right?

5 A. Yes.

6 Q. And the lawsuits surround -- the  
7 lawsuits are about essentially who caused the  
8 asbestos is contamination at Site 3 and Site 6; is  
9 that right?

10 MR. MCGINLEY: Objection; calls for  
11 speculation.

12 BY MS. BRICE:

13 Q. In part.

14 A. In part, yes.

15 Q. What did you discuss on that subject at  
16 your meeting?

17 A. We didn't really discuss that aspect.  
18 We were discussing what information that could be  
19 provided.

20 Q. What do you mean what information could  
21 be provided?

22 A. Well, I mean it was more of putting  
23 together what was being -- what was provided to  
24 Randy Schick dealing with the 104 what was

1 provided -- pretty much, in a sense bringing the  
2 IDOT chief counsel the Attorney General's counsel  
3 up to speed of what -- how things were done through  
4 the other parts, you know, what we did with Schick,  
5 what he did, how he put together what Phil had  
6 done, and those aspects.

7 Q. So there was no discussion over whether  
8 IDOT actually or its contractor actually moved the  
9 asbestos around in the 1970s?

10 A. I don't believe we talked about that  
11 specifically at that meeting.

12 Q. Did you talk about asbestos at all at  
13 that meeting?

14 A. Other than that it was the basis of the  
15 lawsuit, yes.

16 Q. Okay. Let's take it out of the context  
17 of that meeting and all of your conversations that  
18 you had regarding this entire project because you  
19 have been involved since the 104(e) request, right?

20 A. Correct.

21 MR. MCGINLEY: Objection. I think that  
22 misstates his testimony.

23 BY MS. BRICE:

24 Q. Okay. Have you been involved in this

1 matter since the 103 [sic] request was sent to IDOT  
2 from USEPA?

3 A. Off and on, yes.

4 Q. In all of your conversations and  
5 meetings and correspondences relating to this  
6 matter starting with the 104(e) request up until  
7 right now, what conversations or correspondence  
8 have you been involved in surrounding the question  
9 of whether IDOT placed, moved, or caused asbestos  
10 to be present on Sites 3 Or 6? When I say "IDOT,"  
11 I mean IDOT or its contractor.

12 A. The conversations that we had all along  
13 always have been about whether it was normal  
14 construction practices and not specifically  
15 relating to the parts of the case.

16 Q. So no one's ever talked about whether or  
17 not IDOT actually moved, spread, disposed of  
18 asbestos at the site?

19 A. That aspect was only done based upon my  
20 research in looking at Dorgan's stuff.

21 Q. You never talked to Mr. McGinley about  
22 that?

23 A. Only in that it relates to the  
24 testimony -- to the work. Prior to that it was

1 just whether it was normal construction practices  
2 and how it related to it back then as compared to  
3 now and what we did.

4 Q. What was the chief counsel's view on all  
5 of this, IDOT's chief counsel's view?

6 A. I don't know what the IDOT chief counsel  
7 view is.

8 Q. Well, you said you've talked to him  
9 quite a bit about this -- well, maybe not quite a  
10 bit.

11 You've talked to him, and he's been  
12 involved in this; isn't that right?

13 A. If you're referring to Matt Dougherty --

14 Q. Yes.

15 A. -- that he has been involved, yes.

16 Q. Right.

17 And what did --

18 A. I have not had in-depth conversations  
19 with him.

20 Q. Have you had any conversations with him  
21 about whether or not IDOT is responsible for the  
22 asbestos that is located on Site 3 and Site 6?

23 A. I don't believe I've had that kind of  
24 conversation with him.

1 Q. Okay. Have you had any conversation  
2 with anyone else about whether IDOT is responsible  
3 for the contamination on Sites 3 and 6?

4 A. Other than what's presented in my  
5 report.

6 Q. So you have not talked to Mr. McGinley  
7 about that at all except for providing him your  
8 written report.

9 Is that your testimony?

10 MR. MCGINLEY: Objection; asked and  
11 answered at this point.

12 THE WITNESS: Yes.

13 BY MS. BRICE:

14 Q. You had no conversations at all --

15 A. The only conversations --

16 Q. -- about your opinion --

17 A. The only conversations that we've had  
18 was -- dealt with practices. In regards to my  
19 opinion, we have had no conversation regarding my  
20 opinion. I was asked to provide an opinion and to  
21 write something up, and that's what was done.

22 Q. Okay. We'll come back to that.

23 What was your role in the 104(e)  
24 response?

1           A.     It was more of a technical gopher, in  
2     essence. Randy Schick had -- needed some  
3     information on different questions that he had to  
4     respond to, and he came to me to find that  
5     information.

6           Q.     And what did you do?

7           A.     I found that information.

8           Q.     What information?

9           A.     I found him -- I think I found some of  
10    the figures regarding that -- construction plans.  
11    I found him some of the maps that he needed to  
12    provide. I provided him some of the -- I went and  
13    got him some of the historical aerial photos.

14          Q.     Have you ever talk to Duane Mapes?

15          A.     No, I did not.

16          Q.     Did you ever talk to anyone who worked  
17    on the project in the 1970s?

18          A.     No.

19          Q.     Have you ever talked to anyone at any  
20    time who worked on the project in the 1970s?

21          A.     No.

22          Q.     Did Randy Schick talk to you about his  
23    conversation with Duane Mapes?

24          A.     No.

1 Q. Did you review the 104(e) response  
2 before it went out?

3 A. No.

4 Q. What was your understanding of IDOT's  
5 belief regarding whether or not it was responsible  
6 for asbestos contamination at the site when it  
7 presented the USEPA with the 104(e) response?

8 MR. MCGINLEY: Objection; compound,  
9 assumes facts not in evidence.

10 THE WITNESS: I don't believe we had  
11 any belief.

12 BY MS. BRICE:

13 Q. Okay. What was your understanding of  
14 Mr. Mapes -- He was the resident engineer, right?

15 A. Correct.

16 Q. What is a resident engineer?

17 A. A resident engineer in the district is  
18 responsible for individual contracts that they're  
19 out in the field watching get built and making sure  
20 its being built in conformance with the plans and  
21 specs.

22 Q. Okay. And so this project, Duane Mapes  
23 was the resident engineer, correct?

24 A. Correct.

1 Q. And was he out on the site all the time  
2 or most of the time?

3 A. I do not know.

4 Q. Is it typical for the resident engineer  
5 to be present at the location of the construction  
6 project most of the time?

7 A. It is typical that a resident engineer  
8 will be at the project all the time he can be  
9 there, yes.

10 Q. Did you attempt to locate anyone who  
11 worked on the project in the 1970s in the course of  
12 working on this?

13 A. No. Sorry.

14 Q. Why not?

15 A. Well, it was -- I think my perception  
16 was that there was no one else alive.

17 Q. And why was that -- Did someone tell you  
18 that or -- Why was that your perception?

19 A. Well, I -- because it was such an old  
20 project, I did not think there was anyone around  
21 anymore.

22 Q. Have you spoken to anyone that worked on  
23 the 104(e) response while working on this matter?  
24 And I mean talking about now. I'm talking about

1 present time, so that was a confusing question.

2 Let me start over.

3 You worked on the 104(e) response.

4 There were a number of other people that  
5 worked on the 104(e) response, right?

6 A. I do not know who else worked on it  
7 other than Randy Schick and myself.

8 Q. And who?

9 A. Randy Schick and myself.

10 Q. Oh, myself. Sorry.

11 And Randy Schick is deceased; is that  
12 correct?

13 A. That is correct.

14 Q. So did you make any attempts to find out  
15 who else worked on the 104(e) response and to go  
16 talk to them about what they knew about it?

17 A. I did not believe there was anybody else  
18 that worked on the 104(e).

19 Q. Well, did you ever had any conversations  
20 with Mr. Schick about his conversation with  
21 Mr. Mapes?

22 MR. MCGINLEY: Objection; asked and  
23 answered.

24 THE WITNESS: I did not.

1 BY MS. BRICE:

2 Q. Did you try to find anyone who worked

3 for Bolander Construction at the time?

4 A. No, I did not.

5 Q. So do you know anything about the

6 project other than what you read in the documents

7 attached to your report?

8 A. That is correct. All I know is what

9 I've picked up through the file regarding that

10 project.

11 Q. I assume you met with Mr. McGinley to  
12 prepare for your deposition today; is that right?

13 A. Yes.

14 Q. What did you talk about?

15 A. We talked about what types of questions  
16 I might be asked.

17 Q. Did you talk about the fact that  
18 asbestos has been found within the fill material  
19 that was placed by IDOT's contractors in the 1970's  
20 on Sites 3 and 6?

21 MR. MCGINLEY: Objection; assumes facts  
22 not in evidence.

23 THE WITNESS: No, we did not talk about  
24 that.

1 BY MS. BRICE:

2 Q. Okay. What types of questions did you  
3 talk about?

4 A. Questions that may be asked based upon  
5 my expert report.

6 Q. Such as?

7 A. That you may ask me about my  
8 qualifications and ask me about different sections  
9 of my report.

10 Q. Was there anything -- Did you look at  
11 any documents?

12 A. No.

13 Q. Okay. Was there any subject matter or  
14 topic that you spent a fair amount of time  
15 discussing?

16 A. No.

17 Q. Did you discuss your opinion about  
18 whether IDOT caused, spread -- Let me get back  
19 here.

20 Did you discuss your opinion on Page 8  
21 that the department did not use, spread, place, and  
22 dispose of ACM?

23 MR. MCGINLEY: Did you want to take a  
24 moment to look at that before you answer?

1 (Witness peruses document.)

2 THE WITNESS: Like I said previously,  
3 every section of this report we went over,  
4 and they tried to, sort of, give me a feel  
5 for what types of questions you might ask.

6 BY MS. BRICE:

7 Q. And what type --

8 A. So in that, they -- this section was  
9 discussed in equal proportion to every other.

10 Q. Okay. And what questions did they  
11 suggest I might ask with respect to that section?

12 A. I really don't remember.

13 Q. Did you talk about the figures in  
14 Mr. Dorgan's report?

15 A. No.

16 Q. Okay. Let's look at your report.

17 Where are the opinions found in this  
18 report? It seems like you have certain things that  
19 are underlined. Are those the opinions or are they  
20 somewhere else?

21 A. Yeah. I would say the underlined  
22 portions are sort of the opinions.

23 Q. Okay. Sort of or they are the opinions?

24 A. Well, yeah, okay. If you want to --

1 yeah.

2 I don't necessarily look at them as

3 opinions.

4 Q. Okay. Well, I --

5 A. But they were a -- sort of like the, in

6 your realm, the opinions.

7 Q. Okay. So just for procedural purposes,

8 we need to know exactly what your opinions are

9 because that's what I need to ask you the questions

10 about.

11 A. Okay.

12 Q. So other than what is underlined, do you

13 have other opinions in this report?

14 A. No.

15 Q. Have you reached these opinions to any

16 specific degree of certainty?

17 A. Yes.

18 Q. Okay. What is it?

19 A. I'm very certain --

20 Q. Meaning?

21 A. -- that those opinions are correct.

22 Q. Okay. What is that in a percentage from

23 1 to 100?

24 A. Well, I'd just go with that 100 percent.

1 Q. What's your current position with IDOT?

2 A. Currently I am a Technical Manager 4.

3 Q. What does that mean?

4 A. Well, it's just a title that -- that --

5 that's in the State system. It's not related to

6 responsibilities.

7 Q. Okay. So what do you do?

8 A. I didn't mean to feed you the question,

9 but...

10 Q. It's a pretty innocuous question.

11 A. I oversee -- I'm sort of like the

12 environmental technical expert on soil and

13 groundwater issues. I oversee contracts that

14 investigate State right of way and determine what

15 soil contamination or groundwater contamination

16 exist, and then I take all that information that

17 the consultant provides, I write special

18 provisions, I put together pay items and

19 quantities. I insert all that stuff or have the

20 district insert all that stuff into the contract

21 plan so it can be bid on.

22 Q. And does the state own the areas within

23 the right of way that are designated on the various

24 plans for specific projects?

1 A. They can.

2 Q. How about with respect to the project at  
3 issue here? And we can get into this in more  
4 detail later. But there are limits of  
5 construction. There's easements. And there's  
6 right of ways.

7 A. Correct.

8 Q. Who owns the area within the right of  
9 way with respect to this project?

10 A. I believe it's a mixed issue of  
11 ownerships.

12 Q. Okay.

13 A. Currently.

14 Q. Okay. Who historically owned it in the  
15 1970s?

16 A. I believe in 1970, at the beginning of  
17 this project, there were resolutions that were  
18 created by the City of Waukegan and Lake County  
19 that they were going to purchase all right of way  
20 east of -- in essence, east of the railroad tracks.

21 Q. Did they do that?

22 A. No, they did not.

23 Q. And so did IDOT own it prior to that  
24 time?

1           A.     IDOT purchased the right of way and the  
2 easements.

3           Q.     And when did IDOT purchase the right of  
4 way and easements?

5           A.     I believe it was sometime prior to  
6 construction, like 1970 or so.

7           Q.     And for how long did IDOT own the right  
8 of way and the easements?

9           A.     I am not sure when IDOT gave up the  
10 right of way, but the easements in association with  
11 Site 3 were reverted back once construction is  
12 complete.

13          Q.     Right.  
14                How about the right of ways, though? I  
15 mean, does IDOT still own those right of ways  
16 associated with Site 3 and Site 6?

17          A.     From my -- the information that I have  
18 that I found that Wauk- -- City of Waukegan owns  
19 the right of way and jurisdiction of the road.

20          Q.     Which right of way?

21          A.     The right of way of Sands and Greenwood  
22 Avenue.

23          Q.     And when did Waukegan take over that  
24 right of way from IDOT?

1           A.    I did not investigate that aspects.

2           Q.    When were you first contacted about this  
3 specific lawsuit?

4           A.    I believe I was contacted by Phil  
5 McQuillan when it was originally -- when he became  
6 aware of it.

7           Q.    And why did he contacted you; because  
8 you were involved in the 104(e)?

9           A.    I believe he contacted me because I --  
10 like I stated, I'm somewhat the environmental  
11 expert on soil and groundwater issues.

12          Q.    Understood.  
13                And what did you tell him about the  
14 case?

15          A.    I believe I probably told him that I was  
16 involved in the 104(e), and I believe most of the  
17 discussions we had were just looking at historical  
18 area photographs.

19          Q.    Did he ask you or anyone else ask you at  
20 any time is there any, you know, validity to this  
21 argument that IDOT put asbestos-containing  
22 materials --

23          A.    I don't recall --

24          Q.    -- on the ground at Site 3 or 6?

1           A.     I don't recall ever being asked that  
2 question.

3           Q.     Or something similar?

4           A.     Or anything similar.

5           Q.     Okay. Exhibit 1. Does this contain all  
6 the opinions you plan to offer in this case?

7           A.     I believe so at this time, yes.

8           Q.     Well, "at this time" is different than  
9 "I believe so."

10          A.     At this current point in time I have no  
11 other opinions. I do not know if things change  
12 over the next years whether or not I will ever have  
13 another opinion or not.

14          Q.     Okay. But as you sit here, these are  
15 the only opinions you intend to offer at a hearing  
16 on this matter?

17          A.     Yes, at this time, yes.

18          Q.     How many drafts of this report did you  
19 prepare?

20          A.     I guess technically there was one draft.

21          Q.     Okay. Did you edit on your computer?

22          A.     Yes.

23          Q.     So you would just edit and then save and  
24 then edit and then save and then provide a draft.

1 Is that basically how it worked?

2 A. Yes.

3 Q. And when was the first time you shaved  
4 something that you prepared with counsel for IDOT,  
5 be it the chief counsel or the Attorney General's  
6 Office?

7 A. I'm not sure what the exacted date, but  
8 it was roughly two days prior to when it was due.

9 Q. Did you discuss with the AG or anyone at  
10 IDOT what should go into the report?

11 A. No.

12 Q. So your report was just -- You were the  
13 only person that formulated the responses that you  
14 put -- not the responses.

15 You were the only person that formulated  
16 the opinions that you drafted and placed into this  
17 report; is that correct?

18 A. Yes.

19 Q. No one gave you any guidance?

20 A. The only guidance I got was from our  
21 IDOT chief counsel on because I wasn't sure at the  
22 beginning how it should be formatted, and he  
23 provided me -- told me to -- that there was some  
24 good formats online that I should look at.

1 Q. And in your mind your report was focused  
2 on rebutting the report of Mr. Dorgan; is that  
3 correct?

4 A. That is -- That is what they wanted, but  
5 I would not -- I would not paraphrase what that  
6 report -- that report does.

7 Q. Okay. Why don't you explain what you  
8 mean.

9 Who is "they"?

10 A. Well, the attorneys, I should say.  
11 Sorry.

12 Q. They wanted --

13 A. Them.

14 Q. So they wanted you to rebut?

15 A. That's what they wanted is a rebuttal to  
16 his statements.

17 Q. Okay. And how did you deviate from  
18 that?

19 A. What I did is that I reviewed all the  
20 historical information and put the pieces together  
21 to draw the picture as to what happened out there.  
22 Now, in the course of providing the sequence of  
23 events that would have occurred, it then takes on  
24 rebuttal of certain aspects of his report. But I

1 did not go through his report and try to rebut

2 everything he said.

3 Q. Okay. With respect to Mr. Dorgan's  
4 report, are there other aspects of his report that  
5 you do rebut that are not contained in what we call  
6 Exhibit 1?

7 A. This is the only, as your term,  
8 rebutting that I have.

9 Q. Okay. So just for an example, there are  
10 figures attached to Mr. Dorgan's expert report?

11 A. Right.

12 Q. Okay. Do you dispute the accuracy of  
13 any of those figures?

14 A. I believe his figures were accurate in  
15 what he was presenting.

16 Q. Understood. So just so I'm clear  
17 because I think I gave you a bad question  
18 originally.

19 Other than the opinions contained in  
20 Exhibit 1, you do not have any other rebuttal  
21 points with respect to Mr. Dorgan's report; is that  
22 correct?

23 A. As I stated before, I did not go through  
24 his report to rebut everything that he had written

1 to confirm or deny what he wrote.

2 Q. Right. But this is my chance to take  
3 your deposition on his report.

4 So I need to know is there anything else  
5 in his report as you sit here today that you are  
6 intending to rebut at a hearing or at trial on this  
7 matter?

8 A. I have no plans on rebutting any other  
9 aspects of his report at this time.

10 Q. Did anyone assist you in preparing the  
11 report?

12 A. No.

13 MS. BRICE: Can we take a short break.

14 (Brief recess.)

15 (Gobelman Group Exhibit No. 2 marked  
16 for identification.)

17 BY MS. BRICE:

18 Q. Mr. Gobelman, I've marked for the record  
19 Deposition Exhibit 2, which are Illinois Department  
20 of Transportation's Responses to Complainant's  
21 First Set of Interrogatories, and I believe the  
22 second document is -- it actually has the same  
23 title, but I think it's the supplemental responses.

24 So if you turn to the last page of each

1 document there is a verification which you signed,  
2 correct?

3 A. Yes.

4 Q. Are those your signatures on both of  
5 these documents -- Is that your signature on both  
6 of these documents?

7 A. You say "both."

8 Q. Well, there's two.

9 A. Oh, I only have one.

10 Q. Oh, it's here (indicating).

11 A. Okay. Yes.

12 Q. How did you verify that these responses  
13 were correct?

14 A. I read it.

15 Q. That's it?

16 A. Well, in regards to my signature, I read  
17 it. This was accurate. And I signed it.

18 Q. Okay. Did you do any investigation to  
19 determine that the statements made in this document  
20 are accurate?

21 A. I believe everything -- the  
22 investigation was done prior to the development of  
23 this document.

24 Q. What investigation?

1 A. The review of all the information.

2 Q. Your review? Did you review all this  
3 information prior to April of 2015?

4 A. Let's see.

5 (Witness peruses document.)

6 THE WITNESS: Based to my -- to the  
7 best of my knowledge, the information  
8 provided here was accurate and correct.

9 BY MS. BRICE:

10 Q. Okay. When did you review the records  
11 relating to this lawsuit in order to prepare your  
12 expert report?

13 A. I do not know when that started.

14 Q. Okay.

15 A. It was after the initial meeting with  
16 the Attorney General's Office.

17 Q. Was it before you signed Deposition  
18 Exhibit 2? Had you reviewed all of these records  
19 before you signed Deposition Exhibit 2?

20 A. I am not sure if I reviewed all the  
21 records prior to this, but I reviewed a lot of the  
22 records.

23 Q. Prior to signing the document?

24 A. Yes.

1 Q. So did you sign the document based upon  
2 your review of the records and your determination  
3 that the statements were accurate, based upon your  
4 review of the records?

5 A. Based upon my knowledge. The best of my  
6 knowledge, the information that was provided was  
7 correct.

8 Q. Did you try and find Randle Schick's  
9 file to confirm the statements?

10 MR. MCGINLEY: Objection; vague and  
11 ambiguous.

12 BY MS. BRICE:

13 Q. Well, Randle Schick, right, was the  
14 attorney who worked on the 104(e) response, right?

15 A. Correct.

16 Q. And did he have a file on the 104(e)  
17 response?

18 A. Yes.

19 Q. Okay. Have you looked at his file?

20 A. Yes.

21 Q. Okay. Has that entire file been  
22 produced, to your knowledge?

23 A. I have no knowledge when it was  
24 produced --

1 Q. Okay. And what did you --

2 A. -- because I don't have control of it.

3 Q. What did you find in that file?

4 A. His response to the 104(e) and other  
5 documentations.

6 Q. What other documentations?

7 A. I do not have a list of every document  
8 that was in that file.

9 Q. Okay. Well, what do you recall being in  
10 that file?

11 A. I recall that there was information on  
12 the contract plans and the attachments associated  
13 with -- that were provided in the 104(e).

14 Q. Okay. Do you recall any notes being in  
15 that file?

16 A. I do not recall any notes.

17 Q. Did you take any other steps other than  
18 reading the document, which is Deposition Exhibit  
19 2, and thinking about your knowledge with respect  
20 to what you had reviewed up until that time to --  
21 Strike that.

22 Did you take any other steps other than  
23 reviewing the document and referring then your mind  
24 back to what you had previously read before you

1 signed that verification form?

2 A. No, I did not take any other steps.

3 MR. MCGINLEY: Can I, just for the sake  
4 of the record because this is a group  
5 exhibit, but the reporter's only stamped the  
6 first one, can we just read the Bates numbers  
7 into the record?

8 MS. BRICE: Definitely. Go right  
9 ahead.

10 MR. MCGINLEY: The exhibit consists of  
11 IDOT 003279 through IDOT 003295.

12 MS. BRICE: I'm going to mark for the  
13 record Deposition Exhibit 3, which is also a  
14 group exhibit, and it is IDOT 000378 through  
15 391, and then the other document does not  
16 have a Bates stamp on it. There is a Bates  
17 stamp version in the record. But it is IDOT  
18 November 27, 2000 response to the 104(e)  
19 request from USEPA.

20 (Gobelman Exhibit No. 3 marked for  
21 identification.)

22

23 BY MS. BRICE:

24 Q. I'm going to focus on the second

1 document, which is the responses from IDOT. And if  
2 you can turn to Attachment A, which is the second  
3 page, there is a list of people who I believe are  
4 the people that were involved in helping prepare  
5 the 104(e) response.

6 A. Yes.

7 Q. Are any of these people still at IDOT?

8 A. I don't believe any of them are still  
9 with IDOT.

10 Q. Do you know where any of them are  
11 currently?

12 A. The only person that I know currently is  
13 Mike Hine, and he is with the Federal Highway  
14 Administration.

15 Q. Okay. Did you reach out to Mike Hine  
16 prior to preparing your expert report in this case?

17 A. No.

18 Q. And if you can take a look at Question  
19 5, which is on Page 000382, which talks about:

20 "Identify the acts or  
21 omissions of any person, other  
22 than your employees, contractors,  
23 or agents that may have caused  
24 the release or threat of release

1 of hazardous substances..."

2 basically at the site. I'm not quoting

3 it.

4 Did you have any role in responding to

5 that question?

6 A. I did not have a role in responding to

7 that question.

8 Q. Okay. And then Question 10:

9 "Describe all arrangements

10 for the transportation, movement,

11 or placement of ACM that was in

12 situ at Area of Concern No. 3..."

13 Did you have any role in responding to

14 that question?

15 MR. MCGINLEY: Can we, just for the

16 sake of the record, indicate what the Bates

17 number for that is, please.

18 MS. BRICE: Sure. 000383.

19 MR. MCGINLEY: Thank you.

20 THE WITNESS: I did not have a role in

21 that.

22

23 BY MS. BRICE:

24 Q. If you turn to the actual response, the

1 second-to-last page, it talks about, on Response

2 No. 9:

3 ..the Department of Public

4 Works and Buildings had a

5 responsibility for maintenance,

6 traffic enforcement and control

7 of By-Pass A during the period of

8 its construction."

9 What does that mean in your mind? What

10 were they responsible for doing?

11 A. It means that -- that the IDOT contract

12 was in control. There was a contract, and then

13 they had control of doing the work associated with

14 those properties. They were -- they had access and

15 control.

16 Q. That IDOT did?

17 A. IDOT, yes, or at that time Public Works

18 and Building.

19 Q. And that is a predecessor to IDOT?

20 A. Yes.

21 Q. Okay. Done with that.

22 What experience do you have with

23 Transite pipe made in the 1970s?

24 MR. MCGINLEY: Objection; vague and

1           ambiguous.

2                       THE WITNESS: I have no experience with  
3           the making of Transite pipe.

4 BY MS. BRICE:

5           Q.     Do you have any experience with the  
6           handling of Transite pipe made in 1970s?

7                       MR. MCGINLEY: Same objection; vague  
8           and ambiguous.

9                       THE WITNESS: I guess I don't  
10          understand your question.

11 BY MS. BRICE:

12          Q.     Okay. What is Transite pipe?

13          A.     It's an asbestos cement pipe.

14          Q.     Have you ever seen Transite pipe that  
15          was made in the 1970s?

16          A.     I do not recall whether I have seen  
17          Transite pipe that was made in the '70s.

18          Q.     What does Transite pipe look like?

19          A.     Asbestos concrete pipe, which is usually  
20          referred to as Transite pipe, is a concrete pipe  
21          that has, depending on the -- the year that it was  
22          made, certain percentages of asbestos in it.

23          Q.     Can you tell by looking at the pipe  
24          whether or not it has asbestos in it or not?

1           A.     I believe in the older versions where it  
2 had a higher percentage of asbestos in it, you  
3 could look at it and tell that it was that type of  
4 pipe.

5           Q.     Okay. How do you know that?

6           A.     I guess just from obtaining knowledge  
7 through the years.

8           Q.     Okay. But you've never seen pipe that  
9 was made in the 1970s, Transite pipe?

10          A.     I do not recall seeing pipe made in the  
11 1970s.

12          Q.     Do you know how much asbestos Transite  
13 pipe contained in the 1970s?

14          A.     I know at one point it was in the 70 and  
15 80 percent asbestos, but then it went down to  
16 manufacturing down to 8 to 10 percent asbestos  
17 contained. But I do not know what dates those  
18 percentages relate to in the '70s.

19          Q.     And do you have any experience with  
20 Transite pipe made prior to the 1970s?

21          A.     No experience regarding prior to 1970  
22 Transite pipe.

23          Q.     And have you ever seen Transite pipe  
24 that was made prior to the 1970s?

1           A.     I don't recall whether or not I have  
2     seen Transite pipe prior to 1970.

3           Q.     Do you know how Transite pipe made in  
4     the 1970s or prior thereto degrades?

5           A.     I do not know how Transite pipe degraded  
6     prior to 1970.

7           Q.     Do you know how someone in the 1970s  
8     would describe pieces of Transite pipe that they  
9     encountered?

10           MR. MCGINLEY:  Objection; calls  
11           speculation.

12                     You can answer, if you understand  
13           the question.

14           THE WITNESS:  I would -- in my view, in  
15           the construction business, they would call it  
16           concrete pipe.

17     BY MS. BRICE:

18           Q.     Was it prohibited to use concrete pipe  
19     for IDOT projects in the 1970s?

20           MR. MCGINLEY:  Objection; vague and  
21           ambiguous.

22           THE WITNESS:  No.  We use concrete pipe  
23           today.

24     BY MS. BRICE:

1 Q. Okay. Was it prohibited to use concrete  
2 pipe that contained asbestos in it for IDOT  
3 projects in the 1970s?

4 A. No. It was not prohibited.

5 Q. What expertise are you relying on in  
6 offering your opinions?

7 A. In regarding what?

8 Q. Everything.

9 What are you saying you're an expert in?

10 A. Well, my expertise comes from eight  
11 years at Illinois EPA doing project management,  
12 permitting, overseeing cleanups, State funded and  
13 voluntary. I also spent the last 21 years at IDOT  
14 doing environmental expertise in regarding cleanups  
15 of dealing with soil and groundwork contamination,  
16 how it has to be properly managed, any aspects of  
17 spills relating to yards, any aspects regarding  
18 compliance assessments, creating environmental  
19 management systems for operational yards. I  
20 oversaw -- I should take that back.

21 I didn't oversee. I did the technical  
22 reviews of all highway authority agreement projects  
23 in which I determined cost associated to what those  
24 parties -- based upon what IDOT did an

1 investigation and removed as part of construction.  
2 An aspect of that was I had to go through old  
3 historical records, put together the pieces of what  
4 was done, and historical records to determine what  
5 aspects -- what types of work was done there and  
6 how that could be related back to the agreement  
7 and -- as far as cost recovery.

8 Q. Okay.

9 A. I provided testimony and stuff at  
10 numerous environmental regulations, the TACO  
11 regulations, Tiered Approach to Corrective Action  
12 objectives, the clean construction or demolition  
13 debris regulations.

14 Q. Do you have any expertise with regard to  
15 how materials were handled by IDOT or its  
16 contractors in the 1970s?

17 MR. MCGINLEY: Objection; vague and  
18 ambiguous.

19 THE WITNESS: Could you repeat that  
20 again?

21 BY MS. BRICE:

22 Q. Sure.

23 Do you have any expertise with respect  
24 to how IDOT or its contractors handled various

1 types of materials --

2 A. I under- --

3 Q. -- in the 1970s?

4 A. Sorry. I understand how they managed  
5 materials back in the 1970s.

6 Q. Okay. Are you an expert in how they  
7 managed materials in the 1970s?

8 A. I do not know how you would define  
9 "expert" of --

10 Q. Have you interviewed anyone with respect  
11 to how exactly IDOT or its contractors handled  
12 materials in the 1970s?

13 A. I did not interview anyone regarding how  
14 they managed soils -- materials back then.

15 Q. Have you ever talked to anyone who  
16 handled materials -- Strike that.

17 Have you ever attempted to study how  
18 IDOT or its contractors handled materials on road  
19 and bridge construction projects in the 1970s?

20 MR. MCGINLEY: Objection; vague and  
21 ambiguous and compound.

22 THE WITNESS: Yes. I have reviewed the  
23 1970 spec book.

24 BY MS. BRICE:

1 Q. Okay. Other than reviewing the book,  
2 have you done anything else to become an expert in  
3 how IDOT or its contractors handled materials for  
4 road and bridge construction projects in the 1970s?

5 A. Outside of how things were managed on  
6 this particular project, I reviewed the spec book  
7 of how things were done.

8 Q. Right.  
9 Other than reviewing the spec book, have  
10 you done anything else to become an expert in this  
11 topic?

12 A. I reviewed the spec book outside of this  
13 project for things -- how things were done in the  
14 197- -- how they did in the spec book.

15 Q. I'm sorry. I'm confused by your answer.  
16 You reviewed the spec book, right?

17 A. Correct.

18 Q. What else have you done to become an  
19 expert on how materials were handle by IDOT and its  
20 contractors in the 1970s?

21 A. You're asking me a question that is  
22 related to the entirety of all IDOT work --

23 Q. Sure.

24 A. -- in the 1970s.

1 Q. Sure.

2 A. And in doing so, I reviewed the spec

3 book in regards to how IDOT managed materials --

4 Q. So other than that --

5 A. -- other than what's in this case.

6 Q. Okay. So you reviewed the materials in

7 this case, and you reviewed the spec book.

8 Is that your answer?

9 A. Yes.

10 Q. Okay.

11 A. But that is not the answer to the

12 question you asked.

13 Q. Okay. Well, the question I asked was:

14 What did you do to become an expert in how IDOT or

15 its contractors managed asbestos -- not asbestos,

16 managed materials on road and bridge construction

17 projects in the 1970s. And you said you reviewed

18 the materials in this case and the spec book.

19 A. I said outside of this case, I reviewed

20 the spec book.

21 Q. Understood. You reviewed materials in

22 this case, and you reviewed the spec book.

23 Is there anything else you have ever

24 done to become an expert on that topic?

1           A.    Outside of this case and the information  
2   in this case, that's the only thing I have  
3   reviewed.

4           Q.    Have you ever talked to somebody who did  
5   road and bridge construction projects in the 1970s  
6   for IDOT or its contractors to ask them how they  
7   handled materials?

8           A.    No, I did not.

9                   MS. BRICE:   Okay.  I'm going to mark  
10   the Dorgan report.

11                           (Gobelman Exhibit No. 4 marked for  
12                           identification.)

13                   MS. BRICE:   Just for the record -- and  
14   we'll come back to this -- the court reporter  
15   has marked for us the expert report of  
16   Douglas G. Dorgan, Jr., as Deposition Exhibit  
17   4.

18   BY MS. BRICE:

19           Q.    And you have reviewed this report,  
20   correct?

21           A.    Yes.

22           Q.    And this is the report you're referring  
23   to when you say on Deposition Exhibit 1 rebuttal  
24   report of Steven L. Gobelman, you're rebutting this

1 expert report, Deposition Exhibit 4, correct?

2 A. Yes.

3 Q. I want to step back for a second. A lot  
4 of your opinions focus on how asbestos-containing  
5 materials ended up buried on Sites 3 and 6.

6 What possible explanations did you  
7 consider?

8 A. I considered the record that was in the  
9 file of how the construction job was created.

10 Q. Okay. And what are the possible ways  
11 that that asbestos ended up buried on Sites 3 and  
12 6? You know, I imagine you came up with a variety  
13 of theories and then said, This is the right  
14 theory. So what theories did you analyze?

15 A. I did not come up with a variety of  
16 theories.

17 Q. Okay. So then explain the process.

18 What's your methodology for arriving at  
19 your opinions on the fact that -- on how the  
20 asbestos ended up on Sites 3 and 6?

21 A. I don't --

22 MR. MCGINLEY: I think it would be  
23 help- -- I mean, is there a specific portion  
24 of the report that you want to ask him about

1 with respect to how that asbestos may have  
2 been -- came to be there?

3 MS. BRICE: No, not specifically. I  
4 mean, a lot of the different opinions talk  
5 about how the asbestos could have gotten  
6 there or how it did get there and that IDOT  
7 didn't put it there. So I want to know how  
8 he arrived at the opinion that --

9 BY MS. BRICE:

10 Q. Well, I can suggest this. I think some  
11 of your opinions are that Johns Manville put it  
12 there and IDOT didn't put it there. I'm talking  
13 about asbestos being buried. I'm not talking about  
14 the concrete pipes on top of the parking lot. I'm  
15 talking about the asbestos being buried beneath the  
16 soil on Site 3 and Site 6.

17 So what potential -- how did you arrive  
18 at those opinions? What was your methodology?

19 A. Well, first, I wouldn't call it an  
20 opinion. It is that that statement was coming from  
21 Johns Manville's report itself.

22 Q. Which statement?

23 A. The statement that the material was  
24 placed there at Site 3 from Johns Manville.

1 Q. Okay. Well, so you're not offering an  
2 opinion that Johns Manville put it there?

3 A. No. I'm just, in a sense, stating  
4 what's factually presented in the report.

5 Q. So what is your opinion on how the  
6 asbestos-containing materials ended up being buried  
7 on Sites 3 and 6?

8 A. The only opinion that I believe I  
9 provided was that it is possible that some of that  
10 material could have been buried as associated with  
11 the utilities being installed and -- or being  
12 maintained.

13 Q. Okay. But when you say "could have been  
14 buried," are you saying that it was, that it's more  
15 likely than not, that it's 100 percent that it was  
16 buried? What are you saying?

17 A. I'm saying that it -- that is -- when  
18 utilities excavate, that that material will be  
19 redistributed and moved.

20 Q. So are you saying --

21 A. -- and if there was asbestos there, then  
22 that material would have been moved and potentially  
23 buried.

24 Q. Okay. So are you offering any opinion

1 on how the asbestos that is currently buried on

2 Sites 3 and 6 became buried on Sites 3 and 6?

3 A. My opinions were based upon the IDOT

4 construction methodology and how IDOT did its work

5 there.

6 Q. Right. But I want to know what your

7 opinion is.

8 How did it get there? How did the

9 asbestos on Sites 3 and 6 that's buried on Sites 3

10 and 6 get there? Are you offering an opinion on

11 that or not?

12 A. I believe the only opinion that's in my

13 report had to do with utilities and their being

14 installed through asbestos-containing material and

15 being maintained in asbestos-containing material.

16 Q. Okay. But are you saying that that's

17 how it got there or that's a possibility?

18 A. I'm saying that those -- material was

19 there and the installation of utilities would have

20 potentially moved that to a different horizon from

21 which it originally was in.

22 Q. Okay. Well, how did it get there in the

23 first place?

24 A. I do not believe in my report I render

1 any opinion on how it was got there other than the  
2 factual evidence that was in the reports from Johns  
3 Manville.

4 Q. So are you offering any opinion that  
5 IDOT did not put asbestos-containing material in  
6 the ground on Site 3 and Site 6?

7 A. I believe my opinion of the construction  
8 project that it is very possible for IDOT to put  
9 material in Site 3 and Site 6.

10 Q. Okay. Let's back up.  
11 I want to know -- and it's just a little  
12 confusing, so I'm trying to get my arms around  
13 it -- what your opinions are on how the  
14 asbestos-containing material that is currently  
15 buried on Sites 3 and 6 got there. And you said  
16 that you are referring to a factual statement  
17 that -- what you believe to be a factual statement  
18 contained in a report that Johns Manville  
19 constructed the parking lot with asbestos, right?

20 A. Correct.

21 Q. But it's not your opinion that Johns  
22 Manville actually buried asbestos or was  
23 responsible for the asbestos that is currently  
24 buried in Site 3 and Site 6?

1           A.    I am taking the assumption that if a  
2 consultant paid by Johns Manville wrote a statement  
3 in the report that stated that Johns Manville said  
4 that they built the parking lot with  
5 asbestos-containing material and that they used  
6 concrete pipe on the top for curb bumpers, that  
7 that is factually correct.

8           Q.    Okay. But other than that statement,  
9 okay, that's in that one document by ELM -- we'll  
10 get there -- is there anything else that -- No.  
11 Let me back up.

12                    So are you rendering an opinion that  
13 Johns Manville caused the asbestos on Site 3 and  
14 Site 6?

15           A.    I am not rendering -- My opinions only  
16 relate to the IDOT construction process and how it  
17 relates to all this.

18           Q.    Okay. So you are not offering an  
19 opinion that Johns Manville caused the asbestos  
20 that is currently buried in Site 3 and Site 6?

21           A.    In my opinion, it is not an opinion. It  
22 is what is factually found in the record.

23           Q.    Are you offering any opinions that IDOT  
24 or its contractor did not cause the asbestos that

1 is currently buried on Site 3 and Site 6?

2 A. My report reflects that it's very  
3 unlikely and maybe impossible that IDOT put  
4 material in Site 3 and Site 6.

5 Q. Okay. I thought you said it was  
6 possible earlier, so that's why I was confused.

7 A. No.

8 Q. So your opinion is that it is unlikely  
9 that IDOT or its contractor buried the asbestos.

10 Is that your opinion?

11 A. It's not an opinion. It's based upon  
12 the factual evidence of the contract.

13 Q. So are you offering an opinion or not?  
14 I mean, that's what this deposition is about.

15 A. Right. I don't understand -- Maybe  
16 our -- maybe my definition of "opinion" and your  
17 definition of "opinion" isn't necessarily the same.

18 Q. Okay. But you're being offered as an  
19 expert in this case, okay, and there's rules that  
20 govern experts and what their opinions are.

21 And so I need to know if you're going to  
22 get up on the stand and say, "This is my opinion  
23 based upon my experience, knowledge, et cetera  
24 that, you know, Johns Manville caused this and IDOT

1 didn't." I need to know if you're going to offer  
2 that as an opinion or not.

3 A. My opinions are what's in that report.

4 Q. Okay. But I'm asking you right now --

5 A. Okay.

6 Q. -- you've just said four or five  
7 different things, so I'm trying to understand.

8 Are you saying that what -- Let's go  
9 back.

10 What are you saying caused the asbestos  
11 on Site 3 and Site 6?

12 A. I am not saying anything regarding what  
13 caused the asbestos on Site 3 and 6 other than what  
14 was factually found in the record of the reports  
15 written.

16 Q. Okay. So you're just reciting what the  
17 record said?

18 A. I would assume that a report that is  
19 written for Johns Manville would be accurate.

20 Q. Okay. Other than reciting what's in the  
21 records, are you doing anything else?

22 A. In regards to?

23 Q. This expert report.

24 A. In regards to what?

1 Q. In regards to what you are calling  
2 opinions that are underlined. You said you're  
3 reciting what's in the record.

4 Are you then arriving at an opinion  
5 based upon a number of factors and saying, "This is  
6 my opinion," or are you just saying, "This is what  
7 the record says"?

8 A. To me you're being very vague right now.  
9 I don't understand what your question is.

10 Q. Okay. Well, my question is: How did  
11 you come to the conclusions that you came to in  
12 your report? They're based upon the record, right?

13 A. Correct.

14 Q. Are they based upon anything else?

15 A. No.

16 Q. Okay. And so we've got asbestos buried  
17 in Site 3 and Site 6. You know, Johns Manville  
18 could have caused it, IDOT or its contractor could  
19 have caused it.

20 Is there --

21 A. No.

22 Q. Are there any other -- Oh, they didn't?  
23 There's no possibility?

24 A. I do not believe it is possible that

1 IDOT or its contractor could have.

2 Q. 100 percent certain?

3 A. As close as you can get to that.

4 Q. Did you consider any other  
5 possibilities?

6 A. The evidence that is in the construction  
7 record does not lead to any other opinion, other  
8 than it is not there by contractor or IDOT.

9 Q. How do you rule out that the IDOT's  
10 contractor didn't take the Transite pipe, concrete  
11 Transite pipe, break it up. And then put it in the  
12 embankments or put it in the road on Site 3 or in  
13 and around Site 3 in the road and bury it?

14 MR. MCGINLEY: Objection; compound.

15 THE WITNESS: You have to go back to  
16 the beginning of a contract and understand  
17 what the contract is telling the contractor  
18 to do. There was a sequencing of events that  
19 have to occur. You cannot pass A and go onto  
20 B until A is done. So there's a sequence of  
21 events, A, B, C, D, E, let's say. You cannot  
22 skip. A has to be done first to its  
23 entirety, then B, then C.

24 BY MS. BRICE:

1 Q. Have you ever seen anyone not follow the  
2 sequence of events in a special provision in a  
3 contract?

4 A. In this particular case, it could not be  
5 changed.

6 Q. Why is that?

7 A. Because you are building a new road and  
8 shutting down roads. In order to do those roads,  
9 you have to have a means in which people can move.  
10 So the only way that can be done is that you have  
11 to build a detour road. So detour roads had to be  
12 built. They had to be built before any other work  
13 can be done.

14 Q. Right. But does Detour Road A have to  
15 go first or can B or C go before A?

16 A. They all are going at the same time --

17 Q. Oh, okay.

18 A. -- all detour roads.

19 Q. Are going at the same time?

20 A. Are going at the same time.

21 Q. Okay. I thought your report said A was  
22 first, then B, then C.

23 A. No, I do not believe my report says  
24 that.

1 Q. Okay.

2 A. I believe it says detour roads had to be

3 done.

4 Q. When did they build the embankments?

5 A. Embankments for what?

6 Q. For Greenwood.

7 A. After all the detour roads were

8 completed.

9 Q. How do you know that?

10 A. Because in order to build the

11 embankments for Greenwood, they'd have to close

12 Greenwood. And in order to close Greenwood, you'd

13 have to have the means for transportation to move

14 in and out. And the only way the transportation is

15 going to be moving in and out is through the detour

16 roads. So the detour roads have to be done first

17 prior to shutting down Greenwood and building the

18 embankment.

19 Q. Okay. But can't you take material from

20 the detour road, from your excavation of the detour

21 road, and move it over to where -- and set it in

22 the right of way for Greenwood, the embankments for

23 Greenwood?

24 A. No. That isn't logical in construction.

1 Q. Why not?

2 A. Because you're telling the contractor to  
3 move the soil twice, and then that requires  
4 him to -- cost associated with moving soil twice.  
5 The project is based on a balanced -- to be as  
6 balanced as possible.

7 So you have cuts and fills associated  
8 with construction. There isn't enough cut material  
9 in the embankments -- I'm sorry, in the detour --  
10 creating of the detour roads to have any excess  
11 material to be stored anywhere or have the room to  
12 be stored anywhere for that. All the cut material  
13 that's coming off of the detour roads is going into  
14 the detour roads, and then they had to bring  
15 additional fill material from a borrow site, most  
16 likely, to bring it up to what -- the material that  
17 they needed to build detour roads.

18 Q. Okay. And we'll go into that.

19 But more generally, you weren't involved  
20 in this site, right? I mean you weren't there --

21 A. No.

22 Q. -- in 1971, '72?

23 And you haven't talked to anybody who  
24 was there in 1971, '72, right?

1           A.    That is correct.

2           Q.    So it's possible that they didn't follow  
3 the sequencing that you've laid out; isn't it?

4           A.    I would say that it is not possible.

5           Q.    That there was no deviation in the  
6 sequencing that you've put for in the special  
7 provisions, it's completely impossible? Is that  
8 your opinion?

9           A.    It is completely impossible, yes.

10          Q.    Okay. And it's your opinion that it's  
11 completely impossible that the contractor would  
12 have taken the Transite pipe on top of the parking  
13 lot, broken it up, and set it to the side and used  
14 it later?

15          A.    No, because he would have wanted to  
16 clear the property of the material. And the  
17 parking lot was considered stable enough, and they  
18 didn't want to disturb it, so it would seem very  
19 illogical for the contractor to run pipe on top of  
20 it and to crush, which would cause damage to the  
21 parking lot and could make it unstable. So -- and  
22 any material that they would put, they're going to  
23 have to remove anyway, so the contractor would have  
24 cleared the material like any other material, trees

1 and shrubs, to clear the material out --

2 Q. Okay. So --

3 A. -- if there was Transite pipe at that  
4 time of the construction.

5 Q. Okay. If there was Transite pipe at the  
6 time of construction, are you saying that it's  
7 impossible that he would have broken up that pipe,  
8 set it to the side, and then used it in the  
9 construction of the embankments?

10 A. I'm saying it's very unlikely that he  
11 would have crushed it and used it in the  
12 embankment --

13 Q. Okay. But you haven't talked --

14 A. -- of the --

15 Q. You haven't --

16 A. -- of the detour roads.

17 Q. You've never spoken to him, correct?

18 A. That is correct.

19 Q. And you don't know what he did; do you?

20 A. I do not know what the contractor did.

21 Q. And the resident engineer had the final  
22 call, did he not, on how materials were used  
23 pursuant to the specifications?

24 A. I do not believe you're representing

1 that correctly.

2 Q. Okay. The resident engineer had the  
3 final call on how certain materials were used in  
4 the specifications; isn't that right?

5 A. He is responsible to make sure that all  
6 materials used are in compliance with the spec and  
7 special provisions.

8 Q. And isn't it true that the  
9 specifications under 207.04 state that concrete can  
10 be, should be -- can be and should be placed in  
11 embankments?

12 MR. MCGINLEY: Objection; vague and  
13 ambiguous as to what you're referring to.

14 MS. BRICE: It's the specifications,  
15 207.04.

16 MR. MCGINLEY: I just want to make sure  
17 that that's in the record and just not the  
18 section number.

19 THE WITNESS: I do not believe you have  
20 represented that correctly.

21 MS. BRICE: Okay. Well, let's look at  
22 it.

23 Can you grab the specifications?

24 Mark this as Deposition Exhibit 5,

1 please. And this is IDOT 001068 through

2 001103.

3 (Gobelman Exhibit No. 5 marked for

4 identification.)

5 BY MS. BRICE:

6 Q. So these are the standard specs for road

7 and bridge construction that I believe you said in

8 your expert report were applicable to this project.

9 MR. MCGINLEY: I'm sorry, Counsel. Can

10 we just have a minute so he can make sure

11 that it's complete?

12 MS. BRICE: Sure. That's my question.

13 THE WITNESS: So what's your question?

14 BY MS. BRICE:

15 Q. Are these the specifications that you

16 said were applicable to the project?

17 A. I would say I believe so. I don't see a

18 cover page that says that it's from the spec book

19 at that time period, but --

20 Q. Well, I'll represent this is how it was

21 produced to me --

22 A. Okay. All right.

23 Q. -- so I'm assuming that that's the case.

24 A. Okay.

1 MS. BRICE: Evan, is there any reason  
2 to --

3 MR. MCGINLEY: Well, what you have are  
4 the sections of the spec book that were  
5 requested. We asked you specifically what  
6 provisions you wanted --

7 MS. BRICE: Understood.

8 MR. MCGINLEY: -- and that's what we  
9 produced.

10 MS. BRICE: Sure. But this is the spec  
11 book --

12 MR. MCGINLEY: That is correct.

13 MS. BRICE: -- that would have been  
14 applicable to this project?

15 THE WITNESS: Or at least portions of  
16 the spec book.

17 MS. BRICE: Understood.

18 MR. MCGINLEY: Portions of, that's  
19 right.

20 BY MS. BRICE:

21 Q. Okay. And did all of these  
22 specifications that are -- Let's put it this way.

23 Are all of these 200 specifications, 201  
24 through 207, were they applicable to this project?

1           A.    Unless they were superseded by a special  
2   provision.

3           Q.    All right. Let's take a look at 207.04.

4                   MR. MCGINLEY: Is there a Bates number?

5                   MS. BRICE: I'm not there yet. 1079.

6 BY MS. BRICE:

7           Q.    Okay. And if you'll go on the left-hand  
8 side down the middle, it says, quote:

9                   "When embankments are  
10                   constructed of crushed material,  
11                   broken concrete, stones, or rocks  
12                   and earth, such material shall be  
13                   well distributed" --

14                   MR. MCGINLEY: Sorry, that's not  
15   207.04. That's 20- --

16                   MS. BRICE: Here (indicating).

17                   MR. MCGINLEY: Right there? Okay.

18 BY MS. BRICE:

19           Q.    -- "and sufficient earth or  
20                   other fine materials shall be  
21                   incorporated with them when they  
22                   are deposited to fill the  
23                   interstices and provide solid  
24

1           embankment."

2                   And then I'm going to go down to the  
3 next paragraph:

4                   "Pieces of concrete not  
5           exceeding 2 square feet for any  
6           area of surface and large rocks  
7           and boulders may be placed in  
8           fills without being broken up,  
9           provided they are well embedded,  
10          and the interstices filled with  
11          smaller pieces or smaller  
12          material in a manner to give a  
13          density satisfactory to the  
14          Engineer."

15                   Do you see that?

16           A.     Mm-hmm.

17           Q.     Okay. Now I'm going to go to 202.03,  
18 which is 001072, and up at the top, second  
19 paragraph, it says:

20                   "All stones, stumps,  
21           boulders, broken rock, broken  
22           concrete and related material  
23           that cannot be placed in the  
24           embankment shall be disposed of

1 at locations designated by the  
2 Engineer within the right of way;  
3 in borrow sites on or adjacent to  
4 the right of way or at other  
5 locations outside the right of  
6 way. These materials shall be  
7 buried under a minimum of 2 feet  
8 of earth cover. These materials  
9 shall be disposed of in a neat,  
10 orderly manner and shall not  
11 create unsightly conditions."

12 Do you see that?

13 A. Yes.

14 Q. And then, let's go to 202.04, and it  
15 says:

16 "Excavated materials that  
17 are suitable shall be used in the  
18 construction of the roadway as  
19 far as practicable, and no such  
20 material shall be wasted without  
21 permission of the Engineer."

22 Do you see that?

23 A. Mm-hmm.

24 Q. Okay. So after reading that, are you

1 telling me that it's impossible for the concrete  
2 that was on top of the -- assuming the concrete was  
3 on top of the parking lot, that it's impossible  
4 that the contractor would have broken it up and  
5 placed it in the embankments?

6 A. What I'm saying is that it is unlikely,  
7 that he would not do that because he's going to  
8 have to move the material twice.

9 Q. Okay. But other than --

10 A. He would not do that because that's not  
11 economical for his purpose. He would not place  
12 something that he's going to have to take time and  
13 material to crush and move that he's going to have  
14 to remove and get rid of again.

15 Q. Okay. But don't the specifications say  
16 that he should use broken concrete in the  
17 embankments?

18 MR. MCGINLEY: Objection.

19 THE WITNESS: No.

20 MR. MCGINLEY: I think that  
21 mischaracterizes the statement in the  
22 document.

23 MS. BRICE: Okay.

24 THE WITNESS: No.

1 BY MS. BRICE:

2 Q. And how do you interpret the  
3 specifications as to the use of broken concrete  
4 that is found on the site or concrete that is found  
5 on the site?

6 A. It is representing that if the  
7 contractor wants to use concrete in his embankment,  
8 that is the method in which he has to do it, that  
9 it has to be broken, embedded in soil, you know, no  
10 bigger than two feet and all that kind of stuff.  
11 It isn't telling the contractor that he has to use  
12 concrete in his embankment.

13 Q. Okay. But he can?

14 A. If he wants to use concrete in the  
15 embankment, he can.

16 Q. And if he has to deal with surplus  
17 material and haul it off, doesn't he have to pay a  
18 fee under the specifications?

19 A. He is getting paid to haul material off.

20 Q. Are you sure about that?

21 A. I'm pretty sure.

22 Q. Okay. We're going to have that  
23 somewhere else. I'll come back to that.

24 So who prepared these specifications?

1           A.     I do not know who specifically prepares  
2 the specifications in 1970.

3           Q.     Okay.  Were they prepared for IDOT or  
4 its predecessor, as far as you know?

5           A.     If it was done to the way its done now,  
6 IDOT prepares the specifications.

7           Q.     Okay.  And IDOT keeps these  
8 specifications in its regular course of business, I  
9 assume?

10          A.     Yes.

11          Q.     Do you have any evidence that these  
12 specifications were not followed with respect to  
13 the project?

14          A.     Any aspects with deviations from the  
15 spec book and any deviations beyond what is written  
16 as part of the special provisions in the contract  
17 plans that supersede the spec book, can be modified  
18 in the field; and that would require some sort of  
19 correspondence from the RE, whether it's a change  
20 order or something to that effect.

21          Q.     When the specifications refer to the  
22 engineer, are they referring to the resident  
23 engineer or someone else?

24          A.     I believe it is defined as it is now

1 as -- technically it's defined as the engineer of  
2 the department, but that is then, sort of, handed  
3 down to the resident engineer.

4 Q. Okay. And that person is an employee of  
5 IDOT, correct?

6 A. The engineer?

7 Q. Yes.

8 A. Yes.

9 Q. Okay. And what happens if the special  
10 provision is not followed?

11 A. If the special provision is not  
12 followed, then the job -- and it's not being  
13 superseded by a special provision or not been  
14 altered as part of the construction project, then  
15 the project is not built to the specifications.

16 Q. Right.

17 But what happens? Is there a lawsuit?  
18 You know, what happens if the contractor doesn't  
19 follow the special provision?

20 A. I believe a number of things could  
21 occur. I mean, they could be required to go back  
22 and fix if it would cause a problem. They could be  
23 subject to litigation. There are bonds that are  
24 applied to the contract jobs that can be held.

1 Q. Have you ever been involved in a project  
2 where the special provisions or the specs were not  
3 followed?

4 A. Yes.

5 Q. Okay. And how many?

6 A. I don't have a recollection of how many.

7 Q. More than five?

8 A. Possibly.

9 Q. More than ten?

10 A. I do not know.

11 Q. Can you give me an example of one?

12 A. In most cases that I'm familiar with  
13 that deal with not following things in the current  
14 spec book regarding to environmental reporting  
15 requirements, and sometimes the contractor fails to  
16 provide the report that the spec book requires.

17 Q. Now, who else from IDOT would be  
18 involved -- would be going to the site in this  
19 situation with respect to our project? Duane Mapes  
20 is there as resident engineer. Who else is  
21 involved from IDOT on this type of project?

22 A. Oh, I would assume that -- depending on  
23 the size of the project, that the resident engineer  
24 may have assistants. There may be people from our

1 materials office there, collecting samples of  
2 materials to have them checked, traffic controls  
3 people.

4 Q. Okay. Does IDOT conduct audits or  
5 inspections of ongoing projects?

6 A. I believe the supervising field  
7 engineers will come out and inspect to see what is  
8 going on, making sure all the paperwork is done and  
9 that kind of stuff. I don't necessarily it is like  
10 an audit, like an accounting type of thing, but  
11 people come out to check to make sure things are --  
12 are...

13 Q. And if the contractor wants to deviate  
14 from the plan, does he have to get approval from  
15 IDOT?

16 A. If he's deviating from what the contract  
17 plans are, he has to get IDOT's approval.

18 Q. And why is that?

19 A. Because it's IDOT's job. It's their  
20 project.

21  
22 (Gobelman Exhibit No. 6 marked for  
23 identification.)  
24

1 BY MS. BRICE:

2 Q. I've handed you what is Plans for  
3 Proposed Federal-aid Highway drawings, which are --  
4 and it's hard to read -- JM00113- -- I think it's  
5 -32. Yes, -32 through 001235. And these were the  
6 documents that we obtained through IDOT's 104(e)  
7 request, so these were the plans that were attached  
8 to IDOT's 104(e) request.

9 Do these appear to be the plans that you  
10 reviewed?

11 MR. MCGINLEY: Objection; vague and  
12 ambiguous as to time.

13 (Witness peruses document.)

14 THE WITNESS: I do not believe these  
15 are the plans that I reviewed at the time in  
16 my records.

17 BY MS. BRICE:

18 Q. Okay. Why do you say that?

19 A. Huh?

20 Q. Why do you say that?

21 A. I believe the plans that I reviewed, the  
22 page numbers, there are -- as part of the pay items  
23 and quantities, there were duplicate page numbers  
24 that went like 5-A, 5-B type of thing. And so the

1 final document was more pages than the original  
2 project says it is.

3 Q. Okay. Did you produce that to us?

4 A. I provided all the information to  
5 counsel. I don't know what they produced to you.

6 MS. BRICE: We don't have -- I don't  
7 think we have your engineering rec- -- we  
8 don't have the plans.

9 MR. MCGINLEY: We produced --

10 MS. BRICE: Can we go off the record  
11 for a second?

12 MR. MCGINLEY: Sure.

13 (Discussion held off the record.)

14 MS. BRICE: We had a discussion about  
15 the discrepancy of the plans. It appears  
16 that Mr. Gobelman got his own set of plans,  
17 which nobody realized were different than the  
18 plans that had exchanged in the discovery.

19 So I'm going to ask to reserve the  
20 right to continue the deposition to depose  
21 Mr. Gobelman with respect to those plans once  
22 I receive them if I need to, but I'm not sure  
23 that I will necessarily need to, but I just  
24 want to reserve that right.

1 BY MS. BRICE:

2 Q. So is there --

3 A. Just -- Just --

4 Q. Go ahead.

5 A. Just so you know, these plans is 81

6 through Page 81. This is the set of plans.

7 These --

8 THE REPORTER: I'm sorry, Page 81...

9 THE WITNESS: 81 through 81.

10 BY MS. BRICE:

11 Q. There are -- There are --

12 A. 81 pages.

13 Q. -- 81 pages of plans?

14 A. Right. And the plan, the last page is

15 Page 81 of 81. So this is the set of plans that --

16 Q. Yes.

17 A. These, I'm not sure how they relate

18 because they're not a part of -- there are typicals

19 for other things, and so they may have been given

20 to you as examples for construction stuff --

21 Q. So this --

22 A. -- but they were not attached a part of

23 these plans.

24 Q. Okay. Let me try and clarify the record

1 then.

2 So after Page 81, which is --

3 A. 1213.

4 Q. -- 1213, there are additional documents,  
5 1214 through 1235.

6 And what you're saying is 1213 through  
7 1235 were not in this set of documents that you --

8 A. 1214.

9 Q. -- obtained? 1214.

10 Okay. Is there anything else that is  
11 different that you can discern --

12 A. The only thing --

13 Q. -- from these plans, Deposition Exhibit  
14 6, with respect to the ones that you looked at?

15 A. The only thing that I recall is that  
16 there were additional pages in the pay item  
17 quantities --

18 Q. Okay.

19 A. -- in which it would appear what  
20 happened was is that in the course of putting  
21 together our plans, these plans then get sent to  
22 our central office to be put up for letting. The  
23 district could provide the department in central  
24 office changes, and those changes then could have

1 been -- were most likely put in -- additional

2 sheets in to the pay item and quantity pages --

3 Q. Understood.

4 A. -- for those changes for the bid. And I

5 think those are the changes that I saw that aren't

6 in the original.

7 Q. Okay. But do you have any reason to

8 dispute the accuracy or authenticity of Pages 1

9 through 81 -- Sheets 1 through 81?

10 A. I don't see anything.

11 Q. Okay. So let's go to the very first

12 page.

13 A. Although I would like, just for the

14 record, that every page of this is supposed to have

15 a page to and from, and there are a lot of pages in

16 here that don't --

17 Q. That's the way it was produced to us.

18 A. And I just want to make sure that

19 they're not -- those pages and markings aren't in

20 there, so --

21 Q. I know. So maybe your -- If your

22 version has that, that would be very helpful to see

23 because the version we have has that same problem.

24 A. Okay.

1 Q. Okay. So the front cover of this  
2 Document 6 says "As Built" in handwriting, you see  
3 over there? And then it says "Changes shown in  
4 red" in the handwriting.

5 Do you see that?

6 A. Well, I don't see anything in red.

7 Q. Sure.

8 But it says "Changes shown in red?"

9 A. Oh, "in red." Okay. Thank you. I'm  
10 sorry.

11 Q. Okay. Have you seen a copy, a color  
12 copy where the changes are in red?

13 A. No, I have not.

14 Q. Okay. Do you know if there is such a  
15 color copy that exists?

16 A. I would think that at this time there  
17 are no color copies existing.

18 Q. Okay. And it looks to me -- and tell me  
19 if this is a wrong assumption -- but that when  
20 changes were made on here, they did it in  
21 handwriting; is that correct?

22 A. That's typically how it would have been  
23 done, yes.

24 Q. And these drawings were prepared for

1 IDOT, correct, or its predecessor?

2 A. The design -- the project design was  
3 most likely in-house that IDOT designed.

4 Q. Okay. So you think IDOT -- Okay. Got  
5 you.

6 A. I don't see -- I say that because I do  
7 not see a stamp from some other firm stamping their  
8 PE on it certifying these things, only the stamp  
9 that has IDOT on it.

10 Q. Okay. So you think -- it appears to you  
11 that IDOT prepared these drawings; is that right?

12 A. Yes.

13 Q. Okay.

14 A. At that time most things were done  
15 in-house.

16 Q. Okay. And over here on the far right of  
17 this front page you have "approved" and then you've  
18 got -- and it might be hard to see --

19 A. Right.

20 Q. -- and you can look on my copy, but it  
21 says 9/9/70, and there is a whole list of people.

22 A. Correct.

23 Q. What is that signifying?

24 A. Those are the -- sort of like the --

1 I'll use an environmental term -- chain of custody  
2 of the plans approving it to be able to go to  
3 letting.

4 Q. Okay. And so these documents were  
5 approved in and around 1970; is that right?

6 A. Yes.

7 Q. Okay. And in order to put together  
8 these drawings, I am assuming that there is a time  
9 period in which surveying is done, soil borings are  
10 done, other things are done on the site; is that  
11 right?

12 A. I guess I'm not sure I understand your  
13 question.

14 Q. Sure.

15 Well, in order to prepare the drawings,  
16 right --

17 A. Correct, mm-hmm.

18 Q. -- there are -- in here there's soil  
19 boring records?

20 A. (No response.)

21 Q. There's some sheets?

22 A. Yes.

23 Q. So before that, before 1970, they had to  
24 do some soil borings in order to have those records

1 in the plan, right?

2 A. Right, for the plan, right.

3 Q. And then they had to do some surveying  
4 on the various sites, correct, in order to create  
5 these plans?

6 A. Yes, there was most likely surveying.

7 Q. Okay. And what other type of work would  
8 they have done on Site 3, physical type of work at  
9 the sites, to put together these plans in 1970?

10 MR. MCGINLEY: Vague and ambiguous as  
11 to the use of the term "physical."

12 BY MS. BRICE:

13 Q. Physical, like, onsite, things -- where  
14 they would actually be out there.

15 A. I don't believe, other than surveying,  
16 any other --

17 Q. And soil borings.

18 A. Well, to me, the soil borings were more  
19 like for geotechnical soil borings, and those are  
20 mostly done around the bridge abutment areas.

21 Q. Okay.

22 A. The other stuff in here, the  
23 cross-sections don't necessarily have come from  
24 soil borings.

1 Q. Okay. But let's just talk about the  
2 bridge area.

3 So there are soil borings that are done?

4 A. For geotechnical analysis.

5 Q. Yes.

6 A. Yes.

7 Q. Okay. So the whole project, right, soil  
8 borings, surveying.

9 Whatever activity where they would have  
10 been present on this site prior to 1970 or in 1970?

11 A. (No response.)

12 Q. When I say "they," I mean IDOT or its  
13 predecessor.

14 A. I don't know of any other issues that  
15 would go on that they'd be at the site prior to  
16 construction other than surveying and geotechnical  
17 soil borings.

18 Q. Okay. Have you seen any geotechnical  
19 report relating to this project?

20 A. I have not seen any official  
21 geotechnical report.

22 Q. Have you seen any soil borings from the  
23 1970s relating to Site 3 or Site 6?

24 A. I believe the plans have -- had soil

1 borings, boring logs.

2 Q. But I don't think they match up with --

3 A. Not that -- Sorry, sorry, sorry.

4 Q. -- Site 3 or 6.

5 A. 3 and 6, no.

6 Q. Okay. And I pointed this out to Evan at  
7 one point.

8 There are soil borings that are missing.

9 If you look at 001180, you'll see borings for 15  
10 through 18, and then there's another set of  
11 numbers, but we're missing, I think, 1 through 15.

12 Do you have any idea where those are?

13 And I could be mischaracterizing it, but there's a  
14 gap in the soil boring numbers?

15 A. To me that indicates -- it's not that  
16 they're missing. It's that they weren't necessary  
17 to be included in these plans.

18 Q. Okay. So --

19 A. They may have been doing a number of  
20 geotechnical soil borings for other things, and the  
21 only ones that relate to this particular contract  
22 regarding the bridges and abutments were these  
23 particular borings. So they're numbered in the  
24 field certain numbers, and then those numbers are

1 depicted over here.

2 Q. Understood.

3 So on 1180 we have Borings 15 through  
4 18.

5 A. Right.

6 Q. And on 1202 we have 19 through 24, but  
7 we don't have 1 through 14.

8 So you have no knowledge as to what 1  
9 through -- what areas 1 through 14 related to?

10 A. No, I do not.

11 Q. How is a right of way different from a  
12 limit of construction?

13 A. The right of way is the complete  
14 footprint that IDOT is taking control of, be it,  
15 you know -- Well, right of way meaning ownership.  
16 Within that you're going to have a construction  
17 limit. The construction limit is the lines around  
18 that the contractor must stay within.

19 Q. Okay. But we read in the specs that you  
20 can dispose of certain material outside of the  
21 right of way.

22 Do you recall seeing that?

23 A. Yes.

24 Q. Okay. So you agree that certain

1 materials can be buried and disposed of outside of  
2 the right of way?

3 A. The contractor can't take the -- outside  
4 of the right of way is considered offsite.

5 Q. Right. I mean, outside the limits of  
6 construction -- I misspoke -- and inside the right  
7 of way.

8 A. Yes, yes, he could.

9 Q. Yes.

10 A. Right, he could, with permission, place  
11 material outside of the construction limit within  
12 the right of way.

13 Q. With permission from the engineer?

14 A. Correct.

15 Q. Okay. Turn to Sheet 8, which is 1139,  
16 please. Got that? And if you need to look at this  
17 bigger one, I can show it to you, no problem.

18 A. Okay.

19 Q. So this says Plan Greenwood Avenue,  
20 Stations 7 through 12. And if you see above, sort  
21 of, Station 9-1/2 something that says, parking lot.

22 Do you see that?

23 (Witness peruses document.)

24 MR. MCGINLEY: Yeah, I think the larger

1 one would work better.

2 THE WITNESS: Okay.

3 BY MS. BRICE:

4 Q. Is this the general location of the  
5 parking lot we've sort of been discussing that  
6 Johns Manville was using that is the subject of  
7 this litigation?

8 A. I would -- I suspect that that --  
9 whether or not that's written exactly where the  
10 parking lot sits; but, yes, that's referred to, but  
11 there was a parking lot there.

12 THE COURT REPORTER: I'm sorry. I just  
13 didn't hear you. "Whether or not" --

14 THE WITNESS: Whether or not that is  
15 written exactly where the parking lot is, it  
16 is in the general location of where that  
17 parking lot is.

18 BY MS. BRICE:

19 Q. And does this sheet indicate any  
20 concrete or pavement or any surface material in  
21 that parking lot area?

22 A. It does not provide any information -- I  
23 can see -- It's oriented incorrectly.

24 Q. Sorry.

1           A.     North is up.  It does not indicate  
2 anywhere of what the parking lot exists of.

3           Q.     But if you see over here on the -- okay.  
4 Now, I'm disoriented.

5           A.     South.

6           Q.     Going south and a little to the east, it  
7 says "drive."

8                     Do you see that?

9           A.     Correct.

10          Q.     And then there's written over here to  
11 the further -- to the east "gravel drive."

12                     Do you see that?

13          A.     Yep.

14          Q.     Okay.  Do you know anything about the  
15 history of this drive or this gravel drive or what  
16 this plan is referring to?

17                     MR. MCGINLEY:  Objection; compound.

18                     THE WITNESS:  I believe from the  
19 aerials that the -- the first drive, which is  
20 like a paved drive, not the gravel drive, was  
21 one of the entrances to the parking lot on  
22 the east side.

23 BY MS. BRICE:

24          Q.     Just quickly, there's some INV numbers

1 that are handwritten in here. INV, one of them  
2 says 581.3.

3 Do you see that?

4 A. Mm-hmm.

5 Q. What is that denoting, if you know?

6 A. I do not know off the top of my head.

7 Q. And there's also some -- there's some  
8 lines right underneath the word "parking lot" that  
9 are kind of a straight line, and then they have  
10 half moons over them or -- is that a storm sewer  
11 that they're putting in?

12 A. That depicts a storm sewer and inlet,  
13 yes.

14 Q. Okay. And do you know how deep that  
15 storm sewer was?

16 A. Without -- It doesn't --

17 Q. Not from this document?

18 A. It would relate to the -- what's in the  
19 cross-section.

20 And I take it back. The INV is the  
21 invert elevation, because there's an invert  
22 elevation over here, so that's the elevation of  
23 that -- of the inlet. And that's the invert of the  
24 discharge.

1 Q. Okay. So we've got a storm sewer coming  
2 right through this word "parking lot" basically; is  
3 that correct, generally?

4 A. Yes. There is a proposed storm sewer to  
5 drain the north side of the Greenwood Avenue.

6 Q. And there's also a bunch of "E"s.  
7 Do you see these lines going left to  
8 right that have "E" on it?

9 A. Yes.

10 Q. What does that mean?

11 A. "E" stands for electrical.

12 Q. And are those overhead or underground?

13 A. I believe all these are over.

14 Q. Okay. And then I want to point you  
15 to -- it says down here at the bottom, notes, it  
16 says:

17 "See Sheet 17 for right of  
18 way details" --

19 I'm sorry. I can't read upsidedown.

20 What does it say:

21 A.

22 "For right of way details,  
23 see Sheet 28."

24 Q. Sorry. Just scratch all that. Let's

1 start over.

2 A. You want to the first one?

3 Q. Yeah.

4 So if you could please read that first  
5 note.

6 A.

7 "For pavement elevation in  
8 geometrics, see Sheet No. 17."

9 Q. And for the record, I'll represent --  
10 and I've told counsel this -- is no Sheet 17 in the  
11 copy that we have. And this was the copy that was  
12 provided to USEPA.

13 So I'm wondering if you've seen  
14 Sheet 17?

15 A. I may have. I don't remember --

16 Q. Okay.

17 A. I don't recall when I looked at them,  
18 the plans that I had, whether or not there were  
19 page numbers missing.

20 Q. Okay. Did counsel ask you if had a copy  
21 of Sheet 17?

22 A. No.

23 Q. So you didn't realize until right now  
24 that there might be Sheet 17 missing?

1           A.     I did not realize until this deposition  
2 that we were looking at two different sets of  
3 plans.

4           Q.     Understood.  So let's just -- and Evan  
5 has represented he couldn't find Sheet 17 in his  
6 either.  So we'll look at your set and see if it's  
7 there, which will be great.

8                     But can you tell me what Sheet 17 would  
9 show, given this description?

10          A.     Well, since this page is referring to  
11 Greenwood Avenue, I would assume that the pavement  
12 elevation and geometrics would all be relating to  
13 what the elevations at along Greenwood Avenue would  
14 need to be as far as when they're building their  
15 embankment.

16          Q.     Right.

17                     And I just realized also there is  
18 another part down here that says "Sheet 17."  It  
19 says "for driveway."

20          A.     It says:

21                     "For driveway details, see  
22 Sheet No. 17."

23          Q.     What would that be showing you, if you  
24 have driveway details?

1           A.     I would assume, without seeing Sheet 17  
2 right now, that detail would reflect the driveways  
3 along Greenwood Avenue --

4           Q.     Okay.

5           A.     -- because there are multiple driveways.

6           Q.     And do you recall seeing any sheet that  
7 showed driveways?

8           A.     I do not recall at this time whether --  
9 that information.

10          Q.     And on this document in general -- and  
11 I'm trying to establish this for all our reference  
12 points. As I looked at the documents, it looks to  
13 me like the parking lot, generally, which I tried  
14 to draw here -- and I'm not going to hold you to  
15 that -- runs from about Station 7 through 12 along  
16 Greenwood.

17                   Do you have any reason to dispute that?

18          A.     I --

19          Q.     I think it might be 11.

20          A.     No.

21                   MR. MCGINLEY: I think 11's --

22                   MS. BRICE: 11 --

23                   THE WITNESS: I think what you're maybe  
24 representing is the boundaries of Site 3 --

1 BY MS. BRICE:

2 Q. You're right.

3 A. -- not the boundaries of --

4 Q. You're right.

5 A. -- the parking lot.

6 Q. That's -- No.

7 A. Because I believe the parking lot is a  
8 smaller entity of Site 3.

9 Q. It is. It is. I think -- Well, I'm  
10 pretty sure, actually, that this was the parking  
11 lot, 7 through 11; but I guess we can look at that  
12 later.

13 A. Well, you can find that in the details  
14 of --

15 Q. Right.

16 A. -- the road, of the detour roads.

17 Q. Well, then -- but it doesn't show the  
18 same station number then, unfortunately. Well, if  
19 you can find it, that would be great.

20 What's that? Tell us.

21 A. That outline would indicate --

22 Q. What page are you looking at?

23 A. -- which is -- which is, Sheet 28 of 81,  
24 is that the dotted line to this south of Greenwood

1 Avenue would represent the parking lot.

2 Q. And what stations are associated with  
3 the parking lot, the Greenwood Avenue stations?

4 A. So, yeah, it would go from 11 to -- or  
5 it should start at somewhere around 8 plus 00 to 11  
6 plus 00.

7 Q. Okay. So 8 to 11, more or less. Okay.  
8 Great.

9 Can you take a look at -- do you mind if  
10 I come over -- around?

11 MR. MCGINLEY: Okay.

12 BY MS. BRICE:

13 Q. Can you take a look at 24, which I think  
14 I have up here at the front. And then the detour  
15 road, I'm looking at detour road here as to where  
16 it sort of crosses the parking lot. And that to me  
17 looks to be Station 12 through about 15.

18 Is that accurate -- or 13. Sorry.

19 A. I would say that it crosses the Detour A  
20 road at somewhere around Station 10 plus 50 and  
21 would end at -- around 13, 14, maybe -- 1375, 17  
22 plus 75.

23 Q. So let's match this up at the bottom of  
24 24.

1                   So you can see down here at the profile  
2 10 through 13, 14, right?

3           A.     Correct.

4           Q.     This area appears to me to be fairly  
5 flat.

6                   Is that accurate?

7           A.     The proposed grade is relatively flat,  
8 yes.

9           Q.     And how do you know what the actual  
10 grade is? Is there any way to figure that out?

11          A.     There is a dotted line that is labeled  
12 "existing ground line" and that will flow either  
13 above the proposed grade or below the proposed  
14 grade and maybe sometimes at the proposed grade.

15          Q.     Do these plans indicate that there needs  
16 to be much fill in this area where the Detour Road  
17 A crosses the parking lot?

18          A.     On this particular page, it does not  
19 provide quantities of fill.

20          Q.     Okay. We can set that aside for a  
21 second.

22                   Is borrow material the same as fill  
23 material?

24          A.     No.

1 Q. Okay. Can you explain to me the  
2 difference?

3 A. What's your question?

4 Q. Borrow material versus fill material.

5 A. Borrow material is material that is  
6 brought on to the site --

7 Q. Right.

8 A. -- from an offsite source.

9 Q. And it can be the same as fill material  
10 and not necessarily?

11 A. (No response.)

12 Q. Can you use borrow material as fill  
13 material?

14 A. That is what you're using it for.

15 Q. Okay. Perfect. That is what I thought.  
16 I just wanted to make sure I understood it.

17 A. Just the opposite is not the case.

18 Q. And you can also use cut material as  
19 fill material, right?

20 A. Correct.

21 Q. And I think you said in your report that  
22 the record doesn't identify where borrow material  
23 was used -- where the borrow material used on this  
24 project came from; is that right?

1           A.     Correct.  There is no record of where  
2     the borrow material was obtained from.

3           Q.     Okay.  And I think you also said that  
4     the -- there's no record of borrow material being  
5     used on Detour Road A; is that right?

6           A.     Yes, there would be no -- there would be  
7     no need for borrow material to be used on Detour  
8     Road A.

9           Q.     And why is that?

10          A.     Because they have an excess amount of  
11     cut material, so all the cut material coming from  
12     that detour road would be utilized as fill and the  
13     excess would be utilized as fill in one of the  
14     other detour roads.

15          Q.     Okay.  But they'd have to pick up that  
16     fill and move it to that other detour road, right?

17          A.     Correct.

18          Q.     Okay.  They could also pick up that fill  
19     and move it over to Greenwood Avenue right of way;  
20     couldn't they?

21          A.     No.

22          Q.     Why?

23          A.     It would be in the way.  One, it would  
24     be in the way of existing traffic and site lines,

1 and it would be a safety hazard. Two, I do not  
2 know if there is enough right of way for it to be  
3 placed there, and it required the contractor to  
4 double handle material.

5 Q. Well, but he has to handle it anyway to  
6 move it to the other detour road.

7 A. But then it's being used for its  
8 intended purpose. He's not then having to pick it  
9 back up again and place it into an embankment.

10 Q. But he could have put it -- used it for  
11 the embankment if he didn't want to use it for the  
12 detour road; couldn't he?

13 A. No. It wouldn't have happened?

14 Q. It would be prohibited?

15 A. There was nothing to indicate that there  
16 was any means for him to be able to do that.

17 Q. Was it prohibited?

18 A. It's not prohibited.

19 Q. Do you know if there was any work done  
20 on these overhead transmission lines with respect  
21 to the project?

22 A. I don't remember seeing anything  
23 regarding the work on the transmission lines.

24 Q. Okay. How about work done at the base

1 of the transmission lines?

2 A. I believe there were issues regarding  
3 potential conflicts with some of the base in which  
4 they had to be careful in excavation around those  
5 bases to make sure they were maintained as being  
6 stable and that, in which they had to hand dig.

7 Q. And do you know which transmission lines  
8 those were?

9 A. I do not recall.

10 Q. Is it in the documents?

11 A. It possibly would be in the document  
12 because they had a change order regarding hand  
13 digging regarding that, so I would speculate that  
14 it would refer to wear.

15 Q. So I'm now going to direct your  
16 attention to a couple of other documents in  
17 Deposition Exhibit 6, and I'm looking at JM 001203  
18 and JM 001204 and we had identified the stations  
19 for Greenwood --

20 A. I have a question.

21 Q. Yeah.

22 A. Why -- why is your set of plans not in  
23 any --

24 Q. Because I --

1 A. -- incomplete order? Is that your --

2 Q. Yeah, I did this because these are the  
3 ones I wanted you to look at.

4 A. Okay. It just confused me why Page 71  
5 was in the front.

6 Q. Because I was going to ask you about it.

7 MS. BRICE: Can we go off the record  
8 for a second.

9 (Discussion held off the record.)

10 BY MS. BRICE:

11 Q. So we're at the Greenwood Avenue  
12 stations.

13 And this document, JM 001203, what is  
14 this document, this sheet? What is it depicting?

15 A. It is depicting the cross-sections of  
16 Greenwood Avenue between Station 7 plus 00 to  
17 Station 9 plus 00.

18 Q. And if you note that at Station 8 for  
19 example, it says -- there's a note:

20 "Remove unsuitable material,  
21 140, porous granular embankment,  
22 38."

23 Do you see that?

24 A. Yes.

1 Q. Why is there a discrepancy? What is  
2 happening?

3 A. It is providing the contractor that it  
4 is anticipated that he's going to have to remove  
5 140 cubic yards of unsuitable material, and he's  
6 going to have to supply 38 cubic yards of porous  
7 granular material as fill.

8 Q. And what I'm getting at, I think you  
9 know, is that in your report you said that porous  
10 granular embankment had to be used with respect to  
11 all unsuitable material because of a special  
12 provision.

13 Do you remember that?

14 A. That is not what I said.

15 Q. Okay. Then why don't you explain what  
16 you said?

17 A. I said that porous granular backfill is  
18 required to be used as backfill.

19 Q. Okay. But if they remove unsuitable  
20 material --

21 MR. MCGINLEY: I'm sorry. Let's stop  
22 until the call gets captured.

23 (Discussion held off the record.)

24 MR. MCGINLEY: Why don't we go back on.

1 BY MS. BRICE:

2 Q. Okay. You were going to explain this to  
3 me, and what you were showing in your report about  
4 porous granule embankment.

5 A. What I said was that the volumes of  
6 porous granular backfill is for material to be  
7 brought in for fill that doesn't relate anything to  
8 unsuitable material.

9 Q. Okay. So if you take out unsuitable  
10 material, you can fill that space with porous  
11 granular embankment and other fill?

12 A. If you need to add -- the porous  
13 granular backfill incorporates all the fill that  
14 would be needed to bring it up to grade.

15 Q. Okay. So that's my question, because  
16 here, you're removing more, and there's a much less  
17 porous granular embankment going in.

18 A. That may represent that the area is  
19 above the grade line, and they need to be moved  
20 out.

21 Q. But is that what that shows here?

22 A. It is anticipated at the beginning of a  
23 project that you're going to have to remove this  
24 much material. This is relating to the parking lot

1 structure. And then -- so those things did not  
2 apply when actually it was built.

3 Q. So how do you know what actually  
4 happened?

5 A. There was a change order in the  
6 construction record that says exactly what  
7 happened.

8 Q. Okay. But that change order -- And we  
9 can get to it, but it's talking about the whole  
10 entire project.

11 A. Each individual change order relates to  
12 each individual change that would have occurred in  
13 the project.

14 Q. Okay. We'll go there.

15 Okay. Let's go to the next Page 1204,  
16 and these are Stations 10 through 12. We've got  
17 the same thing here. You know they're anticipating  
18 removing unsuitable material in 194 and Porous  
19 Granular Embankment 42.

20 Do you see that?

21 A. Yes.

22 Q. So what were they anticipating at that  
23 time?

24 A. First, I do not know what the stationing

1 of this is, because it is cut off. So it's 10 plus  
2 something. I will assume it's 10 plus 00.

3 Q. Okay.

4 A. You have to understand that cut and fill  
5 are what is used as materials that could be used on  
6 the project. The cut material can be used as fill.  
7 None of those volumes relate to unsuitable or  
8 unstable material. Those volumes are completely  
9 different.

10 So in this particular case, they're  
11 saying that they're going to have to remove 134  
12 cubic yards of unsuitable material, and they're  
13 going to need an additional 42 cubic yards of  
14 forest granular backfill.

15 Q. Right.

16 But what else are they going to fill  
17 that cut with?

18 A. It could be filled in with cut material  
19 existing on the project.

20 Q. Right. Okay. I notice that the  
21 drawings don't ever identify unstable material.

22 Are those typically identified in the  
23 drawings? I just see unsuitable material. I don't  
24 see unstable material.

1           A.     Well, both unsuitable and unstable  
2 materials -- you don't see unstable materials in  
3 the plans because it's more of something that  
4 relates to in the field as far as being the ground  
5 is too wet or something like that. And that would  
6 occur on a site-specific situation of the day.

7                     The same with unsuitable material.  
8 There is an anticipation of unsuitability going in  
9 to a project, but the reality of unsuitableness of  
10 the material doesn't officially occur until they're  
11 in the field and determine it.

12           Q.     Okay. Are obstructions noted on the  
13 drawings?

14           A.     Define "obstructions."

15           Q.     I don't know. You defined them.  
16 They're defined in the specs.

17           A.     I'm not sure what you're referring to  
18 "obstructions."

19           Q.     Well, you talk about it in your report.  
20 So whatever you referred to in your report as  
21 "obstructions" is what I'm referring to.

22                     Go ahead. See if you can find it.

23           A.     I don't know. I was just flipping  
24 through it so I could get there once you tell me

1 where it's at.

2 Q. Well, do you have any recollection of  
3 talking about obstructions in your report?

4 MR. MCGINLEY: Counsel, do you want him  
5 to read through the whole report? Is there  
6 something specific --

7 MS. BRICE: No. No. I want to know if  
8 he has any recollection of talking about  
9 obstruction in the report. That's my  
10 question.

11 (Witness peruses document.)

12 BY MS. BRICE:

13 Q. If you need me to point it out, I'm  
14 happy to. It's on Page 6. Underneath your  
15 opinion, your opinion says, "Article" -- It says  
16 number of things. And then it says:

17 "2.101 of the Standard Specs  
18 because this material would have  
19 been in the way and removed from  
20 the construction project as with  
21 any other obstruction."

22 A. Right. Obstructions would refer to --  
23 as defined in the clearing of a property.

24 Q. Uh-huh.

1           A.     And obstructions are just the things  
2     that are in the way.

3           Q.     Okay.  Would they be identified in the  
4     plan drawings?

5           A.     I do not believe they would be  
6     identified.

7           Q.     Okay.  Let's go to Page 4 of your  
8     report.  Up at the top, you say:

9                     "Unsuitable material would  
10                    include organically rich soils,  
11                    landscape material, wet soils  
12                    that are unstable, and any soil  
13                    that cannot be used in an  
14                    embankment."

15                    Do you see that?

16           A.     Correct.

17           Q.     Where did you come up with that  
18     definition?

19           A.     It is my understanding of what it is  
20     meant by unstable and suitable material.

21           Q.     Okay.  So it's not defined anywhere, as  
22     far as you know?

23           A.     It is defined in the spec and of how to  
24     deal with that type of material.

1 Q. Okay. But does it say exactly that in  
2 the specifications or not? I mean, is that  
3 something you came up with based upon your  
4 experience?

5 A. Well, I have quotes around it, and it  
6 refers to 5.

7 Q. You don't have quotes around it. You  
8 have quotes around the next --

9 A. I have an ending quote -- Oh, no, oh,  
10 there. I looked. I couldn't see the beginning of  
11 it.

12 Yeah, I guess one could say that's my  
13 understanding of what unsuitable material can  
14 include.

15 Q. Do you know how unsuitable material was  
16 defined in the 1970s?

17 A. I believe anything unsuitable means  
18 anything that can -- cannot achieve the spec  
19 compaction.

20 Q. Okay. But do you know if there was a  
21 different understanding in the 1970s?

22 A. The understanding in the 70s, without  
23 comparing -- unsuitability, only means that it is  
24 not suitable for an embankment, and that is based

1 upon engineering material. So there isn't a  
2 definition of this soil, that soil. It's a  
3 definition of that can it achieve compaction.

4 Q. Okay. Let's look at the specifications,  
5 which we marked as Deposition Exhibit 5. So let's  
6 say that the contractor encountered concrete  
7 Transite pipes on top of the parking lot when it  
8 began work on the Amstutz project.

9 How would the specs have treated this  
10 material?

11 A. My opinion is they would have treated  
12 that material as obstructions that needed to be  
13 cleared.

14 Q. And what do the specs say about how you  
15 clear those types of materials?

16 A. It is removed from project.

17 Q. Where is it taken?

18 A. I have no idea where the material is  
19 taken to.

20 Q. Can obstructions be disposed of on the  
21 project?

22 A. It is possible that cleared material  
23 could be placed within the right of way with the  
24 engineer's approval.

1 Q. And would the proper way to handle  
2 obstructions be set forth in the specifications?  
3 Would that be where you would look?

4 A. Say that again. Sorry.

5 Q. Yeah.

6 If you're trying to figure out how to  
7 handle obstructions on this project in the 1970s  
8 and you ran into obstructions, would you look to  
9 the specifications to determine how to dispose of  
10 them or move them or deal with them?

11 A. I do not believe the specifications  
12 would dictate what to do with them, other than it  
13 needed to be removed.

14 Q. Okay. But do you agree that the  
15 specifications would be what governs?

16 A. The specifications or any change orders  
17 that amend the specifications govern on the  
18 project.

19 Q. Okay. Do you know what actually  
20 happened to the cement Transite pipes that were  
21 located on the Site 3 parking lot?

22 A. I do not know what happened to those  
23 pipes.

24 Q. Do you know how these pipes were

1 actually classified under the specifications?

2 A. I do not know how they were specifically  
3 classified in this documentation.

4 Q. How was concrete in and of itself  
5 treated in the 1970s? Was it treated as an  
6 obstruction?

7 A. If it was in the way, it would be  
8 treated as an obstruction.

9 MS. BRICE: Can we take a break?

10 MR. MCGINLEY: Sure.

11 (Brief recess.)

12 BY MS. BRICE:

13 Q. What is surplus material exactly? Can  
14 you define that for me?

15 A. Surplus would be considered excess  
16 material.

17 Q. Okay. Would obstructions fall within  
18 that or could they?

19 A. No.

20 Q. No? Why not?

21 A. Surplus, in its nature, would be that it  
22 was material that could be used -- obstructions and  
23 material that is being used for clearing is not  
24 usable material.

1 Q. Okay. Well, but what if it was  
2 concrete.

3 Because the specs do talk about concrete  
4 can be used in embankments, right?

5 A. Mm-hmm.

6 Q. Okay. So if you're not going to -- if  
7 you have concrete and it can be used in the  
8 embankments, is it then surplus material if you  
9 don't use it?

10 A. I don't believe it would fall under  
11 surplus.

12 Q. And why is that?

13 A. I'd have to look at the definition of  
14 surplus that's, I think, defined in the spec to see  
15 if it would include that or not.

16 Q. Okay. But as you sit right here right  
17 now, you don't know?

18 A. I don't recall.

19 Q. Okay. All right. Let's go to Page 3 of  
20 your report where you talk about the sequencing.  
21 And I know we've talked about this a little bit,  
22 but --

23 MR. MCGINLEY: Sorry. Hang on one  
24 second.

1 MS. BRICE: Oh, sorry. My fault.

2 (Discussion held off the record.)

3 BY MS. BRICE:

4 Q. So you talk about the sequencing here,  
5 right --

6 A. Yes.

7 Q. -- in the middle of Page 3?

8 A. Yes. I'm sorry.

9 Q. I just want to establish, you know, for  
10 the record, you don't know for a fact that this is  
11 the sequence that was used?

12 A. I know for a fact that that had the  
13 sequencing that it was defined in the contract  
14 plans.

15 Q. Right.

16 A. And that the contractor had -- there was  
17 no indication in the file that it was deviated from  
18 that, and I don't believe it would be possible for  
19 them to deviate from that sequencing of events.

20 MS. BRICE: Okay. Well, I'm going to  
21 mark this as Deposition Exhibit 7. And this  
22 is IDOT 000247, and it's an October 13th,  
23 1971 document.

24 (Gobelman Exhibit No. 7 marked for

1 identification.)

2 BY MS. BRICE:

3 Q. And down here on the bottom it says --

4 It's a pre-construction meeting:

5 "Commonwealth Edison - No

6 immediate conflict if Bolander

7 starts with Detour Road C."

8 Do you see that?

9 A. (No response.)

10 Q. And I'm just trying to understand if  
11 this is a deviation from your report or not. Let's  
12 say they did start with Detour Road C.

13 MR. MCGINLEY: I'm sorry.

14 Have you had enough time to look  
15 at this yet?

16 THE WITNESS: No, not yet.

17 MS. BRICE: Okay, sorry.

18 (Witness peruses document.)

19 THE WITNESS: Okay.

20

21 BY MS. BRICE:

22 Q. Okay. Does this document indicate that  
23 the sequencing of events that you established in  
24 your report could have been deviated from in this

1 project?

2 A. No. It does not show a conflict in the  
3 sequencing of events.

4 Q. Okay. Well, turn to Page 5 of your  
5 report, and, sort of, the second full paragraph you  
6 talk about Detour Road A being done first.

7 A. No. I do not talk about a detour road  
8 being done first. I'd say that the first step in  
9 their construction is that they have to construct  
10 Detour Road A, B, and C.

11 Q. Okay. But can you pay atten- -- Can  
12 you go to this part here. It says: :

13 "...the remaining 4,046  
14 cubic yards of soils would have  
15 to" --

16 MR. MCGINLEY: I'm sorry.

17 What page are you referring to?

18 MS. BRICE: 5 of the expert report.

19 THE WITNESS: Fine.

20 BY MS. BRICE:

21 Q. Oh, sorry. That's where I thought I had  
22 you looking.

23 A. Oh. I thought you were talking about  
24 the sequencing, and I was on the same page you said

1 before.

2 Q. Here (indicating).

3 A. Okay.

4 Q.

5 "The construction...shows  
6 that Detour Road A would have an  
7 estimated 5,148 cubic yards of  
8 cut and 1,102 cubic yards of  
9 fill."

10 And then you say:

11 "Therefore, an estimated  
12 1,102 cubic yards of cut...could  
13 have been used as fill for Detour  
14 Road A and the remaining...cubic  
15 yards of soils would have to be  
16 removed and most likely used" for  
17 "construction of...B and C."

18 A. Okay.

19 Q. I read this as you're saying that Detour  
20 Road A was done first.

21 Am I wrong?

22 A. In my writing of this as it related to  
23 Site 3, I just use Site A as being done first, not  
24 that --

1 Q. Okay.

2 A. Not as an indication of -- any  
3 indication of what was constructed first.

4 Q. Okay. So it's possible that Detour Road  
5 C or B were before Detour Road A?

6 A. It's -- or all could have been  
7 constructed at the same time, yes.

8 Q. Okay. And in your discussion of the  
9 sequencing, where do embankments on Greenwood fit  
10 in here?

11 A. Are you referring back to Page 3?

12 Q. Back to Page 3, yes.

13 A. It would be under Step 4, the complete  
14 grading and paving of Greenwood and Sands Avenue.

15 Q. Okay. And do you do the embankments  
16 before that or, I would assume, before you grade  
17 and pave, but I don't know.

18 A. Well, if the sequencing here, all  
19 right -- but as I said earlier, it's like pieces of  
20 a puzzle. You have Step A. Step A is that you  
21 have to build your detour roads.

22 Q. Got it.

23 A. Step B is that once the roads are  
24 complete, you can now close Greenwood and Sands --

1 the two roads, Greenwood and Sands.

2 Now, at that point, you can't -- the  
3 sequencing is that you rip up the road, start  
4 building a bridge. So once the bridge is built,  
5 then you can start building or completing your  
6 embankment on Greenwood that goes somewhat at the  
7 same time as part of the building of Greenwood.

8 Q. Perfect. Thank you. That explains a  
9 lot. I appreciate that.

10 So if you go down slightly a little bit  
11 more on Page 3, you have -- you sort of state these  
12 pay items.

13 A. Mm-hmm.

14 Q. What's your point here?

15 A. The point of this whole section was to  
16 try to establish sort of the framework of the  
17 beginning of the project and what it exists. And  
18 what I was providing here are a list of contract  
19 pay item and quantities as related to this job in  
20 regards that they could have been applied to the  
21 areas in question.

22 Q. Okay. But these are for the entire  
23 project, right?

24 A. That is how it was -- Yes. That is how

1 it was written in the contract plans.

2 Q. Okay. So do you know what portions of  
3 these related to Detour Road A or the construction  
4 of Greenwood Avenue?

5 A. They are -- other than going back into  
6 the plans and adding up all the cuts and fills and  
7 doing that, you could come up with an idea of what  
8 those -- what proportions it would be.

9 Q. Okay. So in the plans -- and this is  
10 what I'm trying to figure out.

11 If I want to find out how much cutting,  
12 filling, porous granular embankment, et cetera, was  
13 used at certain stations along Greenwood Avenue,  
14 what do I do with the documents that we have  
15 available to us?

16 A. It is not available of what actually was  
17 put in there. It would be kept in the engineer's  
18 logbook.

19 Q. Okay. So we don't have that  
20 information?

21 A. For specific stationings, correct.

22 Q. But we have estimates.

23 So those numbers on Pages 70 to 71,  
24 around that area, were estimates, not the actuals;

1 is that right?

2 A. Correct. It's the estimates of what --  
3 how it was being bid. And they all add up to these  
4 totals that are in the contract pay items.

5 Q. Okay. How high were the embankments on  
6 Greenwood?

7 A. I do not know without looking at the  
8 plans that memorize that.

9 Q. Were they higher than one-and-a-half  
10 feet tall?

11 A. Where at specifically?

12 Q. On Greenwood.

13 A. Well, the embankments started at zero,  
14 and it went all the way across until it's --  
15 overpasses, and the bridges at Amstutz -- if I can  
16 get that word right -- the expressway.

17 Q. Amstutz?

18 A. Right.

19 Q. So it probably went from zero to 12 feet  
20 or something like that? I mean, I'm guessing.

21 A. Yes, yes.

22 Q. But it was --

23 A. It went from zero.

24 Q. -- at some point it was higher than

1 one-and-a-half feet, right?

2 A. At some point along the road, yes.

3 Q. Okay. What portions of Sites 3 and 6 do  
4 you believe were governed by the special excavation  
5 provision?

6 A. I believe the entire contract is  
7 governed by the special excavation provision.

8 Q. Okay. And so what I'm trying to  
9 understand is, what was paid as special excavation  
10 with respect to Sites 3 and 6?

11 A. The removal --

12 Q. When I --

13 A. No. I'm just trying to --

14 Q. Yeah.

15 A. -- trying to think of it. I know  
16 specifically that there is an additional change  
17 order that added special excavation for the removal  
18 of all the detour roads.

19 Q. Right. And so that's what I'm trying to  
20 figure out.

21 Is there anything else that tells us  
22 what was treated as special excavation on Sites 3  
23 and 6 other than that one document?

24 A. All excavation associated with this

1 project is covered under special excavation.

2 Q. I gotcha. And my problem with that and  
3 why I'm confused is when you look at your pay  
4 items, special excavation is 19,228.

5 A. Right.

6 Q. But then you've got removal and disposal  
7 of unsuitable materials at 44,000. And it's sort  
8 of suggesting that everything was not treated as  
9 special excavation to me. That's why I'm trying to  
10 understand the discrepancy there. And Maybe I just  
11 don't understand how it works.

12 A. The removal of unsuitable is a  
13 standalone.

14 Q. Okay.

15 A. Special excavation is for all excavation  
16 associated that is needed for the project.

17 Q. Understood.

18 And I think you said -- but I want to  
19 make sure -- that the contract and the specs do not  
20 specify the disposal location for unstable or  
21 unsuitable materials associated with the project?

22 A. That is correct. The plans do not  
23 dictate where it could go.

24 Q. Is that unusual?

1 A. No.

2 Q. Okay. Let's turn to Page 5. And I'm  
3 referring to the first underlined opinion which  
4 says:

5 "Excavated unstable and  
6 unsuitable materials were  
7 excavated from Site 3 would not  
8 have been placed back on Site 3;  
9 there was no room within the  
10 right of way for this material to  
11 be placed."

12 What unstable and unsuitable materials  
13 are you talking about with respect to Site 3?

14 A. Any material that would have been in  
15 common that would have been classified as unstable  
16 and unsuitable.

17 Q. Right.

18 But I think you said that there wasn't  
19 anything in the drawings that suggested anything on  
20 Site 3 was unsuitable or unstable; isn't that  
21 right?

22 A. I believe the plans had volumes for  
23 un- -- I thought you showed me --

24 Q. On 3? On 3?

1 A. That stationing that you provided, I  
2 thought it was the same.

3 Q. No, no. That's not 3.

4 A. Oh, no.

5 Q. 3, the parking lot.

6 A. I'd have to look at the cross-sections  
7 of that.

8 Q. Okay.

9 A. And that...

10 Q. Here (indicating), right?

11 (Witness peruses document.)

12 THE WITNESS: Plans are messed up.

13 BY MS. BRICE:

14 Q. This is A (indicating).

15 A. Yeah, yeah. I'm just...

16 Yes. The plans don't show any noted  
17 unsuitable material at the time that the plans were  
18 prepared.

19 Q. Or unstable material, right?

20 A. Or unstable, at the time the plans were  
21 prepared.

22 Q. Do you have any evidence suggesting --  
23 or do you have any documents that say unsuitable or  
24 unstable material was removed as part of the work

1 on Detour Road A?

2 A. I believe there was a change order that  
3 states that the parking lot was to remain not  
4 considered unsuitable or unstable material, and  
5 they kept it on the site.

6 Q. Okay. Other than that document, is  
7 there anything else?

8 A. I don't recall, off the top of my head,  
9 if there are any other documents.

10 Q. So let's go back to that same paragraph  
11 on 5 we were looking at which talks about an  
12 estimated 5,148 cubic yards of cut and 1,102 of  
13 fill.

14 So as I read that, there was leftover  
15 cut, right?

16 A. Yes.

17 Q. And do you know what was contained in  
18 that cut?

19 A. If it's defined as "cut," it would be  
20 soil that was -- would have been thought to have  
21 been deemed suitable for use as an embankment -- or  
22 fill material I should say.

23 Q. Do you know if it contained any  
24 asbestos-containing material?

1           A.     There is no indication that it contained  
2 any asbestos-containing material.

3           Q.     You say in this opinion up at the top  
4 that there was no room within the right of way for  
5 this material.

6                     Let's take a look at that Detour Road A  
7 which is sheet 24, JM 1154, I believe.

8                     And as we discussed earlier, the right  
9 of way is larger than the limits of construction,  
10 correct?

11           A.     At times.

12           Q.     Okay. So it's your opinion, looking at  
13 this right of way, that none of the cut material  
14 could have been placed in the right of way.

15                     Is that your opinion?

16           A.     My opinion is that, yes, none of the cut  
17 material would have been placed in the -- in or off  
18 the right of way.

19           Q.     Okay. Where would they have taken it?

20           A.     And it would be the contractor's  
21 responsibility to take care of that.

22           Q.     Does the engineer have any influence  
23 over that?

24           A.     No.

1 Q. Well, the engineer has influence over  
2 whether things are used as suitable or unsuitable  
3 material, right?

4 A. On his project.

5 Q. Yes. That's what I'm talking about.

6 Would the engineer have some influence  
7 over where cut material is taken --

8 A. Only --

9 Q. -- on the project?

10 A. Only as it relates to on the project  
11 within his right of way.

12 Q. Could they have used that cut material  
13 to restore Site 3?

14 A. I don't understand what you mean by  
15 "restore."

16 Q. Well, you have in your opinion that --  
17 again on Page 5 that:

18 "The removal of Detour Road  
19 A at the end of the project would  
20 not have been placed" -- "The  
21 removal of Detour A at the end of  
22 the project would not have been  
23 placed on Site 3 because the  
24 Contractor was required to

1 'restore ComEd's...property  
2 substantially to the same  
3 condition it now exists upon  
4 Contractor's completion.'" "

5 A. Correct.

6 Q. So what did they use to restore the  
7 property?

8 A. They didn't use anything to restore the  
9 property. They were removing it back to the  
10 original grade. So they had to add fill, then they  
11 had to remove fill and then allow it -- and to make  
12 sure that the property properly drained.

13 Q. Right.

14 But if they're adding fill, where is the  
15 fill coming from?

16 A. The fill that they moved in would  
17 have -- could come from anywhere along the detour  
18 roads. There was an excess amount of cut material,  
19 and that would be used as fill.

20 Q. Right. But you just said that that cut  
21 material wouldn't be left in the right of way.  
22 They would have moved it.

23 A. No. I said -- you asked me about  
24 unsuitable material, and I said the unsuitable or

1 unstable material would have to be removed.

2 Q. Oh, then I must have misunderstood.

3 So the cut material can be placed in the  
4 right of way and stay there for a long time?

5 A. The cut material would have been  
6 utilized as part of the construction project. They  
7 would not have, we use the term, wasted it along  
8 the right of way for no purpose.

9 Q. Sure.

10 But they could have done the cut -- The  
11 excess cut material on Detour Road A could have  
12 been placed right outside the road within the right  
13 of way and then used later, right?

14 A. No. They would have to use -- they  
15 would use that material to build the embankment.  
16 They needed fill, and that's what the cut material  
17 was used for.

18 Q. Okay. So then later when they have to  
19 restore this, where do they get the fill material  
20 to restore Detour Road A?

21 A. They don't add material. They remove  
22 material.

23 Q. So they didn't add anything to restore  
24 it?

1           A.     No.  They moved it back down to the  
2 original grade because they had to build it up --

3           Q.     Right.

4           A.     -- to build the road.

5           Q.     And then they obliterated the detour  
6 road?

7           A.     And then they had to remove the detour  
8 road.

9                   MR. MCGINLEY:  Objection.

10          BY MS. BRICE:

11           Q.     Well, the document says "obliterate the  
12 detour road."

13                   Do you disagree the document says that?

14           A.     No.  The document says that.

15           Q.     Okay.  So it's your opinion that they  
16 did not put any fill material on top of Detour Road  
17 A after they took out the detour road?

18           A.     My opinion is that it states that they  
19 have to restore the property back to the original  
20 grade.

21           Q.     Okay.

22           A.     And the original grade was below the  
23 embankment fill area that they had to build the  
24 detour on.

1 Q. Okay. But when you take out a road,  
2 don't you sometimes -- you have to scrape under the  
3 road.

4 Is there ever a time where you have to  
5 put fill material to level everything out?

6 A. They would have removed the fill. They  
7 would have then made sure that there was proper  
8 drainage on the property. So I don't know whether  
9 or not they over-excavated that or not.

10 Q. But if they did over-excavate --  
11 hypothetical.

12 If they did over-excavate, they would  
13 have had to find fill material to place back where  
14 that road was; isn't that true?

15 A. Well, if they over-excavated, then I  
16 would assume that they would use the material that  
17 they excavated to go back and place back in the  
18 stuff that they undercut.

19 Q. Okay. But they place -- they had to put  
20 something there, right?

21 A. They would have to, yes.

22 Q. Do you know the condition of Site 3 at  
23 the end of the project?

24 A. I do not know the condition.

1 Q. Okay. Let's go to Page 5, Parking Lot

2 Removal opinion, which says:

3 "Based upon the record,  
4 Johns Manville's parking lot was  
5 never removed in order to  
6 construct Detour Road A."

7 Why is this important to the question of  
8 whether asbestos was buried as part of the project?

9 A. Because I believe in Mr. Dorgan's report  
10 he thought that -- sort of indicated that the  
11 parking lot was removed and that material was used  
12 to scatter throughout the site.

13 Q. Okay.

14 A. And what I'm trying to state is that the  
15 parking lot never left, and that the  
16 asbestos-containing material that was found -- in  
17 essence, the asbestos-containing material that was  
18 found in later investigations was there from the  
19 beginning.

20 Q. Is it your opinion that there was some  
21 sort of a cover to the parking lot?

22 MR. MCGINLEY: Objection; vague and  
23 ambiguous.

24 MS. BRICE: Yeah, vague and ambiguous.

1 BY MS. BRICE:

2 Q. What do you think the parking lot --  
3 what was the top of the parking lot made out of, in  
4 your opinion?

5 A. Before or after?

6 Q. Before, at the very beginning.

7 A. I would assume that it was made with  
8 some asphaltic type of material.

9 MS. BRICE: Okay. Let's mark this as  
10 Deposition Exhibit 8.

11 (Gobelman Exhibit No. 8 marked for  
12 identification.)

13 BY MS. BRICE:

14 Q. This is a deposition exhibit we were  
15 referring to earlier, right? You quote this  
16 exhibit in your report.

17 What's the import of this exhibit to  
18 your opinion?

19 A. It is stating that it was determined  
20 that the parking lot could be left where it is. It  
21 didn't have to be removed, and that instead of  
22 building -- putting 9 inches of base course, which  
23 is what we they were building the road -- detour  
24 road out of, all they had to do is place 2 inches

1 on it to lift and strengthen the parking lot so  
2 they could be used -- so the detour road could be  
3 used over it.

4 Q. Okay. And also I think you said -- you  
5 know, this document says Detour B across the Johns  
6 Manville parking lot.

7 And you said in your report that you  
8 thought that this was a typo. They were actually  
9 talking about Detour Road A?

10 A. Correct.

11 Q. Okay. Let's take a look -- Actually, we  
12 can start here. Let's take a look at 24, and then  
13 we're going to take a look at -- I'm back on  
14 Exhibit 6.

15 Okay. I'm looking here at Sheet No. 25  
16 of JM 001155. If you'll notice, this is -- this is  
17 the profile of Detour Road B, right?

18 A. (No response.)

19 Q. Isn't that what it says it is?

20 A. Yeah. I was just -- sorry, I was  
21 looking at --

22 Q. Okay. Can you read that note for me  
23 right there?

24 (Witness peruses document.)

1 BY MS. BRICE:

2 Q. Can you read it into the record?

3 A. Oh, sorry. Well, it's kind of hard to  
4 read:

5 "Place granular subsurface  
6 material were required by direct  
7 of the engineer. Station  
8 something to station something,"  
9 because I can't read it, it's  
10 like "106" maybe "to 113 in  
11 parking lot, remove the 9  
12 existing in places to 5" maybe.

13 BY MS. BRICE:

14 Q. Okay. That's all right. It's talking  
15 about 9-inch existing in place, with 9-inch  
16 stabilized bituminous base. And it's talking about  
17 parking lot.

18 Do you see that?

19 A. Right.

20 Q. We're talking about parking lot. We're  
21 talking about Detour Road B, right?

22 A. In this particular drawing, yes.

23 Q. In this particular drawing.

24 Let's go back to Drawing 24, where we're

1 talking about Detour Road A, and let's look at that  
2 same general area.

3 Do they talk about a parking lot or  
4 removal of 9-inch bituminous base?

5 A. No, they do not.

6 Q. Let's go back to Deposition Exhibit 8.  
7 It's talking about a 9-inch stabilized base course.

8 Do you see that?

9 A. Yes.

10 Q. Okay. Now, have you noticed in the  
11 aerial drawings that Detour Road B actually goes  
12 through a former Johns Manville parking lot on the  
13 Johns Manville property?

14 A. That is correct.

15 Q. Okay. So is it still your position that  
16 this document here, Deposition Exhibit 8, is  
17 talking about Detour Road A instead of B and it's a  
18 typo, or is it more likely that it is not a typo  
19 and it's talking about Detour Road B?

20 A. If it was referring to the parking lot  
21 for Detour Road B, it already established that it  
22 wasn't going to be 9 inches of base course. It was  
23 going to be a lesser amount. So it wouldn't have  
24 been a change order for them to change from 9-inch

1 to 2-inch. It was already in the plans.

2 Q. But the plans don't talk about any  
3 parking lot on top of Detour Road A.

4 Any parking lot asphalt material or  
5 concrete material or anything along those lines,  
6 does not show up in the plans; does it?

7 A. I lost you somewhere in the middle of  
8 that.

9 Q. Okay. On the parking lot on Site 3 --

10 A. Okay.

11 Q. -- we were just looking at Detour Road  
12 A, it doesn't discuss any kind of removal of  
13 parking lot material; does it?

14 A. The plans do not talk about removal of  
15 parking lot.

16 Q. But they do on Detour Road B.

17 They talk about removal of parking lot  
18 material, right?

19 A. Yes. They were talking about that they  
20 can add so much -- I'd have to find it again --  
21 They don't have to use 9-inch base coarse. They  
22 can use a lesser amount.

23 Q. So is it still your position -- and if  
24 it is, explain to me why, Deposition Exhibit 8 has

1 a typo and it's actually talking about Detour Road  
2 A and not Detour Road B.

3 A. Because, in my opinion, that if the  
4 plans are already stated that there was a deviation  
5 going to be needed for the Detour Road B, so that's  
6 already built into the plan. So there wouldn't be  
7 a change order of deduction because of it. It's  
8 already been -- It's already built into the plans.  
9 So this is a deviation.

10 MS. BRICE: Mark this as Deposition

11 Exhibit 9.

12 (Gobelman Exhibit No. 9 marked for  
13 identification.)

14 BY MS. BRICE:

15 Q. This is IDOT 000329, and this was  
16 attached to your bibliography, and it's a document  
17 dated May 5, 1975.

18 Can you explain to me why this document  
19 is important to your opinion?

20 (Witness peruses document.)

21 THE WITNESS: This is a change order  
22 that sort of finalizes the volumes and  
23 quantities. And so it's talking about the  
24 adding of the special excavation for removal

1 of all the detour roads. And then it's final  
2 deductions of quantities for -- in a sense,  
3 for the entire project of all the material  
4 that it didn't have to be removed.

5 So the total volume of removal and  
6 disposal of material, total volume of borrow  
7 excavation that didn't need to come to the  
8 site and porous granular backfill that didn't  
9 have to come to the site.

10 BY MS. BRICE:

11 Q. Is there anything in this document that  
12 is particularly important to your opinion other  
13 than just background information?

14 A. It relates to the removal and  
15 obliteration of the detour roads.

16 Q. Okay. Other than that?

17 A. (No response.)

18 Q. I mean, it's talking about all the  
19 detour roads, right?

20 A. Correct.

21 Q. I mean, it's not specific to one, right?

22 A. That is correct.

23 Q. So you can't say from this document that  
24 there was so much unsuitable material at Detour

1 Road A; isn't that correct? You can't quantify  
2 whether or not there was unsuitable material at  
3 Detour Road A?

4 A. On this document, that is correct.

5 Q. Right. And I think this was a document  
6 we were referring to earlier where you said, "I  
7 think there's a document that says that there is  
8 unsuitable and unstable material on the detour  
9 roads and the obliteration of the detour roads."

10 Do you remember talking about that?

11 A. No, but I don't know if I was referring  
12 to this document.

13 Q. Okay. If you were, then we've talked  
14 about it. If you weren't, we'll move on. It's too  
15 complicated.

16 MR. MCGINLEY: Just for the record, I  
17 think we're about at the three-hour mark at  
18 this point. So we're on the same page about  
19 this.

20 MS. BRICE: Yeah.

21 BY MS. BRICE:

22 Q. On Page 6 you say:

23 "The Transite pipes would  
24 not have been crushed and

1 scattered throughout the site  
2 because the Contractor would not  
3 have taken any action that would  
4 have potentially damaged the  
5 stability of the parking lot."

6 Do you see that?

7 A. Yes.

8 Q. If the parking lot did not have any sort  
9 of an asphalt cover and was just surface, right,  
10 was just dirt, would your opinion with the same?

11 A. I think it would be.

12 Q. Why?

13 A. Because any time you're running the  
14 machinery over, let's say, soil material that is  
15 compacted, and now you're, sort of, digging into it  
16 when you're crushing the pipe, you're creating a  
17 potential unstable material on the surface that may  
18 lead to some unsuitability or unstableness of that  
19 parking lot that would require them to maybe not be  
20 able to use it.

21 Q. Right.

22 But Detour Road A only cuts across a  
23 portion of the parking lot, right?

24 A. Yes.

1 Q. Okay. So is there any reason why they  
2 couldn't have moved those pipes over to a different  
3 part of the parking lot area or a different portion  
4 within the right of way and done the crushing  
5 there?

6 A. It's possible, but that would require  
7 the contractor was going to have to take his --  
8 make a lot of effort to do that on something that  
9 is going to be removed anyway.

10 Q. Other than Deposition Exhibit 9, do you  
11 have any other evidence that the parking lot on  
12 Site 3 had any type of asphalt or a similar base?

13 A. I don't recall seeing anything regarding  
14 an asphalt base.

15 Q. If there had been such an asphalt base  
16 and it hadn't been removed --

17 And that's your opinion, right?

18 A. Correct.

19 Q. -- (continuing) wouldn't the soil  
20 borings done throughout Site 3 on the parking lot  
21 indicate asphalt?

22 A. Well, they indicated cinders and other  
23 things like that that could have been part of it.  
24 I'm not sure when they removed -- whether or not

1 the contractor removed, as part of clearing the  
2 road, that he could actually clear two inches of  
3 asphalt or whether he just took a swipe and removed  
4 it all, removed a chunk of it.

5 Q. Do any of the soil borings indicate  
6 asphalt along Site 3?

7 A. I don't recall seeing the words  
8 "asphalt" as part of the boring --

9 Q. Okay. Do any of the soil borings  
10 indicate any type of material similar to asphalt  
11 that would have been composed for use as a parking  
12 lot material?

13 A. I think there were materials that could  
14 be used as parking lot type material.

15 Q. Such as?

16 A. Well, I think there was -- what do they  
17 call it -- grindings, you know, like bottom ash  
18 type materials that they found in some of the  
19 borings around that Parking Lot 3 and that.

20 Q. Okay. But if there were a base on top  
21 of the parking lot that wasn't removed, wouldn't  
22 you expect to find in the soil borings consistency  
23 of a certain type of material that would have  
24 comprised that base?

1           A.     Yeah, I would say that you would expect  
2 to see something, depending on the amount of  
3 material that was left behind once it was all  
4 removed.

5           Q.     Okay. Opinion 5, Page 6. Take a second  
6 to read this, if you need to.

7                     But what point are you trying to make  
8 here? There is not an underlined area for an  
9 opinion. So is there an opinion in here?

10          A.     As I stated before, when I laid this  
11 thing out, I was providing, sort of, like a  
12 historical representation of what I see in the  
13 file.

14          Q.     Okay.

15          A.     Some of it turned into opinions that  
16 were underlined. Some of it was just information  
17 for clarification of things.

18          Q.     Okay. But are you offering any opinions  
19 in this Section 5?

20          A.     In essence, the opinion would be that  
21 the City of Waukegan and Lake County paid  
22 100 percent of the work because this is work that  
23 they needed to have done.

24          Q.     But that's more of a fact, right?

1           A.     Yeah. Well, you -- I say "fact." You  
2 started with "opinions." Vice versa.

3           Q.     Well, I'm trying to understand if you're  
4 taking that fact and then making some bigger  
5 opinion based upon that fact is what I'm trying to  
6 understand.

7           A.     I don't think I'm trying to make any  
8 larger opinion than what was factually found in the  
9 file.

10          Q.     Do you know if liability under the  
11 Illinois Environmental Protection Act hinges on who  
12 is paying for the work?

13                   MR. MCGINLEY: Objection; calls for  
14 legal conclusion.

15                   You can answer, if you know.

16                   THE WITNESS: In 19 --

17 BY MS. BRICE:

18          Q.     No. Now.

19          A.     Under -- under what -- who?

20          Q.     Section 21.

21          A.     Section 21 of the Act. So under now it  
22 would be a proportionate liability, so everyone  
23 would have a portio, whether it was the owner or  
24 the operator.

1 Q. So it doesn't matter who was paying for  
2 the work, correct?

3 MR. MCGINLEY: I'm going to object as  
4 being vague and ambiguous.

5 THE WITNESS: It matters. And it  
6 matters on the -- in regarding to the  
7 proportionate of who's actually responsible  
8 for it.

9 BY MS. BRICE:

10 Q. But there is some liability for the -- I  
11 guess as you refer to them as the operator --

12 A. Yes.

13 Q. -- right?

14 And so there's liability for the people  
15 actually overseeing the work, right?

16 A. Owners of the properties and the people  
17 doing the work, third parties doing the work on the  
18 property both have liability --

19 Q. And people who are responsible for the  
20 work, people who are overseeing and telling the  
21 people how to do the work.

22 MR. MCGINLEY: I'm going to object. I  
23 mean, Mr. Gobelman is not being presented to  
24 provide an opinion on this matter.

1 MS. BRICE: Sure.

2 MR. MCGINLEY: I mean, you can ask if  
3 you want to, but it's not within his purview.

4 MS. BRICE: Well, he used to work at  
5 the Illinois Environmental Protection Agency,  
6 and so I'd like to know his opinion.

7 THE WITNESS: I would think that if --  
8 everyone would have some sort of liability.  
9 A person that isn't the owner or an operator  
10 but is dictating the work may have some  
11 liability if their dictations exacerbated the  
12 situation. I had to throw in a \$3 legal term  
13 for you.

14 BY MS. BRICE:

15 Q. Okay. Let's turn to Page 7. And you  
16 have an underlined opinion here:

17 "It is my opinion that over  
18 the years the installation and  
19 maintenance of these lines would  
20 have disturbed the existing  
21 conditions and potential asbestos  
22 material could have been buried  
23 with these underground utility  
24 lines were installed or during

1 maintenance" -- "when these  
2 underground utility lines were  
3 installed or during maintenance."

4 A. Right.

5 Q. So I want to take this apart a little  
6 bit. You say at the very first sentence of this  
7 section:

8 "A number of utilities were  
9 in conflict and had to be  
10 adjusted prior to the start of  
11 this project."

12 Which utilities are you talking about  
13 with respect to Sites 3 and 6 that were there at  
14 the beginning of the project?

15 A. I believe it's part of that -- No. 4 had  
16 a list of utilities that were still in conflict at  
17 the beginning.

18 Q. Okay. And that's where I'm going.  
19 Because your next sentence, you talk about a number  
20 of different types of utilities, and it's a little  
21 unclear.

22 Are you saying that these utilities in  
23 this next sentence were all there at the beginning  
24 of the project or were not there or do you not

1 know?

2 A. No. I'm saying that, one, there were  
3 utilities there at the beginning when we did our  
4 project.

5 Q. Mm-hmm.

6 A. There were a list -- and I didn't  
7 necessarily compare and contrast the list that was  
8 presented by USEPA of utilities that are existing  
9 to date to -- because I don't believe the list that  
10 was in that thing I reported that was in conflict  
11 was only providing the list of utilities that are  
12 still in conflict. It didn't provide a list of all  
13 utilities.

14 But what I'm stating is that any of the  
15 utilities that have gone through this area, whether  
16 it was done prior to 1970 or after, would have  
17 disturbed the material there and potentially moved  
18 material from the surface to the subsurface.

19 Q. Okay. You're talking about -- you say  
20 in that:

21 "...would have disturbed the  
22 existing conditions."

23 What existing conditions are you  
24 referring to?

1           A.    The existing is at the time in which the  
2 utility is being built.

3           Q.    Okay.  And with respect to -- Does that  
4 also apply to 1970 and what was going on in 1970 or  
5 '75?

6           A.    If the utility was being relocated or  
7 installed in the '70s or prior to 1970, then it  
8 would have disturbed the existing conditions.

9           Q.    Okay.  And so when IDOT was doing  
10 work -- and we saw earlier there was an  
11 installation of a storm drain and there were a  
12 bunch of ditches, right, that were done on the  
13 plans -- IDOT or its contractor would have  
14 disturbed those same existing conditions, right?

15          A.    They would have excavated out the  
16 existing conditions and made the drain lines, yes.

17          Q.    Right.  
18                But they would have disturbed in and  
19 around those existing conditions?  It's not they're  
20 going to excavate everything?

21          A.    They're going to excavate out what they  
22 need for construction purposes.

23          Q.    Right.

24                And then what they would have done

1 around that area could have been backfilled over  
2 it, right?

3 A. I think you're losing me there.

4 Q. I think I'm losing myself, too. When  
5 they excavate, right, let's say that there was --

6 A. Sorry.

7 Could you just start with what type of  
8 excavation because each type of excavation would be  
9 something completely different.

10 Q. Understood. Let's just make an  
11 assumption. And this goes to your next opinion,  
12 that the parking lot was built with  
13 asbestos-containing materials, okay?

14 A. Correct.

15 Q. So we assume that and IDOT or its  
16 contractor then does excavations for Detour Road A,  
17 right?

18 A. It built Detour Road A, yes.

19 Q. But there's cut?

20 A. Correct.

21 Q. And there's fill?

22 A. Correct.

23 Q. And no cut is deemed unsuitable material  
24 in any of the documents that we have reviewed?

1 A. Correct.

2 Q. And so when they -- so if they took out  
3 asbestos-containing material and then they reused  
4 it, they would have moved the asbestos-containing  
5 material around, correct?

6 A. Removed asbestos-containing material  
7 from where?

8 Q. From the detour road --

9 A. From --

10 Q. From the parking lot. If it was made  
11 out of parking lot, and you take it out as cut and  
12 then you use it as fill somewhere else, it still  
13 contains asbestos-containing material; does it not?

14 A. Well, I believe what I am stating is  
15 that the parking lot wasn't removed as part of  
16 building the road or part of cut.

17 Q. I think we're saying two different  
18 things.

19 But you said -- Well, but they had to --  
20 Then what did they do to get the storm drain in?  
21 How do they dig down in there?

22 A. They excavate out the material.

23 Q. Okay.

24 A. And they would use porous granular

1 backfill to backfill the material.

2 Q. Yeah.

3 But they'd have to cut through the  
4 parking lot, though?

5 A. Yes.

6 Q. So they had to excavate out part of the  
7 parking lot -- They would have excavate out part of  
8 the parking lot to do the ditch, right?

9 A. Yes, to restore drainage after the  
10 parking lot is removed -- I should say after the  
11 detour road is removed --

12 Q. Right. But they built --

13 A. They would have to establish drainage.

14 Q. -- they built ditches across Site 3,  
15 right, in the plans?

16 A. In the plans it was proposed that they  
17 were going to build ditches.

18 Q. Okay. So if they did build ditches  
19 across the parking lot, they would have had to cut  
20 down into the parking lot; isn't that right?

21 A. Yes.

22 Q. You use the word here "potential  
23 asbestos."

24 I'm just curious why you use that word?

1 A. Where are you?

2 Q. "It is my opinion that over the  
3 years..."

4 A. Okay. I don't know where you're at.  
5 Here (indicating)?

6 Q. (Indicating.)

7 A. Oh, there it is. I thought that's where  
8 you were at, but then I had the loss potential.  
9 I'm like, I don't see it.

10 (Witness peruses document.)

11 THE WITNESS: Because -- I used the  
12 word "potential" as an indication that there  
13 was areas that they may not have had  
14 asbestos-containing materials. So whatever  
15 potential that was encountered would have  
16 been moved.

17 BY MS. BRICE:

18 Q. Okay. You refer to this 1999 ELM  
19 report?

20 A. Correct.

21 Q. Which you quote as saying:

22 "...according to Johns  
23 Manville, the parking lot was  
24 constructed with materials

1 containing asbestos-containing  
2 materials..."

3 Did you talk to anyone at ELM to figure  
4 out what they intended by that sentence?

5 A. No, I did not.

6 Q. Is it possible that they were talking  
7 about the parking lot -- there was soil, and then  
8 they put concrete, Transite pipe as bumpers around  
9 the parking lot to create the parking lot.

10 Couldn't they be referring to the  
11 concrete Transite pipe bumpers as what they use to  
12 build the parking lot in this reference?

13 A. In the context of the report, I did not  
14 think that that's what they were referring to.

15 Q. But it's possible; isn't it?

16 A. Things are possible.

17 Q. Have you ever seen EPA state in any of  
18 its documents that the parking lot itself was built  
19 with asbestos-containing material?

20 A. I did not see anything in EP -- stating  
21 one way or the other.

22 Q. Have you ever seen any other document  
23 other than this one 1999 ELM report that says that  
24 Johns Manville said the parking lot was constructed

1 with materials containing asbestos-containing  
2 materials?

3 A. I believe things are referenced back to  
4 that report, but I don't necessarily remember  
5 specifically whether or not anybody else used that  
6 type of language.

7 Q. So other than this statement here in the  
8 ELM report, do you have any other evidence that  
9 Johns Manville constructed a parking lot on Site 3  
10 that contained asbestos-containing materials other  
11 than Transite pipe on top of the parking lot?

12 A. I lost you again.

13 Could you do that again.

14 MS. BRICE: Can you read that back.

15 (Record read as requested.)

16 THE WITNESS: I have no other evidence.

17 BY MS. BRICE:

18 Q. So I take it, given that, you don't have  
19 any other information about how much asbestos was  
20 used, is that right, to construct this parking lot?

21 A. I don't have any evidence of how much.

22 Q. Okay. Do you know where the asbestos  
23 was located to construct this parking lot?

24 A. I do not have evidence of where they

1 placed the asbestos-containing material in the  
2 parking lot.

3 Q. Do you know if it was scattered across  
4 or uniform?

5 A. There was no evidence to say that.

6 Q. Do you know if it was buried or on top?

7 A. There was no evidence of saying how it  
8 was built.

9 Q. Or how deep? Do you have any about  
10 idea?

11 A. There as no evidence to say how it was  
12 built.

13 Q. Do you have any evidence that ComEd  
14 agreed to let JM put fill material on its property?

15 A. I'm not sure, but I know there was an  
16 easement documentation. I thought for sure -- I  
17 would assume that they would have to have  
18 permission to change.

19 Q. Right.

20 But do you have any evidence that they  
21 actually agreed to let JM put fill material on  
22 their property?

23 A. I don't recall whether or not the  
24 easement document had anything about that.

1 Q. Did you do anything to confirm the  
2 accuracy of the statement contained in the ELM 1999  
3 report?

4 A. No, I did not.

5 Q. Going back to Section 6 here, you talk  
6 about:

7 "...potential asbestos  
8 material could have been buried"  
9 with underground utility lines.

10 Again, are you rendering an opinion that  
11 that did, in fact, occur more probably than not, or  
12 are you just saying this is a possibility.

13 A. I'm saying that when you excavate,  
14 there's no way of placing material back from what  
15 originally was existing -- back to its existing  
16 condition, so they wouldn't have disturbed it. And  
17 there would be a possibility that that material  
18 would have been buried deeper.

19 Q. Right.

20 But do you know for a fact that any  
21 excavations done on Site 3 or 6 required the  
22 utility excavator to remove asbestos and then place  
23 it back?

24 A. No, I don't believe there was anything

1 that had to deal with them specifically removing  
2 asbestos and putting it back.

3 Q. Okay. Have you looked at any records  
4 regarding installation or removal of or maintenance  
5 of utilities on Site 3 or Site 6?

6 A. No, I have not looked at any utilities.

7 Q. Do you know where those utilities are  
8 located?

9 A. I know based upon the figures that were  
10 provided in the various reports where the utility  
11 lines are.

12 Q. Okay. Do you know how often the  
13 utilities were maintained?

14 A. I believe -- the term that I am using  
15 "maintained" is that there was a failure or leakage  
16 and that they would have to go in and do  
17 maintenance, not that there was -- having to go in  
18 and actually excavate to maintain.

19 Q. Okay. Do you know if maintenance was  
20 ever done on any of these utilities?

21 A. I have no indication whether or not  
22 there were any leaks or spills that required them  
23 to do maintenance.

24 Q. Do you know how deep these utilities

1 were buried?

2 A. I believe the reports state that -- that  
3 the utilities are buried, but I do not recall.

4 Q. Do you know if the -- where the  
5 utilities are in relation to the asbestos that's  
6 been found?

7 A. I believe a lot of the investigatory  
8 reports relate to the utility lines and where the  
9 asbestos was found.

10 Q. But sitting here right now, can you tell  
11 me if they line up or not?

12 A. I believe it does line up with some of  
13 the utilities that cross Parking Lot 3.

14 Q. Okay. Which ones? Do you know?

15 A. I do not know which ones, per se.

16 Q. Okay. Go to 7, please, Page 7 of  
17 Opinion 7. The opinion talks about:

18 "...economics would suggest  
19 that JM would have used all types  
20 of ACM material including  
21 Transite pipes to build the  
22 employee parking lot."

23 So are you offering an opinion that  
24 Johns Manville did, in fact, use

1 asbestos-containing material to build the parking  
2 lot other than the concrete Transite pipes?

3 A. My opinion is, it is based upon the  
4 report that said it was built with it that that's  
5 what they did.

6 Q. Okay. So just based upon that one  
7 statement, is that right, in the report?

8 A. I believe there is no other evidence  
9 other than what was found in the investigation that  
10 there was asbestos in the subsurface.

11 Q. What if that's wrong? What if  
12 the asbestos -- Johns Manville did not use asbestos  
13 to build the parking lot? All that happened was  
14 there was a soil and Johns Manville put concrete  
15 bumpers on top of the parking lot and then IDOT  
16 came in and did its work? How did the  
17 asbestos-containing materials end up buried in the  
18 subsurface?

19 A. Under your scenario?

20 Q. Mm-hmm.

21 A. Well, under your scenario, I would also  
22 assume that the -- the initial asbestos pipe that  
23 were placed were not the final pipes that were  
24 there at the end.

1 Q. Let's just assume they -- let's just  
2 assume the initial pipes were placed and there were  
3 different pipes that were removed and they were  
4 removed off the site. Nothing was placed on the  
5 site. All you had were pipes on top of Site 3.  
6 There were no other pipes anywhere else.

7 How did those pipes end up buried under  
8 Sites 3 and 6?

9 A. So now your assumption is -- under your  
10 hypothetical, is that the site parking lot was not  
11 built with asbestos-containing material?

12 Q. Right.

13 A. The existing Transite pipes that were  
14 placed on as curb bumpers were also the final  
15 Transite pipes, right?

16 Q. Or they were removed off the site and  
17 new ones were placed on.

18 A. So nothing was ever slid off the site is  
19 your -- is your theoretical?

20 Q. Sure. Or --

21 A. I'm just trying to get a handle of your  
22 theoretical so I can render an answer to it.

23 Q. Nothing was ever buried by Johns  
24 Manville. If something had slipped slightly off

1 the side, it was still on the surface. Nothing was  
2 buried. If there were pieces of concrete pipe,  
3 they would have still been sitting on the surface.

4 A. Okay.

5 Q. So if that's the case, how did the  
6 concrete Transite pipe end up buried under Site 3  
7 and Site 6?

8 A. Well, you still have utilities that are  
9 excavated and could potentially taking stuff that's  
10 on the surface and putting it at the bottom.

11 Q. Okay. But is that more likely than IDOT  
12 who came in and built an embankment right there and  
13 built a detour road through the parking lot using  
14 those materials in their construction? You think  
15 it's more likely than not that the utilities are  
16 responsible as opposed to IDOT?

17 A. My opinion is is that under the  
18 sequencing of construction that whatever was placed  
19 by IDOT on the detour roads had to be removed back  
20 to the existing conditions. So under your theory  
21 or your hypothesis that IDOT would have moved stuff  
22 off, it would have been removed at the end of the  
23 construction when they removed everything off.

24 Q. I understand that.

1                   Let's take the utilities out of the  
2 hypothetical. No utilities. No utilities there.

3           A.     Okay.

4           Q.     Parking lot made of soil with concrete  
5 Transite pipes on top of it. JM leaves. IDOT  
6 shows up. There are concrete Transite pipes on top  
7 of Site 3.

8                   How do they end up buried under Site 3  
9 and in the embankment? How do they get there?

10          A.     So you're taking out everyone --

11          Q.     Yep.

12          A.     -- and you're only leaving, in your  
13 hypothetical, for the embankment along Greenwood or  
14 the embank- -- or the detour road are you talking  
15 about?

16          Q.     I'm talking about all of it --

17          A.     Okay.

18          Q.     -- under the detour road and in the  
19 embankment.

20          A.     So you're taking out, under your theory,  
21 everyone else --

22          Q.     Well, no, I'm --

23          A.     -- everyone? You're taking out  
24 everybody else, all the utilities are out of the

1 picture, and the only people who are left in the  
2 picture are IDOT, right?

3 Q. Mm-hmm.

4 A. And the manufacturing company itself?

5 Q. Yep.

6 A. Okay.

7 Q. How do they end up buried there?

8 A. So are we to -- are you also taking out  
9 the fact that things could have fallen off trucks,  
10 broken? Are you taking out those too?

11 Q. I'm asking you your opinion.

12 A. No, you're --

13 Q. It's a hypothetical.

14 A. You're -- Sorry, you're giving me a  
15 possibility, and I'm just trying to figure out what  
16 the endpoint of your -- your theoretical is going  
17 to go to.

18 Q. Well, I'm not going to debate this for  
19 the next 30 minutes.

20 I mean, do you have a response or not?  
21 I gave you my hypothetical.

22 A. It is still possible that Transite pipe  
23 that were on the surface could have still gotten  
24 buried.

1 Q. By whom?

2 A. Well, it could be by nature itself,  
3 depending on the wetness and the water and the  
4 muckiness --

5 Q. Okay.

6 A. -- you know, and gravity could have done  
7 something.

8 Q. Is it possible it could have been buried  
9 by IDOT's contractor?

10 A. I don't see how the sequencing would  
11 allow it to be buried underneath Greenwood Road  
12 and that.

13 Q. Okay. So you're 100 percent certain  
14 that that never could have happened, that IDOT's  
15 contractor never could have buried concrete pipe in  
16 the embankment or on Site 3, you're 100 percent  
17 certain? Is that your opinion?

18 A. My opinion is I don't see how it could  
19 be possible.

20 Q. Okay. Let's go to Dorgan's report. I  
21 want to go to Figure -- Figures 4 and Figures 5,  
22 okay?

23 Do you agree with me that on Figure 4  
24 Figure 4 is depicting asbestos-containing material

1 within the zone with which IDOT filled the area  
2 depicted on this map?

3 A. I believe it is depicting what the  
4 investigation showed --

5 Q. The investigation shows --

6 A. -- based upon --

7 Q. -- asbestos within the fill material  
8 that was placed by IDOT; does it not?

9 A. I don't believe it is stating that.

10 Q. Okay. I didn't say it's stating it. I'm  
11 saying it's showing that, that it's within that  
12 zone where IDOT placed fill material.

13 Does it not show that there is  
14 asbestos-containing material within that zone  
15 within which IDOT placed fill material in the  
16 1970s?

17 MR. MCGINLEY: I'm going to object  
18 because I think the document and the figures  
19 speaks for itself and shows what it shows.

20 THE WITNESS: It shows that someone has  
21 represented that there was fill material --  
22 based upon some boring logs, that there was  
23 fill material and that they have visual  
24 asbestos-containing material within that

1 fill, yes.

2 BY MS. BRICE:

3 Q. And that fill is based -- and that fill  
4 is the fill material that was placed by IDOT?  
5 That's the area that IDOT placed the fill material,  
6 right?

7 A. I am not -- I am not sure about that.

8 Q. Okay. Let's look at the next page. On  
9 this page it's showing that there is  
10 asbestos-containing material in the embankment, in  
11 the Greenwood embankment, to the south.

12 Does it not show that?

13 A. Sorry, I lost you.

14 Q. Okay.

15 A. I was looking --

16 Q. Okay. I'm looking at Figure  
17 Number --

18 MR. MCGINLEY: 5.

19 THE WITNESS: 5.

20 BY MS. BRICE:

21 Q. 5, okay.

22 This is depicting the Greenwood  
23 embankment, okay? And here it says "PEAT (Soft)."

24 Do you see that? That's the unsuitable

1 material that needed to be removed, right?

2 A. It is saying that in here. I'm not  
3 sure. Are they relating --

4 Q. Okay. Assuming this is accurate, that  
5 is material that would have been removed?

6 A. If it was -- yes, if it was in as part  
7 of construction --

8 Q. It says it does --

9 A. -- it would have been --

10 Q. Yes.

11 A. -- right.

12 Q. Okay. So when they did that, they would  
13 dig down under, they would have to dig all the way  
14 down to where it says "PEAT (SOFT)" and "PEAT", and  
15 they would have to dig all the way down there and  
16 take out that material, right?

17 A. If they determined that that material  
18 was -- needed to come out with the amount of the  
19 embankment that's on top of it.

20 Q. Right.

21 So if they did that and they -- they  
22 would then fill that area back up above there,  
23 correct, to get it to the correct grade, right?

24 A. They would have -- if anything below

1 would have to come up to grade.

2 Q. Okay. And does this figure not show  
3 that there is asbestos-containing material within  
4 that area that was filled by IDOT's contractor, so  
5 the area between the unsuitable material and the  
6 final grade line?

7 A. Yes. I think the analytical results  
8 show that there was asbestos-containing material  
9 found in those borings.

10 Q. And, again, you believe that got there  
11 how?

12 A. I don't believe I rendered an opinion  
13 how it got there.

14 Q. Okay. Who put it there?

15 A. I have no idea who put it there or if it  
16 was not part of the existing.

17 Q. Okay. Okay. Just go back. I'm not --  
18 it's not going to be that much longer. I mean, I  
19 know I'm going to go the four hours, but we'll be  
20 close.

21 MR. MCGINLEY: That's fine. It's your  
22 deposition.

23 MS. BRICE: So where are we?

24 MS. HANNA: 1:30.

1 MS. BRICE: Okay. Got it.

2 BY MS. BRICE:

3 Q. So again, let's go back.

4 I had --

5 MR. MCGINLEY: Go back to what, which

6 document?

7 MS. BRICE: I'm getting ready to tell

8 you.

9 BY MS. BRICE:

10 Q. -- Dorgan report --

11 MR. MCGINLEY: Okay.

12 BY MS. BRICE:

13 Q. -- economics would suggest, okay, that

14 Johns Manville would have used all types of ACM

15 material --

16 MR. MCGINLEY: I'm sorry. That's not

17 the Dorgan report. That's his report you're

18 quoting.

19 MS. BRICE: Okay, sorry. It's very

20 confusing. I'm confusing myself.

21 MR. MCGINLEY: I just want to make sure

22 that the record is clear.

23 MS. BRICE: And I appreciate that.

24 THE WITNESS: I was going to say maybe

1 he agreed with me, and I missed that.

2 MS. BRICE: I appreciate that, Evan.

3 Thank you. It's been -- it's a bit  
4 harrowing, as you know, when you're trying to  
5 take a deposition.

6 MR. MCGINLEY: I totally appreciate  
7 that.

8 MS. BRICE: As it is responding to  
9 questions with lots of documents.

10 BY MS. BRICE:

11 Q. Okay. All right. Sorry. Your report,  
12 Page 7, "economics would suggest..."

13 What economics are you talking about  
14 here?

15 A. I'm referring to when -- when a company  
16 has to build something that they're just providing,  
17 in this case, a parking spot for his administrator  
18 people and visitors or whoever is going to use that  
19 parking lot, it's my experience that you will use  
20 whatever is readily available to build your  
21 parking -- build that so that you don't have to  
22 expend a lot of funds to build it. And so they  
23 would have built that parking lot with  
24 whatever material -- whatever material they may

1 have had or whatever was close to build the parking

2 lot.

3 Q. Okay. But what if ComEd had already  
4 leveled out that area and filled it with cinders  
5 and slag, which is what they had on hand, right,  
6 because it was from their facility? What if they  
7 had already leveled that out? I mean, what you're  
8 saying, obviously, all Johns Manville would have to  
9 do would be place those pipes on the parking lot.  
10 It would be more economical for them to do that;  
11 wouldn't it?

12 A. In your theory, if the parking lot  
13 existed prior to --

14 Q. No --

15 A. -- Johns Manville doing anything and all  
16 they would have to have done is put curb bumpers  
17 on, then, yes.

18 Q. Right. And I guess -- Let me rephrase.

19 I'm not saying the parking lot itself  
20 existed. I'm just saying that there had been fill  
21 placed on that area of the ComEd property  
22 sufficient to where it could withstand a parking  
23 lot, not that any specific area had been built up.

24 A. I think that's what I was stating as

1 well.

2 Q. Gotcha.

3 So you had a number of topo maps that  
4 you provided. And I wanted to know if you have any  
5 information what happened on Site 3 between 1939  
6 and 1960 because the topos jump from '39 to '60.  
7 And there's a few aerials, so let's just take out  
8 the aerials. But based on the topos, do you have  
9 any topo information between '39 and '60?

10 A. I was thinking there was -- the topos  
11 provided were '08, 1929, '39. Then it goes to '60.

12 Q. Right.

13 So do you have any topo information  
14 between 1939 and '60 that you haven't referenced in  
15 this report?

16 A. No, I do not believe that I do.

17 Q. Okay. So it's possible that between  
18 1939 and 1960, ComEd filled the area that is  
19 depicted on the topo maps?

20 A. In using the topos as your guide and  
21 under your theory, that is possible, yes --

22 Q. Okay.

23 A. -- something could have happened between  
24 them, yes.

1 Q. Okay. I mean, isn't it possible -- I  
2 mean, taking out my topos in anything, I mean,  
3 that's possible in any event, right; I mean, that  
4 ComEd could have come in and filled Site 3?

5 A. Yeah. I didn't find any record that  
6 showed that ComEd did it or didn't do it.

7 Q. Okay. I'm going to Opinion 8 on Page 8  
8 of your report.

9 Could the contractor have done the work  
10 on Site 3 without IDOT obtaining the right of way  
11 in the easement?

12 A. No, he would not have permission.

13 Q. And could he have done the work without  
14 IDOT providing the plans and the specifications?

15 A. No.

16 Q. And he was required to follow those  
17 plans and specifications, right?

18 A. Correct.

19 Q. And he was also required to follow the  
20 decisions of the resident engineer, right?

21 A. Yes.

22 Q. Have you seen any documents in the  
23 record discussing decisions made by the engineer  
24 during construction with respect to Sites 3 and 6?

1           A.     I believe the only thing I've seen  
2 regarding 3 or 6 were related to -- that were based  
3 upon the change orders that were documented.

4           Q.     Okay. So would his decisions be in that  
5 book you were referring to earlier, the engineer's  
6 log?

7           A.     Right.

8           Q.     Has anyone tried to find that, as far as  
9 you know?

10          A.     I believe we found everything in regards  
11 to that record. The problem is that the retention  
12 schedules, they probably no longer exist.

13          Q.     And what type of information does the  
14 engineer put in his logbook?

15          A.     Typically he would document the events  
16 of the day, you know, material that comes in,  
17 material that leaves, where they're working. He  
18 would include in that how many people were working,  
19 you know, whatever was required for him to document  
20 in his reports regarding -- you know, for payment,  
21 so that he can document, when he sees the bills  
22 come through, that that is acceptable to pay.

23          Q.     Would he document decisions about where  
24 things were placed or, you know, he approved this

1 type of material or said that type of material was  
2 unsuitable, that sort of thing?

3 A. He would have dictated where things were  
4 to be placed in the purview that it was required  
5 for construction purposes for the contract.

6 Q. But would that be in his log generally?

7 A. Yes, I would think he would include that  
8 in his log.

9 Q. And would he sort of describe what  
10 happened every day in the log, like, "This is" --  
11 you know, "These are the steps that we took today"?

12 A. I believe, in general, he would describe  
13 the events of the day in his log.

14 Q. And how long are these engineer logs  
15 generally kept?

16 A. I'm not -- I don't know what the  
17 retention schedule was for those things.

18 Q. How are they now? How long are they  
19 kept now? Do you know?

20 A. There is a retention schedule for that.  
21 I would suspect it's probably ten years or so,  
22 somewhere in that neighborhood.

23 Q. Okay. Page 9, please, of your report,  
24 it says:

1 "The contractor may have  
2 managed asbestos cement pipes,  
3 (Transite) at sometime along  
4 construction project."

5 What are you talking about here, what  
6 pipes; the bumper pipes or some other type of pipe?

7 A. Well, as I -- I think stated earlier, I  
8 think under the spec, asbestos-containing cement  
9 pipe is an acceptable pipe that can be used along  
10 with asbestos under-drains that can be used. So  
11 I'm not sure whether or not any of that material --  
12 it could have existed in the existing right of way  
13 already. So the pipes that is being referred to by  
14 Mapes isn't related -- may not necessarily be  
15 relating to the bumper pipes. It's just talking  
16 asbestos pipe, and that could be any type of pipe.

17 Q. Right.

18 But do you have any evidence that the  
19 contractor encountered existing asbestos pipe  
20 during the work on Site 3 and Site 6?

21 A. I don't think there's anything in the  
22 record to say what type of pipes were encountered  
23 as part of this construction.

24 Q. And it's your opinion that the road

1 wasn't removed for Site 3, for the parking lot on  
2 Site 3 so, therefore, if he didn't dig down, he  
3 wouldn't have up run into any existing  
4 asbestos-containing pipes, right?

5 MR. MCGINLEY: I think that misstates  
6 the witness's testimony.

7 MS. BRICE: Okay. Sorry. Let me try  
8 again.

9 BY MS. BRICE:

10 Q. I think that you said that it was your  
11 opinion that they built Detour Road A on top of the  
12 parking lot, right?

13 A. Correct.

14 Q. Okay. So would they have done any  
15 excavation -- well, you know what? Just strike  
16 that whole thing. I don't care.

17 So you're not referring to the parking  
18 bumpers. As I understand it, your opinion is that  
19 you believe the contractor would have taken those  
20 parking bumpers and taken them off site; is that  
21 right?

22 A. I believe -- Yes, my opinion is that he  
23 could have cleared the site.

24 Q. Okay. But do you have any evidence that

1 that's actually what happened to the parking  
2 bumpers?  
3 A. There's no indication of what happened  
4 to those parking lot -- even if they -- or whether  
5 or not they even existed at the time of  
6 construction.

7 MS. BRICE: On that point, I just want  
8 to mark a couple things. I'm going to mark  
9 these three aerial photos. The first is  
10 JM 001296. The second is JM 0005837. And  
11 the third is JM 0005835.

12 The first one is dated, as  
13 represented to me by Johns Manville, late  
14 1950s. The second one is dated 1961. The  
15 third one is dated 1974.

16 Okay. So if we can mark those as  
17 the next deposition exhibit.

18 THE COURT REPORTER: Do you want them  
19 as one exhibit, one group exhibit, or each  
20 one separate?

21 MS. BRICE: You know what? I'm going  
22 to add three other photos to this.

23 So we're also going to add to the  
24 next deposition exhibit three other larger

1 aerial photos that were produced by IDOT.  
2 One has handwriting on it that says 10/20/67.  
3 The next one says 6/11/70. The next one says  
4 10/26/72. Okay.

5 MR. MCGINLEY: And there are Bates  
6 numbers on the back of them that I think  
7 would probably be helpful to just read that  
8 in.

9 MS. BRICE: Okay. So the three Bates  
10 numbers are IDOT 002636, IDOT 002635, and  
11 IDOT 002634.

12 And can we go off the record for a  
13 second while we get this organized.

14 (Gobelman Exhibit No. 10 marked for  
15 identification.)

16 MS. BRICE: All right. So just to  
17 confuse the record even more -- just  
18 kidding -- we just added one more aerial  
19 photo here, and it is dated 7/1/54, to the  
20 beginning, and we've put the aerial photos in  
21 chronological order, and they all depict a  
22 different time, and the IDOT number for that  
23 '54 photo is 002633.

24 So basically we have a series of

1 aerial photos of the site area that are  
2 '54 -- 1954, one that is circa late 1950s  
3 which shows the parking lot, 1961, 1967, '70,  
4 and '72, and '74. Okay?

5 MR. MCGINLEY: And that's a total of  
6 seven photos, correct?

7 MS. BRICE: I am assuming that you  
8 counted accurately, yes.

9 BY MS. BRICE:

10 Q. Okay. So if you can direct your  
11 attention to the 1967 photo first.

12 A. Okay.

13 Q. Okay. So you say in your report that --  
14 you talk about '67 versus '70 --

15 A. Mm-hmm.

16 Q. -- and you say the '70 photo shows a  
17 vacant parking lot and the condition of the parking  
18 lot appears different as compared to the '67 aerial  
19 photo.

20 So if we can look at these two together  
21 and you can explain to me, in your words, what you  
22 think is different.

23 A. Well, just looking at the color  
24 schemes --

1 Q. Can you refer to which one you're  
2 talking about?

3 A. Oh, sorry. The '67 photo has numerous  
4 cars parked on it, and a lot of the areas around  
5 the cars are dark and wet-like material.

6 Q. How do you know that that's wet?

7 A. Typically wet shows up as a darker gray  
8 than the surrounding, so I am assuming that that  
9 represents like a wetter type of material --

10 Q. Do you hold --

11 A. -- or it could just be that the base of  
12 the material is a darker color.

13 Q. Okay. Do you hold yourself out as an  
14 expert in interpreting aerial photographs?

15 A. I don't know if I would call myself an  
16 expert, but I have reviewed aerial photographs for  
17 a very, very long time.

18 Q. Okay. Go ahead.

19 A. And then on the '70 aerial photograph,  
20 looks like a very dryer condition photo, more  
21 white, no cars. The lines on it are a lot  
22 different than -- surrounding boundaries are more  
23 defined than the boundaries of that '67 photo.

24 Q. When you're talking about boundaries,

1 let me see if I can put this into words that the  
2 record will be able to catch.

3 Around the parking lot, when you look at  
4 it on the aerial photos, you see sort of white  
5 demarkations that, sort of, de-mark the area of the  
6 parking lot, right?

7 A. In the 1970 photo --

8 Q. Yes.

9 A. -- yes.

10 Q. And in the -- and in the 1967 photo,  
11 right?

12 A. Some. Right --

13 Q. Some.

14 A. -- not to the same extent that is in the  
15 '70 photo.

16 Q. Right. Well, and then -- I'm looking  
17 for '54.

18 A. It's in my hand.

19 Q. Okay. So let's -- here I'm taking the  
20 late 1950s photo, and this is a photo that's from  
21 the Johns Manville -- it's a picture of the picture  
22 that is on the wall in Johns Manville's corporate  
23 headquarters in Denver. And if we need to bring it  
24 to trial, we'll bring it to trial.

1 Do you see this demarcated area that I'm  
2 talking about in this 1959 photo? So you've got  
3 this, sort of, white square outline, right?

4 A. Yes.

5 Q. Okay. And then there's other, sort of,  
6 lines of white sort of going through the site that  
7 look like it's telling the cars where to park.

8 Would you agree with that?

9 A. Yes.

10 Q. Okay. So taking this photo, how does  
11 this change, in your mind, from what you're seeing  
12 in this '59 through the '67 then the '71 -- Well,  
13 actually the next one is '61. I just totally  
14 messed this up, so...

15 (Witness peruses documents.)

16 THE WITNESS: To me it would appear  
17 that at the time that the photographs are  
18 taken that the -- there's an indication that  
19 either the boundaries that existed in the  
20 original photo were no longer there and then  
21 are replaced over time or uncovered or  
22 something because they appear and disappear  
23 and then reappear.

24

1 BY MS. BRICE:

2 Q. Okay. But from an aerial photo

3 perspective.

4 So there could be something covering it

5 when you're taking the aerial photo that you

6 wouldn't necessarily see the demarcation, correct?

7 A. That is possible.

8 Q. Okay. So when you were talking about

9 the difference between the '67 and '70 photo,

10 again, can you explain what your point was?

11 A. That there -- it appeared by the 1970

12 that the parking lot was no longer being used

13 because it appears, based upon the area, that there

14 are a lot of other cars parked there, but there are

15 no cars parked in that parking lot. So it was --

16 either had already vacated and not being used,

17 maybe because of the perceived construction project

18 that's going to occur in a couple years, you know,

19 or just nobody decided that day to park there.

20 Q. Right. And what do you see in the -- do

21 you still see the demarcation, the white lines

22 around the parking lot and lines sort of horizontal

23 up and down -- or vertical?

24 A. There are lines around the property.

1 Q. Yeah.

2 A. It is difficult on this photo to  
3 determine the white lines going across the property  
4 because you also have the effects of the electrical  
5 lines that show up as white coming across that  
6 property as well.

7 Q. Okay. Anything else that is important  
8 to your opinion with respect to the aerial photos?

9 A. It appeared to me that there was also  
10 additional -- I don't know if it was a barricade or  
11 something potentially put on the '70 photo, maybe  
12 to prevent people from coming in. It doesn't  
13 appear on any other --

14 Q. Where are you referring to?

15 A. (Indicating).

16 Q. Yeah, mark it. Go ahead.

17 A. No, I'm not going to mark the photo.  
18 But see how there's like a polygon-ish thing, it  
19 comes up, over, and down?

20 Q. So this is on the far west side --  
21 northwest corner of the parking lot?

22 A. Yes.

23 Q. Okay.

24 A. Okay. And that sort of white lines

1 aren't anywhere --

2 Q. Okay.

3 A. -- and I have no idea.

4 (Witness peruses documents.)

5 THE WITNESS: And to me, the '67 photo  
6 had a more pronounced draining feature to the  
7 east side of it, and that's, you know, maybe  
8 why nothing is showing up, that doesn't exist  
9 anymore. Where on the '70 photo, there is a  
10 less drainage feature on the east side coming  
11 beside that parking lot.

12 I guess that's it.

13 BY MS. BRICE:

14 Q. Do you have any evidence at all that JM  
15 buried Transite pipe on Site 3 and Site 6?

16 A. I have no evidence other than what was  
17 listed in the reports.

18 Q. Okay. I'm going to skip over here to  
19 Page 12 of your report.

20 A. We're done with the aerials for now?

21 Q. Yes, for now.

22 A. Sorry. Again, what page?

23 Q. Page 12, and this is where you're  
24 talking about USEPA's concerns.

1 A. Okay.

2 Q. So I'm going to offer you my  
3 hypothetical. Let's assume that the only  
4 asbestos-containing material on Sites 3 and 6 were  
5 pieces of cement concrete Transite pipe on the  
6 surface and possibly a few fibers on the surface.

7 If this were the case, what would  
8 USEPA's remedy have been?

9 A. If the only pieces -- or as you  
10 describe, the remedy, in essence, would be the  
11 same, which would be to remove all the  
12 asbestos-containing material so that the utilities  
13 would have a clean corridor. So if it was only at  
14 the surface and whatever small areas you depicted,  
15 then that would be the only areas that would need  
16 to be remediated.

17 Q. Right.  
18 So they wouldn't have to dig down and  
19 dig out buried asbestos-containing material to  
20 create the clean corridor, right?

21 A. They would have had just to clean out --  
22 remove what asbestos existed under your scenario.

23 Q. Which would be on the surface, correct?

24 A. Under your scenario.

1 Q. Correct.

2 You have this sentence in here in the  
3 third paragraph that starts with "knowing." It  
4 says:

5 "Knowing that the  
6 Department's Contractor did not  
7 remove the parking lot to build  
8 the detour road but could have  
9 removed some of the parking lot  
10 with the removal of the detour  
11 road at the completing of the  
12 construction project, the  
13 asbestos-containing materials  
14 beneath parking lot were placed  
15 there during the construction of  
16 the original parking lot by Johns  
17 Manville and the spread of  
18 asbestos-containing materials  
19 during the 25 or more years the  
20 parking lot was in service."

21 Can you explain this to me? What's your  
22 point here?

23 A. The point was -- is that the placement  
24 of asbestos -- we removed everything as it existed,

1 but we may have removed some additional of the  
2 parking lot as part of removal of the detour roads.  
3 But there was still asbestos there based -- from  
4 a -- in a sense, existing conditions. So that's  
5 material, if the parking -- because the parking lot  
6 was built with asbestos-containing material, so  
7 that material is still at -- is beneath the parking  
8 lot as it exists. And then there would have  
9 been -- the operation of the -- because of the  
10 operation there of the manufacturing, that there  
11 were other debris and material that could have  
12 ended up there through truck spillages, wind  
13 blowing, all those types of material that asbestos  
14 could have gotten onto that property.

15 Q. Right.

16 But you don't know that for a fact,  
17 correct?

18 A. No.

19 Q. And so your point with this is? Again,  
20 I'm not sure I understand the point.

21 A. I believe the point was getting -- it  
22 was just stating that the existing asbestos  
23 conditions exist there, and the remedy was going to  
24 be the same no matter what IDOT did because there

1 was already asbestos there.

2 Q. Right. But if there was asbestos only  
3 on the top, right, if it was only on the top and it  
4 hadn't been buried, the remedy would be different.  
5 You wouldn't have to dig down and take out  
6 asbestos, it was buried, if it was just sitting on  
7 the top.

8 A. Under your scenario, yes.

9 Q. Yeah.

10 A. But that doesn't, I believe, represent  
11 the scenario that's there.

12 Q. Have you ever been involved in a  
13 project --

14 MR. MCGINLEY: Excuse me. Let me  
15 interrupt.

16 How much longer do you think you  
17 have because we're several minutes over four  
18 hours at this point. If you want to go a few  
19 more minutes, that's fine.

20 MS. BRICE: Yeah, I just have a few  
21 more, but this is it.

22 Are we several minutes over with  
23 all the breaks? Can we actually calculate  
24 where we are?

1 MR. MCGINLEY: Well, I mean, at 1:50, I  
2 had said we had an hour, and you agreed with  
3 that.

4 MS. BRICE: No, I didn't agree. You  
5 said we had one hour. I mean, I don't know.

6 MR. MCGINLEY: I think you acknowledged  
7 it.

8 MS. BRICE: I was acknowledging that  
9 you said it. I was not agreeing with it.

10 In any event, I'm sure I can get  
11 through this fairly quickly. So let's just  
12 keep going and then we'll take a very short  
13 break, like everybody does, as you did,  
14 before you finished, and then we'll come  
15 back.

16 BY MS. BRICE:

17 Q. Have you ever been involved in a project  
18 where USEPA or IEPA required clean corridors for  
19 buried utilities?

20 A. I don't recall any specific project that  
21 required clean corridors for utilities in the  
22 scenario that you're expressing.

23 Q. Okay. You talk in your report about  
24 asbestos being found on the north side of Greenwood

1 Avenue.

2 Do you know what I'm talking about?

3 A. Yes.

4 Q. Okay. Was any of that asbestos found

5 outside the areas where the contractor -- where

6 IDOT and its contractor did work on the project

7 because --

8 A. There --

9 Q. Sorry. Let me strike.

10 The embankment for Greenwood was done on

11 the south side of Greenwood and on the north side

12 of Greenwood, right?

13 A. Correct.

14 Q. Okay. And we've been mainly talking

15 about the south side of Greenwood?

16 A. Correct.

17 Q. Okay. Now I'm talking about the north

18 side of Greenwood.

19 And I'm trying to understand if the

20 asbestos was found outside of that right of way

21 area where IDOT or its contractor did work in the

22 1970s?

23 A. As I understand what you're asking, is

24 that there was asbestos found on the north side,

1 and it was outside the construction limits of IDOT.

2 Q. You believe that to be the case?

3 A. I believe that's what the investigatory  
4 reports show.

5 Q. Outside of the right of way?

6 A. Outside of IDOT's construction project.

7 Q. Okay. Can you point me to any specifics  
8 that would back that up?

9 A. I believe it was in some of the reports  
10 that showed north side and it went east.

11 Q. Right. But there was a right of way for  
12 the north side as well because they did work on the  
13 north side of Greenwood.

14 A. Only to a certain portion of the --

15 Q. Right. I'm only talking about that  
16 far -- the portion that lines up with Site 3, so  
17 right on the other side of Site 3, so just to the  
18 north of Site 3, okay?

19 So that northern portion where they  
20 built the embankment, right, was there any asbestos  
21 found outside of the area within which IDOT or its  
22 contractor did work in the 1970s? Do you know?

23 A. I don't believe there was asbestos  
24 detected on the north side within this construction

1 project's limits on the north side of Greenwood.

2 Q. What about within the right of way?

3 A. Well, that would be within -- We're  
4 talking about two different things, I think, and  
5 that's what's confusing me right now.

6 Q. Okay.

7 A. There's this project --

8 Q. Yes.

9 A. -- which then dealt with Greenwood on  
10 the north side.

11 Q. Mm-hmm.

12 A. I don't believe the analytical that was  
13 done showed asbestos on the north side within the  
14 embankment of Greenwood.

15 Q. Okay.

16 A. But there was asbestos found farther  
17 east.

18 Q. Okay. So that's the asbestos you're  
19 talking about in your report is the asbestos that  
20 was found further east toward the lake?

21 A. Yes.

22 Q. Okay.

23 A. But it's within Greenwood Avenue.

24 Q. Okay. I want to go to your last

1 opinion, 15. It says:

2 "The potential freeze-thaw  
3 cycles did not play a part in the  
4 USEPA's decision-making process  
5 because the freeze-thaw cycles  
6 would only come into play if no  
7 remedial action was conducted.

8 What's your point with this opinion?

9 A. Well, I think there was some effort to  
10 put in the original that somehow this freeze-thaw  
11 cycle caused -- was an issue, I should say. And so  
12 what I was trying to state is that the freeze-thaw  
13 cycle and whether or not the material that was in  
14 the subsurface would have been pushed to the  
15 surface played no part, in my opinion, of USEPA's  
16 remedy because their remedy is to provide a clean  
17 corridor for the utilities.

18 Q. Okay. Right.

19 But if the asbestos is buried, which it  
20 is in this case, in order to provide a clean  
21 corridor you have to remove the buried asbestos,  
22 right?

23 A. Yes. That is what EPA is saying for the  
24 utilities.

1 Q. For the utilities.

2 And doesn't EPA, in numerous documents,  
3 especially its action memorandum, talk about how  
4 the freeze-thaw cycle is a driver in requiring the  
5 excavation all the way down to the utilities to  
6 create the clean corridor?

7 A. Well, I believe what they were trying to  
8 sort of relate is that in the alternative of doing  
9 nothing, the problem would still be that you would  
10 have asbestos that would be moving to the surface  
11 that could be a problem to people.

12 Q. Right.

13 A. But if they're removing the utility,  
14 that has nothing to do with the requirement to  
15 remove all utilities, making the utility lines free  
16 of asbestos.

17 Q. Right.

18 But because the asbestos is buried, the  
19 freeze-thaw cycle plays some role in EPA's  
20 analysis, correct?

21 A. In the areas outside of the utilities.

22 Q. Okay. Because EPA was concerned with  
23 buried asbestos moving up to the surface and then  
24 exposing people on the surface?

1 A. Correct, that is one of the exposure

2 routes.

3 Q. Have you looked at the final remedial

4 action work plan?

5 A. I don't believe I was ever provided a

6 copy of the final remedial work plan.

7 Q. Do you dispute the accuracy of any of  
8 Mr. Dorgan's calculations or figures in his report?

9 A. Figures regarding -- I mean,  
10 calculations regarding what?

11 Q. What needed to be done with respect to  
12 the remedy. Remember, there was a whole bunch of  
13 calculations done as to how much it was going to  
14 cost?

15 You didn't rebut it, so I'm assuming  
16 that --

17 A. I didn't --

18 Q. -- you don't have any opinions on that?

19 A. I don't have no opinions regarding that.

20 MS. BRICE: Okay. I got this last  
21 night, so I want to ask about this because I  
22 didn't have a chance to really look at it.

23 MR. MCGINLEY: That's fine.

24 MS. BRICE: So last night I received

1 probably around 5:00 from Mr. McGinley notes  
2 that Mr. Gobelman provided to him -- and  
3 they're not Bates stamped, but I'm sure we'll  
4 get the Bates stamped -- that are, as I  
5 understand it, part of his log of his work,  
6 and it's a number of pages. But we can go  
7 ahead and mark it.

8 MR. MCGINLEY: I note for the record  
9 that the pages are individually numbered.

10 MS. BRICE: Well, but I'm not going to  
11 read them all into the record right now.

12 MR. MCGINLEY: I'm just saying, I mean,  
13 if you're trying to call attention to the  
14 portions.

15 MS. BRICE: Oh, I see what you're  
16 saying. I see -- oh, okay. Thanks. Got it.

17 I'd like to mark for the record  
18 Deposition 11 which I just referred to  
19 moments ago.

20 (Gobelman Exhibit No. 11 marked for  
21 identification.)

22 BY MS. BRICE:

23 Q. Can you, please, Mr. Gobelman, explain  
24 to me what this is?

1           A.     It's a copy of -- sort of, my logbook  
2     that I have maintained through my life of being  
3     with the State.

4           Q.     Okay.  And on the first page, which is  
5     Page 32, what on here relates to this project?

6           A.     Nothing.

7           Q.     Do you know why this was copied then?

8           A.     I suspect it was the marked -- it's a  
9     logbook, so it's like this (indicating).  It's  
10    together, and so I -- when he asked for what --  
11    when Evan asked which ones, I put a line in it that  
12    said "from here on," and so this was the back side  
13    of the front -- the left side of the page.

14          Q.     Understood.  Okay.  Let's just turn the  
15    page, and maybe we can go really quickly through  
16    this.

17                    On 33, is there anything on 33 that  
18    relates to this project?

19          A.     A phone call that I received from Evan:

20          Q.     

21                    "No need to get consultant  
22    on board yet until after meeting  
23    on Tuesday."

24                    Is that right?

1 A. Yes.

2 Q. And what consultant was he referring to?

3 A. I believe this was prior to determining  
4 whether or not who was going to be an expert  
5 witness, and we had stated in, sort of, a  
6 pre-meeting that I had statewide consultants that  
7 we could use if they needed to bring them in as an  
8 ex- -- to look at the information to render an  
9 opinion.

10 Q. Okay. All right. Next page, I see it  
11 says:

12 "Discuss Dorgan expert  
13 report" in the middle on 4/28.

14 Is there anything else on here?

15 A. There was a meeting regarding Manville  
16 that says "discuss." And then there was a phone  
17 call with Matt the next day. That would be the  
18 only reason why we'd be calling Matt --

19 Q. Okay. 35.

20 A. -- or he would be been calling me, I  
21 should say.

22 Q. Anything on 35?

23 A. It does not look like there's anything.

24 MR. MCGINLEY: I'm just going to --

1 just to make it easier, rather than pulling  
2 out, I just started from the point in his log  
3 to the end.

4 MS. BRICE: Okay. Do you want to just  
5 have him point out what's -- is that faster?  
6 Have him point out --

7 MR. MCGINLEY: Sure, yeah. Probably.

8 BY MS. BRICE:

9 Q. Yeah. Why don't you go through them,  
10 and just point out what in here relates to this  
11 project.

12 A. There's nothing on Page 35. There is  
13 nothing on 36. And then on Page 37 was, sort of,  
14 my notes, from -- Page 37, 38, 39, 40 were just  
15 sort of my notes as I was listening to Mr. Dorgan's  
16 deposition. And then after that is a phone call.

17 Q. Yeah. Let me ask you a question about  
18 that. It says, "Evan" and "transcript rebuttal."  
19 And then it says "outline." Then it says "résumé."  
20 And it says "rebut report transcript."

21 What does -- does that say "outline"?

22 A. Yes, I believe that's what it says.

23 Q. Okay. What were you referring to there?

24 A. I was just -- we were just talking about

1 the starting of the report that, you know, start  
2 with an outline.

3 Q. Okay.

4 A. I was just writing it for my own  
5 information to remember what to do.

6 Q. Did you do an outline?

7 A. It's, in a sense, the report.

8 Q. Did you write an outline down anywhere?

9 A. No.

10 Q. Did you share your thoughts of an  
11 outline with anyone?

12 A. No.

13 Q. Did you write an outline on the computer  
14 and then write over it?

15 A. In essence, yes.

16 Q. And did you ever share that with Evan or  
17 anyone else?

18 A. Not until the, sort of, final draft.

19 Q. Okay. What's next?

20 A. Okay. I think 41 I made a call to Anne  
21 Erdmann with ISGS because I was having problems --  
22 because of the way the topo maps -- that's where I  
23 got the topos was from the Illinois State  
24 Geological Survey. And she had emailed them to me,

1 and that's that email that you got.

2 Q. Mm-hmm.

3 A. And so I was asking her if there was  
4 something else, if there was a way of depicting it  
5 because of the way it, sort of, formatted out on  
6 that email.

7 Q. Okay.

8 A. And I was asking if -- and also  
9 regarding a PESA report that was done that touched  
10 that portion of the property.

11 Q. PESA, what's a PESA report?

12 A. Preliminary environmental site  
13 assessment.

14 Q. Oh.

15 A. It's like a Phase 1 property audit type  
16 thing. And it was PESA No. 2308, and I think that  
17 was provided to you guys, too.

18 Page 42, nothing. Page 43, nothing.

19 Q. There's something that says Amstutz  
20 Expressway on the bottom.

21 A. Oh, I'm sorry. I missed that.

22 As part of that PESA that was done, we  
23 did a -- we did a further investigation, and that  
24 investigation had to deal with the Amstutz

1 Expressway overpass area, and so I had -- the  
2 consultant I had on-board that did that was Babu  
3 Sukumar with Weston Solutions. And I just wanted  
4 to make sure that I was reading what I was -- the  
5 information right, that that's all we were in was  
6 that area over the expressway.

7 Q. Okay. So you were convinced that it  
8 wasn't covering this site?

9 A. Yeah. We didn't go any further than  
10 just around that site.

11 Q. Right. And I think that says it on the  
12 next page:

13 "Weston.

14 "Amstutz, not involved."

15 A. Oh, yeah.

16 Q. Okay.

17 A. Yeah, because I called him on that  
18 previous one, and he was not in. And I sent him an  
19 email, and then that was the follow-up call that he  
20 called me.

21 Then I called Dean Tiebaut because it  
22 says -- which is sort of like a confusing thing  
23 here. Dean Tiebaut also -- because I was also  
24 asking around that same time about the expressway,

1 as I stated earlier, about the area to the north of  
2 the expressway that was open.

3 Q. Got it.

4 A. And I was trying to find out from  
5 Ecology and Environment. I thought they were the  
6 ones that I went out there with them. And  
7 District 1 was asking if there was any analytical  
8 on that north side of that expressway.

9 Q. Gotcha.

10 A. Then there was a conference call on 44  
11 that says "Johns Manville, conference call."

12 There doesn't appear to be anything on  
13 45. Nothing on Page 46. Nothing on 47. Nothing  
14 on 48. 49, nothing. On Page 50 there's a call  
15 from Evan. Page 51 there's nothing. 52, nothing.  
16 And then 53, the call that I made to Evan.

17 Q. Right. And it says:

18 "Bring file on report only."

19 Do you have some other file?

20 A. The way my files are put together is I  
21 have a file from the -- so like the 104(e) with  
22 Randy Schick. And then I have some information  
23 on -- the file information from when McQuillan was  
24 involved. And then I have another file that's set

1 up of Mr. Dorgan's testimony and his bibliography  
2 information. And then I have another file that  
3 relates to just my report and its bibliography. So  
4 I was just writing a note just to bring that file,  
5 I needed to bring that file.

6 Q. Okay. And did you produce in response  
7 to the document request all of the materials in  
8 those other files?

9 A. I believe so, yes.

10 MS. BRICE: Okay. We'll take just one  
11 second.

12 MR. MCGINLEY: Fine, sure.

13 (Brief recess.)

14 (Gobelman Group Exhibit No. 12  
15 marked for identification.)

16 MS. BRICE: Okay. We're back on the  
17 record.

18 BY MS. BRICE:

19 Q. I've handed you Group Exhibit 12, which  
20 is a series of documents that were produced to us  
21 in response to the document request we served on  
22 you recently. And there are a couple questions I  
23 have about this. And I can't tell you the Bates  
24 range because I think it's various documents, so I

1 will refer to the document itself.

2 The first document, the first page, is  
3 in December 2013 you got a message from James  
4 Sterr.

5 Does this ring a bell? Do you see that?

6 A. Yes.

7 MR. MCGINLEY: Can you say what year  
8 this is, please.

9 MS. BRICE: I just said 2013.

10 MR. MCGINLEY: Oh, I'm sorry, I just  
11 heard you say December 16th. Okay.

12 BY MS. BRICE:

13 Q. What was this about?

14 A. I believe it dealt with the lawsuit  
15 coming in and Mr. Sterr asking me if I -- in a  
16 sense, asking me if I knew anything about this.

17 Q. Okay. And what did you tell him?

18 A. I believe I told him that I  
19 was involved -- I knew about the site.

20 Q. Anything else?

21 A. Well, that I had worked with Randy on  
22 the 104(e).

23 Q. Okay. Anything else you remember?

24 A. No.

1 MS. BRICE: There's the next series of  
2 documents -- and I'm going to actually ask  
3 Evan this question.

4 Evan, there is a bunch of  
5 documents that are redacted that are  
6 communications between you and Steve or Steve  
7 and Matt and I don't understand why they're  
8 redacted.

9 MR. MCGINLEY: Let's see.

10 MS. BRICE: So, for example, 3204,  
11 3205.

12 MR. MCGINLEY: They are -- Let's see.

13 3204 because he was not designated  
14 as an expert at this point.

15 MS. BRICE: It doesn't matter under the  
16 Rules.

17 MR. MCGINLEY: Well --

18 MS. BRICE: Anything that was shared  
19 with him at all is fair game.

20 MR. MCGINLEY: Well, I mean, if you  
21 want, we can produce unredacted versions to  
22 you. I mean, it's -- we think that, I mean,  
23 particularly for the earlier emails, I mean,  
24 there's no basis for having to produce them

1 as-is.

2 Certainly the ones that pertain  
3 back to 2013, you know, those are between  
4 Mr. McQuillan and Mr. --

5 THE WITNESS: Jones.

6 MR. MCGINLEY: -- Jones, yeah. And  
7 Steve obtained these as a result of being  
8 asked about this by James Sterr who is a  
9 claims manager for IDOT, as I understand it.

10 MS. BRICE: Okay. Okay. Well, what  
11 I'd like to do, then, with respect to this  
12 is -- We don't have a privilege log in this  
13 case, so if you could produce unredacted  
14 copies of this, and then we could -- if we  
15 have questions, we could maybe continue with  
16 a phone deposition to clear up these issues.

17 MR. MCGINLEY: You can just look  
18 through and see what, if anything, in here is  
19 of significance. It's all maintained in the  
20 order in which it's Bates stamped, so you  
21 should be able to figure it out fairly  
22 quickly.

23 MS. BRICE: Well, I would say -- and I  
24 understand your objection as to 003201, but

1 under certain Supreme Court case law,  
2 anything that's been shared with the expert,  
3 even if it's privileged material, is subject  
4 to review.

5 MR. MCGINLEY: Yes, but that wasn't --  
6 I mean, that was well -- and it's a year and  
7 a half before he had any role in the case.

8 MS. BRICE: He was having a role in the  
9 case.

10 MR. MCGINLEY: As an expert.

11 MS. BRICE: Well, we can fight about  
12 that later.

13 MR. MCGINLEY: Okay.

14 MS. BRICE: But, you know, I want it  
15 made for the record that I object to this  
16 Document 3201 being designated as privileged  
17 and redacted. And there are probably a  
18 number of other documents in this exhibit  
19 that I would feel the same way about.

20 MR. MCGINLEY: But we're producing the  
21 version that has not been redacted, so we --

22 MS. BRICE: It's in this stack?

23 MR. MCGINLEY: That's what I was saying  
24 before.

1 MS. BRICE: This page, too?

2 MR. MCGINLEY: Everything that you're  
3 looking at right there that's redacted, you  
4 can find the original unredacted version  
5 right there before you.

6 MS. BRICE: Okay. Okay. Well, I  
7 didn't realize that, so I apologize.

8 MR. MCGINLEY: And I mean, the fact of  
9 the matter is you've also had it for a week,  
10 I mean, so had you -- you're raising it now  
11 for the first time. I understand that you  
12 believe that there is a legal position that  
13 attaches to it, but, I mean, you know.

14 MS. BRICE: Well, I haven't had a  
15 chance to look at this, but...

16 MR. MCGINLEY: We produced it last  
17 week.

18 MS. BRICE: The unredacted portions, I  
19 have not had an opportunity to look at those.

20 (Counsel peruses document.)

21 BY MS. BRICE:

22 Q. In this document they talk about making  
23 a trip to Schaumburg.

24 What are they referring to>, do you

1 know?

2 A. Schaumburg is the location of District  
3 1, so I assume they were talking about going to the  
4 District 1 office.

5 Q. Okay. And who is Mr. Fortmann?

6 A. Fortmann currently is the acting  
7 regional engineer of District 1.

8 Q. You asked here:

9 "Did the Schick file have a  
10 complete set of the construction  
11 plans for 1971 construction  
12 project?"

13 Why were you asking that question?

14 A. Because I didn't have a complete set at  
15 that time.

16 Q. Okay. You went and got a complete set?

17 A. I had pieces at the time of the plans,  
18 but I didn't have a complete set.

19 Q. Okay.

20 A. So before I went and started to go get a  
21 new set, I was asking if the file had the complete  
22 set.

23 Q. Okay. And did it?

24 A. I did not see it in there.

1 Q. But you believe you now have a complete  
2 set, and that's -- you're going to provide that to  
3 us, as we discussed earlier, right?

4 A. Provide you the set that I have, yes.

5 Q. Okay. And do you believe that to be a  
6 completes set?

7 A. I believe that is all the pages that  
8 were let regarding that project, yes.

9 Q. Well, when you say "complete set of  
10 construction plans," do you believe what you're  
11 going to provide us is the complete set of  
12 construction plans?

13 A. As far as I know it is, yes.

14 Q. And did you get any other documents from  
15 District 1?

16 A. No. That's all I got was the plans.

17 Q. You sent an email to Matt:

18 "Strategy in regards to  
19 what? Is this regarding the  
20 Manville lawsuit against IDOT  
21 seeking compelling equitable  
22 relief?"

23 Did you have a strategy meeting?

24 A. I don't know. I'd have to see that

1 email.

2 (Witness peruses document.)

3 THE WITNESS: I was -- I didn't know  
4 what was going on, so I was asking a question  
5 when they were -- I think that's around --  
6 Oh, I think that was - the meeting was  
7 scheduled to meet Evan for the first time,  
8 and so I was trying to -- I was getting  
9 thrown into it, and I didn't know what was  
10 going on. So I was just asking general  
11 questions of "What's going on?"

12 BY MS. BRICE:

13 Q. Right.

14 Did you go to the strategy meeting?

15 A. I went to that meeting, yes.

16 Q. And what strategy was discussed at that  
17 meeting?

18 A. I believe we were just answering the  
19 AG's questions on what was going on. I don't think  
20 it was called to be a strategy meeting.

21 Q. All right. Thanks. So I just have,  
22 two, I think, other questions.

23 There was a document in the file that's  
24 referred to in your bibliography that was produced

1 that was created by LFR, July 8th, 2008, I believe.

2 Do you know the document I'm talking  
3 about, where they were digging in the embankment  
4 and --

5 A. Yeah.

6 Q. I'm trying to not waste time.

7 So digging in the embankment, and they  
8 found the -- looking for the KV line, right, and  
9 there was asbestos down in the embankment.

10 Do you need me to pull the document?

11 A. I don't recall it off the top of my  
12 head.

13 MS. BRICE: We'll do it really fast --  
14 go ahead. We'll just mark it later. We're  
15 going to mark this as --

16 Deposition Exhibit 13?

17 THE COURT REPORTER: Yes.

18 MS. BRICE: Okay. July 8th, 2008, LFR  
19 document.

20  
21 (Gobelman Exhibit No. 13 marked for  
22 identification.)

23 BY MS. BRICE:

24 Q. Have you reviewed this document before?

1 A. Yes, I believe I have seen this.

2 Q. Okay. I have a very simple question.

3 Are you offering any opinions in this  
4 case with respect to this document?

5 A. I don't believe it's offering anything  
6 in regards to contradicting anything that's written  
7 in here.

8 Q. I'm sorry. I didn't understand what you  
9 said.

10 A. Well, it's referring to utility lines,  
11 and it does somewhat deal with, you know, that  
12 utility lines were being maintained and excavated.

13 Q. Okay. But are you -- other than that,  
14 are you offering any opinions or rebutting this in  
15 any way?

16 A. I do not believe I'm specifically  
17 rebutting anything in here.

18 Q. Okay. One last question.

19 You said in your report -- you were  
20 talking about Duane Mapes and what he said in the  
21 104(e) response. And I believe this is on -- in  
22 Opinion No. 9.

23 Okay. So see Opinion No. 9 on your  
24 report, middle of the first paragraph, you say:

1 "As stated in Mr. Dorgan's  
2 report and in the Department's  
3 104(e) response dated November  
4 27, 2000, 'Retired Resident  
5 Engineer, Duane Mapes, recalled  
6 dealing with asbestos pipe during  
7 the project and burying some of  
8 it:

9 You then say:

10 "Mr. Mapes recalled dealing  
11 with asbestos pipe during the  
12 project, the project meaning the  
13 entire construction project, not  
14 just Johns Manville parking lot  
15 on Site 3 and Site 6."

16 How do you know that?

17 A. Just in the context in which it was  
18 written.

19 Q. But you never spoke to Mr. Mapes, right?

20 A. No.

21 Q. And you never talked to Mr. Schick about  
22 what Mr. Mapes said, right?

23 A. No.

24 Q. Okay. So you're just assuming that

1 that's what he was referring to; is that right?

2 A. Well, because he used the term "during  
3 the project," and "the project" relates to the  
4 entire project, not just specifically to a  
5 particular spot on the project.

6 MS. BRICE: Okay. Gotcha.

7 Okay. I think we're done.

8 MR. MCGINLEY: Okay.

9 THE COURT REPORTER: Read and sign?

10 MR. MCGINLEY: Yes.

11 FURTHER DEPONENT SAITH NAUGHT.  
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I, MARY ANN CASALE, a Certified  
Shorthand Reporter of the State of Illinois, do  
hereby certify that heretofore, to-wit:

On July 10, 2015, personally appeared  
before me STEVEN L. GOBELMAN, a witness in a case  
now pending and undetermined before The Illinois  
Pollution Control Board Johns Manville is the  
Complainant and The Illinois Department of  
Transportation is the Defendant.

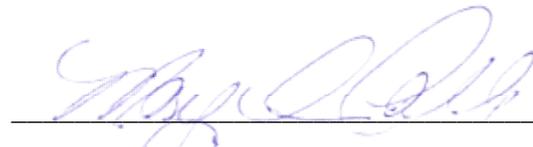
I further certify that the witness was  
first duly sworn to testify to the truth, the whole  
truth, and nothing but the truth in the cause  
aforesaid; that the testimony then given by the  
said witness was reported stenographically by me in  
the presence of said witness, was thereafter  
converted to the written English word via  
computer-aided transcription, and the foregoing is  
a true and complete transcript of the testimony so  
given by said witness as aforesaid; that the  
signature of the witness to the foregoing  
deposition was not waived.

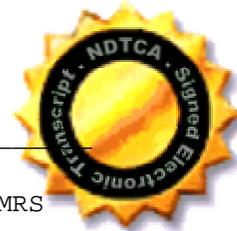
I further certify that the taking of  
this deposition was pursuant to Notice and that

1 there were present at the taking of said deposition  
2 the appearances as hereinbefore noted. I further  
3 certify that I am not a relative or employee or  
4 attorney or counsel, nor a relative or employee of  
5 such attorney or counsel for any of the parties  
6 hereto, nor interested directly or indirectly in  
7 the outcome of this action.

8 IN TESTIMONY WHEREOF, I have hereunto  
9 set my hand and affixed my notarial seal this 14th  
10 day of July 2015.

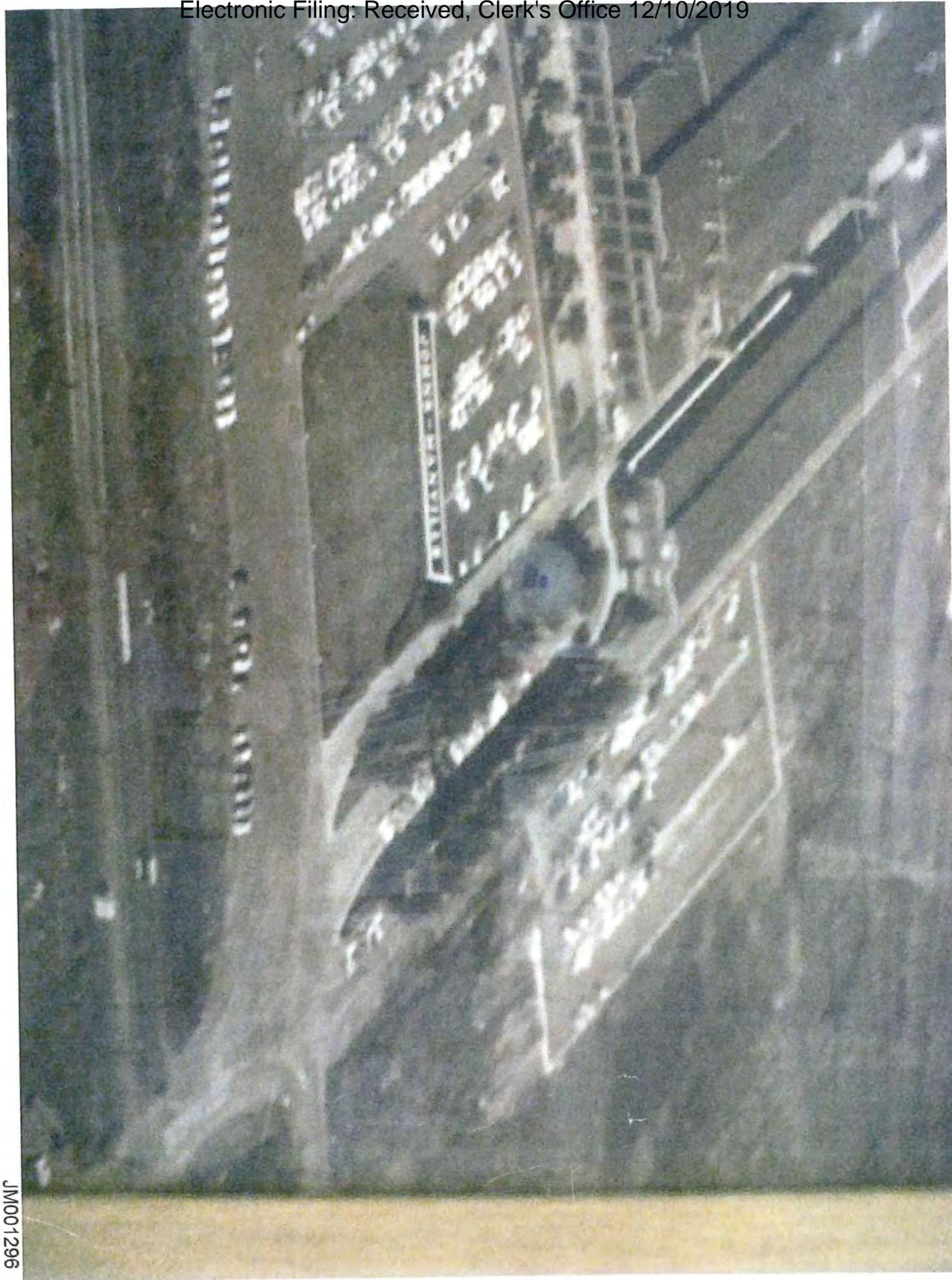
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MARY ANN CASALE, CSR, RPR, CLVS, CMRS



Illinois C.S.R. License No. 084-002668

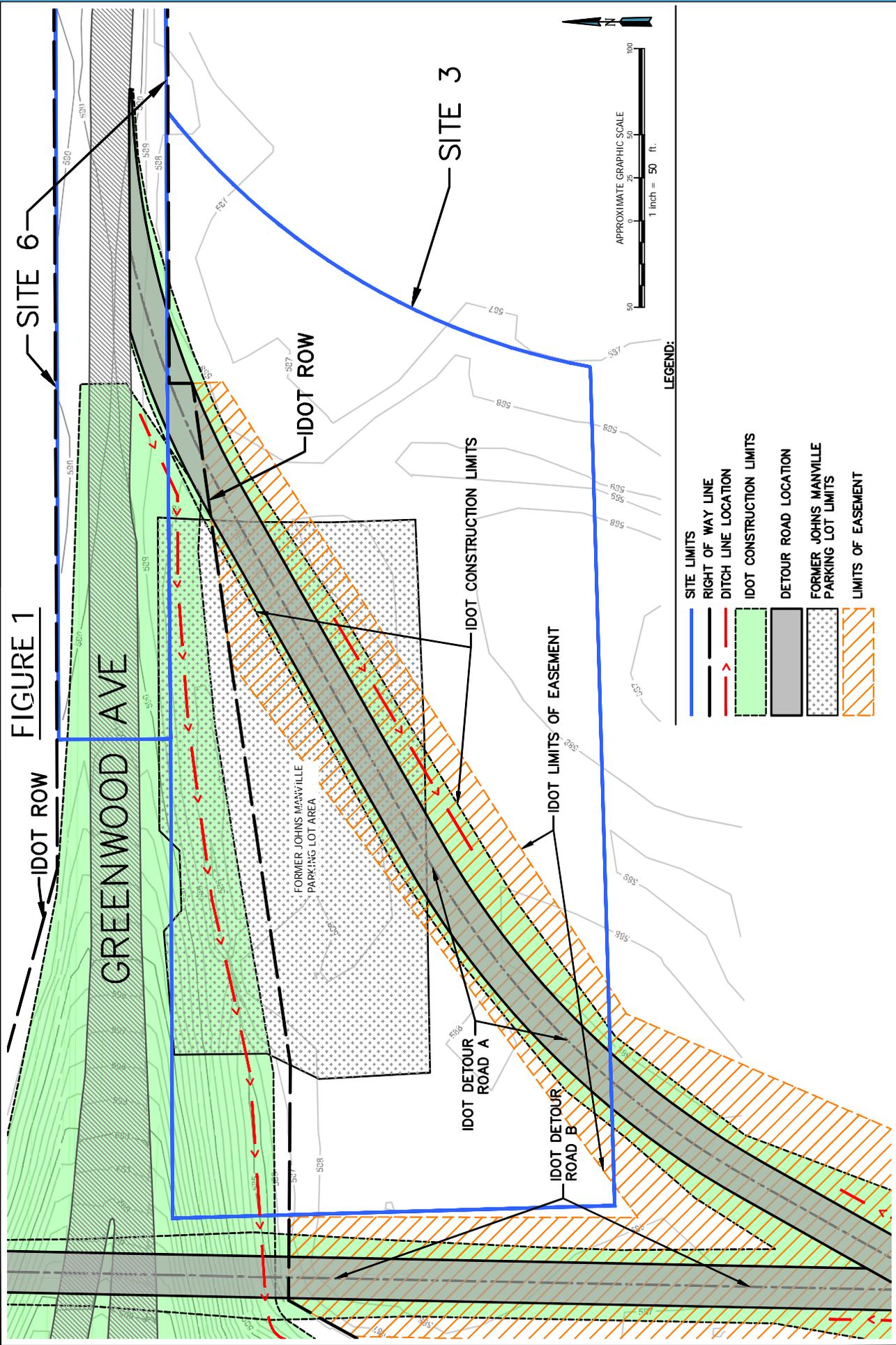
**EXHIBIT 3**



JM001296

**EXHIBIT 4**

No.	DATE	REVISION DESCRIPTION



**EXHIBIT 5**

**CHICAGO TITLE  
INSURANCE COMPANY**  
NATIONAL COMMERCIAL SERVICES | CHICAGO

V. Gina Giannelli  
(312) 223-2754

Johns Manville  
717 17<sup>th</sup> Street  
Denver, Colorado 80202

RE: Property located in Waukegan, Illinois (see attached)

Ladies and Gentlemen:

You previously requested a title search with respect to the property highlighted in blue (current attachment reflects a green depiction) in the attached drawing. Please know that Chicago Title does not perform such searches. Property Insight, our sister company, manages our title plant and provides such searches.

Attached hereto is a copy of a report issued by Property Insight with respect to the subject property.

Very truly yours,

CHICAGO TITLE INSURANCE COMPANY

By: *V. Gina Giannelli*  
V. Gina Giannelli

Enclosures

CHICAGO TITLE INSURANCE COMPANY  
National Commercial Services | Chicago  
717 17<sup>th</sup> Street, Suite 2000 | Chicago, IL 80202  
Phone: (312) 223-2754 Fax: (312) 223-2754

Not bound to Company, No Fraud Commitment

**JM 006016**



Xpress Services

Miscellaneous Search

Xpress Services by Property Insight, 505 E. North Ave, Ste 200 Carol Stream, IL 60188

P (630)510-4150 F (630)588-0536

Customer Reference: WAUKEGAN AREA 2

Effective Date: 12/30/2015

Order No.66661615-JMM

JOHNS MANVILLE  
717 17TH ST  
DENVER, CO 80202

DATE DELIVERED: 01/14/2016

State & County: Illinois, Lake

**A. Vesting Information**

Legal Description: SEE ATTACHED AREA 2 (HIGHLIGHTED IN BLUE) AS ILLUSTRATED ON THE ATTACHED MAP.

**B. Search Results**

WE HAVE SEARCHED OUR LAKE COUNTY, ILLINOIS TRACT INDICES FOR DEED CONVEYANCES AND DEDICATIONS SINCE THE RECORDING OF 2288725 (RECORDED JUNE 8, 1984) THROUGH OUR CURRENT COVER DATE DECEMBER 30, 2015 AND NOTE THE FOLLOWING:

- Grant for Public Highway. 5/8/1984 DocId: 2288725 Grantor(s): COMMONWEALTH EDISON CO Grantee(s): STATE OF IL Sign Date: 8/3/1971

NO OTHER DEED CONVEYANCES OR DEDICATIONS FOUND OF RECORD BETWEEN THE AFOREMENTIONED DATES.



**EXHIBIT 6**

If, however, the inspection discloses any work, in whole or in part as being unsatisfactory, the Engineer will give the Contractor the necessary instructions for correction of same, and the Contractor shall immediately comply with such instructions. Upon correction of the work, another inspection will be made which shall constitute the final inspection provided the work has been satisfactorily completed. In such event, the Engineer will notify the Contractor in writing of the date of final inspection.

When the contract includes railroad grade separation or grade crossing work, such work shall also be subject to the inspection and approval of the Railroad Engineer, insofar as Railroad interests are concerned, but such inspection and approval shall in no sense make the Railroad a party to the contract.

When the contract includes work for which the Federal Government is to pay a portion of the cost thereof, such work shall also be subject to the inspection and approval of the representatives of the Federal Government, but such inspection and approval shall in no sense make the Federal Government a party to the contract.

### SECTION 106. CONTROL OF MATERIALS

106.01 Source of Supply and Quality Requirements. The materials used on the work shall meet all quality requirements of the contract. In order to expedite the inspection and testing of materials, the Contractor shall notify the Engineer of his proposed sources of materials prior to delivery. At the option of the Engineer, materials may be approved at the source of supply before delivery is started. If it is found after trial that sources of supply for previously approved materials do not produce uniform and satisfactory products, or if the product from any source proves unacceptable at any time, the Contractor shall furnish acceptable materials from other sources.

All metal materials, as specified in Section 710, which are to be incorporated into the work shall be domestically manufactured or produced.

106.02 Unacceptable Materials. All materials not conforming to the requirements of the contract at the time they are used shall be considered as unacceptable and all such materials will be rejected and shall be removed immediately from the site of the work unless otherwise instructed by the Engineer; if in place, they shall be removed by the Contractor at his expense and replaced with acceptable materials. No rejected material, the defects of which have been corrected, shall be used until approval has been given. Upon failure of the Contractor to comply forthwith with any order of the Engineer pursuant to the provisions of this Article, the Engineer shall have

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authority to remove and replace defective materials and to deduct the cost of removal and replacement from any monies due or to become due the Contractor.

106.03 Samples, Tests, Cited Specifications. All materials should be inspected, tested and approved, by the Engineer before incorporation in the work. The Contractor shall give sufficient advance notice of placing orders to permit tests to be completed before the materials are incorporated in the work, and he shall afford such facilities as the Engineer may require for collecting and forwarding samples and making inspections. All samples shall be furnished without charge to the Department.

Any work in which untested and unaccepted materials are used without approval or written permission of the Engineer shall be performed at the Contractor's risk and may be considered as unacceptable and unauthorized and will not be paid for. Unless otherwise designated, tests in accordance with the most recent cited standard methods of AASHTO or ASTM, which are current on the date of advertisement for bids, or with other standard methods of sampling or testing adopted by the Engineer, will be made by and at the expense of the Department. Samples will be taken by a qualified representative of the Department. All materials being used are subject to inspection, test or rejection at any time. When requested by the Department, the Contractor shall furnish a complete written statement of the origin, composition, and manufacture of any or all materials (manufactured, produced, or grown) that are to be used in the work.

Citations. Wherever in the specifications an abbreviated citation, from those listed in Article 101.01, is used followed by an appropriate serial designation, it shall be construed to mean the latest test or specification as the case may be, either as standards, tentative standards, interims, revisions, or amendments, in effect on the date of invitation for bids.

106.04 Plant Inspection. The Engineer may undertake the inspection of materials at the source. In the event plant inspection is undertaken the following conditions shall be met by the Contractor:

- (a) The Engineer shall have the cooperation and assistance of the Contractor and the producer with whom he has contracted for materials.
- (b) The Engineer shall have full entry at all times to such parts of the plant as may concern the manufacture or production of the materials being furnished.

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Casale/M.O.W.  
EXHIBIT NO. 5  
7-10-15  
M. A. CASALE

Art. 201.01

Clearing, Tree Removal,  
Hedge Removal

disposal of all obstructions such as fences, walls, foundations, buildings, accumulations of rubbish of whatever nature, and existing structures the removal of which are not otherwise provided for in Article 501.04; all logs, shrubs, brush, grass, weeds, other vegetation, and stumps of less diameter than 6 inches.

- (b) Tree Removal. Tree Removal shall consist of the cutting, grubbing, removal, and disposal of all trees and stumps, as hereinafter defined, except those designated by the Engineer to be saved.
- (c) Hedge Removal. Hedge Removal shall consist of the pulling or grubbing, removal, and disposal of all hedge trees or bushes, as hereinafter defined, except those designated by the Engineer to be saved.

201.02 Definition. Tree. A woody, perennial plant having a single main stem or trunk, the diameter of which is 6 inches or more at a point 2 feet above the highest ground level at the tree. Those having a diameter less than 6 inches shall be considered as shrubs.

A tree stump with a diameter at cut-off of 6 inches or more shall be considered as a tree for purposes of measurement and removal.

Hedge. Trees or bushes of osage orange or other varieties of trees planted for fence or windbreak purposes in rows containing 20 or more trees or bushes per 100 lineal feet. Rows containing less than 20 trees or bushes per 100 lineal feet, and scattered hedge trees or bushes shall not be considered as hedge but as trees or shrubs, in accordance with the diameter measurements herein specified.

**CONSTRUCTION REQUIREMENTS**

201.03 Removal of Obstructions and Other Materials. All items defined as clearing in Article 201.01(a) shall be removed and disposed of as required by these specifications.

201.04 Tree Removal. All trees except those designated to be saved, and all stumps, shall be cut and disposed of as provided herein. Trees and stumps within the slope limits of embankments 2 feet or more in depth shall be cut off at ground level. All other trees and stumps within the right of way shall be removed to a depth of not less than 12 inches below the elevation of the subgrade, the finished earth surface, or the ground line.

Clearing, Tree Removal,  
Hedge Removal

Art. 201.05

201.05 Protection of Trees and Shrubs. All trees and shrubs designated to be saved shall be protected during clearing and subsequent construction operations. Overhanging limbs shall be trimmed or cut off to provide a minimum vertical clearance of 20 feet from the finished surface of the roadbed. This shall be considered as clearing.

In the event that any tree or shrub designated to be saved is damaged by the Contractor, such plants shall immediately be repaired or replaced as directed by the Engineer in accordance with standard horticultural practice for such work, at the Contractor's expense. All wound surfaces of one inch or more diameter shall be treated with a commercial pruning compound.

Replacement, if required, shall be as follows: Trees: Furnish, deliver, and plant a tree of the same species and variety, and of the same size; or, furnish, deliver, and plant at locations designated by the Engineer, a number of trees of the same species and variety, having a minimum diameter of 2 inches, whose total inch diameter equal the inch diameter of the tree to be replaced.

Shrubs, Small Trees, or Evergreens: Furnish, deliver, and plant a plant of the same species and variety, and of the same size in height or width as governed by Article 717.01(b) Types 1, 2, 3, and 4; or, furnish, deliver, and plant at locations designated by the Engineer, a number of plants of the same species and variety whose total measurements shall equal the measurement of the plant to be replaced, measured as above.

All replacement planting under this article shall conform to the requirements of Section 645 and Article 717.01; and shall be barerooted, or balled and burlapped according to the transplanting requirements of the plants.

201.06 Hedge Removal. Hedge shall not be cut off at the ground level, but shall be pulled or grubbed in such a manner as to insure complete removal. Scattered hedge trees or shrubs not classified as hedge shall be removed as specified for hedge.

201.07 Removal of Shrubs, Bushes, and Roots. All shrubs and bushes, except those designated to be saved, and all roots within the slope limits of embankments 2 feet or more in depth shall be cut off at the ground level. All other shrubs, bushes, and roots within the right of way shall be removed to a depth of not less than 12 inches below the

Art. 201.07

Clearing, Tree Removal  
Hedge Removal

elevation of the subgrade, the finished earth surface, or the ground line and at least below the bottom of the sub-base material.

201.08 Disposal of Materials. This work shall be done in accordance with Article 202.03.

201.09 Method of Measurement.

- (a) Clearing. Clearing will not be measured for payment.
- (b) Tree Removal.

(1) Inch Diameter. Trees to be removed as a payment item, but not measured in acres, shall be measured per inch of diameter. The diameter shall be measured at a point 2 feet above the highest ground level at the tree and will be determined by dividing the measured circumference of the tree by 3.1416. Stumps shall be measured at the elevation of cut-off. The accumulated total inches of diameter shall be the pay quantity.

Trees to be measured on the basis of inch diameter, special, shall be shown at definite locations on the plans and included in the contract as a pay quantity.

When it is necessary to remove trees in connection with borrow pits furnished by the Contractor, they will not be measured for payment.

- (2) Acre as Unit.

Contract Quantities. When the project is constructed essentially to the lines, grades or dimensions shown on the plans and the Contractor and the Engineer have agreed in writing that the plan quantities are accurate, no further measurement will be required and payment will be made for the quantities shown in the contract for the various items involved except that if errors are discovered after work has been started, appropriate adjustments will be made.

When the plans have been altered or when

Clearing, Tree Removal,  
Hedge Removal

Art. 201.09

disagreements exists between the Contractor and the Engineer as to the accuracy of the plan quantities, either party shall, before any work is started which would affect the measurement, have the right to request in writing and thereby cause the quantities involved to be measured as hereinafter specified.

Measured Quantities. Trees to be removed shall be measured by the acre when included in the contract as a payment item and shown at definite locations on the plans or staked for removal by the Engineer. The entire area within the right of way lines and the stations shown on the plans, or the areas shown on the plans within borrow pits furnished by the Department and channel changes, shall be used in computing the acreage. No deductions will be made for bare areas and existing roads occurring within these limits. Hedge trees or bushes within such areas will not be measured separately as hedge removal.

When it is necessary to remove trees in connection with borrow pits furnished by the Contractor, they will not be measured for payment.

- (c) Hedge Removal. Hedges to be removed outside of areas shown on the plans as tree removal computed on the acreage basis shall be measured in units of 100 lineal feet.

When it is necessary to remove hedge in connection with borrow pits furnished by the Contractor, it will not be measured for payment.

201.10 Basis of Payment.

- (a) Clearing. Clearing will not be paid for separately but shall be considered as incidental to the excavation required in the contract.
- (b) Tree Removal. Tree removal will be paid for at the contract unit prices per inch diameter for TREE REMOVAL (6 TO 15 INCH DIAMETER), TREE REMOVAL (OVER 15 INCH DIAMETER), TREE REMOVAL, SPECIAL (6 TO 15 INCH DIAMETER), and TREE REMOVAL, SPECIAL (OVER 15 INCH

Art. 201.10

Clearing, Tree Removal,  
Hedge Removal

DIAMETER), and per acre for TREE REMOVAL, ACRES, measured as specified herein.

If the contract includes a payment item for Tree Removal, Acres, but does not include a payment item for Tree Removal, Inch Diameter, any tree removal not paid for as Tree Removal, Acres, will be paid for in accordance with Article 109.04.

If the contract does not include a payment item for Tree Removal, tree removal shall be considered as incidental to the excavation required in the contract.

- (c) Hedge Removal. Hedge removal will be paid for at the contract unit price per unit for HEDGE REMOVAL, measured as specified herein. If the contract does not include a payment item for Hedge Removal, any hedge removal required outside of an area paid for as Tree Removal, Acres, will not be paid for separately, but shall be considered as incidental to the excavation required in the contract.

**SECTION 202. ROADWAY EXCAVATION**

202.01 Description. Roadway excavation shall consist of the excavation, removal, and satisfactory disposal of all materials taken from within the right of way for the construction of embankments, subgrade, sub-base, shoulders, intersections, ditches, waterways, entrances, approaches, and incidental work; and the removal and satisfactory disposal of unstable and unsuitable materials, and their replacement with satisfactory materials where required. Roadway excavation shall not be interpreted to include excavation from borrow pits, excavation for structures, or channel excavation.

**CONSTRUCTION REQUIREMENTS**

202.02 Clearing, Tree Removal, Hedge Removal. Prior to starting excavation operations in any area, all clearing, tree removal, and hedge removal in that area shall be performed as required in Section 201.

202.03 Removal and Disposal of Surplus, Unstable and Unsuitable Materials. When permitted all trees and brush that can be destroyed by burning shall be disposed of within the right of way at

Roadway Excavation

Art. 202.03

locations designated by the Engineer in such a manner that public or private property will not be damaged or endangered. No burning of surplus materials will be permitted in or near areas designated as natural scenic areas that are to remain undisturbed. Prior to starting excavation operations, existing oiled earth or bituminous surfaces shall be broken into pieces not to exceed 6 inches in largest dimension, and the larger material either embedded in embankments or disposed of as hereinafter specified.

Wherever possible, stones and boulders occurring within the right of way shall be placed in embankments in layers and compacted, in accordance with Section 207. All stones, stumps, boulders, broken rock, broken concrete and related materials that cannot be placed in the embankment shall be disposed of at locations designated by the Engineer within the right of way; in borrow sites on or adjacent to the right of way or at other locations outside the right of way. These materials shall be buried under a minimum of 2 feet of earth cover. These materials shall be disposed of in a neat, orderly manner and shall not create an unsightly condition. Disposal methods shall not change or alter the natural topographic features of an area without written permission from the Engineer.

Surplus excavated material, including excavated material from sewer trenches, catch basins, or other underground construction, shall be used to widen embankments, flatten slopes, or be disposed of otherwise within the right of way as the Engineer may direct. It shall in no case be deposited at an elevation higher than that of the adjacent roadway without permission from the Engineer. If it cannot be used or disposed of within the limits of the right of way, it shall be disposed of by the Contractor at his expense, outside the limits of the right of way.

All unstable and unsuitable material, including excavated material from sewer trenches, catch basins, or other underground construction shall be excavated or removed and replaced with material acceptable to the Engineer. Unstable and unsuitable material shall not be used in embankments. If unsuitable material is present at or below the finished grade, it shall be removed and replaced with suitable material, in accordance with Section 213. Unless otherwise provided in the plans or special provisions, unstable and unsuitable material shall be disposed of by the Contractor at his expense, outside the limits of the right of way.

The manner of disposal of surplus excavated material, unstable and unsuitable material by the Contractor outside the right of way limits, shall be subject to the approval of the Engineer, and shall be such as will not create an unsightly or objectionable appearance or detract from natural topographic features. The Contractor shall obtain and file with the Engineer permission in writing, from the property owner, for the use of the property for this purpose.

If surplus excavated material, unstable and unsuitable material is

Art. 202.03 Roadway Excavation

disposed of within the right of way but outside of the balance points in which it occurs, overhaul will be paid for in accordance with Section 206.

202.04 Grading the Roadway, Intersections, and Entrances. Excavated materials that are suitable shall be used in the construction of the roadway as far as practicable, and no such material shall be wasted without permission of the Engineer. Excavation operations shall be conducted so that material outside of the limits of slopes will not be removed or loosened. Material removed or loosened shall be replaced in a manner satisfactory to the Engineer.

Material classified as rock by the specifications shall be excavated to a minimum depth of 3 inches below the subgrade of the proposed pavement, surface course, or base course, as shown on the plans, within the limits of the roadbed, and the excavation backfilled with sub-base granular material. If, due to construction operations, the rock is unintentionally excavated more than 3 inches below the subgrade of the proposed pavement, surface course, or base course, the excavation shall be backfilled with sub-base granular material. Care shall be taken that no undrained pockets are left in the surface of the rock. The surface of the rock excavation shall be free from projecting points, ribs or crevices.

Excessive blasting or overshooting will not be permitted. It is understood that the Engineer shall have authority to require the Contractor to discontinue any method of blasting which leads to over-shooting or which endangers public property, private property, or natural features.

Intersecting roads, approaches, entrances, and driveways shall be graded as shown on the plans or as directed by the Engineer. Excavated material from intersecting roads, approaches, entrances, and driveways shall be placed in embankments between adjacent balance points whenever practicable; otherwise, it shall be disposed of as directed by the Engineer.

Earth moved more than once due to either stage construction or by written authorization of the Engineer will be paid for at the contract unit price per cubic yard for Earth Excavation each time it is moved.

202.05 Classification. Roadway excavation shall include all materials encountered regardless of their nature, and unless otherwise provided, such materials will not be classified except as provided herein. Excavated material will be classified by the Engineer as the work progresses. Such classification shall be final and binding upon the Contractor, unless he files a request in writing for reclassification within 15 days after the payment of the current estimate.

Earth Excavation. All roadway excavation shall be classified as

Roadway Excavation

Art. 202.05

Earth Excavation, except those materials provided for in Rock Excavation.

Rock Excavation. Rock excavation shall include:

- (a) All boulders and rocks measuring 1/2 cubic yard or more.
- (b) Granite, trap, quartzite, chert, limestone, hard sandstone, hard shale or slate, or other hard material, in natural ledges or displaced masses, which, it is not practical to excavate and remove without resorting to the continuous use of pneumatic tools, or to continuous drilling and blasting. When continuous use of pneumatic tools, or drilling and blasting is necessary, ripping will be permitted.

202.06 Construction of Ditches and Waterways. Ditches and waterways shall be constructed and maintained to the lines, grades, and cross sections shown on the plans. The Contractor shall also excavate a ditch at the toe of slope of fills and at the top of slope of cuts at such locations as the Engineer designates during the time of construction. Ditches and waterways so constructed shall be kept free from debris until acceptance. Material excavated from ditches at the top of slope of cuts shall be placed in a windrow between such ditches and the top of adjacent cut slopes. All suitable materials excavated from inlet, outlet, and intercepting ditches, and waterways, within the right of way shall be used in the construction of the roadway as far as practicable, except as otherwise provided herein for material excavated from ditches at the top of slope of cuts. Surplus excavation shall be spread in thin, uniform layers. If it becomes necessary to dispose of such material outside of the balance points, within the right of way, overhaul will be paid for in accordance with Section 206. It shall not be deposited within 3 feet of the edge of a ditch or channel. Roots, stumps, and other objectionable material in the slopes or bottoms of ditches shall be removed and the holes backfilled with suitable material.

202.07 Drainage. The roadway shall be maintained so that it will be well drained at all times. If, during the prosecution of the work, it is necessary to interrupt existing sewer or underdrainage, temporary drainage facilities shall be provided until the permanent drainage work has been completed. Such temporary drainage facilities will be paid for in accordance with the provisions of Article 109.04, unless otherwise provided for in the contract.

The Contractor shall be responsible for, and shall take all necessary precautions to preserve and protect all existing tile drains, sewers, and other sub-surface drains or parts thereof which may be affected by his

Frozen earth shall be removed when directed by the Engineer.

When embankments are to be constructed on hillsides or slopes, or if existing embankments are to be widened or included in new embankments, the existing slopes shall be plowed deeply; or additional precautions for binding the fill materials together are justified, steps shall be cut into the existing slopes before the construction of the embankment is started. If the surface of the existing roadway is within 6 inches of the elevation of the subgrade of the completed earth surface, it shall be plowed or otherwise broken up to a depth of not less than 6 inches.

If embankments are to be constructed over existing rigid type pavements or base courses and the distance between the existing surfacing and the finished subgrade, or proposed subgrade, of the new improvement is not less than 3 inches nor more than 12 inches, such pavements or base courses shall be thoroughly broken up into pieces not to exceed 3 square feet in surface area. Such broken surfacing need not be removed unless required by the plans or special provisions.

When the distance between the existing surfacing and the finished subgrade, or proposed subgrade, of the new improvement is less than 3 inches, such pavements or base courses shall be removed. Such broken pavements or base courses as may be made to conform to the requirements of Article 207.04, by breaking up with the concrete breaking equipment on the work, shall be used, where possible, in the construction of the roadway. No broken pavements or base courses shall be wasted without permission of the Engineer.

207.04 Placing Material. Embankment material shall be placed in accordance with the following requirements:

- (a) General. Embankments shall be constructed of materials that will compact and develop a stability satisfactory to the Engineer. No sod, frozen material, or any material which, by decay or otherwise, might cause settlement, shall be placed or allowed to remain in embankments within the area of the roadbed. Embankments shall be constructed to the height and width deemed necessary to provide for shrinkage during compaction. Upon completion, they shall conform to the lines, grades, and cross sections shown on the plans, with proper provision for shrinkage. When embankments are constructed of crushed material, broken concrete, stones, or rocks and earth, such materials shall be well distributed, and sufficient earth or other fine material shall be incorporated with them when they are deposited to fill the interstices and provide solid embankment. No rock

stones, or broken concrete more than 4 inches in largest dimension shall be permitted within a vertical distance of 12 inches from the surface of the finished earth grade, or finished earth shoulders. If the contract includes pavement, surface course, or base course, the vertical distance may be 3 inches from the finished surface of the subgrade for such construction.

Pieces of concrete not exceeding 2 square feet for any area of surface and large rocks and boulders may be placed in fills without being broken up, provided they are well embedded, and the interstices filled with smaller pieces or smaller material in a manner to give a density satisfactory to the Engineer. The layers of the smaller pieces or smaller material shall not exceed 12 inches in depth.

So far as practicable, each layer of material shall extend the entire length and width of the embankment. The material shall be leveled by means of bulldozers, blade graders, or other equipment approved by the Engineer. Each layer shall be not more than 8 inches thick when in loose condition, shall be uniform in cross section, and shall be thoroughly compacted before the next layer is started.

The use of dragline excavators or similar equipment which excavate and deposit material in large unit masses will not be permitted, unless all materials excavated in this manner are spread as provided herein and compacted as required in Article 207.05, or as directed by the Engineer.

- (b) Adjacent to Structures. Preferably, bridges and culverts shall be completed in advance of grading operations. If not so completed, an omission in the embankment of not less than 100 feet on each side of each structure shall be made, and such omitted embankment shall be placed later in accordance with the requirements of the specifications. As an alternate method, an omission in the embankment of sufficient length to permit the completion of the structure and the necessary backfills may be made, provided all backfills and omitted embankments are constructed with granular material furnished and placed at the entire expense of the

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Contractor. The granular material shall conform Article 704.07, and shall be compacted in accordance with Article 207.05.

Embankment behind abutments or around structure shall not be constructed until test specimens show that the concrete has attained a modulus of rupture of 65 pounds per square inch, and also until at least 7 days have elapsed after the completion of the abutment or structure affected. In the absence of tests to determine the modulus of rupture, the minimum length of time between the completion of the abutment or structure and the placing of the embankment shall be at least 14 days exclusive of days in which the temperature falls below 45° F.

Embankment, behind abutments held at the top by the superstructure, shall not be placed until the superstructure has been completed and the falsework removed. Embankment, behind such abutments and behind the walls of culverts having a clear height of more than 5 feet, shall be carried up simultaneously at both ends of the structure, and at no time shall the embankment at one end be more than 2 feet higher than at the other.

Backfill shall not be placed in water at closed abutments, culverts, or retaining walls. The excavated area around these structures shall be pumped dry, and any mud or loose material within the excavated space shall be removed. Sloping sides of the excavated space, that would be liable to cause objectionable wedging action of the backfill against the structure, shall be stepped or serrated to prevent such action. At piers, backfill may be placed in water, provided that both the water level and backfill are kept at approximately the same elevation on opposite sides of the pier. A time interval, approved by the Engineer, shall elapse before placing additional fill on one side of the pier above the water surface.

A cubical deposit of porous coarse aggregate, at least 2 feet in each dimension, shall be placed back of each drain hole in abutment and wing walls and culvert sidewalls. The bottom of this deposit shall be 2 inches below the drain hole. No additional compensation will be allowed

for such work. All form boards or other obstructions shall be removed from the drains before the embankment is constructed.

207.05 Compaction. Each layer of the embankment material shall be disked sufficiently to break down oversized clods, mix the different materials, secure a uniform moisture content, and insure uniform density and compaction. Disking may be omitted if the fill material consists of sand or gravel.

If the roadway embankment is less than 1 1/2 feet, all lifts shall be compacted to not less than 95 per cent of the standard laboratory density. If the embankment height is between 1 1/2 feet and 3 feet inclusive, the first lift shall be compacted to not less than 90 per cent, and the balance to a minimum of 95 per cent of the standard laboratory density. If the embankment exceeds 3 feet in height, the lower 1/3 of the embankment, but not to exceed the lower 2 feet, shall be compacted in a manner that will yield a minimum of 90 per cent of standard laboratory density to the uppermost lift of that portion of the embankment. The next 1 foot of embankment shall be compacted to not less than 93 per cent, and the balance of the embankment to 95 per cent of the standard laboratory density.

The standard laboratory density shall be the maximum density determined in accordance with AASHTO T 99 (Method A or C). A coarse particle correction in accordance with AASHTO T 224 shall be used with Method A and may be used with Method C.

The density of the compacted embankment shall be determined by the Engineer at regular intervals in accordance with AASHTO T 191 or by other methods approved by the Engineer.

When directed by the Engineer, the embankment shall be sprinkled with water.

Compacting equipment and compacting operations shall be coordinated with the rate of placing embankment so that the required density is obtained.

Special care shall be exercised in compacting embankments adjacent to structures and in sharp depressions. Where such areas are inaccessible to the compacting equipment being used, the material shall be placed in 4-inch horizontal layers and uniformly compacted with suitable mechanical equipment. Embankment placed adjacent to a structure shall not contain more than 110 per cent of the optimum moisture determined in accordance with AASHTO T 99 (Method C).

207.06 Maintaining and Trimming Embankments. The Contractor shall replace, at his own expense, any portions of the embankment which have been damaged or displaced by reason of carelessness or negligence on his part. After the embankments have

**EXHIBIT 7**

March 16, 2015

# **EXPERT REPORT OF DOUGLAS G. DORGAN JR.**

**JOHNS MANVILLE VS  
ILLINOIS DEPARTMENT OF TRANSPORTATION**

Former Johns Manville Facility  
Site 3 and Site 6  
Waukegan, Illinois

PREPARED BY



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Figure 3 – Visual Asbestos Containing Material Location Map, Site 3 – Former Johns Manville Manufacturing Facility

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## 1 INTRODUCTION

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### 1.1 Executive Summary and Scope of Work

I have been requested by Bryan Cave, LLP (Client) to provide expert opinions on behalf of Johns Manville concerning Site 3 and Site 6 of the Johns Manville Southwestern Site Area located in Waukegan, Lake County, Illinois (respectively Site 3 and Site 6). The focus of my review has been on impacts to the scope of planned remediation activities resulting from past IDOT construction activities at Site 3, and the western limits of Site 6. I will refer to both Sites herein collectively as the "Site."

Historic investigation and remediation planning at the Site has been completed pursuant to an Administrative Order on Consent No. V-W-07-C-870 (AOC) executed by and between Johns Manville and Commonwealth Edison Company and the United States Environmental Protection Agency (USEPA). Weaver Consultants Group North Central, LLC (WCG) was retained to consider and provide opinions relating to whether the Illinois Department of Transportation (IDOT) is responsible for asbestos containing material ("ACM") found at Sites 3 and portions of Site 6; and, if so: 1) whether, how and when IDOT handled ACM at Sites 3 and 6; 3) whether and the extent to which IDOT's historic handling of the ACM caused or is causing Johns Manville to do additional work associated with its ongoing cleanup; and 3) based upon my experience, whether the IEPA would consider IDOT's handling of the ACM to be a violation of the Illinois Environmental Protection Act ("Act").

To prepare this report, I have reviewed various documents associated with the environmental conditions and remedial action at the Site, including IDOT's standard specifications and engineering drawings relating to its work at the Site in the 1970s, aerial photographs of the Site, environmental investigations at the Site, correspondence with USEPA regarding the Site, evolving plans to remediate the Site, draft cost estimates provided by AECOM, the current contractor, and the documents produced by both JM and IDOT in this case. I also relied upon information gathered from a Site reconnaissance performed on Monday, February 23, 2015. Lastly, I considered my experience with similar sites and projects and public domain documents. Based upon these factors, I have developed the following opinions:

1. The first developed use of the Site 3 occurred in the 1950s when Johns Manville leased Site 3 from ComEd to construct a parking lot for use by employees at the manufacturing facility located north of East Greenwood Drive. The parking lot was removed by IDOT in the late 1960s or early 1970s as part of its work on the Amstutz Expressway Project (the Amstutz Project). Site 3 is now vacant land. Site 6 has historically been used as a road. The road was modified as part of the Amstutz Project by IDOT. The road still exists.

2. IDOT is responsible for the placement and dispersion of ACM waste currently found at the Site. IDOT, at a minimum used, spread, buried, placed and disposed of ACM waste, including Transite® pipe, throughout Site 3 and portions of Site 6 during its work on the Amstutz Project from 1971 to 1976. IDOT's activities associated with the Amstutz Project resulted in crushed Transite® pipe and asbestos material being spread across and buried at Site 3 and the western end of Site 6. IDOT left and never removed the Transite® pipe and asbestos material they spread across and buried at the Site.
3. As a result of IDOT using, spreading, burying, placing, and disposing of ACM waste in and around Site 3 and Site 6 as part of the Amstutz Project, the scope of the expected remedial activities are significantly more extensive than would have otherwise been required by USEPA.

Based on my experience, IEPA would more likely than not consider IDOT's actions in using, spreading, burying, placing, disposing of and leaving ACM waste on Site 3 and Site 6 to be a violation of Section 21 of the Act. Additional and more specific opinions are presented in the text to the following report, together with a discussion of the basis for each major opinion. I reserve the right to modify my opinions should my review of additional information warrant it. In particular, I understand that IDOT is planning to produce certain emails that relate to this case. I also understand that the scope of planned remedial activities, and the cost estimates for implementing the work, continue to evolve. Review of emails to be produced by IDOT, as well as changes to the scope of planned remedial measures and corresponding updates to the associated cost estimates, may influence the opinions presented herein.

## 1.2 Qualifications

My resume, together with the list of my publications is presented in **Appendix A**.

I have over 25 years of experience working as an environmental consultant. I received my Bachelors of Science in Earth Science, with a Minor in Geology, from Eastern Illinois University in 1986. I received my Masters of Science in Geography with a Concentration in Environmental Science from Northern Illinois University in 1994. I am a Licensed Professional Geologist in the states of Illinois and Indiana.

Since 1986 my practice has focused principally on providing consulting services and performing remedial investigation, planning, design and construction for a wide range of industrial, commercial and institutional properties. I have been qualified as an expert witness and supported litigation associated with projects involving environmental assessment, design, permitting, and construction related issues. I have implemented various projects involving compliance with the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). Additionally, I am familiar with and have completed projects under various Illinois regulatory programs including, but not limited to, the Resource Recovery and Conservation Act (RCRA), Leaking Underground Storage

Tank (LUST) Program, and Site Remediation Program (SRP). I have regularly interfaced with both the USEPA and IEPA in many contexts, including CERCLA and violations of the Act.

Of particular relevance to this case, I have worked on numerous commercial and industrial properties exhibiting legacy environmental impacts. Such properties have included steel mills, foundries, landfills, glass manufacturing facilities, rail yards, and commercial shopping centers. I have experience assessing and remediating soils and fill material impacted by a wide range of materials including, but not necessarily limited to, petroleum, chlorinated solvents, metals, polychlorinated biphenyl's (PCBs), and asbestos. I am experienced in the design, permitting, construction and environmental monitoring of both solid and hazardous waste disposal facilities. I have experience supporting environmental investigation and restoration associated with Brownfield's redevelopment, with specific emphasis on evaluating and mitigating risks to future users associated with site environmental conditions. Furthermore, I have significant experience working on projects throughout the Chicago metropolitan area, having spent most of my professional career based in Chicago. Locally, Weaver Consultants Group has offices in Chicago and Naperville, Illinois.

### **1.3 Information Considered**

WCG was provided access to and has reviewed the full document record, including documents produced by IDOT and JM, available for this matter. WCG also reviewed IDOT standard specifications, aerial photographs and recent changes to the scope of work and associated cost estimates provided by AECOM. A bibliography of documents cited in this Expert Report is presented in **Appendix B**. Citations to these references are shown in superscripts in the following text.

### **1.4 Report Organization**

This Expert Report is organized into the following sections:

- Section 2 presents Site background information, factual and historical information related to the Site;
- Section 3 presents my expert opinions, along with discussion supporting my opinions.

## 2 SITE BACKGROUND

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### 2.1 Site Location

Site 3 and Site 6 are shown on the attached **Figure 1**. Site 3 is located southwest of the former Johns Manville (JM) facility at 1871 North Pershing Road, Waukegan Illinois, at the southeast corner of the intersection of East Greenwood Avenue and North Pershing Road. The Site lies within Lake County, and is within the northwest portion of Section 15, Township 45 North, Range 12 East of the Third Principal Meridian. Site 3 consists of approximately 3.115 acres with approximately 641 feet of frontage along East Greenwood Avenue. The Site is bounded to the north by East Greenwood Avenue, to the west by North Pershing Road, to the east by a railroad spur accessing the adjacent Midwest Generation facility, and the south is currently an empty lot.<sup>1</sup>

Site 6 is a linear feature adjacent to the former JM facility primarily comprising the shoulders of East Greenwood Road, in Waukegan, Illinois. The Site is owned by the City of Waukegan.

The surrounding area is a mix of industrial and residential properties, with industrial properties to the east of North Pershing Road and residential properties to the west. A coal-fueled power plant operated by Midwest Generation is located immediately to the east of Site 3, and to the south of Site 6. Illinois Beach State Park lies to the east of the Site on the shoreline of Lake.

### 2.2 Site History

#### 2.2.1 Facility Operations

Site 3 is owned by ComEd and is located south of the Greenwood Avenue right-of-way near the southern property line of the former JM manufacturing facility. According to Nicor Gas Company, a 20-inch natural gas line was installed six to eight feet below ground surface (bgs) beneath Site 3 in 1948<sup>1</sup>. Pursuant to a lease agreement with ComEd, JM used Site 3 as a parking lot for JM employees and invitees from the late 1950s through approximately the early 1970s<sup>13</sup>. It is our understanding that JM constructed a parking lot on Site 3 circa late 1950s in order to provide additional parking for the administration building at the plant<sup>11</sup>. Based upon the record, asbestos-containing pipes were split in half lengthwise and used for curb bumpers within the parking lot on Site 3.

The parking lot was taken out of service in approximately 1972 by IDOT during the Amstutz Project, which included the construction of an embankment on the northwestern portion of the Site as well as IDOT Detour Road A as shown on **Figures 2 and 3**.

IDOT engineering drawings for the Amstutz Project show that IDOT needed to excavate and fill areas on the Site because the underlying material was unsuitable. Prior to IDOT's work on Sites 3 and 6, the elevation of Site 3 was approximately 587.5 to 588.5 feet above mean sea level and Site 6 was approximately 588 feet above mean sea level. Part of IDOT's work involved raising the grade of Site 3 slightly in some areas, lowering the grade in other areas, and raising the grade of Greenwood Avenue substantially in some areas. For example, following construction, the elevation near the intersection of Greenwood and Pershing Road was approximately 600 feet above mean sea level. After construction, the record indicates that the contractor hired by IDOT was paid a "special excavation" fee to "remove and obliterate the Detour Roadways".<sup>18</sup>

Site 3 is currently vacant with the exception of one transmission tower located on the eastern portion of the Site. Site 6 generally comprises the shoulders of East Greenwood Avenue.

### **2.2.2 Environmental Aspects of Historical Operations**

Documents indicate that asbestos-reinforced cement (Transite®) pipes were placed on the Site 3 parking lot and used for tire stops (i.e., to keep the cars from going too far and off the parking lot<sup>11</sup>) in approximately the 1950s. Beginning in approximately 1971, IDOT constructed Detour Road A on Site 3 for use during construction of the Amstutz Project. In their response to USEPA's request for information regarding Site 3, IDOT disclosed that their resident engineer on the project "recalled dealing with asbestos pipe during the project and burying some of it<sup>13</sup>". During the construction of the Amstutz Project approximately 262,000 cubic yards of structural borrow material<sup>14</sup> was required for construction of the bridge approach embankments. The source of this borrow material is unknown at this time. This material would have been brought on the Site and compacted by mechanical means. Some quantity of this 262,000 cubic yards was placed within the western limits of Site 6, and on the northwest portions of Site 3.

## **2.3 Site Environmental Conditions**

In 1998, JM discovered asbestos containing materials (ACM) at the surface on Site 3. In accordance with a sampling protocol agreed upon with USEPA, JM catalogued and removed surficial ACM and conducted sampling of the area.

### **2.3.1 ELM Sampling**

ELM Consulting LLC (ELM) conducted sampling for ACM at Site 3 and issued a report dated December 1999. The northwest and northeast portions of Site 3 were not sampled during the ELM grid-sampling event due to the presence of standing water. Results of the ELM sampling have been visually represented on the attached **Figures 2, 3, 4** and **5**. In general, the ELM sampling identified visual ACM (see **Figure 2**) across generally the north central and northeast portions of Site 3, generally aligned with the

location of former Detour Road A. As demonstrated on **Figures 2 and 3**, asbestos was detected in a number of boring locations, again, generally aligned with the location of former Detour Road A, and across the eastern portions of the northern boundary of Site 3.

Between 1999 and 2007, little activity occurred on the Southwestern Sites. On June 11, 2007, JM, Commonwealth Edison and USEPA signed an Administrative Settlement Agreement and Order on Consent for Removal Action (Agreement). The Agreement recognized that the proceedings under the Agreement were subject to various sections of CERCLA. USEPA declined to consider IDOT a Potentially Responsible Party (PRP) under CERCLA.

### **2.3.2 LFR Sampling**

Pursuant to the above referenced Agreement, LFR Inc. (LFR) conducted an investigation that included Site 3 and Site 6. Results of this investigation were documented in an initial Engineering Evaluation/Cost Analysis (EE/CA) report.

#### **2.3.2.1 Site 3**

The investigation of Site 3 involved the excavation of 14 test pits (see **Figures 2 and 3** for test pit locations). The locations of the test pits were generally placed near borings completed during the 1999 ELM investigation. Visual ACM was observed in two of the fourteen (14) test pits. Pursuant to USEPA approved plans, no soil samples were collected and analyzed for asbestos as a component of the Site 3 investigation.

#### **2.3.2.2 Site 6**

The investigation of Site 6 involved advancing both test pits and soil borings along the length of and within the shoulder of both sides of East Greenwood Avenue. The investigation resulted in 209 soil samples being submitted for PLM analyses, and 21 soils samples submitted for TEM analyses. Various areas of asbestos impacted soil was observed along Site 6. One of these areas includes the shoulder of East Greenwood Avenue immediately adjacent to the northern boundary of Site 3.

### **2.3.3 LFR Investigation**

LFR subsequently advanced an excavation within the southern shoulder of East Greenwood Avenue immediately adjacent to the northern boundary of Site 3 (see **Figure 2** for excavation location) for another entity, Exelon.<sup>8</sup> This excavation was performed to expose two direct-buried electric lines. In a July 8, 2008 letter report written to Exelon, LFR documented the excavation activities. The letter report documents that “[d]uring the excavation, several pieces of Transite® pipe, which is an asbestos containing material, were encountered within the clay fill material.” The letter

report concludes, “[f]rom this it may be concluded that the Transite® pipe was found within the soil placed as part of the Greenwood Avenue ramp construction.”

### **2.3.4 AECOM Investigation**

In May 2013, AECOM conducted additional ACM sampling on Site 3 to assess the vertical and lateral extents of ACM within a 25-foot wide corridor centered on a 20-inch natural gas line owned and operated by Nicor Gas Company. The Nicor Gas line was installed prior to IDOT’s construction work. Owing to the presence of the Nicor gas line, excavations were advanced by hand digging to a depth of one foot below ground surface, below one foot, hydraulic excavation was used. Excavations were advanced to the top of the gas line. Additionally, eighteen (18) test pits were advanced generally along the gas line corridor. The test pits were generally advanced to a depth of approximately eight to nine feet below ground surface. Finally, seventeen soil borings were advanced generally along the gas line corridor. Locations for each of the hydraulic excavations, test pits, and soil borings completed by AECOM are shown on the attached **Figures 2 and 3**.

Asbestos sample results from the excavations, test pits and soil borings are shown on **Figures 2 and 3**. In summary, asbestos via PLM analysis was detected in one soil sample above the analytical sensitivity. In two hydraulic excavations, and four test pits, asbestos was detected but below the analytical sensitivity. Samples submitted for TEM analysis were below analytical sensitivity. Certain additional samples from soil borings and test pits exhibited structures of asbestos. Sample analytical results were believed to warrant additional investigation, which was undertaken in August of 2013.

During the August 2013 Supplemental Investigation, seventeen (17) soil borings were advanced to a maximum depth of nine feet below ground surface. A total of 126 soil samples were submitted for analysis of asbestos. Asbestos via PLM analysis was detected in one of the soil samples. Samples analyzed via TEM were below analytical sensitivity. However, asbestos structures were noted in five of the samples collected from three boring locations.

### **2.3.5 Remedy Background**

Four revised versions of the EE/CA were submitted in response to comments made on behalf of the USEPA. The final EE/CA was submitted to USEPA on April 4, 2011 (“EE/CA Revision 4”). EE/CA Revision 4 evaluated four potential response action options for Sites 3 and 6, based on discussions with EPA. EE/CA Revision 4 identified “Alternative 2” as the preferred remedy for Site 3. This alternative included limited soil excavation (approximately 660 cubic yards) in the northeast corner of Site 3 to a depth of approximately three feet below the ground surface and installation of a vegetated soil barrier over the entire site, at an estimated cost of between \$595,000 and \$630,000.

EE/CA Revision 4 identified "Alternative 3" as the preferred remedy for Site 6. This alternative was described as a "hybrid remedy" combining excavation and off-site disposal of approximately 2400 cubic yards of ACM-affected soil with a vegetated soil barrier running adjacent to Site 3 to avoid disrupting current stormwater drainage patterns. The total cost to implement Alternative 3 on Site 6 was estimated at between \$417,500 and \$500,000. USEPA disagreed with the remedy selected for both Sites. Eventually, the USEPA issued an Enforcement Action Memorandum for the Southwestern Site Area (which includes Site 3 and 6) dated November 20, 2012. For both Sites 3 and 6, USEPA generally required the removal of all asbestos-impacted soils and the creation of clean corridors for all utilities running through the Sites.

Between December 20, 2012 and September 28, 2013, multiple dispute notices regarding the Enforcement Action Memorandum were filed on behalf of JM. The dispute notices were officially resolved in a letter from the Director of the Superfund Division of the USEPA dated September 28, 2013. In response to the Enforcement Action Memorandum, JM coordinated additional site investigation activities at Site 3 that were conducted between May and August 2013 (summarized in Section 1.4.3 above). Ultimately, USEPA agreed to modify some of the more stringent requirements in its Action Memorandum. Thereafter, AECOM prepared a Removal Action Work Plan (RAWP). The most recent RAWP was submitted to the USEPA and is dated March 31, 2014.

### **2.3.6 Summary of Remedy Scope**

The March 2014 version of the RAWP has been developed to address a non-time critical removal action relating to ACM in soil at Sites 3 and 6. The RAWP used as the basis for design of the plan the following:

1. Utility relocation and abandonment
2. Required soil removal
3. Vegetative cover
4. Institutional controls
5. Subrogation agreements

Additionally, two basis of design for construction support activities include:

1. Construction dewatering systems
2. Water quality basis for discharge for NSSD

The RAWP relating to Site 3 and 6 contains a description of the following primary work items:

1. Sites 3 and 6 utility relocation, abandonment, and replacement plans
2. Site 3 soil removal and vegetative soil cover

3. Site 6 soil removal
4. Sites 3 and 6 long-term operations and maintenance (O&M)

#### 2.3.6.1 Site 3

As noted above, the remedy for Site 3 involves relocation or abandonment of select utilities, excavation of ACM impacted soil, and construction of a vegetative soil cover. The following utilities present on Site 3 will be either abandoned, or a clean soil corridor will be created: 1) AT&T telecommunication lines will be relocated and reinstalled above ground, 2) confirmation will be provided documenting former decommissioning of a Commonwealth Edison electric power line, 3) a clean soil corridor will be constructed for a Nicor Gas line, 4) a North Shore gas line will be decommissioned, and 5) a City of Waukegan water main will be replaced and a clean soil corridor constructed (collectively, approximately 3,250 cubic yards of soil will be removed for utility clean soil corridor). Approximately 900 cubic yards of soil to a depth of approximately four feet will be removed from a 0.14-acre area on the northeast corner of Site 3. Finally, a vegetative soil cover will be constructed across approximately 3.14 acres of Site 3. In addition, an environmental covenant will be executed for Site 3 addressing soils remaining in-place under the vegetative cover and a fence will be constructed.

#### 2.3.6.2 Site 6

As noted above, the remedy for Site 6 involves abandonment or relocation of select utilities, and removal of soil. The following utilities present on Site 6 will be relocated or abandoned: 1) AT&T telecommunication lines present on the south side of Site 6 will be relocated, 2) an existing North Shore Gas line will be permanently abandoned, and 3) a City of Waukegan water main will be relocated. Approximately 6,420 cubic yards of soil will be removed to an estimated depth of 3 feet.

### 2.4.5 Summary of Remedy Cost

The cost estimates provided for the Site is reflective of the increased scope of work due to the presence of ACM buried by IDOT. AECOM has prepared draft cost projections for the work to be performed on Site 3 and Site 6 as documented in their March 12, 2015 Correspondence addressed to Douglas Dorgan of Weaver Consultants Group<sup>16</sup>. Tables entitled DRAFT Sub-Project Cost Detail (with Markups) for both Site 3 and Site 6 have been included as **Appendix C**.

AECOM has estimated the cost for RAWP implementation at the Site based upon the March 31, 2014 RAWP as subsequently modified based on communications with USEPA. The communications have resulted in significant changes to the work required. As of the writing of this report, AECOM continues to refine the remediation scope and corresponding estimate of probable cost. The estimate of probable cost prepared by AECOM is included in Appendix C. For Site 3, this estimate projects costs for

implementation of the currently approved RAWP totaling \$3.3M. For Site 6, this estimate projects costs for implementation of the currently approved RAWP totaling \$4M.

### 3 OPINIONS

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The following provides my expert opinions, followed by information in support of the various opinions:

#### 3.1 Site Usage

***The first developed use of the Site 3 occurred in the late 1950s when Johns Manville constructed a parking lot for use by employees at the manufacturing facility located north of East Greenwood Drive. Site 6 was historically used as a road. The road was elevated by IDOT in the 1970s.***

The above opinion is supported by the following multiple lines of evidence.

Based upon review of the facility record, and review of certain available historical use sources, prior to the mid 1950s, Site 3 was a vacant, undeveloped property. In the late 1950s, under lease to Commonwealth Edison (ComEd), Johns Manville constructed an approximate 48,000 square foot parking lot that serviced the adjacent main facility complex located across East Greenwood Avenue. Prior to construction of the parking lot, there had been no previous structures present on the Site 3. The property had not been utilized by ComEd as part of its adjacent power generating facility, nor had it been utilized by the adjacent Johns Manville facility. The parking lot operated from its date of construction in the late 1950, through to approximately 1970 when the parking lot was destroyed under contract to the IDOT to accommodate construction of the Amstutz Project<sup>17</sup>.

As of 1939, Site 6 was paved with a road, now known as Greenwood Avenue. The road was modified in the 1970s by IDOT as part of the Amstutz Project. Fill was used by IDOT to create the embankment and to raise Greenwood Avenue.

#### 3.2 IDOT Construction Activities Responsible for ACM Waste

***It is my opinion that IDOT is responsible for the placement and dispersion of ACM waste currently found at the Site. IDOT used, spread, buried, placed and disposed of ACM waste, including Transite® pipe, throughout Site 3 and portions of Site 6 during construction of the Greenwood Avenue ramp and expressway bypass from 1971 to 1976. These construction activities associated with the Amstutz Project resulted in crushed Transite® pipe and asbestos material being spread across and buried at Site 3 and the western end of Site 6. IDOT never removed the Transite® pipe and asbestos materials it spread across and buried at the Site.***

The above opinion is supported by the following multiple lines of evidence.

Within the project record, there are multiple references to the use of Transite® Pipe within the JM parking lot serving as vehicle parking bumpers. Transite® Pipe, also known as Asbestos Cement Pipe, began being used in the 1940s for potable water, sanitary sewer, and storm drain pipelines (Williams, G. Eric and Aspern, Kent Von, date unknown). The Engineering Evaluation/Cost Analysis prepared by LFR references that “Transite® pipe was utilized as parking space “bumpers” on the ground surface”. The USEPA subsequently confirmed this finding indicating in their Enforcement Action Memorandum that “Asbestos-containing pipes were split in half lengthwise and used for curb bumpers on Site 3.” It would appear that there is little argument that Transite® pipe had been present on Site 3 associated with their use for parking bumpers in the Johns Manville parking lot. Transite® pipe was constructed primarily of Portland cement, however, asbestos was used to increase the pipe strength. Various reports suggest the asbestos content of Transite® pipe could range from 15 percent up to 20 percent, although in later years of production the content was lowered to less than 0.2% (2009, Aspern, Kent Von).

Aerial photos show the parking lot and apparent Transite pipe parking bumpers in aerial photographs from 1961 and 1967. In 1972, the parking lot is no longer evident in an available aerial photo.

In approximately 1970, IDOT began work on the Amstutz Project. The project involved portions of Site 3, and the western end of Site 6. Specifically, as indicated in IDOT Construction Drawings for the Project, a bypass road for the East Greenwood interchange (Detour Road A), was constructed across the center portion of Site 3 as shown on the attached **Figure 3**. Additionally, the Amstutz Project included the construction of the Greenwood Road Overpass, which involved raising the elevation of Greenwood Road and building an embankment near where Greenwood intersects with Pershing. The embankment is on portions of Site 6 and 3 (see Figure 2).

IDOT plans prepared by H.W. Lochner, Inc. for Amstutz Project (F.A. Route 437 – Section 8-HB & 8-VB) provide information documenting the importation of fill material (Borrow Excavation). On sheet 5, Schedule of Quantities, the Summary of Quantities lists total “Borrow Excavation” for the project as 262,540 cu yds. The plan cross sections for Greenwood Ave within Site 6 (Sta 7+00 to 9+22) shown on sheets 71 and 72 of the plans indicate excavation was performed in these areas and fill material was needed.

IDOT was responsible for the fill it brought to the Site. On Sheet 4 of the Lochner plans, the first note of the General Notes states “The “Standard Specifications for Road and Bridge Construction” adopted January 2, 1971, shall govern construction.” The IDOT “Standard Specifications for Road and Bridge Construction” Section 204.42 state “Borrow Excavation shall not be placed in the embankment until the site location, excavation plan and material have been approved by the Engineer in writing.” Thus, all

Borrow Excavation material was to be approved by the IDOT Engineer prior to its use on the Site and IDOT was responsible for its contents.

In AECOMs Respondent Response Document to Engineering Evaluation/Cost Analysis<sup>2</sup>, they indicate “[i]n their response to USEPAs request for information regarding Site 3, IDOT disclosed that their resident engineer on the project “recalled dealing with asbestos pipe during the project and burying some of it.””

As noted in the Background Section, several investigations for the presence of asbestos materials on Site 3 and Site 6 have been completed. The first of these investigations was completed in 1998 and included the visual observation and removal of asbestos fragments and fragment clusters from the surface of Site 3. Of the seventy-four (74) locations where ACM fragments or fragment clusters were encountered on Site 3, Transite<sup>®</sup> Pipe was observed at sixty-five (65) locations (Appendix F of referenced report). Additionally, Transite<sup>®</sup> was identified in several of the borings that were completed as part of this investigation (Appendix G).

Thereafter LFR undertook an investigation of Site 3 and Site 6. Results of this investigation were presented in the report “Engineering Evaluation/Cost Analysis, Southwestern Site Area Sites 3, 4/5, and 6, Revision 4” dated April 4, 2011<sup>2</sup>. Visual ACM was observed in test pits advanced as part of the investigation on Site 3.

In 2008, LFR was retained by ComEd to complete a soil excavation along the south side of the Greenwood Avenue shoulder. The work performed was documented in a letter report addressed to Exelon dated July 8, 2008. The excavation was noted to be located “within the southern shoulder of Greenwood Avenue and, based upon the elevation data, was also within the built-up ramp to the Amstutz Expressway. “ The center of the excavation was reported to be at an elevation of approximately 591 to 591.5 feet above mean sea level (AMSL). The letter report documents that “[d]uring the excavation, several pieces of Transite<sup>®</sup> pipe, which is an asbestos containing material, were encountered within the clay fill material.” ACM was observed within the excavation at approximately 588.5 feet AMSL. The nominal surface elevation of the adjacent Site 3 was reported to be at an approximate elevation of 587.5 feet AMSL. The letter report indicates that the excavation “falls clearly within the Greenwood Avenue ramp construction for the Amstutz Expressway.” The letter report concludes by stating “[f]rom this it may be concluded that the Transite<sup>®</sup> pipe was found within the soil placed as part of the Greenwood Avenue ramp construction.”

Finally, additional investigation of Site 3 was undertaken in 2013 and documented in the report entitled “Southwestern Site Area, Site 3, 4/5, and 6 Removal Action Workplan, Revision 2” prepared by AECOM dated March 31, 2014<sup>1</sup>. In planning for the removal action, additional characterization of the presence of ACM was undertaken using hydraulic and hand excavations, test pits, and soil borings. Consistent with the results of previous investigations, Transite<sup>®</sup> pipe was specifically noted to be present at three of

the sample locations on Site 3 (HYD-05 0-1', HYD-06 0 – 1', TP-10 0-1'). As with previous findings, the physical presence of identifiable Transite® pipe was generally located within the shallow subsurface at the Site.

The locations of Transite® pipe containing ACM discovered on Site s3 and 6, coupled with the Site history, demonstrate that IDOT used, spread, buried, placed, and disposed of ACM waste, including Transite® pipe, throughout Site 3 and portions of Site 6 during its work on the Amstutz Project from approximately 1971 to 1976. The distribution of visual ACM, mostly comprised of Transite® pipe, generally is consistent with the areas where IDOT performed work; the JM former parking lot, Bypass Road A and the embankment and south side of Greenwood Avenue. The occurrence of visual ACM is represented on **Figure 3**, which shows ACM generally being found within the central and northeastern areas of Site 3. This generally overlays with the location of the former parking lot area, which IDOT removed to build Detour Road A. Furthermore, the detection of asbestos in soil samples collected at Site 3 follows a similar pattern, with asbestos generally being detected within the central and northeastern areas of Site 3. Soil samples collected from across Site 3, and the western limits of Site 6, submitted for laboratory analysis exhibited concentrations of asbestos fibers in soil exceeding 0.1%. Asbestos fibers within the soil are believed to have originated at least in part from crushing of the Transite® pipe parking bumpers during the IDOT construction activities. Transite® pipe by nature is inert and non-friable. It is converted from a solid to a friable form during the crushing process. As evidenced by fragments of Transite® pipe being identified during various previous investigations, it is apparent that the condition of the original Transite® pipe bumpers had been changed by the disturbance associated with the construction activities performed by IDOT. The act of crushing Transite® pipe as a result of being tracked with heavy equipment, and being buried as occurred during the IDOT construction activities would result in asbestos fibers being released into the surrounding soils.

Further, when you compare the engineering drawings used by IDOT for Bypass Road A and Greenwood Avenue with the location of Transite® and ACM, it is clear that the Transite® and ACM is located in areas that were excavated and filled by IDOT as part of the construction. The Transite® pipe is located within three to four feet of the ground surface. This is demonstrated most clearly on **Figures 4 and 5**, which demonstrates the occurrence of asbestos within soil samples collected from fill materials placed by IDOT. The Transite® and ACM were found on Site 3 and Site 6 within fill materials placed by IDOT, above the predominant Site 3 and Site 6 elevation prior to IDOT construction, or in areas where IDOT excavated and removed “unsuitable materials”. The July 8, 2008 LFR states “...it may be concluded that the Transite® pipe was found within the soil placed as part of the Greenwood Avenue ramp construction.”

This evidence shows that when IDOT demolished the former JM parking lot to build Bypass Road A, it crushed and buried portions of the Transite® pipe that had been

located on the parking lot. IDOT also spread the Transite® pipe around portions of Site 3 and 6 close to the former parking lot area as part of its work.

In summary, it is my opinion that the source of the Transite® pipe found at Sites 3 and the western limits of Site 6 immediately adjacent to the northern boundary of Site 3 was the Transite® pipe that had been used as parking bumpers in the former JM parking lot. The Transite® pipe bumpers were not removed but were crushed, buried, and mixed into the subsurface as part of Bypass Road A construction and the construction of the East Greenwood Road overpass embankment for the Amstutz Expressway.

### **3.3 IDOT's Handling of Transite® Pipe Resulted in a Substantial Increase in Scope of Remedy for Site 3 and Site 6**

*It is my opinion, that in the absence of the buried and dispersed Transite® pipe on the Site, it is unlikely that any response action would have been necessary at the site other than the surface ACM removal efforts.*

As a result of IDOT's use, spreading, burying, placing and disposing of ACM in and around Site 3 and 6 as part of the Amstutz Project, the scope of the expected remedial activities are more extensive than would have otherwise been required by USEPA.

It is apparent that USEPA was concerned with the prospect of ACM moving up to the surface and becoming airborne. In the USEPA Modification to the EECA dated February 1, 2012, they specifically highlight concerns that "in frost susceptible areas, such as Waukegan, stones, and other large particles, such as broken scraps of asbestos, tend to move differentially upward through the soil with each freeze/thaw cycle. Thus, asbestos-containing wastes that are covered with soil can, over time, reach the soil surface and become readily releasable to the air".

USEPA also notes, "the shoulders of Greenwood Avenue in Site 6 are not vegetated and are subject to physical disturbance from the general public as well as potential damage from vehicles, snow plows, salt trucks, etc. Sites 3, 4/5, and 6 also contain utilities and these areas will be disturbed during maintenance and repair activities. Such damages or disturbance may result in the release of asbestos containing materials and asbestos fibers."

These concerns were used as the justification for requiring a more substantial cover design. The Transite® pipe observed on Site 3 and Site 6 is most comparable to "stones, and other large particles, such as broken scraps of asbestos". In the absence of this buried Transite® pipe, it is unlikely if any form of response activity would be needed.

On November 12, 2012, USEPA issued an Enforcement Action Memorandum (EAM). The purpose of the EAM was to communicate USEPA's position with respect to environmental conditions at Site 3 and Site 6. Specifically, the EAM documents USEPA's

determination "...of an imminent and substantial threat to public health, welfare or the environment posed by contaminated soils at the Southwestern Site Area (Site) including Sites 3, 4/5, and 6, in Waukegan, Lake County, Illinois, and to document approval of the proposed non-time critical removal action for the Site."

The EAM marked a significant expansion of the scope of the remedy when compared to AECOM's EECA version 4. USEPA makes a number of statements in this document demonstrating that the new remedy was mandated because asbestos was buried on the Site. The EAM repeats many of the same points raised in the February 1, 2012 EECA Modification it imposed.

However, it even takes it a step further when justifying its decision for all soil removal and clean corridors. The EAM states "of particular concern are digging and soil moving related to road repair, utility repair and any other construction activities on the sites." It also stresses that utilities "such as natural gas, electric, communications, water and sewer in Sites 3, 4/5 and 6 require immediate access and repair to respond to leaks of damaged lines." USEPA indicates that excavation would be necessary to access the utilities in an emergency situation and that the excavation "would be likely to result in the potential release of ACM and asbestos fibers. USEPA continues: "In the event of a breach of other loss of integrity, pressurized underground utilities also have the potential to force overlying soils to the surface resulting in the potential release of ACM and asbestos fibers. Therefore, excavation of clean corridors for all such utilities must be provided as soon as possible to prevent the potential release of ACM and asbestos fibers."

In the EAM, USEPA states that Site 3 potential receptors include: 1) utility workers from either ComEd servicing their buried lines that cross the Site or from other utilities who maintain buried lines or easements for their lines, 2) construction workers installing additional utilities in the future and 3) anyone walking or biking across the field, i.e., trespassers. Potential receptors for Site 6 include: 1) utility workers, 2) road repair and maintenance, and, 3) construction workers installing additional utilities in the future and the general public, as users of the roadway. USEPA's Risk Evaluation concluded that as a result of asbestos being present at Site 3 and Site 6 "[a]dverse health risks are reasonably anticipated in the event that exposure occurs."

It is apparent that the primary concern expressed by USEPA was buried ACM that could either impact workers servicing utilities or could reach the surface as a result of the upward thrust of additional fragments or "broken scraps of asbestos". As stated within the EAM, conditions at the Site were deemed to meet the criteria for a removal action. In the absence of buried ACM and broken scraps of asbestos having the potential to reach the ground surface, it is believed likely that no removal action at Site 3 or within the western limits of Site 6 would have been needed.

The conclusion that the Transite<sup>®</sup> pipe buried and spread by IDOT is causing an expansive remedy is supported by the well-documented approach being applied to ACM removal at the nearby Illinois Beach State Park. This site is located approximately one mile from Site 3. Past investigations have concluded that surficial ACM that washes onto the beach is not expected to be harmful to human health.<sup>14</sup> The presence of limited quantities of generally non-friable ACM at the surface (assuming the absence of Transite<sup>®</sup> pipe) of Site 3 would be comparable to the conditions encountered at Illinois Beach State Park (IBSP). Therefore, it is reasonable to conclude that in the absence of Transite<sup>®</sup> pipe at Site 3 and within the western limits of Site 6, a strategy similar to that being employed at IBSP would be appropriate for managing Site conditions.

Alternatively, for purposes of assessing the broader scope resulting from IDOT's actions at Site 3 and the western limits of Site 6, I have considered a more conservative approach to managing the Site conditions assuming Transite<sup>®</sup> pipe had not been spread and buried. Under this alternative scenario, I have assumed that Transite<sup>®</sup> pipe had been left in its original location on the surface of Site 3 in 1970. Under this alternative scenario, I believe that the plan submitted in the EECA would have been more than adequate to manage the Site 3 conditions and that no remedy would have been required for the western portion of Site 6.

As noted above, the EECA Revision 4 had proposed Alternative 2 as the remedy for Site 3. This alternative included installation of a soil barrier over approximately 3.12 acres of Site 3. This alternative was projected to cost as much as \$620,000 to construct, with long term Operations and Maintenance (O&M) costs projected at \$142,000 (over a 30-year period). Based on the cost of construction, and long-term O&M, this alternative remedy would cost \$762,000.

It is my opinion that due to the presence of buried Transite<sup>®</sup> pipe, the USEPA has demanded a more expansive scope for managing Site 3 conditions.

This added scope is reflected in the cost differentials. The current required remedy on Site 3 is projected to cost \$3.3M. It is my opinion based on review of the estimate prepared by AECOM that this estimate is reasonable for the tasks that have been quantified. However, a number of additional required tasks have not been included in this estimate, and some uncertainty exists regarding the actual costs for removal and/or replacement of select utilities. Consequently, it is my opinion that the actual costs for implementing the USEPA required remedy may potentially expand by a factor of 20% or more, raising the total cost of construction to approximately \$4.0M. Additionally, the AECOM estimate does not include long-term O&M expenses. Long-term O&M expenses are not expected to deviate substantially from the estimate included in the original EECA, and therefore, I have assumed additional O&M expenses of \$140,000. This raises the total cost of remedy implementation being required by USEPA to \$4.14M, resulting in an incremental cost increase for the selected remedy of \$3.4M.

A similar analysis can be conducted for Site 6. However, the Transite pipe bumpers were not placed on Site 6. Thus, if you assume pre-IDOT construction conditions, there should have been no need for any remedy on the western portion of Site 6 and certainly no remedy that involves the creation of clean corridors or the excavation of ACM contaminated soils. It is my opinion that IDOT's activities have caused the remedy on the western portion of Site 6.

USEPA is not requiring any work on the south side of Greenwood Road other than the area that was impacted by IDOT's work on the Amstutz Project.

As discussed in Section 2.4.2.2, the remedy selected for Site 6 involves abandonment or relocation of select utilities, and removal of soil. The following utilities present on Site 6 will be relocated or abandoned: 1) AT&T telecommunication lines present on the south side of Site 6 will be relocated, 2) an existing North Shore Gas line will be permanently abandoned, and 3) a City of Waukegan water main will be relocated. Approximately 6,420 cubic yards of soil will be removed to an estimated depth of 3 feet. For the southern portion of Site 6, the Scope of Work to be implemented pursuant to the approved RAWP includes:

1. Abandonment of a North Shore 12" gas line that transects Site 3, then intersects Site 6 and runs in an east/west orientation to the eastern limits of the Site 6 area located south of Greenwood Road.
2. Removal and relocation of an AT&T Fiber Optic Cable that transects Site 3 then intersects Site 6 and runs in an east/west orientation to the western limits of the Site 6 area located south of Greenwood Road.
3. Removal of asbestos contaminated fill material and replacement with clean fill.

Weaver Consultants has evaluated the Cost Estimate prepared by AECOM for the entire Site 6 (included as Appendix B). We have segregated those costs to be incurred for only the portion of Site 6 located on the south side of Greenwood Road, immediately adjacent to Site 3. Based upon our tabulation of these expenses, we believe that the work to be performed within the subject area will total between \$700,000 and \$1,000,000 (this is approximately 25% of the total estimated cost for the entire Site 6). However, a number of additional required tasks have not been included in this estimate, and some uncertainty exists regarding the actual costs for removal and/or replacement of select utilities. Consequently, it is my opinion that the actual costs for implementing the USEPA required remedy may potentially expand by a factor of 20% or more, raising the total cost of construction for the area of Site 6 immediately north of Site 3 to approximately \$840,000 to \$1.2M. It is my opinion based on review of the estimate prepared by AECOM that this estimate is reasonable for the tasks that have been quantified.

### **3.4 IDOT'S Conduct was a Violation Section 21 of the Act**

Based upon my significant experience with IEPA, the IEPA regulations, the Act, CERCLA, RCRA and USEPA, it is my opinion that IDOT used, spread, buried, placed, disposed of and left pieces of asbestos containing Transite® pipe and ACM contaminated fill at Sites 3 and 6 as part of its work on the Amstutz Project. IDOT never removed the ACM and thus it remains largely in situ.

Based on my experience, the Transite® pipe and ACM contaminated fill attributable to IDOT would be treated by the regulators as “discarded material” under Section 3.535 of the Act and thus a would qualify as a “waste” per the definition. The material resulted from IDOT’s work on the Amstutz Project.

Similarly, IDOT’s actions were the result of the consolidation of refuse (crushed Transite® pipe and/or contaminated fill) at Site 3 and 6, neither of which would be viewed by IEPA as a sanitary landfill under Illinois law. Thus, it is my opinion based on past experiences with similar sites, that IEPA likely would view IDOT’s conduct to be “open dumping” under Section 3.305 of the Act, 415 ILCS 5/3.30.

Both USEPA and IEPA treat crushed and buried ACM as both “solid waste” and “hazardous waste.” Further, these agencies would likely view the dumping and placing of said ACM at Sites 3 and 6 as “disposal” under Section 3.185 of the Act, 415 ILCS 5/3.185.

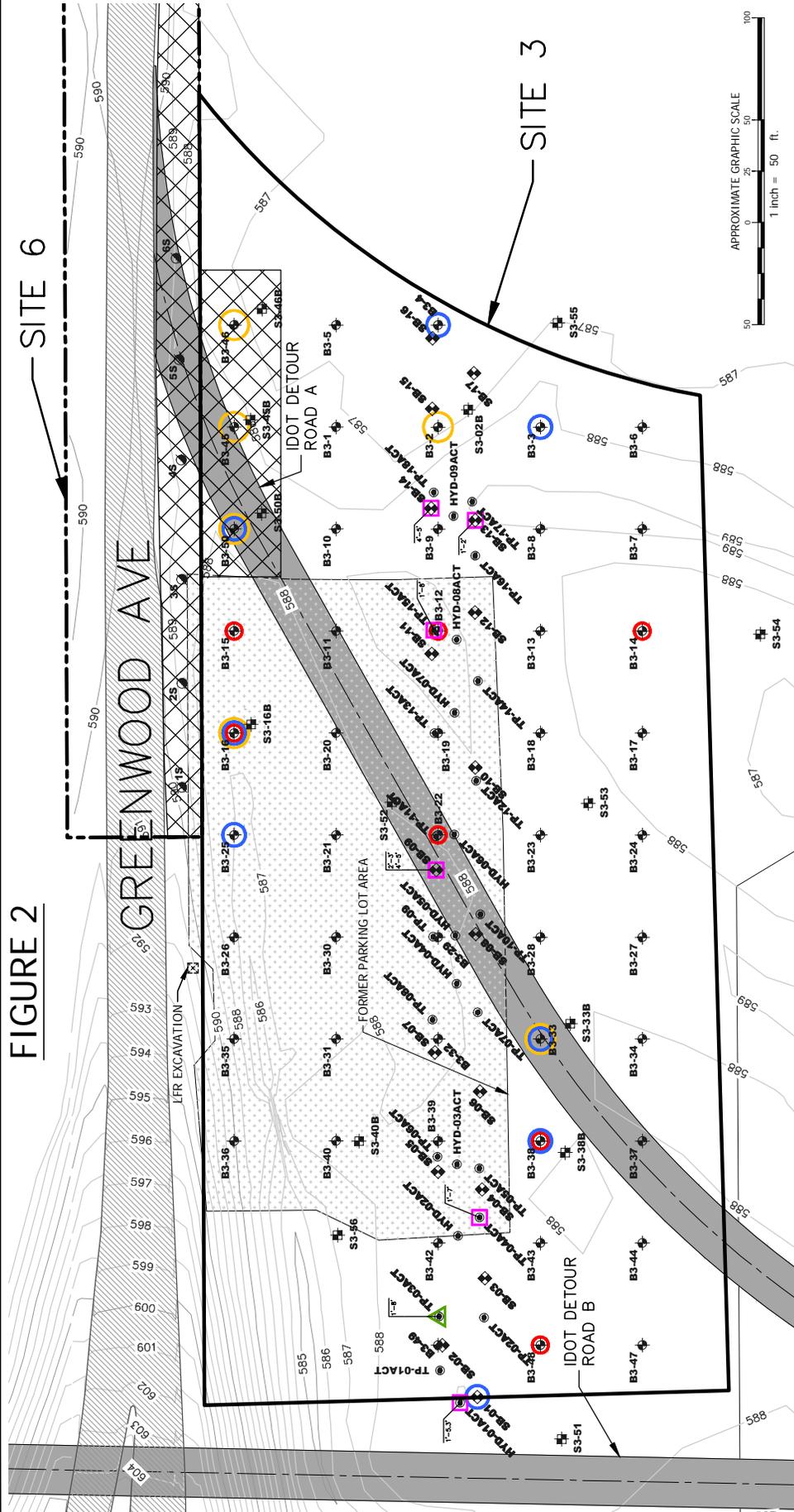
Neither Site 3 nor Site 6 are permitted waste disposal sites or facilities, which meet the requirements of the Act or its regulations as they relate to the disposal or abandonment of waste.

Based upon my experience and the foregoing, it is my opinion that IEPA would more likely than not view IDOT’s conduct during the Amstutz Project involving asbestos as violating Section 21 of the Act. We believe that a client engaged in similar activities would be subject to potential enforcement action.

**FIGURES**

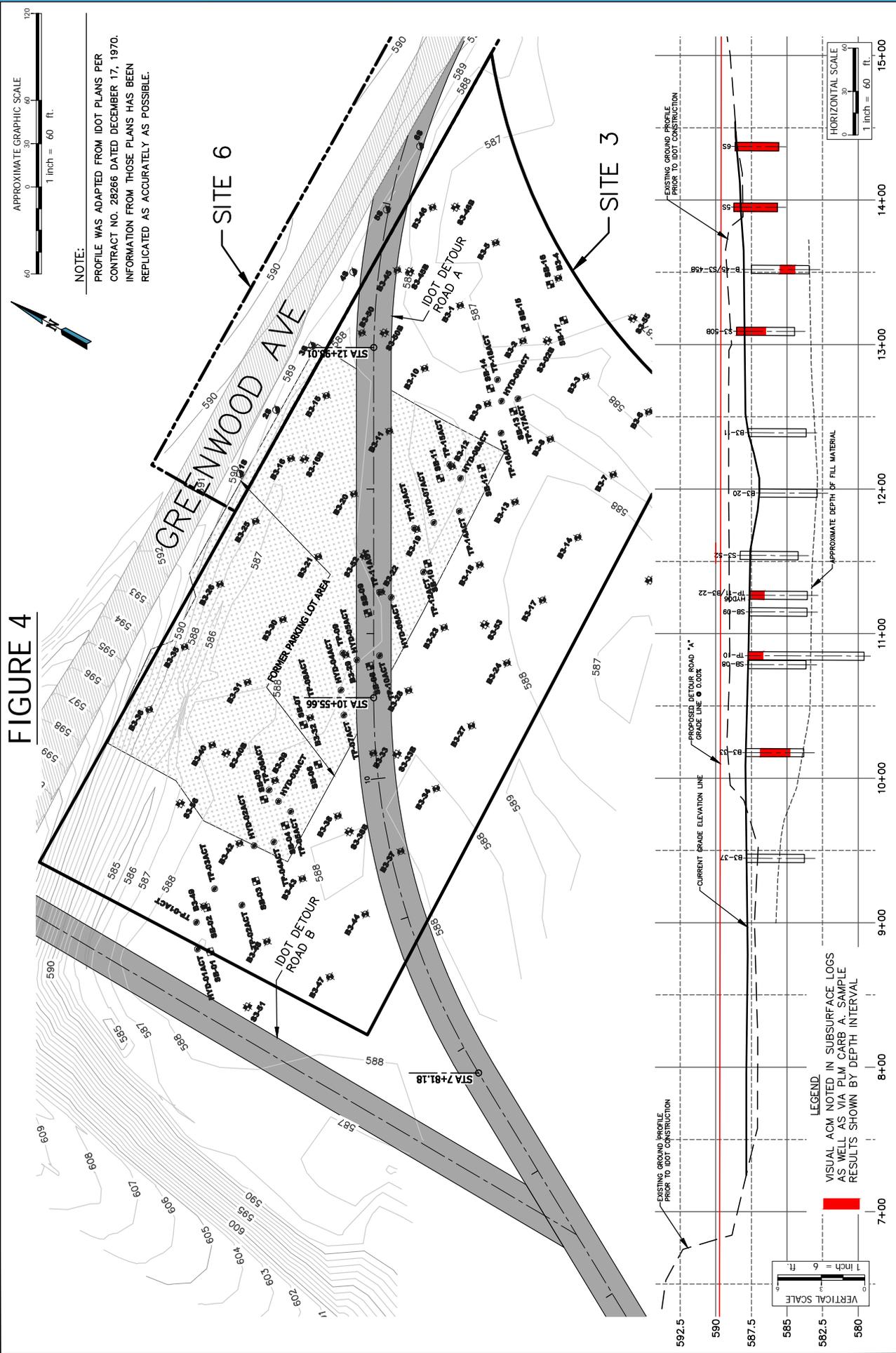


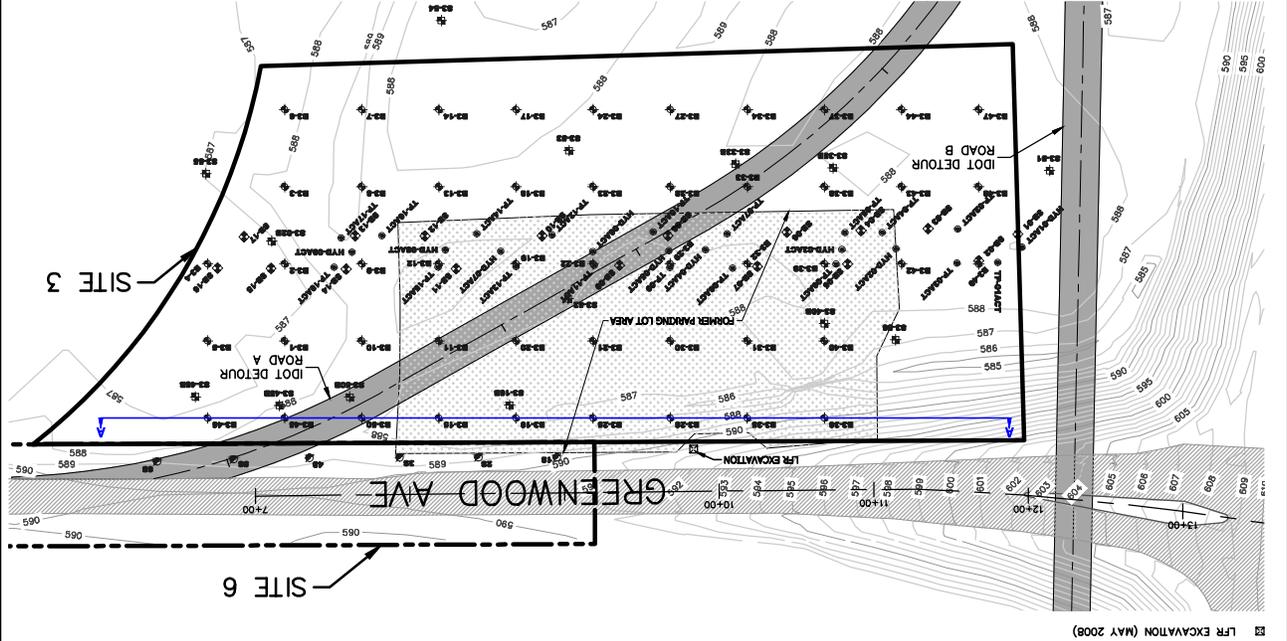
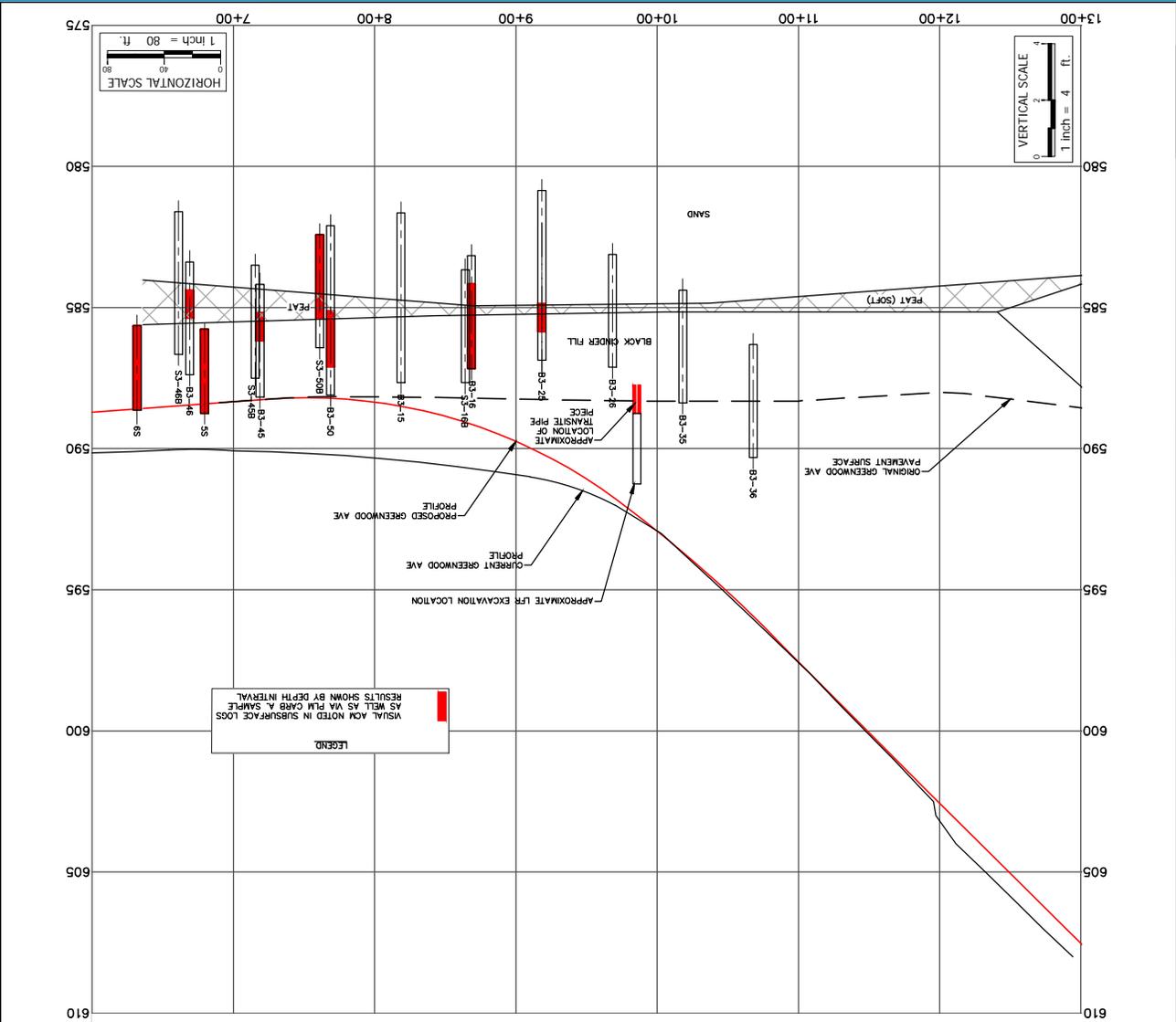
FIGURE 2



- LEGEND:**
- B3-XX ◈ ELM BORING LOCATION (1999)
  - S3-XX ◈ LFR TEST PIT SAMPLE LOCATION (2008)
  - TP-XX ◈ LFR EXCAVATION (MAY 2008)
  - SB-XX ◈ SOIL BORING LOCATION (LFR APRIL 2008)
  - TP-XX ◈ SOIL BORING LOCATION (AUGUST 2013)
  - TP-XX ◈ TEST PIT/HYDRO EXCAVATION (MAY 2013)
  - 0'-1' SAMPLE RESULTS YIELDED > 0.25% ACM VIA PLM CARB A
  - 1'-2' SAMPLE RESULTS YIELDED > 0.25% ACM VIA PLM CARB A
  - 2'-3' SAMPLE RESULTS YIELDED > 0.25% ACM VIA PLM CARB A
  - ◻ SAMPLE RESULTS YIELDED ≤ 0.1% ACM, LESS THAN 5 ASBESTOS FIBERS COUNTED VIA TEM CARB B (DEPTH INTERVAL DENOTED ON FIGURE)
  - ◻ SAMPLE RESULTS YIELDED > 0.25% ACM, VIA PLM CARB A (SAMPLE WAS A COMPOSITE OF DEPTH, DENOTED ON FIGURE)
  - ◻ AREA OF SOIL EXCAVATION







**NOTE:**  
 PROFILE WAS ADAPTED FROM IDOT PLANS PER CONTRACT NO. 28266 DATED DECEMBER 17, 1970. INFORMATION FROM THOSE PLANS HAS BEEN REPLICATED AS ACCURATELY AS POSSIBLE.

**LEGEND**  
 LFR EXCAVATION (MAY 2008)

**APPROXIMATE GRAPHIC SCALE**  
 1 inch = 80 ft.

**FIGURE 5**

**APPENDIX A**

**DOUGLAS G. DORGAN, JR. RESUME**

Principal

### **Fields of Expertise**

Environmental Site Assessments, Environmental Permitting, Brownfield's Redevelopment, Groundwater Impact Assessments, Environmental Remedial Projects, Risk Based Corrective Action

### **Certification**

Licensed Professional Geologist, State of Indiana  
Licensed Professional Geologist, State of Illinois  
OSHA Supervisor's Health & Safety Training  
Chemical-terrorism Vulnerability Information (CVI)  
Authorized User

### **Education**

B.S. Earth Science, Eastern Illinois University, 1986  
Graduate Course Work in Environmental Studies, Sangamon State University, 1986  
M.S. Geography/Environmental Science, Northern Illinois University, 1993

### **Professional Summary**

Mr. Dorgan serves as Principal and Senior Project Manager with Weaver Consultants Group. He has over twenty years of environmental and solid waste control project experience. He currently leads the firm's Environmental Practice professional staff. He has supervised completion of numerous projects including multi-phase environmental site assessments, risk based corrective action, Brownfield's redevelopment, hydrogeological investigations, groundwater impact assessments, remediation planning and implementation, multi media compliance audits, UST closures, and solid waste management facility permitting.

Prior to joining Weaver Consultants Group, Mr. Dorgan was an Office Director for a national environmental consulting firm.

### **Select Project Experience**

He has been involved in over 50 state voluntary remediation program projects at sites located in states throughout the Midwest and Southwest. These projects have utilized a range of closure strategies involving site-specific fate and transport

modeling, risk assessment, remediation, land use controls, and engineered barriers. Many of these projects were completed in support of property acquisition and consequently completed in accordance with aggressive schedule and risk mitigation requirements.

Mr. Dorgan has provided services to both private and public sector clients redeveloping Brownfield's. Plans have included residential, retail, commercial, industrial, and mixed use developments. Work has been performed pursuant to various state and federal grant and revolving loan programs. He also consults on the unique construction related aspects of developing distressed properties.

He manages activities performed in compliance with a RCRA Hazardous Waste Management Permit for a major steel company located in Northwest Indiana. Responsibilities include supervision of preparation of permit renewal and amendment applications, permit negotiations with IDEM and USEPA, and ongoing groundwater sampling and reporting for a hazardous waste landfill network comprised of 64 monitoring points. Mr. Dorgan also manages RCRA Corrective Action activities for the site, including preparation of required plans and deliverables and investigation and corrective measures implementation pursuant to approved workplans.

Mr. Dorgan managed acquisition of a comprehensive "No Further Remediation" letter pursuant to the Illinois Site Remediation Program for a 14-acre parcel located in the northern suburbs of Chicago. A soil and groundwater investigation was performed to assess site impacts. Tier 2 modeling and development of site specific background following the Illinois Tiered Approach to Corrective Action Objectives (TACO) methods were used to support appropriate soil and groundwater remediation objectives. Remediation activities included removal of 45,000 tons of debris and fill material, and excavation and disposal of LUST contaminated soils.

As Principal in Charge, Mr. Dorgan is responsible for overseeing design, permitting and compliance



activities for a Type II and III Solid Waste Disposal facility in Pines, Indiana. He is also responsible for oversight of ongoing RI/FS activities for the Town of Pines Superfund Site in Pines, Indiana. On behalf of a major PRP, Mr. Dorgan is collaborating with other technical consultants on the implementation of the RI/FS and ongoing remedial measures development and construction.

He managed the site investigation and Indiana Voluntary Remediation Program activities for a large glass manufacturing facility in Central Indiana. Site investigation activities resulted in remediation of select facility areas to control for impacts attributable to semi-volatile organic compounds, polychlorinated biphenyl's (PCB's), and inorganic constituents. Additional site measures included removal of contaminated creek sediments and implementation of a comprehensive groundwater investigation.

Mr. Dorgan is currently managing an Illinois SRP application for a former die casting facility with PCB impacts to facility structures, soils, and shallow groundwater. Extensive site investigation has been undertaken and TACO Tier 2 and 3 modeling performed. A Site Investigation and Remediation Objectives Report has been submitted to support remediation objectives negotiation. He is coordinating planning for remedial activities including the acquisition of a Pollution Legal Liability and Environmental Cost Cap insurance policy.

He was Project Manager for a comprehensive Phase I Environmental Site Assessment of the General Motors Danville, IL gray iron foundry whose operations date to the early 1940s. Project required a detailed records review and site inspection to identify potential areas of concern. Subsequent responsibilities included developing a scope of work for site investigation.

Mr. Dorgan managed implementation of a facility-wide investigation for PCB-related impacts at a die casting facility in Chicago, Illinois. The investigation included sampling of soil, concrete, structural

surfaces, and process equipment. Based on investigation results, alternative risk-based opinions were evaluated for site remediation. In support of on-going litigation, an engineering remediation cost estimate was generated.

Mr. Dorgan managed RCRA Corrective Action activities for a specialty steel manufacturing facility in Niles, Michigan. Activities include operation and monitoring of an Interim Measures groundwater remediation system, implementation of preliminary subsurface investigations, development of RCRA RFI Workplans, and negotiations with Michigan Department of Environmental Quality personnel.

Mr. Dorgan managed a Phase I, II, and III Environmental Site Assessment of a 45-acre business park in Indianapolis. Project activities were performed on an accelerated basis to facilitate an aggressive land transfer negotiation. A detailed hydrogeologic assessment and a risk assessment was performed, quantifying required remedial measures.

He conducted comprehensive and media-specific environmental compliance audits of facilities located in four states for a major medical diagnostic imaging equipment manufacturer. Comprehensive audits were performed for select waste and scrap material management facilities. Audits included recommendations for corrective measures in addition to development of a division-wide program for management of recoverable waste streams.

Mr. Dorgan was the Project Manager for a Phase I and II Environmental Site Assessment of a 1.1 million square foot former can manufacturing facility in Chicago. Assessment activities were designed to evaluate long term liabilities and environmental considerations associated with facility reuse and/or demolition planning.

He has secured a focused NFR letter pursuant to Illinois SRP requirements for a fleet maintenance facility in the Chicago area. Project activities were implemented on an expedited basis to accommodate a property transaction. Direct

Principal

negotiations and communications with the IEPA allowed the NFR letter to be issued within 10 weeks of submission of the Site Investigation and Remediation Objectives Report.

Mr. Dorgan was responsible for managing environmental compliance aspects of a comprehensive underground storage tank management program implemented by a major electric utility company in Northern Illinois. The project required UST removal oversight/closure certification, site investigation, regulatory reporting, corrective action design/supervision, and regulatory negotiation. Project activities were concurrently undertaken at over 30 sites.

### **Publications/Presentations**

Contributing author *"Municipal Solid Waste Landfills - Volume I General Issues,"* University of Illinois at Chicago, November, 1989

*"Conducting Phase I Environmental Site Assessments,"* presented to the DeKalb County Economic Development Corporation, Industry Roundtable, DeKalb, IL, November, 1990

*"Environmental Audits for Selection of Solid Waste Disposal Sites,"* presented at Waubensee Community College, Sugar Grove, IL, November, 1992

*"Distribution of Cadmium, Copper, Lead and Silver in Surface Soils of the Chicago Metropolitan Area,"* Northern Illinois University, August, 1993

*"Conducting Effective Environmental Site Assessments,"* presented to the Institute of Business Law Conference 'Environmental Regulation in Illinois', September, 1993

*"Minimizing Liability in Real Estate Transactions by Conducting Effective Environmental Site Assessments,"* New Mexico Conference on the Environment, Journal of Conference Proceedings, April, 1994

*"General Geologic/Hydrogeologic and Contaminant Transport Principles,"* presented to ITT/Hartford Insurance Co., January, 1996

*"Environmental Site Assessments and the Due Diligence Process,"* presented to the AIG

Environmental seminar 'Legal Actions Against Facilities', March, 1998

*"Brownfields Development, TACO and the SRP Process,"* presented to the Calumet Area Industrial Commission Executive Council, May, 1998

*"Property Acquisition and the Due Diligence Process,"* presented to Cushman and Wakefield Corporate Services Department, August, 1998

*"Brownfields Development, TACO and the SRP Process,"* presented to the Calumet Area Industrial Commission, March, 1999

*"Risk Management Tools for Contaminated Site Development,"* presented to a construction industry seminar 'A View From the Top', February, 2000

*"Voluntary Remediation of Brownfields/Risk Based Remediation"* presented to Illinois Association of Realtors, October, 2002

*"Blue Skies for Brownfields",* Illinois Association of Realtors Magazine, May 2003

*"Environmental Considerations Associated with Site Development",* presented to Power Construction Operations Meeting, March 2006

*"Weaver Consultants Group Environmental Manager AAI Roundtable",* facilitator and presenter, June 2006

*"Overview of AAI and ASTM E1527-05: The Changing Due Diligence Landscape",* presented to Grand Rapids Chamber of Commerce Environmental Committee, January, 2007

*"Weaver Consultants Group Environmental Manager Vapor Intrusion Roundtable",* facilitator and presenter, July/November, 2007

*"Brownfields Redevelopment: A Catalyst for Change",* presented to Indian University Northwest, July, 2011

### **Professional Affiliations**

National Brownfield Association  
Air and Waste Management Association



**APPENDIX B**

**BIBLIOGRAPHY OF DOCUMENTS CITED**

## **APPENDIX B**

### **BIBLIOGRAPHY OF DOCUMENTS CITED**

1. Removal Action Work Plan, Revision 2; Southwestern Site Area – Sites 3, 4/5, and 6, Johns Manville Site, Waukegan, Illinois dated March 31, 2014, prepared for United States Environmental Protection Agency (USEPA) Region 5 and prepared by AECOM Technical Services, Inc.
2. Engineering Evaluation/Cost Analysis (EE/CA) Southwestern Site Area Sites 3, 4/5, and 6: Revision 4 and Addendum dated April 4, 2011 and October 31, 2011, prepared for Johns Manville and Commonwealth Edison Company and prepared by ARCADIS U.S., Inc.
3. Surface and Subsurface Characterization Site 2 and Site 3 Former Johns Manville Manufacturing Facility: Waukegan, Illinois dated December 10, 1999, prepared for Johns Manville and prepared by ELM Consulting, LLC.
4. Johns Manville Southwestern Site Area, Waukegan, Lake County, Illinois: Administrative Order on Consent, V-W-07-C-870 dated February 1, 2012 (initial version dated June 11, 2007), prepared for Johns Manville and prepared by USEPA Region 5.
5. Fourth Five-Year Review Report for Johns-Manville Site dated April 30, 2013, prepared for USEPA Region 5 and prepared by USEPA Region 5.
6. Enforcement Action Memorandum dated November 30, 2012, prepared for Johns Manville and Commonwealth Edison Company and prepared by USEPA Region 5.
7. Standard Specifications for Road and Bridge Construction dated January 1, 2012, prepared for Illinois Department of Transportation and prepared by Illinois Department of Transportation.
8. Results of Power Line Excavation; Greenwood Avenue Ramp adjacent to Southwestern Site Area; Waukegan Illinois dated July 8, 2008, prepared for Commonwealth Edison Company and Exelon Corporation and prepared by LFR Inc.
9. Brad Bradley (USEPA) to Denny Clinton (Johns Manville) dated July 10, 1998, *Exhibit C*.
10. Second Five-Year Review Report for Johns-Manville Site dated May 2, 2003, prepared for USEPA Region 5 and prepared by USEPA Region 5.
11. Bruce D. Ray (Johns Manville) to Margaret Herring (USEPA Region 5) dated July 1, 1999, *Response to CERCLA Section 104(e) Request*.
12. Barnhardt, M.L, 2010, *Surficial Geology of Waukegan Quadrangle, Lake County, Illinois: Illinois State Geological Society*, USGS-STATEMAP contract report, 2 sheets, 1:24,000.
13. Respondents Response Document to Engineering Evaluation/Cost Analysis (EE/CA), Revision 4, as Modified and Approved by USEPA; Southwestern Site Area, Waukegan,

## **APPENDIX B**

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14. Cali, S., Scheff, P., and Sokas, R., 2006, *Illinois Beach State Park (IBSP): Determination of Asbestos Contamination in Beach Nourishment Sand Final Report of Findings*, Great Lakes Centers for Occupational and Environmental Safety and Health.
15. AECOM Johns Manville Site 3 and Site 6 Draft Cost Estimate\_11Mar15 dated March 12, 2015, prepared for Weaver Consultants Group and prepared by AECOM Technical Services, Inc.
16. Williams, E.G.; Von Aspern, K., *Asbestos Cement Pipe: What if it Needs to be Replaced?*, HDR Engineering, Inc.
17. Modifications to the Engineering Evaluation/Cost Analysis dated February 2012, prepared for Johns Manville and prepared by USEPA Region 5.
18. Complainant's Motion for Leave to File it's First Amended Complaint, In the Matter of: Johns Manville, a Delaware Corporation, Complainant, vs. Illinois Department of Transportation, Respondent, PCB No. 14-3 dated March 12, 2014

**APPENDIX C**

**AECOM REMOVAL ACTION WORKPLAN COST ESTIMATE**

**Sub-Project Cost Detail Report (with Markups)**

**Estimate Documentation for Site 3 (probable cost):**

1. Dewatering and soil removal can be accomplished over Nicor gas line (2640 cy)
2. Decommissioning 8-inch North Shore Gas pipe and AT&T lines
3. Establish Clean utility corridor along City of Waukegan water main (330 LF)
4. Install 2-foot soil cover over entire site and site restoration (3.14 acres)
5. Dewatering and limit soil removal in northeastern corner (900 cy)

Nicor Gas Line excavation + city water main 3250 cy  
 Northeastern corner soil excavation area 900 cy  
 Clean corridor for North Shore Gas easement 794 cy  
 Additional utility excavation pits for NSG and AT&T 500 cy  
 Vegetative cover area 3.14 acre

Total Sub-Project Marked-up Cost: \$3,329,171.00

Description	Quantity	UOM	Material	Labor	Equip	Sub Bid	Extended Cost	Estimating Notes
AECOM - regulatory, field sampling, air monitoring	1	LS	\$0.00	\$0.00	\$0.00	\$180,000.00	\$180,000.00	
DMP - RSE	1	LS	\$0.00	\$0.00	\$0.00	\$60,000.00	\$60,000.00	
Utility abandonment - north shore gas	1	LS	\$0.00	\$0.00	\$0.00	\$188,940.00	\$188,940.00	25% of Oct 2013 Cost Estimate
Utility abandonment - AT&T	1	LS	\$0.00	\$0.00	\$0.00	\$111,655.60	\$111,655.60	35% of Oct. 28, 2014 cost estimate
Utility Installation - AT (Phase II)	1400	LF	\$0.00	\$0.00	\$0.00	\$75.00	\$105,000.00	Move utilities underground
Required soil excavation + water main removal	5444	CY	\$0.00	\$0.00	\$0.00	\$40.00	\$217,777.78	Excavation, transportation and landfill disposal
Dewatering operations plus water disposal (NSWRD)	21,600,000	GAL	\$0.00	\$0.00	\$0.00	\$0.10	\$2,160,000.00	30 days dewatering at 500 gpm, incl labor & equipment
Install road crossing - horizontal bore for dewatering pipe	100	LF	\$0.00	\$0.00	\$0.00	\$200.00	\$20,000.00	
Install new 10-inch HDPE water main	330	LF	\$0.00	\$0.00	\$0.00	\$60.00	\$19,800.00	
Geotextile	15,198	SY	\$0.00	\$0.00	\$0.00	\$2.50	\$37,994.00	
Borrow Pit Sand - backfill excavation	5444	CY	\$0.00	\$0.00	\$0.00	\$14.00	\$76,222.22	
Borrow Pit Sand - vegetative cover sand layer	2,533	CY	\$0.00	\$0.00	\$0.00	\$14.00	\$35,461.07	
Clay final cover material - 15-inch thickness	6,332	CY	\$0.00	\$0.00	\$0.00	\$8.00	\$50,658.67	
Imported Compost-Sand mix	1,266	CY	\$0.00	\$0.00	\$0.00	\$25.00	\$31,661.67	
Chain-link fencing	1,700	LF	\$0.00	\$0.00	\$0.00	\$20.00	\$34,000.00	

**Sub-Project Cost Detail Report (with Markups)**

**Estimate Documentation for Site 6 (Probable Cost):**

Ongoing remedial action for Site 6 portion of the Southwestern Sites

1. Excavation of ACM impacts
2. Excavation and Replacement of Water Main Clean Utility Corridor on N Side of Greenwood Ave (4417 CY)
3. Decommissioning of North Shore Gas main on N Side of Greenwood Ave
3. Conventional trench box installation of 10-inch water line (3482 LF)
4. Site restoration (1.30 AC)

Excavation for ACM impacts  
 Trenching for City of Waukegan water main  
 Excavation for additional ACM identified in 2014 sampling  
 Excavation for utility pits (North Shore Gas, A&T)  
 Length of new 10-inch HDPE water main  
 Area of excavation for site restoration

7510 cy  
 4901 cy  
 2000 cy  
 500 cy  
 3482 LF  
 1.80 AC

plus 30% contingency

Site 6 Sub-Project Total Cost: \$4,074,989.40

Description	Quantity	UOM	Material	Labor	Equip	Sub Bid	Extended Cost	Estimating Notes
AECOM - regulatory, soil sampling, air monitoring	1	LS	\$0.00	\$0.00	\$0.00	\$140,000.00	\$140,000.00	
DMP - RSE	1	LS	\$0.00	\$0.00	\$0.00	\$60,000.00	\$60,000.00	
Utility abandonment - north shore gas (cost estimate)	1	LS	\$0.00	\$0.00	\$0.00	\$377,875.00	\$377,875.00	50% of Oct 2013 quote
Utility abandonment and relocation - (Oct 2014 work order)	1	LS	\$0.00	\$0.00	\$0.00	\$207,360.40	\$207,360.40	65% of Oct. 28, 2014 quote
Utility Installation - ATT Fiber optic underground run (Phase II)	1400	LF	\$0.00	\$0.00	\$0.00	\$75.00	\$105,000.00	Move utilities underground
Required soil excavation + water main removal	14911	CY	\$0.00	\$0.00	\$0.00	\$40.00	\$596,440.00	Excavation, transportation, landfill disposal
Dewatering operations plus water disposal	20,160,000	LS	\$0.00	\$0.00	\$0.00	\$0.10	\$2,016,000.00	Excavation, transportation, landfill disposal
Install new 10-inch HDPE water main	3482	LF	\$0.00	\$0.00	\$0.00	\$60.00	\$208,920.00	70 days dewatering at 500 gpm, incl labor & equipment
Borrow Pit Sand - excavation backfill	14,911	CY	\$0.00	\$0.00	\$0.00	\$14.00	\$208,754.00	
Vegetation	1	LS	\$0.00	\$0.00	\$0.00	\$15,000.00	\$15,000.00	
Chain-link fencing	3,482	LF	\$0.00	\$0.00	\$0.00	\$20.00	\$69,640.00	
Traffic control	1	LS	\$0.00	\$0.00	\$0.00	\$50,000.00	\$50,000.00	

**EXHIBIT 8**

# Expert Rebuttal Report of Steven L. Gobelman

Johns Manville

VS

Illinois Department of Transportation

May 29, 2015

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Appendix B – Steven L. Gobelman Resume

## **1. Purpose and Summary**

I have been asked by counsel for the Respondent to review and comment on the Expert Report of Douglas G. Dorgan Jr (Mr. Dorgan's Report) concerning the former Johns Manville Facility Sites 3 and 6 dated March 16, 2015. (1) In addition to reviewing the report, a review was also conducted of some of the bibliography of documents cited in the Report, and other historical records available regarding sites 3 and 6. My comments to the Report can be found in Section 3 through 15. Attached to this report are two Appendixes, Appendix A is a copy of Bibliography of Documents Cited in this report and Appendix B is a copy of my resume.

## **2. Qualifications**

My resume is presented Appendix B.

I obtained a B.S. in Geological Engineering from the University of Missouri-Rolla in 1993 and a M.S. in Geological Engineering from the University of Alaska-Fairbanks in 1985.

I have over 29 years of environment engineering experience. I began my professional career with the Illinois Environment Protection Agency (IEPA). I have over 7 years of experience with IEPA, my responsibilities included processing and managing underground injection control (UIC) permits, Site Remediation Program (SRP) as they related to public and private remediations including brownfield sites, project manager on Comprehensive Environmental Resource, Compensation, and Liability Act (CERCLA) related cleanups under IEPA's State Funded remediations, project management under Resource Recovery and Conservation Act (RCRA) including RCRA corrective actions, RCRA closures, leaking underground storage tank (LUST) program, and solid waste permits and closures.

The past 21 years I have been employed with the Illinois Department of Transportation (Department). My responsibilities with the Department include waste assessments and investigations, overseeing soil and/or groundwater remediation, assisting construction with waste minimization and management, and overseeing the Department's environmental compliance audit (ECA) process and the implementation of an environmental management information system (EMIS) for Department's maintenance yards and laboratory facilities.

As part of my role with the Department, I have to reviewed numerous construction plans to determine the extent of an investigation to be performed and to write a special provision on the proper management of impacted soil and groundwater during construction. This role requires direct interaction with project design and construction personnel. I have participated in writing over a thousand special provisions that were inserted into the construction plans include the pay items and quantities associated with the special provision. I have participated in pre-construction meetings and weekly

construction status meetings with Contractor. Worked at transportation construction projects regarding soil excavation and management and how this process interacts and affects the transportation project.

I was also the Department's technical expert reviewer on Highway Authority Agreement (HAA). I have reviewed over a thousand HAA which included determining the Department's acceptable extent of impacts on our right of way. As part of the HAA review process and for executed HAA, I reviewed completed construction projects that have an existing HAA or as part of a new HAA review and determined the Department's environmental cost associated with the HAA area. Some of these HAA review required reviewing old construction projects to figure out what was construction, how it was constructed, what the pay items and quantities were used on the construction project, and change orders associated with the project.

I attended continued education seminars with the Department regarding Staging and Traffic Control, Erosion Control, Phase I Process Overview, Location and Environmental Studies, Phase II Startup and Coordination, Earthwork and Quantities Calculations, Plan Format and Composition, Specification/Special Provision/Plan Notes, Assessments/Plan Processing/Letting, Land Acquisition and Surveying, Managing Consultant Projects, IDOT Highway Program Finance, and Geometric Design.

I am registered Professional Engineer and a Licensed Professional Geologist in Illinois. I am a member of the Transportation Research Board (TRB) – ADC60 Committee for Waste Management and Recourse Efficiency in Transportation.

### **3. Background Information Regarding Contract 28266 and the 1971 Standard Specifications for Road and Bridge Construction**

Contract 28266 had a letting date of September 3, 1971. (2) Contracts are advertised in at least 9 times a year by the Department. Each group of projects are published in the Transportation Bulletin and typically a Contractor has five weeks to get a copy of the plans, prepare their bid, and submit the bid to the Department. The date the bids are open is call the letting date. These bids are competitive and the lowest acceptable bid is awarded the contract.

This project was necessary to create a structure that will carry Greenwood Avenue over Federal Aid (FA) Route 42 (Amstutz Expressway) and a separation structure which will carry Greenwood Avenue over the Chicago and North Western Railroad, this contract also included constructing detours, grading, drainage structures, a retaining wall, and surfacing of Greenwood Avenue and Sand Street. (3) The contract was awarded to Eric Bolander Construction Company on September 30, 1971 and the construction improvements were expected to start on or about October 12, 1971. (4)

The construction plan general notes states that the Standard Specifications for Road and Bridge Construction adopted January 2, 1971 (5) (Standard Specifications) shall govern construction. (3)

In accordance with Article 101.07 of the Standard Specifications, the contract was a "written agreement between the Department and" Eric Bolander Construction Company (Contractor) "setting forth the obligations of the parties". (5) "The contract includes the invitation for bids, proposal, letter of award, contract forms and contract bond, specifications, supplemental specifications, special provisions, general and detailed plans, also any agreements that are required to complete the construction of the work in an acceptable manner." (5) Article 105.05 states that the construction "plans will govern over specifications, supplemental specifications will govern over specifications, and special provisions will govern over both specifications and plans". (5)

A special provision included in the contract plans required the construction work to have a specific sequence of operations. "The Contractor shall conduct his operations in accordance with the following sequence of operations.

1. Construct Detour A, B, and C.
2. Divert Greenwood Avenue traffic to Detour C and Sand Street traffic to Detour A and B.
3. Construct the bridges carrying Greenwood Avenue of FA 42 and the Chicago and North Western Railroad.
4. Complete the grading and paving of Greenwood Avenue from Sand Street to the west end of the project.
5. Complete the grading and paving of Sand Street for its entire length.
6. Divert traffic from Detours B and C to Greenwood Avenue and Sand Street and remove Detours B and C.
7. Complete the grading and paving of Greenwood Avenue from the beginning of the project to Sand Street.
8. Divert traffic from Detour A to Sand Street and remove detour." (2)

This construction contract included a number of pay items and quantities but the following were specific to this issue.

- |          |   |                     |
|----------|---|---------------------|
| • 202008 | Removal and Disposal of Unsuitable Material | 44,809 cubic yards  |
| • 205001 | Special Excavation                          | 19,228 cubic yards  |
| • 209002 | Porous Granular Embankment                  | 20,431 cubic yards  |
| • 603005 | Storm Sewer Class 1 12 inch diameter        | 169 linear feet     |
| • 603030 | Storm Sewer Class 2 12 inch diameter        | 466 linear feet (2) |

There was a special provision for Porous Granular Embankment and Removal and Disposal of Unsuitable Material in the bid documents. (2) The other pay items were defined in the Standard Specifications. (5)

Removal and Disposal of Unsuitable Material means the "removal of unsuitable material to the lines and grades shown on the plans or as directed by the Engineer, and the satisfactory disposal of same in accordance with the applicable portions of Article 202.03 of the Standard Specifications". (2) "The Contractor shall replace the excavated portion with porous granular material. The porous granular material shall be placed in an

elevation approximately two feet above the water table.” (2) Unsuitable material would include organically rich soils, landscape material, wet soils that are unstable, and any soil that cannot be used in an embankment. Embankment material must be able to be “compacted to not less than 95 percent of the standard laboratory density”. (5)

“Special Excavation shall consist of the removal of all existing structures defined herein; earth excavation, rock excavation, and borrow excavation; the placing of all suitable excavated materials in the subgrade, or embankments, or as replacement; and the satisfactory disposal of all surplus materials, or materials unsuitable for use in the subgrade, or embankments, or as replacement.” (5) “Special excavation shall include all materials encountered, and no other classification of excavated materials will be made.” (5) This pay item was used for all types of excavation completed in the construction contract.

Porous Granular Embankment “shall consist of furnishing, transporting, and placing porous granular material where required by the plans or as directed by the Engineer in accordance with Article 209 of the Standard Specifications” or “the Contractor may elect to furnish broken stone”. (2) Porous granular embankment was used as part of the embankment, structural fill, and as a sub-base material beneath the temporary road. When a road is constructed the existing ground surface is call the subgrade, which can be graded and compacted. On top of the subgrade is the sub-base, the sub-base is a furnished material that is compacted to provide a stable base and drainage for the road. In the case of this contract, porous granular embankment was used as a sub-base material. The road itself is called the base, in regards to the detour roads the base included a 9 inch stabilized bituminous layer.

For the pay items Storm Sewer Class 1 and 2, the Contractor can choose from Reinforced Concrete Culvert Storm Drain and Sewer Pipe (RRCP), Asbestos Cement Non-Pressure Sewer Pipe (ACSP), Standard Strength Clay Sewer Pipe (SSCSP), and Standard Strength Non-reinforced Concrete Sewer Pipe (SSNCSP). (5)

Other terms used in the contract plans are cut and fill. Cut means the volume of material that must be excavated to reach the designed subgrade or the necessary grade line. The cut material was assumed to be a stable and suitable material and can be used in other areas needing fill. Fill means the volume of material needed to elevate the subgrade or elevate an area to the necessary grade line, which would include any embankments. Fill areas can used excess material from the cut areas or borrow material would have to be brought in.

Borrow material was an excavation that “consist of excavating, transporting, and placing of materials obtained from locations furnished by the Contractor or from borrow pits furnished by the State and shown on the plans, necessary for the construction of embankment, subgrade, shoulders, sub-base, intersections, approaches, entrances, and other parts of the work”. (5)

The construction records for this contract do not provide the disposal locations of the unstable and unsuitable material. All excavated material including the removal of the detour roads were paid as special excavation.

Excavated unstable and unsuitable materials were excavated from Site 3 would not have been placed back on Site 3; there was no room within the right of way for this material to be placed. In regards to the detour roads, sheet 24 of the construction plans shows the extent of the easement through Site 3. Within the easement area was the construction limit and within the construction limit was the detour road and ditches had to be constructed. (3) All work was to be conducted within the construction limits. (5) There was no information available nor did the construction plans show any required removal of unstable and unsuitable materials, therefore the volume of unstable and unsuitable material removed during the construction of detour road A was not known. If any unstable and unsuitable materials were removed it would not have been used within detour road's construction limit because at the end of the construction project the Contractor was to "restore Commonwealth Edison Company's property substantially to the same condition it now exists upon Contractor's completion of work". (2) The Contractor would not add material that he would have to remove at a later date.

The construction plans show that detour road A would have an estimated 5,148 cubic yards of cut and 1,102 cubic yards of fill. (3) Therefore, an estimated 1,102 cubic yards of the cut material could have been used as fill for detour road A and the remaining 4,046 cubic yards of soils would have to be removed and most likely used in the construction of detour B and C. The construction sequencing required detour roads A, B, and C to be constructed first. The total estimated cut for all the detour roads was estimated at 16,495 cubic yards and the estimated volume of fill needed was 17,059 cubic yards. (3) Therefore, in the construction of detour roads A, B, and C, all cut material could have been used in the construction of the detour roads. An additional 564 cubic yards of borrow material would have been required to complete the construction of the detour roads.

The removal of Detour A at the end of the project would not have been placed on Site 3 because the Contractor was required to "restore Commonwealth Edison Company's property substantially to the same condition it now exists upon Contractor's completion of work". (2)

#### **4. Site 3 Parking Lot Removal**

In Mr. Dorgan's Report he stated that the "parking lot was destroyed under the contract to the IDOT to accommodate construction of the Amstutz Project". (1) Based upon the record, Johns Manville's parking lot was never removed in order to construct Detour A road. Authorization of Contract Changes not Involving Section Length, Authorization #14, dated November 14, 1973, indicated a deduction of 2,644 square yards of Stabilized Base Course 9 inches. (6) The justification for this change was that "The deduction of the 9 inch stabilized base course is for areas where the job conditions required the use of a variable thickness base. Some of this occurred at the intersection

of the detours with Sand Street and Greenwood Avenue. The majority of the deduction was where Detour B crossed the Johns Manville parking lot. The existing bituminous material on the parking lot was sufficiently thick to serve as a base requiring only a 2 inch lift to strengthen and true up the surface for detour purpose.” (6) Authorization #14 referred to Detour B crossing the Johns Manville parking lot, the document appears to contain a typo because Detour A crosses Johns Manville parking lot and not Detour B.

Authorization of Contract Changes not Involving Section Length, Authorization #18 (Final), dated May 5, 1975, added additional special excavation volume for the removal and obliteration of the Detour Roadways. “The reduction in Removal and Disposal of Unsuitable Material (noted in the change order as R.U.M.) and Porous Granular Embankment were based on a field judgement, that much of the sub-surface material was in fact suitable and did not warrant removal and replacement. The reduction in borrow excavation was made to agree with the source of measurement i.e. from the “Borrow Pit” to the “Embankment in Place” as outlined in the Special Provisions.” (7)

Any materials on the surface of the parking lot include the Transite® pipes used as curb bumpers would have been cleared in accordance with Article 201.01 of the Standard Specification because this material would have been in the way and removed from the construction project as with any other obstructions. Article 201.01(a) Clearing, “clearing shall consist of the removal and disposal of all obstructions such as fences, walls, foundations, buildings, accumulations of rubbish of whatever nature, and existing structures the removal of which are not otherwise provided for in Article 207.04, all logs, shrubs, brush, grass, weeds, other vegetation, and stumps of less diameter than 6 inches”. (5) Any material on top of the parking lot would have been removed or moved out of the way in order to place the 2 inch bituminous lift. The Transite® pipes would not have been crushed and scattered throughout the site because the Contractor would not have taken any action that would potentially damage the stability of the parking lot. The Contractor already planned on keeping the parking lot in place and only adding a 2 inch bituminous lift.

**5. Site 3 Parking Lot Easement With Commonwealth Edison Company and Greenwood Avenue east of Railroad was obtained in the Name of the State However the City of Waukegan and Lake County are paying for all Improvements**

According to the agreement with the City of Waukegan regarding this project dated April 11, 1966; “the City of Waukegan will negotiate, pay for and acquire in the name of the CITY all right of way east of the Chicago and North Western Railroad necessary to reconstruct the at-grade intersection of Greenwood Avenue and Sand Street. The CITY will maintain the improvement along Greenwood Avenue in its entirety”. (8)

According to the agreement with the Lake County regarding this project dated October 26, 1965; “the COUNTY will acquire all agreements with the Chicago and North Western Railroad necessary to construct Greenwood Avenue over the railroad”. (9)

The resolution documents further state that “the CITY will reimburse the STATE 40-percent of the cost of all construction along Greenwood Avenue east of Station 13+20, including the railroad grade separation structure, intersection work at Sand Street and any reimbursable utility work necessary”. (8) “The COUNTY will reimburse the STATE 60-percent of all cost of all construction along Greenwood Avenue east of Station 13+20, including the railroad grade separation structure, intersection work at Sand Street and any reimbursable utility work necessary.” (9)

Based upon the record, the City of Waukegan and Lake County paid 100-percent of the improvements to Greenwood Avenue and Sand Street east of the Chicago and North Western Railroad tracks, including the construction of Detour A and B. The Department in the design of Amstutz Expressway could have designed the expressway road to go over Greenwood Avenue thus not affecting any aspect of Greenwood Avenue or Sand Street. However it would appear that the City of Waukegan and Lake County wanted these improvements to Greenwood Avenue and Sand Street in order to improve traffic congestion and safety across the Chicago and North Western Railroad tracks.

## **6. Utility Adjustments Made Prior to and After the Department’s Construction Project**

A number of utilities were in conflict and had to be adjusted prior to the start of this project. (4) Utilities buried under the Johns Manville parking lot in Site 3, including City of Waukegan Storm Water, City of Waukegan Water, Nicor Gas, AT&T Phone Cable, Commonwealth Edison Company Fiber Optic Cable, and Commonwealth Edison Company 12KV Power Lines. (10) It is my opinion that over the years the installation and maintenance of these lines would have disturbed the existing conditions and potential asbestos material could have been buried when these underground utility lines were installed or during maintenance. The 1999 ELM report stated that “according to Johns Manville, the parking lot was constructed with materials containing asbestos containing materials (ACM)”. (11) Therefore, any utility excavation for installation or maintenance would have encountered ACM and that material would have been redeposit throughout the utility excavation.

## **7. How was Johns Manville Parking Lot on Site 3 Construction?**

It was never specified what types of ACM was used to create the parking lot. Based on the materials found in the test pits and the fact that Johns Manville used Transite® pipes to create curb bumpers and they used ACM to build the parking lot, economics would suggest that Johns Manville would have used all types of ACM material including Transite® pipes to build the employee parking lot.

No information was provided nor was discussed in Mr. Dorgan’s Report regarding John Manville parking lot on Site 3 prior to 1950. It has been reported that sometime in the 1950s the parking lot was created to provide parking spaces to the Johns Manville

employees and visitors. (1) Based on the 1954 aerial photo the parking lot does not exist. (12)

In a review of historical topographic maps from 1908, 1914, 1929, 1939, 1960, 1972, 1980, 1993, and 2012, the area shown as a marshy wet area from 1908 till 1960 where the area was no longer depicted as a wet area. (13) A review of the 1939 aerial photography of Site 3 shows the area as vegetative with swales. (14) A swale is a low area, a wet depression between ridges.

In order for Johns Manville to create a level and dry parking area for their employees, Johns Manville would have added fill material to bring up the parking area to a similar elevation as Greenwood Avenue and to keep the parking lot dry during the wet times of the year. According to the 1999 ELM Report, "the parking lot was constructed with materials containing asbestos containing materials (ACM)". (11) The LFR test pit borings logs show that some of this area was filled with cinders and slag. (15) Cinders and slag waste can be produced during the burning of coal from an electrical power plant and the closest source of cinders and slag would be the Midwest Generation facility.

## **8. The Department Did Not Use, Spread, Place, and Dispose of ACM**

The Department did not use, spread, bury, place and dispose of ACM regarding site 3 and 6, the Department's only involvement was construction oversight and it was the Contractor's responsibility to determine how materials will be managed. There was no record showing that the Department dictated the use, spread, placement, and disposal of ACM on Site 3 and Site 6 as part of the construction of detour road A. In accordance with 202.03 of the Standard Specifications, "if unsuitable material is present at or below the finished grade, it shall be removed and replaced with suitable material". (5) The construction plans do not provide any volume of unsuitable material required to be removed from Site 3, only that the earthwork requiring a cut of 5,148 cubic yards and a fill of 1,102 cubic yards. (3) Some of the cut materials could have been used as fill material if the Department's Resident Engineer determined that the material was suitable. Excess material would not have been placed in Site 3 because the Contractor knows that at the end they must "restore Commonwealth Edison Company's property substantially to the same condition it now exists upon Contractor's completing of work". (2)

Article 202.03 of the Standard Specifications further states that if not otherwise directed, "unstable and unsuitable material shall be disposed of by the Contractor at their own expense, outside the limits of the right of way". (5) It was the Contractor's responsibility to manage this unstable and unsuitable material, the Department only concern was that it was removed and no longer affecting any aspect of the project.

Article 201.01(a) Clearing, "clearing shall consist of the removal and disposal of all obstructions such as fences, walls, foundations, buildings, accumulations of rubbish of

whatever nature, and existing structures the removal of which are not otherwise provided for in Article 207.04, all logs, shrubs, brush, grass, weeds, other vegetation, and stumps of less diameter than 6 inches". (5) It was the Contractor's responsibility to clean materials that are in the way, including material on top of the parking lot and remove them at their own expense. The Department would not have dictated where cleared materials could go only that they are no longer affecting any aspect of the project.

The property was owned by Commonwealth Edison Company and the Department obtained an easement to allow the Contractor to build temporary detour roads. All road improvements east of the Chicago and North Western Railroad are being funded 100-percent by Lake County and City of Waukegan. (8) (9) This work was not the Department's work but work being conducted on behalf of Lake County and City of Waukegan.

**9. Information that the Prime Contractor Spread, Buried, Placed, and Disposed of ACM and the Department's Resident Engineer Disclosed that Pipes were Moved and Buried**

The Contractor may have managed asbestos cement pipes (Transite®) at some time along the construction project. As stated in Mr. Dorgan's Report and in the Department's 104(e) response dated November 27, 2000, "retired Resident Engineer, Duane Mapes, recalled dealing with asbestos pipe during the project and burying some of it". (16) Mr. Mapes recalled dealing with asbestos pipe during the project, the project meaning the entire construction project not just Johns Manville parking lot on Site 3 or Site 6. As presented in #3 above, storm sewers can include asbestos cement pipes and no information was available regarding the use of asbestos cement pipes in Site 3 or Site 6. In addition, no information was available regarding the used as perforated asbestos cement underdrains beneath Greenwood Avenue or Sand Street. As part of the construction project these asbestos cement pipes could have been encountered and abandoned as part of other drainage improvements along Greenwood Avenue.

If the Contractor moved Transite® pipes from the Johns Manville parking lot it would have been removed as unstable and unsuitable material or as part of clearing the site. Based on the sequencing of the project that will be discussed later, the Contractor would have either removed the material off-site or out of the way.

**10. Disposal of Transite® Pipes during the Johns Manville's Use of the Parking Lot**

Johns Manville would not have any economic motivation to remove broken and un-useable Transite® pipes that were used as a curb bumper but would have moved them off the edge of the parking lot. It is unclear how many, if any, Transite® pipes were located on the parking lot at the time construction started. The June 11, 1970 aerial photo shows a vacant parking lot and the condition of the parking lot appears different as compared to the October 20, 1967 aerial photo. (12) It appears that between 1967 and

1970, Transite® pipes were moved to either improve the parking lot or close it. Mr. Dorgan stated that the parking lot created in the 1950s and was taken out of service in 1970. (1) The easement was obtained from Commonwealth Wealth Edison on August 3, 1971. (17) No information was available on the amount of Transite® pipes used to create parking curb bumpers or what happened to the Transite® pipes over the years when the Transite® pipes could no longer function as they were intended and were replaced. No information was available on whether the un-useable Transite® pipes curb bumpers were removed from the parking lot or just move off the lot onto the ground surface.

At the time the detour road was constructed, the parking lot was determined to be suitable for supporting the detour road and left in-place. (6) Any Transite® pipes that were on the parking lot at the time of construction would have been removed or moved out of the way to allow for the placement of a 2 inch lift to strengthen and true up the surface. (6)

The Contractor was getting paid under pay item 202008 to Removal and Disposal of Unsuitable Material and under pay item 209002 to replace the removed material with Porous Granular Embankment. (2) The contractor was not getting paid to crush and use the Transite® pipes as part of their fill. Also, the crushing of the Transite® pipes could damage the existing parking lot that the Contractor had already determine could be left in place. The Contractor would not have taken the time to scatter the pipes throughout Site 3, but if we were to assume that the Contractor left the Transite® pipes on-site, the Contractor would have put all the Transite® pipes in one place. However, the analytical results and test pits do not show that there were any areas within the construction limit that contained a concentration of Transite® pipes. Only that Transite® pipes were scattered throughout Site 3, which could have been a result of 25 years of using the pipes as car bumpers, the ACM material used to create the parking lot, number of years this area sat adjacent to the Johns Manville site, and the number of utility lines that go through this area.

## **11. Borrow Material Approval**

In Mr. Dorgan's Report, it was stated in Article 204.02 that "Borrow Excavation shall not be placed in the embankment until the site location, excavation plan and material have been approved by the Engineer in writing". (1) The Engineer's approval was to make sure the borrow material was suitable for embankment, meaning that it can meet the necessary compaction requirements. The borrow pit was excavated "in order to insure an aesthetically acceptable borrow site, the steepest slopes used in excavating borrow shall be 4:1". (5)

The contract plans give the Contractor an option to use fly ash as the borrow material. Fly ash can be produced during the burning of coal in an electrical power plant and the closest source of fly ash would be the Midwest Generation facility. Based on a Supervising Engineer's Report dated October 23, 1972, fly ash was being used as the

borrow material in the embankments. (18) No other information was available regarding any other sources of borrow used in this construction project.

## 12. Sequencing and Temporary Road Removal

Mr. Dorgan's opinion did not take into account the construction projects sequencing of work. (2) Mr. Dorgan used the LFR conclusions as evidence that "IDOT demolished the former JM parking lot to build Bypass Road A, it crushed and buried portions of the Transite® pipe that had been located on the parking lot. IDOT also spread the Transite® pipe around portions of Site 3 and Site 6 close to the former parking lot area as part of the work". (1) In the 2008 LFR investigation for Commonwealth Edison Company, LFR concluded that the "Transite® pipe found within the soil was placed there as part of the Greenwood Avenue ramp construction". (15) What LFR's conclusion failed to take into account was the construction sequencing.

Prior to building the embankment on Greenwood Avenue, all detour road had to be completed. Once the detour roads were completed, then Greenwood Avenue could be closed and construction began by removing the roadway and building the embankment. No material from Site 3 could have been used in the embankment for Greenwood Avenue or Sand Street because the roads are still open at the time the detours are completed and there was no embankments being built at this time. All construction had to be completed on Greenwood Avenue and Sand Street before the detour road could be closed. Once Greenwood Avenue and Sand Street were open and the detours closed, then the detours were removed. No material from the closure of the detour road could have been used as part of the embankment because the embankments were all completed.

The contractor had no financial incentive to crush and use the Transite® pipes as part of their fill. As stated earlier, sheet 24 of the construction plans provides the extent of the easement through Site 3. Within the easement area was the construction limit and within the construction limit, the detour road had to be constructed. (3) All work was to be conducted within the construction limits. (5) There was no information available regarding the volume of unstable and unsuitable material removed during the construction of detour road A. The unstable and unsuitable material would not be used within detour roads construction limit because at the end of the construction project the Contractor was to "restore Commonwealth Edison Company's property substantially to the same condition it now exists upon Contractor's completion of work". (2) The Contractor would not add material that he would have to remove at a later date.

As stated in the construction change order, the Contractor did not demolish the parking lot but used the parking lot as the sub-base for the temporary road. The Contractor added a 2 inch lift to strengthen and true up the surface for the detour purpose. (6) Any Transite® pipes that may have been on the parking lot at the time of the detour road construction would have been removed when the site was cleared or moved out of the way.

Johns Manville in creating a level and dry parking area for the Johns Manville employees would have had to add fill material to this area in order to create a parking area base. According to the 1999 ELM Report, "the parking lot was constructed with materials containing asbestos containing materials (ACM)". (11) The LFR test pit borings logs show that some of this area was filled with cinders and slag. (15) Cinders and slag material was most likely came from the waste products from a coal fired power plant, Midwest Generation facility.

Materials found near the parking lot area may have been placed there from historical use of the parking lot, number of years this area sat adjacent to the Johns Manville site, and potentially the creation of the parking lot.

### 13. USEPA's Concerns

The United States Environmental Protection Agency (USEPA) remedial strategy are based on protecting all future asbestos exposures. USEPA's remedial concerns are to remove potential exposure to any receptor, for Site 3 those receptors included utility workers, construction workers, and anyone walking or biking across the field. (19) Mr. Dorgan's Report states that if not for "IDOTs construction project that capping the parking lot area and monitoring the remainder of the site would be all that USEPA would require". (1) Mr. Dorgan's opinion is not consistent with the opinion of USEPA and does not take into account the information from the 1999 ELM report.

In the 1999 ELM report that was prepared for Johns Manville, it stated that "according to JM, the parking lot was constructed with material containing ACM. Over a period of years during the use of the lot and during and after its demolition, ACM was distributed throughout the surrounding area". (11) It further stated that, "ACM in the subsurface was mostly concentrated in the area of the former parking lot. This was to be expected since the materials used to build the former parking lot contained ACM." (11)

Underground utility lines extend across Site 3 and through the Johns Manville parking lot. Knowing that the Department's Contractor did not remove the parking lot to build the detour road but could have removed some of the parking lot with the removal of the detour road at the completing of the construction project, the asbestos containing materials beneath parking lot were placed there during the construction of the original parking lot by Johns Manville and the spread of asbestos containing materials during the 25 or more years the parking lot was in service. Based on the existing condition before the Department's 1971 construction project, and if you remove the Department's construction project from the USEPA remedy evaluation, the selected removal action by USEPA would not have changed. The remedy required by USEPA would have been to eliminate all potential releases of ACM or asbestos fibers, direct contact with ACM or asbestos fibers, and exposure to site workers and general public.

Without creating a clean corridor of the utility workers, workers have to be trained regarding the potential exposure to asbestos and wearing of personal protection equipment (PPE). The use of PPE would require annual respirator fit test and medical

monitoring as required by Occupational Safety and Health Administration (OSHA). Also, emergency repairs may cause asbestos exposures in areas not previously requiring a worker caution or the use of PPE.

The public was allowed to comment on USEPA's proposed response action and the utility companies that are in this area had concerns regarding future worker exposures to asbestos when conducting emergency and routine maintenance repairs. (19) USEPA agreed that to improve long term risk, USEPA added a barrier be placed to inhibit the excavation beyond the clean backfill and an option to relocate the utility to a fully enclosed utility vault. (19)

#### **14. USEPA Remedy of South Side of Greenwood Avenue**

Based on the sequencing of the Department's construction project, the Contractor would not have placed any asbestos containing materials into Site 6 from Site 3. There was no information regarding how this asbestos material was placed in Site 6. Asbestos was found on the south side of Greenwood Avenue and also on the north side of Greenwood Avenue. Utilities are located along the south and north side of Greenwood Avenue. The asbestos material could have been placed in this location by the long term exposure to the Johns Manville facility, utility relocations and installations over the history of the site, or as part of the creation and use of Site 3's parking lot.

Based on the existing condition before the Department's 1971 construction project, and if you remove the Department's construction project from the USEPA remedy evaluation, the selected removal action by USEPA would not have changed. Similar to Site 3, Site 6's potential receptors included utility workers, construction workers, and the general public the use the roadway. USEPA's remedy was to remove all asbestos that could impact a potential receptor. (19)

#### **15. Frost Heaving through Freeze Thaw Cycles was not the Issue with USEPA's Decision**

The potential freeze thaw cycles did not play a part in USEPA's decision making process because the freeze thaw cycles would only come into play if no remedial action was conducted. Mr. Dorgan's stated in his report that USEPA's concern with frost heaving actions caused by freeze thaw cycles would move asbestos materials to the surface of Site 3 and Site 6 was the justification USEPA used to require a "more substantial cover design". (1) USEPA's only concern was to remove all asbestos that could impact a potential receptor. USEPA did use the frost susceptible soils as part of their risk evaluation regarding broken pipes and asbestos fibers in the soil that could move upward. (19)

If Site 3 did not contain any underground utilities, then the only requirement by USEPA would have been a vegetated soil cover. There are three conditions that must exist in order to create frost heave: freezing temperatures, water, and frost susceptible soils. If any one of these conditions was eliminated by the cap design, then the soil will not be

subject to frost heave and ACM would not move to the surface. The vegetated soil cover design has no control on freezing temperature. Removal of all frost susceptible soils would require a removal of all soils down to 48 inches, which was not feasible. The vegetative soil cover can control was the infiltration of water to the frost susceptible soils. Installing a 24 inch vegetative soil cover that includes a 15 inches of native clayey soil layer would move the frost line up 24 inches, so instead of the maximum frost line at 48 inches below the existing grade, it would only impact the top 24 inches of the existing grade. This will reduce the effects of freeze thaw actions and the movement of ACM upward.

# Appendix A

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# **Appendix B**

**Years of Experience**

IL Dept. of Transportation 22

IL Environmental Protection Agency 8

**Education**

MS/Geological Engineering  
University of Alaska-Fairbanks

BS/Geological Engineering  
University of Missouri-Rolla

Undergraduate work/Engineering  
Belleville Area College  
Belleville, Illinois

**Licenses**

Professional Engineer – IL  
Licensed Professional Geologist – IL

**Certification**

OSHA Hazardous Waste Site Worker  
Certification (40 hr)

OSHA Hazardous Waste Worker  
Refresher (8 hr)

**Awards**

1998 IDOT Central Office Engineer of the  
Year

**Affiliations**

Transportation Research Board Member,  
ADC60 – Committee for Waste  
Management and Recourse Efficiency in  
Transportation

**Publications**

*"Sublimation of Reconstituted Frozen  
Silts", MS Thesis, University of  
Alaska-Fairbanks, May 1985.*

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**Professional Experience**

**Illinois Department of Transportation**

**Springfield, Illinois**

**September 2014 to Present**

Technical Manager. Responsible for providing highly specialized technical expertise department wide, for conducting assessments and investigations of special waste, and when required remediation. Review and prepare risk assessments, work plans, quality assurance/quality control plans, recommend further action, NEPA documents, and coordinate various contract activities with districts, central office bureaus, and regulatory agencies.

**Illinois Department of Transportation**

**Springfield, Illinois**

**September 2013 to September 2014**

Technical Manager. Acting Roadside Maintenance Manager. Responsible for policies for operation and maintenance of highway rest areas statewide and responsible for reviewing all rest area plans and making recommendations regarding their design and construction. Responsible for administrative rest area maintenance contracts. Develop policies for turf and plan management for highway rights-of-way statewide (items included are mowing policy, herbicide, plant varieties and diseases, fertilization, and erosion control measures). Technical expert on hazardous waste related to pesticide/herbicide management.

**Illinois Department of Transportation**

**Springfield, Illinois**

**September 1993 to September 2013**

Technical Manager. Responsible for providing highly specialized technical expertise departmentwide, for conducting assessments and investigations of special waste, and when required remediation. Review and prepare risk assessments, work plans, quality assurance/quality control plans, recommend further action, NEPA documents, and coordinate various contract activities with districts, central office bureaus, and regulatory agencies.

**Illinois Environment Protection Agency**

**Springfield, Illinois**

**March 1992 to September 1993**

Lead Worker. Project Manager in the Bureau of Land, Division of Remediation Management, Remedial Project Management Section, Remediation Engineering Sub-Unit. Section's technical expert on geology, hydrogeology, and engineering. Conduct engineering and technical research on problems associated with cleanups conducted in the Section. Conduct public meetings and provide engineering and technical details to public information personnel for media and citizen inquiries.

**Illinois Environment Protection Agency**

**Springfield, Illinois**

**May 1988 - March 1992**

Environment Protection Engineer. Project Manager in the Bureau of Land, Division of Remediation Management, Remedial Project Management Section, State Sites Unit. Unit's technical expert on geology, hydrogeology, and engineering. Perform duties associated with State site cleanup projects, including voluntary cleanup actions negotiated with industry, which are highly technical in nature and include complex engineering, geology, and hydrogeologic problems as well as sensitive issues concerning toxic environmental contaminants and their public health effects. Manage contracts with engineering and cleanup firms for remedial investigations (RI), feasibility studies (FS), design, and cleanup projects. Perform RI/FS that include sampling of groundwater, soil, and hazardous waste.

**Illinois Environment Protection Agency**

**Springfield, Illinois**

**November 1985-April 1988**

Environmental Protection Engineer. Permit Reviewer in the Bureau of Land, Division of Land Pollution Control, Permit Section. Performed a variety of geology, hydrogeologic, and engineering functions pertaining to permit review of underground injection control (UIC) permits, RCRA closures, and solid waste permit and closure applications. Determine the feasibility of the application based on technical/engineering, geology, hydrogeologic data, and financial assurance. Based on the feasibility made recommendations for approval or denial. Worked with computer modeling of pollutant transport in groundwater to determine the extent of groundwater contamination.

**Presentations**

*"Managing 'Uncontaminated Soil' and Special Waste through General Construction Contracts"*, Presented Various IDOT Districts, Project Implementation Annual Meeting, and Project Development Annual Meeting, 2012 and 2013.

*"Acquiring Liability and Avoiding it at the Same Time"*, Presented to the Transportation Research Board's ADC60 Summer Meeting, Portland, Oregon, July 27, 2011.

*"IDOT Approach to EMIS"*, Presented to the Transportation Research Board's ADC60 Summer Meeting, Baltimore, Maryland, June 17, 2008.

*"Creating and Implementing Programs for Environmental Compliance Audits"*, Panel Discussion, Presented to the Transportation Research Board's ADC60 Summer Meeting, Ft Worth, Texas, July 9, 2007.

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*"Implementation of Mobile Incineration at the Paxton Avenue Lagoons Site, Chicago, Illinois"*, Presented at the Environmental Management Exposition, October 1990.

*"Illinois Environmental Protection Agency's Procedure on Setting Cleanup Objectives"*, Presented at Federation of Environmental Technologist, Illinois Environmental News and Views, May 1990.

**EXHIBIT 9**

July 27, 2015

# **EXPERT REBUTTAL REPORT OF DOUGLAS G. DORGAN JR.**

**JOHNS MANVILLE VS  
ILLINOIS DEPARTMENT OF TRANSPORTATION**

Former Johns Manville Facility  
Site 3 and Site 6  
Waukegan, Illinois

PREPARED BY



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**Figure 1 – Construction Features**

**Figure 2 – Construction Features and Visual Transite Pipe**

## 1 INTRODUCTION

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### 1.1 Summary

The report presents my response to the Expert Rebuttal Report of Steven L. Gobelman, dated May 29, 2015 (herein referred to as Gobelman Report). I have elected to rebut certain "opinions" expressed by Mr. Gobelman in the Gobelman Report. In addition, I have addressed a number of "factual" statements contained in the Gobelman Report. My opinions in my initial report and this rebuttal report are made to a reasonable degree of scientific certainty. I reserve the right to supplement this and my original report if additional, relevant information becomes available.

### 1.2 Information Considered

For purposes of this report, in addition to reviewing the documents presented within the Gobelman Report, I have reviewed additional documents, including documents produced as a supplement to the original discovery, documents produced in response to a document request sent to Mr. Gobelman and the Deposition of Mr. Gobelman taken on July 10, 2015. Specific documents referenced herein have been cited and a Bibliography has been included at the end of the report.

## 2 REBUTTAL OPINIONS

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The following provides my expert rebuttal opinions, followed by information in support of the various rebuttal opinions:

### 2.1 IDOT Placed Fill on Site 3 and Site 6 as Part of the Amstutz Expressway Construction Project

#### 2.1.1 Gobelman Opinion on Who is Responsible for ACM Found Buried on Sites 3 and 6

Based upon the Gobelman Report<sup>1</sup> and his deposition<sup>2</sup>, it is unclear to me whether he is expressing an opinion on whether IDOT is responsible for the asbestos containing material (ACM) found buried on Sites 3 and 6. If he is arguing that IDOT is not responsible, I disagree for many reasons. It is my opinion that it is more likely than not that the following occurred:

A) IDOT began work on the Amstutz Project (the Project) in approximately 1968 or 1969 at which time it surveyed Sites 3 and 6 in order to prepare the engineering drawings that were completed in September 1970. During this initial work, IDOT encountered concrete Transite pipe on top of the former JM parking lot. These pipes are evident in various aerial photographs available for Site 3, including an aerial photo dated June 11, 1970<sup>3</sup> which was taken during the time the initial work was being done in conjunction with the Amstutz Project.

B) IDOT treated these concrete Transite pipes as typical concrete pipe and set them to the side when it began work on Site 3. Mr. Gobelman generally agrees with this statement<sup>2</sup> (Page 56).

C) At some point, IDOT crushed some of the concrete Transite pipe and used the crushed pipe as well as other materials that contained pieces of ACM as fill on Sites 3 and 6.

#### 2.1.2 IDOT "Caused or Allowed" ACM on Sites 3 and 6

I disagree with Mr. Gobelman and opine to a reasonable degree of scientific certainty that IDOT "caused or allowed" the use of, the spreading, the disposal, the burying and the placement of ACM on Sites 3 and 6.

First, as noted in my original report and depicted on Figures 1 through 5 of that report, ACM is found in the soils within the areas that were excavated and filled or simply filled at the direction of IDOT and in accordance with the plans drafted by IDOT. Second, in response to a question posed by USEPA<sup>4</sup> specifically regarding Site 3 (IDOT 000383),

IDOT's resident engineer admitted to dealing with "asbestos pipe during the project and burying some of it."<sup>5</sup>

Third, the Standard Specifications for Road and Bridge Construction<sup>6</sup> that Mr. Gobelman admits applied to this Project (the Road and Bridge Specifications), encourage the use of materials found on a project site, including concrete pipe, and indicate that such concrete pipe shall not be wasted and can be buried in embankments, within the right of way or outside the rights of way with the permission of the resident engineer (Section 202.03). In fact, the specifications penalize the contractor if it does not use surplus material found onsite, such as concrete pipe, requiring that it be hauled offsite at their own expense (Section 202.03).

Fourth, it is clear that IDOT directed the contractor on what to build, how to build it and where to place cut and fill materials and where to dispose of materials. Contrary to Mr. Gobelman's opinion on page 8 of his Report, IDOT's role was not limited to one of oversight and it was not the contractor's responsibility alone to determine how materials would be managed. This is evident by reviewing the contract (Contract) in place with Bolander<sup>7</sup>. The Contract includes multiple references to ways in which the Engineer controls the work. By way of example, on Page 3 of the Contract it states "...placing porous granular material where required by the plans or as directed by the Engineer." On the same page where discussing removal and disposal of unsuitable material, it states "...removal of unsuitable material to the lines and grades shown on the plans or as directed by the engineer, ...". The Road and Bridge Specifications state under Section 106.05: "The source of supply of each material used shall be approved by the Engineer before delivery is started." Section 202.03 states "...materials that cannot be placed in the embankment shall be disposed of at locations designated by the Engineer within the right of way...". Again, in Section 202.03, it states "The manner of disposal of surplus excavated material, unstable and unsuitable material by the Contractor outside the right of way limits, shall be subject to the approval of the Engineer, ...". Mr. Gobelman further concedes this point in his deposition where he stated IDOT "had control of doing the work associated with" Site 3 and 6 (Page 53). For illustration purposes, the IDOT Construction Limits, IDOT Limits of Easement, and IDOT Right of Way have been shown relative to the Johns Manville Parking Lot on Figure 1.

Fifth, excess materials, including suitable obstructions, found on Site 3 would have been used as fill material on Site 3 as well as in the embankments of Site 6.

Sixth, Mr. Gobelman has provided no reasonable rebuttal to JM's argument that IDOT crushed and used the concrete Transite pipe as fill on Sites 3 and 6 as outlined above.

Seventh, Mr. Gobelman provides no plausible alternative explanation for how the ACM became buried on Sites 3 and 6.

## **2.2 Unsuitable Material on Site 3 is Contradicted by the Record**

It seems that Mr. Gobelman states that IDOT would not have used the concrete Transite pipes as fill because "Excavated unstable and unsuitable materials were excavated from Site 3 would not have been placed back on Site 3; there was no room within the right of way for this material to be placed." First of all, it is unclear what unstable or unsuitable materials would have been excavated from Site 3. While the IDOT Engineering Drawings<sup>8</sup> detail where unsuitable materials are located on other areas of the Project, they do not reference unstable or unsuitable materials required to be removed for the construction of Detour Road A. On Sheet 24 of the IDOT's Engineering Drawings (the Plan and Profile for Detour Road A), there is no notation for the removal of unsuitable materials associated with construction of Detour Road A. However, there are references to the cut and fill volumes anticipated for Detour Road A. On Sheet 24, a notation indicates that between Station 2+00 (the approximate intersection of Detour Road A and Sand Street) and 15+00 (the approximate intersection of Detour Road A and Greenwood Ave), there would be 5,148 cubic yards of cut, and 1,102 cubic yards of fill. The majority of the cut was necessary to remove a higher topographic feature between Stations 4+00 and 6+75 (located southwest of Site 3). The area of Detour Road A construction that transected Site 3, beginning at approximate Station 8+00, to Station 14+00, required fill to raise the existing site grades to the design elevation. Fill thicknesses ranged up to 2.5 feet in depth. In summary, for construction of Detour Road A across Site 3, no cut was planned, and fill was needed.

## **2.3 Fill on Site 3 More Likely Than Not Originated From Cut for the Detour Roads and Surplus/Obstructions Found on Site 3**

It is more likely than not that the fill needed for Detour Road A came from cut materials from Detour Road A construction or other parts of the Project. Based upon Mr. Gobelman's explanation of the process, it would have made the most sense for materials in close proximity to Site 3 to serve as this fill. Assuming Mr. Gobelman's discussion of the sequencing is accurate, the available cut from the southwestern portion of Detour Road A more likely than not served as the fill for the portion of Detour Road A that cuts across the JM parking lot. Based upon the sampling results as well as other evidence, it is my opinion that pieces of concrete Transite pipe were mixed in with this fill on Site 3. In his deposition, Mr. Gobelman suggested that additional fill might have been needed after obliterating Detour Road A to restore the Site to a condition that existed prior to the construction (Page 148). Given that Transite pipe is found along the roadway, if it was not placed there with the initial fill, it is more likely than not that IDOT used leftover concrete Transite pipe pieces as part of the fill needed to restore the area after the road was obliterated. In fact, the environmental sampling results demonstrate that buried Transite pipe is generally aligned along Detour Road A and the Greenwood Avenue southern right of way. This is demonstrated on Figure 2 which shows the distribution of Visual Transite pipe observed in investigation borings/test pits

as it relates to the Detour Road and Greenwood Embankment construction. A majority of the locations where visual Transite pipe was observed was either within or immediately outside the Construction Limits, Right of Ways or Easements for Detour Road A and the Greenwood Avenue embankment. In a few instances, ACM materials were observed outside of the Construction Limits or Easements. In some instances, this ACM was described as “suspect” Transite pipe (e.g., SB-16). In addition, at select locations, materials were observed to possibly be ACM, but no testing was performed to confirm this suspicion.

Figure 2 shows that the concrete Transite pipe pieces were found predominantly within the Construction Limits, Easements, and Right of Way for Sites 3 and 6. In fact, most of the concrete Transite pipe was found within the Detour Road A and within the Greenwood Road embankment/right of way. While there is one sampling location (SB-07) where visual Transite was discovered outside the limits of the right of way, the Road and Bridge Construction Specifications indicate that the contractor can dispose of materials outside of the right of way with the permission of the engineer, which would explain why concrete Transite pipe is found outside the right of way. In the case of SB-07, the Transite pipe is close to the right of way and within the limits of the former parking lot. There is one sampling location (SB-16) where suspected Transite pipe was noted in the subsurface logs. The logs do not indicate why this sample was treated as suspect instead of identified as Transite pipe.

It is my understanding from Mr. Gobelman’s report that the right of way associated with Site 6, specifically the right of way on the south side of Greenwood Avenue, was originally owned by IDOT or its predecessor. Mr. Gobelman stated that he believes that the right of ways may now be owned by the City of Waukegan. I reserve the right to supplement this Report if additional information is discovered on this topic.

Further, there is no evidence in the record to indicate that concrete Transite pipe was deemed or should have been deemed unsuitable for use as fill. The Road and Bridge Specifications indicate that concrete found at a construction site can and should be used as fill material as discussed further below.

## **2.4 Mr. Gobelman’s Sequencing Statements do Not Support His Claims, But Rather Support My Opinion that ACM was used as Fill on Sites 3 and 6**

Mr. Gobelman describes the sequencing of construction as it relates to cut and fill volumes for construction of the detour roads. While not explicitly stating that Detour Road A was constructed first, he infers this to be the case by indicating that the net cut volume from Detour Road A construction was “...most likely used in the construction of Detour Road B and C.” However, in Mr. Gobelman’s deposition, he acknowledges that Detour Road C or B could have been constructed first (Page 134), or that they could

have been constructed at the same time. In fact, information presented within an IDOT memorandum dated October 13, 1971<sup>9</sup> (Bates Stamp IDOT 000247), indicates construction of Detour Road C first was being contemplated by the contractor. Mr. Gobelman also indicates in his deposition that only after completion of the Detour Roads would construction of the Greenwood Overpass be undertaken (Page 134).

In his Expert Report, Mr. Gobelman indicates that 4,046 cubic yards of soil would be available from construction of Detour Road A. Based on my review of the Engineering Drawings, it appears that for construction of the detour roads (A, B and C), a net total cut volume of 11,833 cubic yards of material was to be generated. Based upon Mr. Gobelman's description of the construction sequencing, this large volume of material would have been staged somewhere within the construction limits until it could be used on other parts of the Project (since completion of the Detour Road construction would precede construction of the Greenwood Avenue embankment).

From the environmental sampling data and other evidence, it is my opinion that crushed concrete Transite pipe was used in the construction of the Greenwood Avenue embankment. It is more likely than not that some of the excess cut material from the detour roads was also part of the fill. Construction of the Greenwood Avenue embankment required the excavation of unsuitable materials followed by backfilling to replace the excavated materials. In fact, the environmental investigations demonstrate that ACM, including concrete Transite pipe, is buried within the areas excavated and then filled by IDOT on Site 6. It should be noted that the only concrete Transite pipe observed on the south side of Site 6 was within samples collected from the area adjacent to Site 3. Further, the Road and Bridge Specifications expressly discuss the use of concrete in embankments.

## **2.5 Utilities Are Not Responsible for ACM On Sites 3 and 6**

In his deposition, Mr. Gobelman says he has no opinion on how the ACM got buried on Site 3 and 6, but that "the installation of utilities would have potentially moved that [the ACM] into a different horizon from which it originally was in." (Page 66 and 67). Mr. Gobelman says that the location of asbestos lines up with the utilities. This is not supported by the record. Figure 2 shows the location of visual Transite pipe on Site 3 and Site 6. As shown on Figure 2 as well as Figure 3 in my original Report, the occurrence of Transite pipe and ACM in the subsurface generally aligns with the location of Detour Road A and the Greenwood Avenue right of way. From my review of the utilities onsite, the overall occurrence of ACM, including Transite pipe, does not align with any specific utility. Further, even if Mr. Gobelman's statements about utility work possibly moving pre-existing ACM were correct, it does not change the fact that IDOT placed the ACM there and abandoned it.

## 2.6 JM Did Not Build the Parking Lot out of ACM

On Page 7 of his Report, Mr. Gobelman states that “Based upon the materials found in the test pits and the fact that Johns Manville used Transite pipes to create curb bumpers and they used ACM to build the parking lot, economics would suggest that Johns Manville would have used all types of ACM material including Transite pipes to build the employee parking lot.” In his deposition, Mr. Gobelman says that his only evidence for his “factual” statement that JM built the parking lot out of ACM comes from one line in one 1999 consultant report<sup>10</sup> which states that “according to Johns Manville, the parking lot was constructed with materials containing asbestos containing materials.” (Pages 67-69; 171). It is my understanding Mr. Gobelman had no direct communications with anyone involved in the drafting of the report (either the original source at Johns Manville or with the author of the report). However, I spoke with a representative of Johns Manville, Mr. Denny Clinton, the primary technical contact for ELM at the time their 1999 work was being performed. Mr. Clinton indicated that the sentence in ELM’s 1999 Report regarding the parking lot being “constructed with materials containing asbestos containing materials” was referring only to the concrete Transite pipes used as parking bumpers on the surface of the parking lot. It is his understanding, that the only ACM associated with construction of the parking lot is the aforementioned concrete Transite pipe. He never told ELM that the parking lot was constructed with ACM other than the concrete Transite pipe on the surface of the parking lot. He said that he has no evidence that prior to IDOT’s construction work, ACM existed below the parking lot.

Furthermore, it is more likely than not that between 1939 and 1960 ComEd used cinders and other materials available on its property to fill in the lower lying portions of Site 3. I have reviewed a series of aerial photographs that are available in the record. Observations associated with Site 3 conditions can generally be described as follows:

1. 1939<sup>11</sup> – It appears that little disturbance has occurred to the Site 3 area in this aerial photo. Some remnant dune and swale topography appears to be present suggesting that there had not been any filling or levelling of this part of the property. Some lineal low lying features that appear to be wet are located on the Property, including across the north end of the property that comprises Site 3.
2. 1946<sup>12</sup> – In this aerial photo, the property immediately south of Site 3 appears to have been covered with a dark material presumed to be cinders originating from the Commonwealth Edison power plant. Some changes in the topography of the northern portion of the Property, which contains Site 3, appear to have occurred. The vegetation that appears in the 1939 photo appears to have been cleared. The dune and swale features are no longer present suggesting filling of the interdunal areas between 1939 and 1946.

3. 1967<sup>13</sup> - In this aerial photograph, the Johns Manville parking lot is clearly evident. In this aerial photo, the concrete Transite pipes used as parking bumpers are clearly evident. It appears that to the immediate east of the parking lot, a cinder access road is in operation. It appears that this road allows for the transport of materials, possibly fly ash and cinders, from the adjacent Commonwealth Edison power plant to what appears to be a pile of material on the southern portion of this Property (similar configuration as seen in 1946 photograph).
4. 1970<sup>3</sup> – This aerial photo again shows the Johns Manville parking lot, however, in this photo, there are no cars parked in the lot. However, as with the previous photo, the Transite pipe parking bumpers are clearly evident. The Transite pipe being used to demarcate the outer boundary of the parking lot appears to have been reconfigured on the northwest corner of the parking lot. The remainder of the site appears to be generally consistent with the 1967 aerial photo.
5. 1972<sup>14</sup> – Significant changes to the Site 3 conditions are evident in this aerial photo. The Johns Manville parking lot is no longer present, nor are its remnants easily recognizable. In addition, both Detour Roads A and B have been constructed across Site 3. Although difficult to discern with clarity, it appears that some ongoing construction is taking place along Greenwood Road, perhaps associated with construction of the embankment.
6. 1974<sup>15</sup> – It appears in this aerial photo that the Amstutz project is largely complete, at least as it relates to Site 3 and Site 6. Detour Road A and B appear to have been removed, although the remnant of Detour Road A is evident in the photo. The Greenwood Road embankment has been constructed and appears to be complete. The cinder access road referenced earlier appears to still be present in its original location.

From review of these aerial photos, contrary to Mr. Gobelman's opinion, it appears that Site 3 was filled prior to the time when JM placed concrete Transite pipe on Site 3 to outline a parking lot area and to be used as parking bumpers.

Mr. Gobelman has indicated that Detour Road A was built on top an asphalt parking lot. This is contradicted by the absence of an asphalt layer being observed from soil borings advanced throughout the Johns Manville parking lot area. If the parking lot had been constructed out of ACM, the soil borings would have shown ACM throughout the parking lot area as well as at multiple depths. Here, the depths of ACM are consistent with the work performed by IDOT. Also, the ACM is located predominantly on the north side of Site 3 where it borders Site 6 (where the embankment was constructed) and along and close to Detour Road A. The soil borings also indicate the presence of cinders as fill material at depths of as much as five feet, which indicates historic filling of the area with cinders.

## 2.7 IDOT Did Not Build Detour Road A On Top of an Asphalt Parking Lot

Mr. Gobelman states that “Based upon the record, Johns Manville’s parking lot was never removed in order to construct Detour A road.” Mr. Gobelman appears to be arguing that the JM parking lot contained an asphalt cover and that IDOT just built on top of it, somehow suggesting that IDOT never touched any ACM during its work at Sites 3 and 6.

He supports this opinion by referencing to Contract Changes (Authorization #14)<sup>16</sup>, which recognized a deduction in the total square yards of 9” stabilized base course. Authorization #14 states “The deduction of the 9” stabilized base course is for areas where job conditions required the use of a variable thickness base. Some of this occurred at the intersection of the detours with Sand Street and Greenwood Avenue. The majority of the deductions though is where detour B crossed the Johns Manville parking lot. The existing bituminous material on the parking lot was sufficiently thick to serve as a base requiring only a 2” lift to strengthen and true up the surface for detour purpose. The additional binder course was substituted for the deleted 9” base course at a net savings as indicated.” In Mr. Gobelman’s Rebuttal Report, he indicates “Authorization #14 referred to Detour Road B crossing the Johns Manville parking lot, the document appears to contain a typo because Detour Road A crosses Johns Manville parking lot and not Detour B.”

It is my opinion that Mr. Gobelman is interpreting the information incorrectly and that the Contract Change (Authorization #14) is correctly referencing Detour Road B and not Detour Road A. This opinion is supported by two primary pieces of evidence. First, both Detour Road A and Detour Road B were designed to transect parking lots. Detour Road B cut across JM’s main parking lot on the north side of Greenwood Avenue. This parking lot was of asphaltic (bituminous) construction, and Detour Road B was constructed transecting this parking lot as shown on Sheet No. 25 of the IDOT Engineering Drawings.

Mr. Gobelman agrees that a parking lot transects Detour Road B (Page 153). However, in his deposition he maintained that the referenced Contract Change document (Authorization #14) contained the typo. His justification for this opinion was that “...the plans are already stated that there was a deviation going to be needed for the Detour Road B, so that’s already built into the plan. So there wouldn’t be a change order of deduction because of it. It’s already been - - It’s already built into the plans. So this is a deviation.” (Page 155). This statement is inconsistent with the documents and it is unclear what “deviation” Mr. Gobelman is referring to in the plans. Sheet No. 25 are the plans that controlled construction of Detour Road B. A notation on this plan for a “Typical Section” of the Detour Road states: “PARKING LOT – Remove 9 inch exist. and replace with 9 inch stabilized bituminous base.” This indicates that the original plans for construction anticipated the removal of the parking lot, and parking lot subbase to a

depth of at least 9 inches. This 9 inches of removed material would be replaced with 9 inches of stabilized bituminous base. However, based upon the subsequent Change Order<sup>10</sup>, a decision was made not to remove the 9 inches, and simply add a 2 inch binder course on top of the existing parking lot. The Change Order specifically says "The majority of the deductions though is where detour B crossed the Johns Manville parking lot. The existing bituminous material on the parking lot was sufficiently thick to serve as a base requiring only a 2" lift to strengthen and true up the surface for detour purposes. The additional binder course was substituted for the deleted 9" base course at a net savings as indicated." By contrast, on Sheet No. 24, which is the corresponding plan for Detour Road A, there are no references to or notations concerning removal of a parking lot. It only refers to the placement of granular subbase material where required as directed by the engineer.

Further, Mr. Gobelman's belief that the Change Order contains a typo is further refuted by references to the "existing bituminous material". There is no evidence in the record suggesting that the former JM parking lot on Site 3 was constructed with asphalt. If Mr. Gobelman's assertion were correct, then the former asphalt parking lot would still be present. However, this is not supported by the numerous soil borings that have been performed within the limits of the former Site 3 parking lot. These borings do not show an asphalt layer being present. Mr. Gobelman maintains that IDOT returned Site 3 to its pre-construction condition after it obliterated Detour Road A. If this were true, IDOT would have had to place an asphalt layer where the parking lot previously existed. Contrary to Mr. Gobelman's suggestions, cinders in soil borings are not evidence of a former asphalt parking lot (Page 160).

## **2.8 IDOT Specifications Allow for Placement of Materials within the Construction Limits and Right of Way**

On Page 6 of the Gobelman Report, Mr. Gobelman provides an opinion that "Any materials on the surface of the parking lot include the Transite pipes used as curb bumpers would have been cleared in accordance with Article 201.01 of the Standard Specifications because this material would have been in the way and removed from the construction project as with any other obstructions." I am in partial agreement with Mr. Gobelman concerning this opinion. At the initiation of the project, the Transite pipes would likely have been treated as an obstruction that would have been removed to clear the project area for construction of Detour Road A and the Greenwood Avenue embankment. Contrary to Mr. Gobelman's opinion expressed in the Gobelman Report, in his deposition (Page 126), he acknowledges "...cleared material could be placed within the right of way with the engineer's approval." Mr. Gobelman's opinion that the pipes would have "...been in the way and removed from the construction project with any other obstructions" is further contradicted by IDOT's Road and Bridge Specifications.

Section 201.08 of the Road and Bridge Specifications says that obstructions shall be disposed of in accordance with 202.03. Section 202.03 requires that "All stones, stumps, boulders, broken concrete and related materials that cannot be placed in the embankment, shall be disposed of at locations designated by the Engineer within the right of way; in borrow sites on or adjacent to the right of way or at other locations outside the right of way." Section 207.04 deals with what can be placed in an embankment. It says that "Embankments shall be constructed of materials that will compact and develop a stability satisfactory to the Engineer...When embankments are constructed of crushed material, *broken concrete* (emphasis added), stones, or rocks and earth, such materials shall be well distributed and sufficient earth or other fine material shall be incorporated with them when they are deposited to fill the interstices and provide solid embankment. ... Pieces of *concrete* not exceeding 2 square feet for any area of surface ... may be broken up, provided they are well embedded ....". Accordingly, the concrete Transite pipe would have been subject to these requirements and would have remained on the site to be used either in the embankment, or would have been buried within or outside of the right of way. Mr. Gobelman in his deposition acknowledges that concrete can be used in embankments (Page 129). Pursuant to Section 202.03 of the Road and Bridge Specifications, the contractor would not have been paid to remove from the site the Transite pipe when it was required to be used or buried as part of the construction project. Suitable surplus material was removed at the contractor's expense. The contractor had a monetary incentive to bury the concrete pipes. Further, the Road and Bridge Specifications state that "Excavated materials that are suitable shall be used in the construction of the roadway as far as practical, and no such material shall be wasted without the permission of the Engineer." This is entirely consistent with information included in IDOT's 104e response<sup>5</sup>. In response to a question concerning Site 3, they disclosed that their resident engineer on the project "recalled dealing with asbestos pipe during the project and burying some of it."

From a practical perspective, the Site 3 Parking Lot was intersected by, and surrounded by, construction being undertaken/directed by IDOT (see Figure 1). Detour Road A transected the Site 3 Parking Lot, Detour Road B was aligned immediately to the west of the Site 3 Parking Lot, and work on the Greenwood Avenue embankment was occurring immediately north of the Site 3 Parking Lot. This places the Site 3 parking lot generally within a triangle comprised of three major elements of the Amstutz Project. In that the Road and Bridge Specifications required concrete pipe to remain on the site (as material for embankment construction, or disposed of within or outside of the right of way), there is a large area surrounding the Site 3 parking lot, even within the right of way, where the concrete pipe could have been placed.

## **2.9 EPA Concern with Frost Heave and ACM Exposure was Concern Driving Remedy Selection**

Mr. Gobelman states in his report that “The potential freeze thaw cycles did not play a part in USEPA’s decision making process because the freeze thaw cycles would only come into play if no remedial action was conducted.” However, he contradicts this opinion in his deposition (Pages 214 and 215). He admits that “EPA was concerned with buried asbestos moving up to the surface and then exposing people on the surface.” In my expert report, I opined that buried ACM is driving the remedy, whether it’s above the utility corridor or not.

The opinion offered in my Expert Report related to the scope of the remedial action being more expansive than would have been necessary if the Transite pipe were not present buried in the soils at Site 3 and Site 6. The final selected remedy for Site 3 requires complete removal of soils from a limited area, construction of an engineered barrier over a large area of Site 3, and creation of clean corridors surrounding select onsite utilities. In the absence of IDOT causing or allowing the Transite pipe to be crushed, spread, used, buried, abandoned and disposed of, I continue to believe the more expansive remedial action would not have been required by USEPA. The remedial action would have been limited to the original planned soil barrier over portions of Site 3, which would have been significantly less costly to implement.

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13. 1967 Aerial Photograph, Bates Stamp IDOT 002634
14. 1972 Aerial Photograph, Bates Stamp IDOT 002636

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16. State of Illinois, Department of Transportation, Elgin, Authorization of Contract Changes not Involving Section Length, Authorization No. 14, dated November 14, 1973.





# EXHIBIT B

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

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

**SECOND AMENDED COMPLAINT**

Complainant JOHNS MANVILLE (“JM”) hereby complains of Respondent ILLINOIS DEPARTMENT OF TRANSPORTATION (“IDOT”) as follows:

**GENERAL ALLEGATIONS**

**Jurisdiction and Parties**

1. This Complaint is brought before the Illinois Pollution Control Board (the “Board”) by Complainant JM on its own motion, pursuant to Section 31(d) of the Illinois Environmental Protection Act (“Act”), 415 ILCS 5/31(d).

2. Section 31(d) of the Act provides that “[a]ny person may file with the Board a complaint . . . against any person allegedly violating this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit, or any Board order.” 415 ILCS 5/31(d).

3. “Person” is defined under the Act as “any individual, partnership, co-partnership, firm, company, limited liability company, corporation, association, joint stock company, trust,



estate, political subdivision, state agency, or any other legal entity, or their legal representative, agent or assigns.” 415 ILCS 5/3.315.

4. Complainant JM is a Delaware corporation authorized to do business in Illinois.

5. Respondent IDOT is an agency of the State of Illinois and was formerly known as the Division of Highways (a division of the Department of Public Works and Buildings).

#### **Factual Background**

6. Complainant JM owned and operated a manufacturing facility on property consisting of approximately 300 acres in Waukegan, Illinois, which manufactured construction and other materials, some of which contained asbestos (the “JM Site”).

7. On September 8, 1983, the United States Environmental Protection Agency (“EPA”) added a portion of the JM Site to the National Priorities List (“NPL”) under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), due to asbestos materials.

8. JM has conducted and completed certain remediation activities at the JM Site under the direction and oversight of the EPA.

9. JM ceased operations onsite in approximately 1998. Thereafter, asbestos-containing material (“ACM”) was discovered beyond the boundaries of the JM Site, on adjacent property owned by Commonwealth Edison (“ComEd”) and the State of Illinois.

10. On June 11, 2007, Complainant JM entered into an Administrative Order on Consent (“AOC”) with EPA whereby JM agreed to conduct a “removal” action at four specific off-site areas. These sites are individually designated as Site 3, Sites 4 and 5 (combined under the AOC as “Site 4/5”) and Site 6 and are collectively referred to as the “Southwestern Site Areas.”

11. ComEd is also a party to the AOC, as the current owner of Site 3 and Site 4/5, and pursuant to the terms of the AOC has agreed to undertake certain response activities at these sites.

12. On information and belief, since at least 1971, the State of Illinois, acting by and through IDOT (or its predecessor agency), has owned, held an interest in and/or controlled portions of Site 6, including a right of way on the southern side of Greenwood Avenue. This area shall be referred to hereafter as the "ROW." Other parts of Site 6 appear to be owned by the City of Waukegan, which is not a party to the AOC.

13. Site 3 is located south of the ROW and east of North Pershing Road in Waukegan, Illinois.

14. Site 6 is located on the north and south edges of Greenwood Avenue east of North Pershing Road and north of Site 3 in Waukegan, Illinois.

15. In December 1998, ACM was discovered at the surface of the area currently designated as Site 3.

16. Subsequent sub-surface investigations of Site 3 have revealed ACM at the surface and at a depth of one to three feet below ground surface (bgs), primarily at the north end of the site, and at a depth of up to four feet bgs in at least two areas of the site.

17. Investigations of Site 6, including the ROW, have similarly revealed ACM at the surface and at a depth of one to three feet below ground surface. Pieces of Transite® pipe, a non-friable form of ACM, are the predominant ACM found at Site 3 and Site 6.

18. The northwest portion of Site 3 and the west portion of Site 6, including the ROW, also contain miscellaneous fill material, some of which has been found to contain asbestos.

19. Many utility lines run through Site 3 and Site 6, including the ROW.
20. In approximately the 1950s and 1960s, JM used Site 3 as a parking lot for its employees and invitees, pursuant to a license agreement with ComEd.
21. Asbestos-containing Transite® pipes were used for curb bumpers on the parking lot surface. Aerial photographs show that these bumpers were in place in the 1950s.
22. Records show that in approximately 1971 Respondent IDOT began construction of a ramp to the Amstutz Expressway as part of its reconstruction of the Pershing Road/Greenwood Avenue intersection.
23. During this construction, IDOT built embankments on the north and south side of Greenwood Avenue, including within the ROW. These embankments involved the removal of “unsuitable material” and the placement of fill up to and above the original grade.
24. Also during construction, IDOT built three detour roads (the “Detour Roadways”).
25. Two of these detour roads, Bypasses A and B, cut through Sites 3 and 6.
26. Bypass A begins on Site 6 and cuts a large, curved swath through the former parking lot of Site 3, which was destroyed by IDOT during this construction.
27. Bypass B cuts through the western portion of Sites 3 and 6.
28. Bypasses A and B were used until the ramp construction was completed in approximately 1976.
29. Records show that a contractor was paid a “special excavation” fee to “remove and obliterate the Detour Roadways” after construction was complete. Neither Bypasses A or B nor the former parking lot are intact at Sites 3 and 6.

30. IDOT has admitted to EPA that it dealt with asbestos pipe during the construction project. IDOT stated in a CERCLA Section 104(e) Response that a retired engineer, Mr. Duane Mapes, recalled “dealing with asbestos pipe during the project and burying some of it. As the Department does not have information about where ACM was located at the start of the project and where it is alleged to have been disposed, he was unable to ask Mr. Mapes to provide more information.”

31. IDOT was not ultimately made a party to the 2007 AOC with EPA. At the time the AOC was signed, EPA took the position that there was insufficient evidence to name IDOT because IDOT did not admit to burying any ACM on or near Site 3 or 6.

32. Subsequent investigations have revealed buried Transite® pipe in the area. Portions of Transite® pipe have been found in the south side shoulder of Greenwood Avenue on parts of Site 3 and 6, including on the ROW, at various depths, including at a depth of approximately 2.5 feet below the ground surface. The elevation of this Transite® pipe is roughly one foot higher than the adjacent surface.

33. Review of IDOT engineering drawings indicates that IDOT, among other things, used ACM as fill when building the embankments to Greenwood Avenue on Sites 3 and 6, including on the ROW.

34. Review of IDOT engineering drawings indicates that IDOT, among other things, used, spread and/or buried ACM during its construction and/or obliteration of Bypasses A and B.

35. Pursuant to the terms of the AOC, on June 13, 2008, JM and ComEd submitted to EPA for its review and approval an initial “Engineering Evaluation and Cost Analysis” (“EE/CA”) for a proposed response action at the Southwestern Sites.

36. After several rounds of revisions in consultation with EPA, JM and ComEd submitted their final EE/CA to EPA on April 4, 2011 (“EE/CA Revision 4”). EE/CA Revision 4 evaluated four potential response action options for Sites 3 and 6, based on discussions with EPA.

37. EE/CA Revision 4 identified “Alternative 2” as the preferred remedy for Site 3. This alternative included limited soil excavation (approximately 660 cubic yards) in the northeast corner of Site 3 to a depth of approximately three (3) feet below the ground surface and installation of a vegetated soil barrier over the entire site, at an estimated cost of between \$595,000 and \$630,000.

38. EE/CA Revision 4 identified “Alternative 3” as the preferred remedy for Site 6. This alternative was described as a “hybrid remedy” combining excavation and off-site disposal of approximately 2400 cubic yards of ACM-affected soil with a vegetated soil barrier running adjacent to Site 3 to avoid disrupting current stormwater drainage patterns. The total cost to implement Alternative 3 on Site 6 was estimated at between \$417,500 and \$500,000.

39. EE/CA Revision 4 was approved by EPA with modifications on February 1, 2012. In its EE/CA approval letter, EPA proposed a new alternative remedy, which it termed “Alternative 5.”

40. EPA’s Alternative 5 included a new proposed remedy for Site 3—termed “Modified Alternative 2”—which was a markedly different remedy from those previously proposed by JM and ComEd. This modified alternative not only included a requirement to remove all asbestos-impacted soils to a depth of four (4) feet below the ground surface in the northeast portion of Site 3, but also required JM and ComEd to create a clean corridor for all utilities running through Site 3 by excavating all soil to a depth of two (2) feet below each utility

line and a minimum width of twenty-five (25) feet centered on each utility line. EPA's estimated cost for construction of this Modified Alternative 2 was \$2,196,000.

41. EPA's Alternative 5 also included a new proposed remedy for Site 6. This alternative—which EPA termed “Modified Alternative 1”—required excavation of “all soil contaminated with ACM and/or asbestos fibers at Site 6 including, but not limited to the area identified as “Area of Excavation for ACM Affected Soil” and “Paving and Potential Subsurface ACM” in Figure 13 in EE/CA” and to make special arrangements necessary for utilities (e.g., additional support or removal and replacement) in areas where removal of ACM is required below three (3) feet below the ground surface. Further, because “Greenwood Avenue was not sampled during the EE/CA Study” and “[i]t is unknown if ACM is located under the Greenwood Avenue Paved Road Surface,” EPA required JM to obtain an environmental covenant signed by the owner of portions of Site 6, the City of Waukegan. EPA's estimated cost for construction of this Modified Alternative 1 was \$1,869,000.

42. On November 30, 2012, EPA issued an Action Memorandum selecting a remedy for the Southwestern Sites, including the Modified Alternative 2 that it had proposed for Site 3 and the Modified Alternative 1 it had proposed for Site 6. However, the Action Memorandum included further modifications that were not previously included in the February 1, 2012 EE/CA approval letter.

43. Specifically, as to Site 3, the Modified Alternative 2 set forth in the Action Memorandum requires JM and ComEd to create a clean corridor for each utility line “extending to a depth requested by the owner of the utility line with placement of a continuous barrier at the base and sides of the excavation to inhibit further excavation and/or exposure beyond the clean fill.” It also includes a new “compliance alternative” of abandoning and relocating utility lines in

lieu of creating clean utility corridors, pending written approval from EPA and provided that each utility owner signs a voluntary subrogation agreement to abandon its line(s). Any new utility lines would be required to bypass the ACM-contaminated areas of the site or to be fully enclosed within utility vaults so as to eliminate the need for excavation during repair or maintenance activities.

44. Similarly, as to Site 6, whereas the Modified Alternative 1 set forth in the EE/CA approval letter had merely required JM and ComEd to “make special arrangements necessary for utilities” in areas where ACM may extend below three (3) feet below the ground surface, the Modified Alternative 1 set forth in the Action Memorandum requires JM and ComEd to create a clean corridor for each utility line by excavating “all soil and sediment to a minimum width of 25 feet centered on any utility line (limited only by the edge of Greenwood Avenue to the extent it is demonstrated to provide a competent barrier to excavation) and to a minimum depth of two feet below the deepest utility line (and extending to a depth needed for protectiveness of utility workers at the deepest utility line) with placement of a continuous barrier at the base and sides of the excavation to inhibit further excavation beyond the clean fill.” No “alternative compliance alternative” was proposed for Site 6.

45. The Action Memorandum states that a response action at the Southwestern Sites is necessary “to abate or mitigate releases of hazardous substances that may present an imminent and substantial endangerment to public health and the environment posed by the presence of soils that are contaminated with hazardous substances.” It further states that a response action is necessary to “reduce the actual and potential exposure to the nearby human population and the food chain to hazardous substances” and that the action is “expected to result in the removal and

capping of contaminated materials at or near the surface which present a threat to trespassers or workers at the Site.”

46. According to the Action Memorandum, the potential health risks associated with ACM contamination at the Southwestern Sites include “exposure to asbestos fibers via inhalation [which] results in significant health effects including mesothelioma, lung cancer, asbestosis, thickening of pleural lining around the lungs and pulmonary deficits. Exposures to soils containing asbestos fibers have been associated with all of these health effects including cancer.” Due to the presence of asbestos in soils, the Action Memorandum indicates that “adverse health risks are reasonably anticipated in the event that exposure occurs.”

47. The Action Memorandum directs JM and ComEd to conduct the following response actions as the selected remedy for Site 3:

- a. Excavate soil in the northeast portion of the Site 3 (approximately 0.14 acres) identified as the “limited excavation area,” to remove all ACM and asbestos fibers (estimated to a depth of 4 feet);
- b. Excavate soil and sediments contaminated with ACM and/or asbestos fibers to a minimum depth of 2 feet below each utility line and extending to a depth requested by the owner of each utility line with placement of a continuous barrier at the base and sides of the excavation to inhibit further excavation and/or exposure beyond the clean fill and a minimum width of 25 feet centered on each utility line and clean backfill to provide a clean corridor for utility maintenance on Site 3 or, alternatively, abandon and relocate utility lines, conditioned on signed voluntary subrogation agreements from the utility owners;

- c. Conduct post-excavation sampling and analysis to confirm there are no remaining ACM or asbestos fibers in soil or sediment within either the limited excavation area or within each utility corridor;
- d. Dispose of all excavated materials in an off-site landfill;
- e. Place and maintain a vegetated soil cover in any areas of Site 3 where ACM or asbestos fibers remain in place;
- f. Implement certain institutional controls in the form of an environmental covenant, pursuant to the Illinois Environmental Covenants Act, 765 ILCS Ch. 122;
- g. Reroute, pipe, or remove surface water as needed to perform the required excavation;
- h. Install and maintain security fencing with warning signs every 100 feet and at all gates completely surrounding all areas where ACM or asbestos fibers remain in place;
- i. Conduct long-term operation and maintenance (O&M) of the vegetated soil cover for a minimum of 30 years beginning when construction is completed.

48. EPA has estimated the cost of construction of the selected remedy for Site 3 at between \$1,705,696 and \$2,107,622. JM disputed portions of EPA's remedy selected for the Southwestern Sites on December 20, 2012 and May 16, 2013, including certain of EPA's cost analyses.

49. The Action Memorandum directs JM and ComEd to conduct the following response actions as the selected remedy for Site 6, including the ROW area:

- a. Excavate all soil contaminated with ACM and/or asbestos fibers without limitation to depth including at a minimum, but not limited to the area identified

- as “Area of Excavation for ACM Affected Soil” and “Paving and Potential Subsurface ACM” in Figure 13 of the EE/CA (which, in non-utility areas, is anticipated to extend to a minimum depth of three (3) feet below ground surface);
- b. Excavate soil and sediments contaminated with ACM and/or asbestos fibers to a minimum depth of 2 feet below each utility line and extending to a depth requested by the owner of each utility line with placement of a continuous barrier at the base and sides of the excavation to inhibit further excavation and/or exposure beyond the clean fill and a minimum width of 25 feet centered on each utility line and clean backfill to provide a clean corridor for utility maintenance on Site 6;
  - c. Conduct post-excavation sampling and analysis to confirm there are no remaining ACM or asbestos fibers in soil or sediment within either the limited excavation area or within each utility corridor;
  - d. Dispose of all excavated materials in an off-site landfill or, with approval from EPA, in the JM industrial canal and/or pumping lagoon under a vegetated soil cover;
  - e. Implement certain institutional controls in the form of an environmental covenant signed by the City of Waukegan, pursuant to the Illinois Environmental Covenants Act, 765 ILCS Ch. 122, or, if this environmental covenant is not feasible, provide for the investigation and full removal of any ACM or asbestos fibers that may remain under Greenwood Avenue to prevent its potential release during road or utility maintenance;

f. If during or after soil excavation at Site 6, samples and/or visual observation indicate the presence of ACM or asbestos fibers under Greenwood Avenue, then install and maintain security fencing with warning signs every 100 feet and at all gates completely surrounding all areas where ACM or asbestos fibers remain in place.

50. EPA has estimated the cost of construction of the selected remedy for Site 6 at \$1,868,790. JM disputed portions of EPA's remedy selected for the Southwestern Sites on December 20, 2012 and May 16, 2013, including certain of EPA's cost analyses.

51. EPA issued a Notice to Proceed with the selected remedy for all of the Southwestern Sites on May 6, 2013. Under the terms and conditions of the AOC, this Notice to Proceed triggers a 120-day period within which JM and ComEd must submit to EPA a Removal Action Work Plan ("RAWP") for performing the response actions at the Southwestern Site Area.<sup>1</sup>

52. JM submitted a draft RAWP for the Southwestern Site Area to EPA in November 2013 and the agency provided comments on December 11, 2013.

53. JM submitted a final RAWP to EPA on January 24, 2014. The agency has not yet approved the final RAWP.

54. With the exception of removing surficial ACM, no response action has commenced at Site 3 or Site 6.

---

<sup>1</sup> JM and ComEd have disputed the selected remedy, pursuant to the dispute resolution provisions of the AOC, on grounds that the EPA substantially modified the selected remedy between its final approval of the EE/CA and the issuance of the Action Memorandum. However, despite this ongoing dispute, EPA did not agree to toll the 120-day period for preparing the Removal Action Work Plan.

COUNT I

**Violations of Section 21 of the Illinois Environmental Protection Act**

55. Complainant realleges and incorporates herein the allegations contained in paragraphs 1-54 of this First Amended Complaint as if set forth herein in full.

56. Respondent IDOT's actions in using, spreading, burying, placing, dumping, disposing of and abandoning ACM waste, including Transite® pipe, throughout Site 3 and portions of Site 6, including the ROW, and in using ACM waste as fill during construction of the Greenwood Avenue ramp and expressway bypass from 1971 to 1976 constitute violations of Section 21 of the Illinois Environmental Protection Act ("Act").

57. Section 21 of the Act, 415 ILCS 5/21, provides, in pertinent part:

No person shall:

(a) Cause or allow the open dumping of any waste; [or]

(e) Dispose, treat, store, or abandon any waste, or transport any waste into this State for disposal, treatment, storage or abandonment, except at a site or facility which meets the requirements of this Act and of regulations and standards thereunder.

58. Section 21 of the Act also provides that no person shall "conduct any waste-storage, waste-treatment or waste-disposal operation" without a permit issued by the agency or in violation of any regulations or standards adopted by the Board. 415 ILCS 5/21(d).

59. Section 3.535 of the Act, 415 ILCS 5/3.535, defines "waste" as:

any garbage, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility or other discarded material, including solid, liquid, semi-solid, or contained gaseous material resulting from industrial, commercial, mining and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows, or coal-combustion products . . . or industrial discharges which are point sources subject to permits under Section 402 of the Federal Water Pollution Control Act, as now or hereafter amended, or source, special nuclear, or by-product materials as defined by the Atomic Energy Act of 1954 . . . or any solid or dissolved material from any facility subject to the Federal

Surface Mining Control and Reclamation Act of 1977 or the rules and regulations thereunder or any law or rule or regulation adopted by the State of Illinois pursuant thereto.

60. Discarded ACM at Sites 3 and 6 are “waste” within the meaning of the Act.

61. Section 3.305 of the Act, 415 ILCS 5/3.305, defines “open dumping” as “the consolidation of refuse from one or more sources at a disposal site that does not fulfill the requirements of a sanitary landfill.”

62. Section 3.185 of the Act, 415 ILCS 5/3.185, defines “disposal” as “the discharge, deposit, injection, dumping, spilling, leaking or placing of any waste or hazardous waste into or on any land or water or into any well so that such waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.”

63. Section 3.445 of the Act, 415 ILCS 5/3.445, defines “sanitary landfill” as:

a facility permitted by the Agency for the disposal of waste on land meeting the requirements of the Resource Conservation and Recovery Act, P.L. 94-580, and regulations thereunder, and without creating nuisances or hazards to public health or safety, by confining the refuse to the smallest practical volume and covering it with a layer of earth at the conclusion of each day’s operation, or by such other methods and intervals as the Board may provide by regulation.

64. Section 3.540 of the Act, 415 ILCS 5/3.540, defines “waste disposal site” as “a site on which solid waste is disposed.”

65. Site 3 and Site 6 are not disposal sites that fulfill the requirements of a sanitary landfill.

66. Site 3 and Site 6 are not permitted waste disposal sites or facilities which meets the requirements of the Act or its regulations as they relate to the disposal or abandonment of waste.

67. IDOT engaged in the open dumping of waste and disposed of ACM waste between 1971 and 1976 when it: (a) used as fill, spread, buried, dumped, placed, disposed of and abandoned ACM waste on Sites 3 and 6, including the ROW, when it built an embankment on the north and south sides of Greenwood Avenue; (b) used as fill, spread, buried, dumped, placed, disposed of and abandoned ACM waste on Sites 3 and 6, including the ROW, when constructed and obliterated Bypasses A and B; and (c) generally used as fill, spread, buried, dumped, placed, disposed of and abandoned ACM waste on Sites 3 and 6, including the ROW, during construction of the Greenwood Avenue ramp and expressway bypass from 1971 to 1976.

68. The ACM waste dumped and disposed of on and under Sites 3 and 6, including the ROW, was abandoned by IDOT around 1976 and currently remains in situ.

69. IDOT caused or allowed the open dumping of ACM waste in violation of Section 21(a) of the Act, 415 ILCS 5/21(a).

70. IDOT caused or allowed the disposal of and abandonment of ACM waste in an area that does not meet the requirements of the Act or its regulations in violation of Section 21(e) of the Act, 415 ILCS 5/21(e).

71. IDOT, as an agent of the State of Illinois, since approximately 1970 has caused and allowed and continues to cause and allow the open dumping, disposal and abandonment of ACM waste within the ROW in violation of 415 ILCS 5/21(a), (e) and has operated and continues to operate a waste-storage, waste-treatment and/or waste-disposal operation involving the ROW without a permit issued by IEPA and not in accordance with regulations adopted by the Board in violation of 415 ILCS 5/21(d).

72. IDOT's violations are continuing in nature.

73. By moving ACM materials both horizontally and vertically within and outside the boundaries of the areas currently designated as Sites 3 and 6, IDOT introduced contamination to Site 3 and 6, including the ROW; exacerbated any existing contamination at those Sites and directly contributed to the scope of the EPA's selected remedy for Site 3 and for Site 6, which requires Complainant JM and ComEd to conduct extensive sub-surface excavation, including by creating clean corridors for each of the utilities running through the site, including within the ROW.

74. JM contends that because IDOT's violations of the Act have directly impacted the scope of the proposed remedy for Sites 3 and 6, including the need to excavate buried portions of Transite® pipe and to create clean corridors around the six utilities (portions of the remedy not proposed by JM and ComEd but ordered by EPA in 2012), IDOT should be required to participate in the response action for Sites 3 and 6.

75. As JM submitted a final Remedial Action Work Plan to EPA on January 24, 2014 and must begin implementation of EPA's proposed remedy shortly after the RAWP is approved, it stands to suffer immediate and irreparable injuries for which there is no adequate remedy at law.

76. Complainant JM is not aware of any identical or substantially similar action pending before the Board or in any other forum against Respondent IDOT based on the same conduct or alleging the same violations of the Act.

**PRAYER FOR RELIEF**

WHEREFORE, Complainant JOHNS MANVILLE respectfully requests that the Board enter an Order against Respondent ILLINOIS DEPARTMENT OF TRANSPORTATION:

A. Authorizing a hearing in this matter at which time Respondent will be required to answer the allegations herein;

B. Finding that the Respondent has violated Sections 21(a), 21(d) and (e) of the Act, 415 ILCS 5/21, as alleged herein;

C. Requiring Respondent 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, pursuant to the Board's broad authority to award equitable relief under Section 33 of the Act, 415 ILCS 5/33; and

D. Grant such other and further relief as the Board deems appropriate.

Dated: February 12, 2016

Respectfully submitted,

BRYAN CAVE LLP

Attorneys for Complainant Johns Manville

By:                   /s/ Susan E. Brice                    
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# EXHIBIT C

RECEIVED  
CLERK'S OFFICE

APR 26 2016

STATE OF ILLINOIS  
Pollution Control Board

ILLINOIS POLLUTION CONTROL BOARD

April 26, 2016

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

 ORIGINAL

**HEARING OFFICER ORDER**

On February 8, 2016, the Illinois Department of Transportation (IDOT) filed two motions: a motion *in limine* to bar certain opinion testimony of Douglas G. Dorgan (Mot. to Bar Dorgan), and a motion *in limine* to bar introduction of certain statements made by former IDOT employee Duane Mapes (Mot. to Bar Mapes). Johns Manville (JM) also filed two motions on February 8, 2016. JM filed a motion *in limine* to bar IDOT from calling Steven Gobelman as a lay witness at hearing (Mot. to Bar Gobelman), and a motion to exclude Mr. Gobelman's opinion testimony (Mot. to Excl. Op. Test. Gobelman).

On February 16, 2016, IDOT filed its responses to JM's Mot. to Bar Mapes and JM's Mot. to Bar Gobelman. Also on February 16, JM filed its responses to IDOT's Mot. to Bar Dorgan and IDOT's Mot. to Bar Mapes.

This order first summarizes the filings regarding each motion and then provides my ruling on each motion.

**IDOT's MOTIONS**

**IDOT's Motion In Limine To Bar Opinion Testimony Of Douglas Dorgan**

**Summary of IDOT's Motion**

IDOT requests an order barring Mr. Dorgan from testifying at hearing about his disclosed opinions 3.2, 3.3 and 3.4. Mot. to Bar Dorgan. Mr. Dorgan's disclosed opinions include the proposition that IDOT's conduct was a violation of Section 21 of the Illinois Environmental Protection Act (Act), that the Illinois Environmental Protection Agency (Agency) "likely would view IDOT's conduct to be 'open dumping' under Section 3.305 of the Act," and that the Agency "would treat crushed and buried ACM as both 'solid waste' and 'hazardous waste.'" *Id.* at 2. IDOT argues that these opinions are legal conclusions that go to the ultimate issue before the Board and are therefore impermissible. *Id.*

IDOT next argues that opinions offered in section 3.2 of Mr. Dorgan's report go to the fundamental question in this case: how IDOT designed and constructed the highway project over forty years ago. *Id.* at 3. IDOT contends that Mr. Dorgan lacks the specialized knowledge, training or experience necessary to render an expert opinion and therefore his opinion must be barred. *Id.* at 3-5. Further, IDOT argues that Mr. Dorgan's opinions relating to the construction work should be barred because the opinion, in part, was based on another expert's opinion. *Id.* at 5. IDOT states that Mr. Dorgan indicated in his deposition that when reaching his opinions, he consulted with a colleague, Mr. Talbot, about construction-related issues. *Id.* at 6-7. IDOT argues that because Mr. Dorgan relied on another expert's opinion to form his own, Mr. Dorgan must be barred from testifying about those issues at hearing. *Id.* at 7-8.

Finally, IDOT seeks to bar Mr. Dorgan's opinions in sections 3.2 and 3.3 of his report because they are speculative, according to IDOT. *Id.* at 8. Specifically, Mr. Dorgan opined that remedial activities are more extensive because "IDOT used, spread, buried, placed and disposed of ACM waste, including Transite pipe, throughout Site 3 and portions of Site 6 during construction . . ." *Id.* IDOT argues that Mr. Dorgan's opinions must be barred because they "are based on nothing more than information provided to him by his colleague" and because they are speculative and unfounded. *Id.*

### **Summary of JM's Response**

JM responds that Mr. Dorgan's opinions do not speak to the ultimate issue in the case because "while IDOT's conduct is relevant to the ultimate question, the only ultimate question is whether JM, as a matter of law, has met its burden of proof." Resp. at 2. JM next argues that even if IDOT committed the alleged violations, "nowhere in the body of Mr. Dorgan's Expert Report does Mr. Dorgan ultimately conclude that IDOT violated the [Act]." Resp. at 3. Moreover, JM argues that opinion testimony describing "the conduct of IDOT in reference to specified rules, regulations and statutes" is permitted under Illinois Rules of Evidence 704. Resp. at 3-4.

JM next contends that Mr. Dorgan is qualified to provide the expert opinions in Section 3.2 of his report because of his education and work history, including environmental consultant at engineering firms. Resp. at 5-8. JM argues that Mr. Dorgan's opinions were not based on Mr. Talbot's opinions, and that Mr. Talbot only assisted Mr. Dorgan in reviewing figures. Finally, JM states that Mr. Dorgan's opinions are not speculative and are based on documentary evidence. Resp. at 11-13.

### **Discussion and Ruling**

Illinois Rules of Evidence 704 allows opinion testimony on the ultimate fact or issue that will be decided by the trier of fact. Expert opinion testimony is admitted to assist the Board in understanding the ultimate issue to be decided. *See Townsend v. Fassbinder*, 372 Ill. App. 3d 890, 905 (2d Dist. 2007). A person will be allowed to testify as an expert if his experience and qualifications afford him knowledge that is not common to laypersons, and where his testimony will aid the trier of fact in reaching its decision. *Thompson v. Gordon*, 221 Ill. 2d 414, 428-29

(Ill. 2006). An expert only needs to have knowledge and experience beyond the average citizen. *Id.*

I find that Mr. Dorgan may testify as an expert given his knowledge and experience, which go beyond that of an ordinary citizen and could consequently assist the Board in its determinations. Mr. Dorgan's assertions regarding the environmental concerns of this case do not amount to legal conclusions, but rather opinions as to the relationship between the facts of this case and applicable laws. Such testimony could conceivably aid the Board. Nor will his testimony encroach upon the Board's ultimate determination, although opinion testimony is not objectionable because it embraces an ultimate issue to be decided by the Board. Ill. R. Evid. 704.

Further, even though Mr. Dorgan consulted with a colleague and had the colleague review Mr. Dorgan's report, the colleague's contribution was minimal and Mr. Dorgan represented that all of the opinions in his report are his own. Finally, Mr. Dorgan's opinions are not impermissibly speculative but based on documentary evidence in the record including a number of reports and manuals. Mr. Dorgan will be allowed to offer his disclosed opinions found in sections 3.2, 3.3 and 3.4 of his report.

IDOT's Motion *In Limine* to Bar Opinion Testimony of Douglas Dorgan is denied. IDOT, however, may renew its objection at hearing.

**IDOT's Motion In Limine To Bar Introduction Of Certain Statements Made By Former IDOT Employee Duane Mapes**

**Summary of IDOT's Motion**

IDOT seeks an order barring JM from entering into evidence or eliciting testimony regarding statements former IDOT employee Duane Mapes made to former IDOT attorney J. Randall Schick. Mot. to Bar Mapes at 1-2. IDOT contends the statements are inadmissible hearsay. *Id.* at 2. IDOT further contends that the statements are not admissible as non-hearsay admissions of a party-opponent under Illinois Rule of Evidence 801(d)(2)(D) because the statements were not made while Mr. Mapes was an IDOT employee. *Id.* at 3.

**Summary of JM's Response**

JM contends that Mr. Mapes' statements are not hearsay under Illinois Rule of Evidence 801(d)(2) because IDOT "manifested an adoption or belief in the truth of Mr. Mapes' statements by transmitting them to the USEPA in IDOT's 104 (c) Response" Resp. at 3-4. Additionally, JM claims the statements are not hearsay under Illinois Rule of Evidence 801(d)(2)(C) because IDOT authorized Mr. Mapes to make the statements. *Id.*

JM also argues that even if the statements are hearsay, they fall within the hearsay exception under Illinois Rule of Evidence 803(8) and 804(b)(3). *Id.* at 4. JM contends that the public records exception under Rule 803(8) applies because IDOT's 104(e) CERCLA Response

was a public record setting forth IDOT activities related to matters observed during IDOT's work on the project that IDOT had a duty to report to the USEPA, and that nothing in the Response indicates a lack of trustworthiness. *Id.* at 5. JM further states that the hearsay exception under Rule 804(b)(3) applies because by making the statement, Mr. Mapes was subjecting himself to potential civil or criminal liability and therefore would not make the statement unless he believed it to be true. *Id.* at 6.

Further, JM argues that Mr. Mapes' statements are admissible under the Illinois Administrative Procedure Act because a "reasonably prudent man can and would rely upon the statements made in that 104(e) Response." *Id.* at 7, citing 5 ILCS 100/10-40 (2014); *see also* 35 Ill. Adm. Code 101.626(a). JM also maintains that the statements should not be barred because Illinois Rules of Evidence 703 and 705 allow an expert witness to rely on otherwise inadmissible statements in formulating an opinion and the expert must disclose the basis for his opinion. *Id.* Finally, JM contends that even if the statements are not admitted for the truth of the matter asserted, they should be admitted to explain the USEPA's investigatory procedure in arriving at its decision to order remedial work on Sites 3 and 6. *Id.* at 9.

### **Discussion and Ruling**

I find Mr. Mapes' statements admissible for a number of reasons cited by JM. For one, they are admissions by a party-opponent through an employee authorized to make statements to USEPA on behalf of IDOT. Beyond that, IDOT's 104(e) Response is a public record and admissible under the corresponding exception to the hearsay rule. Even in the event they are hearsay, I find them trustworthy and material and, having been included in IDOT's 104(e) Response, are the kind of information as would be relied upon by prudent persons in the conduct of serious affairs. *See* 35 Ill. Adm. Code 101.626(a).

IDOT's Motion *In Limine* to Bar Introduction of Certain Statements Made by Former IDOT Employee Duane Mapes is denied. IDOT, however, may renew its objection at hearing.

### **JM's Motions**

#### **JM's Motion To Exclude Opinion Testimony Of Steven Gobelman**

#### **Summary of JM's Motion**

JM seeks an order excluding opinion testimony from IDOT employee Steven Gobelman. JM first argues that after reviewing Mr. Gobelman's report and deposition, it was unable to discern "whether he has actually arrived at any 'opinions' and the bases for those opinions." Mot. to Excl. Op. Test. Gobelman. JM claims that rather than offering opinions, Mr. Gobelman is merely offering "commentary" on issues in this case. *Id.* at 7. JM argues that the statements must be excluded because it cannot identify any actual opinions, or the bases for any opinions, and IDOT failed to comply with the requirement under Supreme Court Rule 213(f) to disclose the "conclusions and opinions of the witness and the bases therefor." *Id.* at 7-9.

JM next argues that Mr. Gobelman lacks the knowledge, skill, experience, training or education required under Illinois Rules of Evidence 702 to testify as an expert on IDOT's historical and utility practices, JM's economic motivations, and USEPA's remedial strategy and decision making processes. *Id.* at 10-14. In particular, JM argues that in Comments 1-3 and 5-8 of his report, Mr. Gobelman makes comments regarding IDOT's historical practices as they relate to this case. *Id.* at 11. JM claims that he should not be allowed to offer such testimony because he reached his opinions without having any first-hand knowledge of IDOT's past practices, without studying sufficient examples of such practices, and without discussing such practices with any person that took part in past projects. *Id.* at 12.

JM next argues that in Comments 4 and 8-11 of his report, Mr. Gobelman similarly offered comments regarding utility practices, JM's economic motivations, and USEPA's decision making process without having the requisite knowledge or experience to be considered an expert on the topics. *Id.* at 13-14. Lastly, JM argues that Mr. Gobelman's opinions regarding IDOT's historical practices, utility practices, JM's economic motivations, and USEPA's deliberative process are based solely on speculation. *Id.* 15-21.

### **Summary of IDOT's Response**

IDOT contests JM's assertions and states that Mr. Gobelman's ample experience and qualifications make him qualified to offer all of his expert opinions in this case. *Resp.* at 6-13. IDOT also maintains that Mr. Gobelman's opinions are not speculative and are either based on his own knowledge and experience or other documents relevant to this case. *Id.*

### **Discussion and Ruling**

Applying the same standard and reasoning used in my ruling regarding Mr. Dorgan's testimony, I deny JM's motion.

While working for IDOT for over twenty years, Mr. Gobelman participated in the investigation and remediation of contaminated sites and also has examined the records of the project at issue in this case, along with the records of several other IDOT highway construction projects. IDOT has demonstrated that Mr. Gobelman has experience and knowledge of IDOT's historical practices, utility practices, economic considerations of remediation projects, and USEPA's concerns with contaminated property beyond that of an average citizen. Therefore, Mr. Gobelman may offer opinion testimony on these subjects as an expert witness.

Furthermore, after reviewing Mr. Gobelman's report and deposition testimony, I find that regardless of how Mr. Gobelman characterized his opinions, it is plain he did offer opinions and identified documentary evidence and experience on which they are based. Nor am I persuaded that Mr. Gobelman's testimony is speculative or that IDOT violated Supreme Court Rule 213(f)'s disclosure requirement.

JM's Motion to Exclude Opinion Testimony of Steven Gobelman is denied. JM, however, may renew its objection at hearing.

**JM's Motion In Limine To Bar IDOT From Calling Steven Gobelman As A Lay Witness  
At Hearing**

**Summary of JM's Motion**

JM seeks an order barring Mr. Gobelman from testifying as a lay witness. JM argues that IDOT did not disclose Mr. Gobelman as a fact witness in discovery and JM did not have the opportunity to depose him as a fact witness. Mot. to Bar Gobelman at 3. JM argues that if he is allowed to testify as a lay witness, the scope of Mr. Gobleman's testimony must be limited to discussing IDOT's Section 104(e) response. *Id.*

**Summary of IDOT's Response**

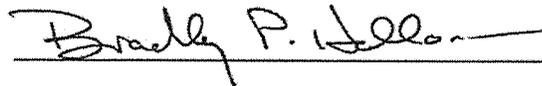
IDOT argues that Mr. Gobelman should not be barred from testifying as a lay witness because during his deposition, JM questioned Mr. Gobelman "extensively" and about matters beyond his expert opinions including but not limited to his involvement in IDOT's 104(e) Response. Resp. at 3-4. IDOT adds that Mr. Gobelman "may be the only living person" involved in the 104(e) Response. *Id.* at 3. IDOT adds that it properly identified Mr. Gobelman in response to an interrogatory about persons contacted in preparing the 104(e) Response. *Id.* at 1-2. Consequently, IDOT argues that JM will not be prejudiced or "harmed in any way" by Mr. Gobelman testifying as a lay witness. *Id.*

**Discussion and Ruling**

I find no basis for barring Mr. Gobelman from testifying as a lay witness, nor any reason to exclude lay testimony on subjects other than just IDOT's Section 104(e) Response. JM was not limited in the subjects it could explore in deposing Mr. Gobelman and clearly inquired into his knowledge of facts relating to the sites at issue and IDOT records. *See* Resp. at 3 & Exh. B. JM has not shown that it will be prejudiced if Mr. Gobelman testifies as a lay witness and on matters other than just IDOT's 104(e) Response.

JM's Motion *In Limine* To Bar IDOT From Calling Steven Gobelman As A Lay Witness At Hearing is denied. JM, however, may renew its objection at hearing.

IT IS SO ORDERED.

A handwritten signature in black ink, reading "Bradley P. Halloran", is written over a horizontal line.

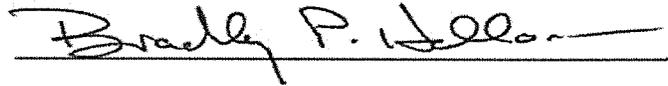
Bradley P. Halloran  
Hearing Officer  
Illinois Pollution Control Board  
James R. Thompson Center, Suite 11-500  
100 W. Randolph Street  
Chicago, Illinois 60601  
312.814.8917  
[Brad.Halloran@illinois.gov](mailto:Brad.Halloran@illinois.gov)

CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing order were e-mailed and mailed, first class, on April 26, 2016, to each of the persons on the attached service list.

It is hereby certified that a true copy of the foregoing order was hand delivered to the following on April 26, 2016:

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

A handwritten signature in black ink, reading "Bradley P. Halloran", is written over a horizontal line.

Bradley P. Halloran  
Hearing Officer  
Illinois Pollution Control Board  
100 W. Randolph Street, Suite 11-500  
Chicago, Illinois 60601

@ Consents to electronic service

SERVICE LIST

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# EXHIBIT D

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),<sup>1</sup> 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<sup>2</sup> 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

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<sup>1</sup> 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).

<sup>2</sup> 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.<sup>3</sup> 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

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<sup>3</sup> 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<sup>4</sup>, 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

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<sup>4</sup> *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.

A handwritten signature in black ink that reads "John T. Therriault". The signature is written in a cursive style with a long horizontal flourish at the end.

---

John T. Therriault, Clerk  
Illinois Pollution Control Board

# EXHIBIT E

May 23, 2016

Page 1

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF: )  
 JOHNS MANVILLE, a Delaware )  
 corporation, )  
 )  
 Complainant, )  
 )  
 vs )  
 )  
 ILLINOIS DEPARTMENT OF )  
 TRANSPORTATION, )  
 )  
 Respondent. )

PCB 14-3

**RECEIVED**  
CLERK'S OFFICE

**MAY 31 2016**

STATE OF ILLINOIS  
Pollution Control Board

TRANSCRIPT FROM THE PROCEEDINGS  
 taken before HEARING OFFICER BRADLEY HALLORAN  
 by LORI ANN ASAUSKAS, CSR, RPR, a notary public  
 within and for the County of Cook and State of  
 Illinois, in Room 9-031 at the James Thompson  
 Center, 100 West Randolph Street, Illinois,  
 on the 23rd day of May, 2016, A.D., at 9:00  
 o'clock a.m.

 **ORIGINAL**

L.A. Court Reporters, L.L.C.  
312-419-9292

May 23, 2016

Page 223

1 site. When I looked at their detailed sheets --  
2 worksheets where they tabulated the materials  
3 found, the overwhelming majority was Transite pipe  
4 fragments.

5 Q. And did you have an occasion to  
6 try and compare this to your figures that you  
7 had put together to see how this matched up  
8 with the location of the roadway and the site?

9 A. We did.

10 Q. What did you discover?

11 A. We found that again similar to the  
12 results of the subsequent investigations that were  
13 presented that there was a strong correlation  
14 of Transite pipe located aligned with Greenwood  
15 Avenue and the Detour Road A.

16 Q. Thank you. I would like to turn  
17 to Page 6 of your rebuttal report. Actually, I  
18 apologize, 16-5.

19 Here, you are talking about  
20 the standard specifications that we reviewed  
21 earlier and you say that they encourage the use  
22 of materials found on the project site, including  
23 concrete pipe, and indicate that such concrete  
24 pipe shall not be wasted and can be buried in

L.A. Court Reporters, L.L.C.  
312-419-9292

# EXHIBIT F

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

<b>In the Matter Of:</b>	)	
	)	
<b>JOHNS MANVILLE, a Delaware corporation,</b>	)	
	)	
<b>JM,</b>	)	<b>PCB No. 14-3</b>
	)	
<b>v.</b>	)	
	)	
<b>ILLINOIS DEPARTMENT OF TRANSPORTATION,</b>	)	
	)	
<b>Respondent.</b>	)	

**NOTICE OF FILING**

To: See Attached Service List

PLEASE TAKE NOTICE that on November 30, 2016, I caused to be filed with the Clerk of the Pollution Control Board of the State of Illinois, *Complainant's Status Report*, 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: November 30, 2016

Respectfully submitted,

BRYAN CAVE LLP

Attorneys for Johns Manville

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**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

<b>In the Matter Of:</b>	)	
	)	
<b>JOHNS MANVILLE, a Delaware corporation,</b>	)	
	)	
<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 STATUS REPORT ON REMEDIATION OF THE SITES**

Complainant JOHNS MANVILLE (“JM”) hereby requests leave to provide this Status Report to the Board regarding remediation of Site 3 and the western end of Site 6 (the “Sites”). Because of the passage of time between hearing of this matter on May 23-25 and June 23-24, 2016, the filing of JM’s Post-Hearing Brief on August 12, 2016, and the time at which the Board will render a decision on the merits of this case, the status of remediation of the Sites has progressed and will continue to progress. JM believes the following information should be considered by the Board in fashioning a proper remedy, if the Board rules in JM’s favor.

**JM’S REQUESTED RELIEF**

1. In this case, among other things, JM has requested: “[t]hat the Board order IDOT: (1) to cease and desist violating the Act; (2) to come into compliance with the Act by participating in JM’s ongoing CERCLA removal action; (3) to comply with such further relief the Board deems necessary; and (4) to sanction IDOT for its misrepresentations.” (Post-Hearing Brief (“PHB”), pp. 5-6.) At the time of hearing, “the removal action ha[d] just begun and [wa]s estimated to cost \$5,265,000 million, of which at least \$2,897,000 is for Site 3 and the west end

of Site 6).” (PHB, p. 58.) JM also has requested that the Board order IDOT to pay JM’s investigation and remediation costs “incurred since the EAM [Enforcement Action Memorandum]” issued in November 2012, which at the time of hearing amounted to \$685,000. (PHB, p. 58; *see also* pp. 2, 6.)

### **REMEDY STATUS**

2. In the more than five months that have passed since JM’s witnesses testified regarding the costs of cleanup efforts at the Sites, JM has continued to implement the Removal Action Work Plan (“RAWP”) for the Sites, as required by the U.S. EPA, and continued to remediate waste dispersed and buried by IDOT without participation from IDOT.

3. As of the date of this Status Report, JM has just completed the majority of the active cleanup work on the Sites necessary to implement the RAWP. Only minor work remains to be done. At hearing, JM witnesses testified that JM did investigation work at the Sites prior to the EAM issued in November 2012, including four versions of an EE/CA (PHB, pp. 23-24); that it had incurred \$685,000 in investigation and remediation costs regarding the Sites since the issuance of the EAM; and that it would incur an additional \$2,897,000 in cleanup costs to implement the RAWP at the Sites. (PHB, p. 58.) None of this testimony was disputed at hearing or in IDOT’s Post-Hearing Brief.

4. Given the fact that JM has implemented the majority of the RAWP between hearing and the date of this Status Report, JM points out that that its request for relief can be satisfied by the Board ordering IDOT to pay JM \$2,897,000 as its way of participating in the remedy (which is, in the very least, the amount IDOT would have had to spend if ordered to implement the remainder of the remedy at or before hearing) or as a means of fulfilling part of JM’s cost recovery claim. At hearing, the costs incurred since the EAM stood at \$685,000.

Therefore, if treated as part of JM's cost recovery claim, the total cost recovery claim would be \$3,582,000.

5. It should be noted that if IDOT had not misled U.S. EPA, the Board and JM about its ownership interests in the right of ways (which caused several months of delay in this case) or if IDOT had not actively sought to delay these proceedings on multiple occasions, there would likely be no need for this Status Report because the hearing and post hearing briefing would have been completed prior to any significant physical work being performed at the Sites or substantial completion of the remedy. (*See* Motion for Leave to File Second Amended Complaint, filed February 16, 2016, ¶¶ 23-28; JM's Notice of Correction, filed February 29, 2016, ¶¶ 5, 8-10; IDOT's Motion to Reschedule Hearing, filed April 18, 2016; JM's Response to Motion Reschedule Hearing, filed April 20, 2016; April 7, 2016 Hearing Officer Order; April 28, 2016 Hearing Officer Order; May 2, 2016 Hearing Officer Order; IDOT's Motion to Toll Filing of its Post-Hearing Brief, filed August 25, 2016; IDOT's Motion to Extend Time to Submit Post-Hearing Brief, filed October 16, 2016.)

6. JM brought this lawsuit in 2013 and has consistently objected to IDOT's delay tactics in large part because of their potential impact on portions of JM's requested relief. For example, after expert discovery was allowed to be re-opened over JM's objection, the parties discussed holding the hearing before the Board in February 2016. This time frame was chosen due to JM's concerns about further delay and the potential impact any delay might have on some of the aspects of JM's requested relief. (*See* JM's Motion for Leave to File Second Amended Complaint, filed February 16, 2016, ¶ 28.) Likewise, once JM learned that IDOT had misrepresented and concealed its ownership interests in the right of ways, JM immediately filed a Motion to Amend the Complaint "*Without Hearing Delay.*" (Filed February 16, 2016

(emphasis added).) As JM stated in that Motion, “it would be unfair and prejudicial to JM to let IDOT further delay this matter and avoid participating in JM’s remedial efforts when IDOT either knew, or should have known, the true ownership status of the ROW and neglected to tell JM.” (*Id.*, ¶ 32.) This history justifies the Board ordering IDOT to pay JM \$2,897,000 not only as a means of participating in the remedy or as a cost recovery mechanism, but also as “such other relief the Board deems necessary,” including, but not limited to, as a sanction and to avoid rewarding IDOT’s delay tactics. (PHB, pp. 5-6, 58.)

### **CONCLUSION**

WHEREFORE, Complainant JOHNS MANVILLE seeks leave to submit this Status Report for the Board’s consideration when evaluating the appropriate remedy and requests that the Board consider this Status Report when fashioning in this matter.

Dated: November 30, 2016

Respectfully submitted,  
BRYAN CAVE LLP  
Attorneys for Complainant Johns Manville

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**CERTIFICATE OF SERVICE**

I, the undersigned, certify that on November 30, 2016, I caused to be served a true and correct copy of *Complainant's Status Report* upon all parties listed on the Service List by sending the documents via e-mail to all persons listed on the Service List, addressed to each person's e-mail address.

/s/ Lauren J. Caisman

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# EXHIBIT G

ILLINOIS POLLUTION CONTROL BOARD  
October 31, 2019

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

**HEARING OFFICER ORDER**

The parties have filed a number motions prior to the commencement of the hearing scheduled for November 19, 2019.

On September 13, 2019, the Illinois Department of Transportation (IDOT) filed a Motion *in Limine* to Strike the Opinions of Douglas G. Dorgan, Jr. (Mot. *in Limine*). Also on September 13, 2019, Johns Manville (JM) filed a Motion to Exclude Base Maps and Related Figures and Testimony at Hearing (Mot. to Excl.). On October 4, 2019, the parties filed their respective responses. Also on October 4, 2019, IDOT filed a Motion to Strike Affidavit of Douglas G. Dorgan Jr. in Support of Complainant's Motion to Exclude Base Maps and Related Figures and Testimony at Hearing (Mot. to Strike). On October 9, 2019, JM filed a Motion for Leave to File a Reply Instanter to IDOT's Response to Complainant's Brief Regarding Motion to Exclude Base Maps, Related Figures and Testimony at Hearing. On October 10, 2019, JM filed its response to IDOT's Motion to Strike Affidavit of Douglas G. Dorgan, Jr. (Resp. Mot. to Strike). On October 15, 2019, IDOT filed its Response to JM's Motion for Leave to File a Reply Instanter to IDOT's Response to JM's Motion to Exclude Base Maps, Related Figures and Testimony at Hearing.

This order summarizes the filings and then provides my ruling on each motion.

**ABBREVIATED PROCEDURAL HISTORY**

After a five-day hearing in 2016, the Board issued an interim opinion and order finding that IDOT caused and allowed open dumping of asbestos-containing material (ACM). Specifically, the Board found 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. The Board further found that IDOT allowed open dumping of ACM waste on the portion of Site 3 within Parcel 0393. Johns Manville v. Illinois Dept. of Transportation, PCB 14-3, slip op at 22-23 (Dec. 15, 2016). The Board directed the hearing officer to hold an additional hearing to develop facts necessary to derive the appropriate remedy. The Board narrowed the remedy hearing to the following three 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 JM's costs attributable to IDOT. *Id.*

On August 13, 2019, the parties filed stipulations to issues one and two above but continue to dispute the share of JM's costs attributable to IDOT. It also appears that the parties do not agree on "where the Board found IDOT responsible for ACM waste in the soil". Mot. to Excl. at 3.

### **IDOT's MOTIONS**

#### **IDOT's Motion *In Limine* To Bar Opinion Testimony of Douglas G. Dorgan, Jr.**

##### **Summary of IDOT's Motion**

IDOT requests an order barring JM's expert witness, Douglas G. Dorgan, from providing certain opinion testimony at hearing regarding cost attribution as set forth in his Expert Report. IDOT argues three reasons to bar Mr. Dorgan's testimony.

The first is the lack of Mr. Dorgan's relevant experience and expertise. Mot. *in Limine* at 4-7. IDOT states that Mr. Dorgan admitted in his deposition that he cannot recall ever having performed a cost attribution like the one that is at issue here. *Id.* at 5-6. Citing Frye<sup>1</sup>, IDOT argues that Mr. Dorgan does not "make any reference to his having employed any sort of established method for conducting his work" as case law requires. *Id.* at 7.

Second, Mr. Dorgan cherry-picked facts that supported his cost analysis "while disregarding possibly less helpful facts" and therefore his cost analysis is "flawed and unreliable." *Id.* at 7-8.

Third, Mr. Dorgan is relitigating issues that the Board in its interim order rejected. Mot. *in Limine* at 4-9. IDOT argues that Mr. Dorgan's opinions on costs attributable to IDOT go far beyond its liability as the Board established in its interim order. *Id.* at 9-12. For instance, Mr. Dorgan opines that IDOT is responsible for all costs associated with the relocation of a City of Waukegan's water line and removal of the North Shore Gas line because all or a portion of the water and gas lines run through a portion of Site 3 within Parcel 0393. *Id.* IDOT also alleges that Mr. Dorgan attempts to enlarge IDOT's liability for Site 6. *Id.* at 10

##### **Summary of JM's Response**

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<sup>1</sup> Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923) (expert must demonstrate methodology accepted within the community of experts)

JM responds that Mr. Dorgan is qualified to provide the expert opinions found in his report. Resp. at 2. JM refutes IDOT's contention that "an expert must have been tasked with the exact same assignment previously". *Id.* JM points to Mr. Dorgan's deposition where Mr. Dorgan testified that he has been tasked with similar assignments but cannot recall if he has ever been tasked with this exact scenario. *Id.* at 3. Mr. Dorgan has, however, had assignments where multiple parties were involved and had to allocate the clean-up costs between the parties. *Id.* at 4.

JM maintains that the Frye test is inapplicable here because Mr. Dorgan's "methodology does not involve scientific studies or tests and is neither new or novel...". *Id.* at 6. JM further argues that "an expert's testimony and opinion is admissible so long as it will assist the Board to determine the facts at issue". *Id.*

JM next contends that Mr. Dorgan's opinions do not re-litigate the Board's liability determination. JM maintains that merely because Mr. Dorgan and IDOT's expert Mr. Gobelman arrive at differing costs, mostly because of their respective approaches, does not mean that they are re-litigating issues already resolved by the Board. *Id.* at 12-13. JM argues that any discrepancy in cost allocation between the two experts are questions for the Board. *Id.*

### **Discussion and Ruling**

In the liability phase of this enforcement proceeding, I observed and listened, as a hearing officer, to hours of testimony from JM's expert Mr. Dorgan. The Board relied on Mr. Dorgan's testimony throughout its interim opinion. Johns Manville v. IDOT, PCB 14-3 (December 15, 2016). I found him qualified then and I find him qualified now. JM concedes that Mr. Dorgan has not participated in the exact same allocation assignment, but argues that Mr. Dorgan has had similar assignments where multiple parties were involved and he had to allocate the clean-up costs between them. A person will be allowed to testify as an expert if his experience and qualifications afford him knowledge that is not common to laypersons, and where his testimony will aid the trier of fact in reaching its decision. Thompson v. Gordon, 221 Ill. 2d 414, 428-29 (Ill. 2006). Mr. Dorgan has the requisite experience and qualifications to testify to the issue of cost allocation and may assist the Board, as he has in the past, in reaching its decision.

IDOT next argues that Mr. Dorgan "cherry-picked" facts that supported his cost analysis "while disregarding possibly less helpful facts" and therefore his cost-analysis is "flawed and unreliable". Whether or not Mr. Dorgan "cherry-picked" evidence favorable to JM is not clear. However, IDOT will be able to challenge Mr. Dorgan's method of cost analysis at hearing through cross-examination if it chooses to do so.

Finally, IDOT argues that Mr. Dorgan is relitigating issues that the Board rejected in its interim order and that his opinions regarding cost attributable to IDOT go far beyond its liability the Board found in its interim order. Whether or not his opinions stray from the narrow issues articulated by the Board for the remedy hearing, that is for the Board to decide.

IDOT's Motion *in Limine* to Strike the Opinions of Douglas G. Dorgan, Jr. is denied. That I find Mr. Dorgan's testimony admissible does not, of course, bind the Board in giving it the weight it deems appropriate. Nor does my ruling here preclude IDOT from objecting to specific issues at hearing.

**IDOT's Motion to Strike Affidavit of Douglas G. Dorgan, Jr. in Support of Complainant's Motion to Exclude Base Maps and Related Figures and Testimony**

**Summary of IDOT's Motion**

IDOT requests an order to strike the affidavit of Douglas G. Dorgan, Jr., that JM filed as Exhibit J in support of its motion to "Exclude Base Maps and Related Figures and Testimony at Hearing".<sup>2</sup> IDOT cites to Illinois Supreme Court Rule 191 (a) in support. Rule 191 (a) requires that the affiant have personal knowledge and that the affidavit shall not consist of conclusions but of facts admissible in evidence. Mot. to Strike at 3.

IDOT first notes that Mr. Dorgan's signature on his 2019 Affidavit is "completely different" than his signature on his 2016 Affidavit. *Id.* at 4. IDOT alleges that the signatures were not written by the same person and therefore not based on Mr. Dorgan's personal knowledge as required by Rule 191 (a). As a result, Mr. Dorgan's 2019 Affidavit must be stricken in its entirety. *Id.* at 4.

Citing caselaw in support, IDOT's next argument is that paragraphs four through seven of Mr. Dorgan's 2019 Affidavit must be stricken because it is "a series of assertions that are unsupported any facts" contrary to what Rule 191 (a) requires. *Id.* at 5. IDOT cites to Cain v. Joe Contarino, Inc. 2014 Il. App. (2d) 130482 (2014), where the court found that the expert ran afoul of Rule 191 (a) where he "cited mostly 'industry customs and practices' ...yet never specified their content." *Id.*

**Summary of JM's Response**

JM responds that IDOT has accused them of fraud and Mr. Dorgan would unequivocally testify to the validity of the signatures. Resp. Mot. to Strike at 1. JM admits that the signatures being compared may look different, however, this is because the previous document was signed over three years ago. *Id.* at 2. Finally, JM states that in the attachment marked as "Exhibit A" is an email Mr. Dorgan sent to attorneys of JM with the signed affidavit, establishing that Mr. Dorgan had personal knowledge of the matters therein. *Id.*

JM next contends that the paragraphs identified by IDOT in the 2019 Dorgan Affidavit are not conclusory and that IDOT misinterpreted the rule found in Cain. JM claims this is because "unlike the affidavit in Cain, which only referred to 'industry customs and practices' and nothing more, Mr. Dorgan's 2019 Affidavit expressly and factually identifies the industry customs and practices Mr. Gobelman failed to meet in creating the Base Maps." *Id.* at 3. JM claims that is sufficient. *Id.*

---

<sup>2</sup> JM filed Mr. Dorgan's 2019 Affidavit as Exhibit A to their Mot. to Excl.

**Discussion and Ruling**

IDOT does not profess to being a handwriting expert, nor do I. IDOT argues that Mr. Dorgan's signature on his 2016 Affidavit is "completely different" from the signature on his 2019 Affidavit and therefore not based upon his personal knowledge as Supreme Court Rule 191 (a) requires. I note that my signature has also changed over the last three years. Unlike the summary judgment proceedings in Cain, Mr. Dorgan will be available at the hearing so that IDOT may illicit testimony from him verifying his signature on his 2019 Affidavit and the content therein if IDOT so chooses.

IDOT's argument that paragraph's four through seven must be stricken because they are conclusionary also fails. As noted above, Mr. Dorgan will be available at hearing and IDOT may cross-examine him regarding the contents of his 2019 Affidavit if it so chooses. I find that Mr. Dorgan does have personal knowledge of the contents therein and that taken as a whole, Mr. Dorgan could competently testify to the contents and to his expert reports. *See e.g. Allied American Insurance Company v. Adam Mickiewicz*, 124 Ill. App. 3d 705 (1984).

IDOT's Motion to Strike Affidavit of Douglas Dorgan's is denied. My ruling does not preclude IDOT from objecting to specific issues at hearing.

**JM's Motion**

**JM's Motion to Exclude Base Maps and Related Figures and Testimony**

**Summary of JM's Motion**

JM requests an order barring IDOT from introducing any evidence, testimony, or exhibits/figures relating to or premised on "Base Maps." Mot. to Excl. at 1. With the exception of the Nicor Gas Line, JM requests an order barring any related figures found in the Initial Report and Supplemental Report of Steven Gobelman and prepared by Andrews Engineering, Inc. *Id.*

JM then references the Stipulation the parties filed on August 13, 2019, and states that while the parties agree on the 'amount and reasonableness' of the costs JM incurred for removal work, "they do not agree on 'where the Board found IDOT responsible for ACM waste present in soil'" and "the share of JM's cost attributable to IDOT." *Id.* at 3. JM states that what remains in dispute is:

- 1) the exact areas where JM did Removal Work ("Removal Areas");
- 2) the areas where IDOT is responsible for ACM waste present in the soil ("IDOT Areas of Liability");
- 3) the extent to which the Removal Areas are connected to the disputed IDOT Areas of Liability; and
- 4) the amount of the costs that should be attributed to IDOT. *Id.*

JM argues that Mr. Gobelman lacks the requisite knowledge, skill, experience, education, and expertise to have created the Base Maps. Mot.to Excl. at 9. JM states that Mr. Gobelman

created the Base Maps because he did not agree with “how Mr. Dorgan defined the IDOT Areas of Liability” and associated attributed costs. *Id.* at 5.

JM states that during the first hearing, Mr. Dorgan, Mr. Gobelman and the Board relied on the reports and maps generated by AECOM which identified areas of liability.<sup>3</sup> JM states that these AECOM maps were “ultimately approved” by the United States Environmental Protection Agency (USEPA). *Id.* at 7. Now for the remedial portion of the hearing, Mr. Gobelman, apparently not in agreement with cost attribution of AECOM’ reports and maps, has created a Base Map<sup>4</sup> to determine the areas of IDOT’s liability. *Mot. to Excl.* at 7.

JM maintains that Mr. Gobelman lacks the relevant experience and expertise to have created the Base Maps. *Mot. to Excl.* at 9-11. JM’s cites to Illinois Rule of Evidence 702 that provides one must rely on expertise of their own to testify as an expert, and, Mr. Gobleman admitted he lacked the expertise to create Base Maps. *Id.* JM states that Mr. Gobleman could not have relied on his own expertise because he is not an expert in AutoCAD, the program used to create Base Maps. *Id.* JM argues that Mr. Gobelman relied on the AutoCAD work of Mr. Nguyen to ensure the Base Map’s accuracy, however Mr. Nguyen denies in his deposition that he played this role, stating he was “not the decision maker” and only made edits to the Base Maps at the direction of Mr. Gobleman. *Id.* at 10. JM requests an order barring the inclusion of these Base Maps and related Figures because Mr. Gobleman, who lacked the expertise in the area, controlled the entire Base Map creation process without any input from Mr. Nguyen, who has experience creating base maps. *Id.*

JM also argues that the Base Maps lack adequate foundation because their creation did not rely on and/or follow the appropriate applicable standards. *Mot. to Excl.* at 11-12. Furthermore, JM maintains the Base Maps were not created using facts or data relied upon by experts in the field. *Id.* JM asserts that Mr. Gobleman did not use AECOM and instead built the boundaries based on an aerial image from Google, resulting in a conflict from AECOM’s Final Site Survey boundaries and that failure to follow appropriate standards led to critical mistakes in creating the Base Maps. *Id.* at 13-14.

JM also argues that key features fail to align with their location as depicted on the AECOM maps. *Id.* at 15. JM claims that established scientific principles and accepted methodologies were not followed in creating the Base Maps because the maps were built using inconsistent sources and because the maps moved fixed features, thus unreliable. *Id.* at 15-17. JM continues its assertions and maintains that the documents Mr. Nguyen used to create the Base Map, including the ELM documents<sup>5</sup>, should not have been used because he did not believe they were reliable. *Id.* at 20.

---

<sup>3</sup> AECOM is JM’s environmental consultant.

<sup>4</sup> Mr. Gobelman’s Base Map was created with the assistance of Michael Nguyen, a CAD manager. “CAD is a computer aided design and drafting technology which is routinely used to make maps.” *Mot. to Excl.* at 7.

<sup>5</sup> ELM documents are documents, including maps and figures, generated by ELM Consulting.

Finally, JM argues that the reliance on Mr. Nguyen was unreasonable and unreliable. *Id.* at 19. JM references Mr. Nguyen's deposition, where he admits to not having any say or control as to what was prepared. *Id.* at 20. JM claims that if Mr. Gobelman actually relied on Mr. Nguyen to create the Base Maps, his reliance was unreasonable, especially after having been made aware of all the mistakes in the Base Maps that Mr. Dorgan had identified in the Dorgan Rebuttal Report. *Id.* at 20-21.

### **Summary of IDOT's Response**

IDOT responds to JM's assertions and maintains that Mr. Gobelman is qualified to provide his expert opinions on cost attribution analysis and that his Base Maps are reasonable and reliable based on his vast experience in dealing with remediation projects and economic considerations. Resp. at 12-15. IDOT also argues that there was no USEPA approved maps or figures for the Site and even if there were, they have no bearing on how to assess cost attribution. *Id.* at 15-16.

IDOT argues that Mr. Gobelman's reliance on Mr. Nguyen's CAD work was reasonable. *Id.* at 19-20. IDOT states that Mr. Nguyen has 17 years working for Andrews Engineering as a CAD technician. *Id.* at 19. Therefore, Mr. Nguyen's CAD work at issue here is trustworthy and has the requisite foundation. *Id.* at 20. IDOT also maintains that reliance on the ELM documents was reasonable given that the USEPA relied on them when approving a remediation plan, as well as Mr. Dorgan and the Board in its interim order finding liability. *Id.*

Finally, IDOT argues that if Mr. Gobelman's reliance on Mr. Nguyen was not reasonable, "then Mr. Dorgan's CAD drafter similarly lacks an adequate foundation, as his CAD drafter approached her [Riah Dunton] work similarly to how Mr. Nguyen approached his work for Mr. Gobelman and thus not reasonable. *Id.*

### **Discussion and Ruling**

Applying the same standard and reasoning used in my ruling regarding the testimony of Mr. Dorgan, I find that Mr. Gobelman has the requisite expertise to use Base Maps to determine areas of liability instead of reports and maps generated by AECOM. As IDOT notes, and I have observed, Mr. Gobelman has vast experience in dealing with remediation and economic considerations. I also find that Mr. Gobelman's reliance on Mr. Nguyen's CAD work was reasonable. Finally, Mr. Nguyen's 17 years' experience working for Andrews Engineering as a CAD drafter satisfies any foundation issues.

JM's Motion to Exclude Base Maps and Related Figures and Testimony is denied. That I find Mr. Gobelman's testimony admissible does not, of course, bind the Board in giving it the weight it deems appropriate. Nor does my ruling preclude JM from renewing its objections to specific issues at hearing.

**JM's Motion For Leave to Reply To IDOT's Response to Complainant's Motion to Exclude Base Maps, Related Figures and Testimony at Hearing**

On October 9, 2019, JM filed a motion for leave to reply to IDOT's response regarding JM's motion to exclude. On October 15, 2019, IDOT filed a response requesting the hearing officer deny JM's motion.

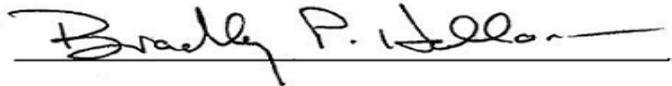
Section 101.500 (e) of the Board's procedural rules states that there is no right to reply except as the Board or the hearing officer permits to prevent material prejudice. After having reviewed JM's motion for leave to reply, I find that no material prejudice would result if the motion was denied.

JM's motion for leave to file a reply is denied.

**Motions for Interlocutory Appeal from Hearing Officer Orders**

The parties are advised that if they choose to file an interlocutory appeal, it must be filed within 14 days after the party receives the hearing officer's written order. Filing a motion for interlocutory appeal will not postpone a scheduled hearing, stay the effect of the hearing officer's ruling, or otherwise stay the proceeding. *See* Section 101.518 of the Board's procedural rules. *But see* Section 101.514 of the Board's procedural rules addressing motions to stay proceedings.

IT IS SO ORDERED.



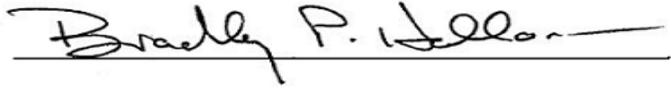
Bradley P. Halloran  
Hearing Officer  
Illinois Pollution Control Board  
James R. Thompson Center, Suite 11-500  
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Chicago, Illinois 60601  
312.814.8917  
Brad.Halloran@illinois.gov

CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing order were e-mailed on October 31, 2019, 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 October 31, 2019:

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

A handwritten signature in black ink, reading "Bradley P. Halloran", is written over a horizontal line.

Bradley P. Halloran  
Hearing Officer  
Illinois Pollution Control Board  
100 W. Randolph Street, Suite 11-500  
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@ Consents to electronic service

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# EXHIBIT H



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1 ground conditions were at that time so that they  
2 can calculate cuts and fill associated with this  
3 detour road.

4 Q. And does that ground line match up  
5 with the detour road that you just highlighted?

6 A. Yes. Unfortunately, you can't see  
7 at the bottom where it's blackened out. There  
8 would be stationings and they would be tied to  
9 the stationings directly to the north -- map  
10 north of this.

11 Q. Okay. So this -- okay. So what  
12 is significant about this ground line?

13 A. Well, one of the significant things  
14 is that --

15 MS. BRICE: I'd like to interpose  
16 an objection, please.

17 HEARING OFFICER HALLORAN: Okay.

18 MS. BRICE: I'm not sure that --  
19 I'm not sure if he is being offered to  
20 opine on anything at this point in time.  
21 I mean, if he wants to talk about reviewing  
22 the construction drawings, that's fine,  
23 but we have no opinion on the table.

24 I'm not sure he's -- I'm

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1 not sure what he's being offered as an  
2 expert in at this point. We certainly  
3 haven't established that he is an expert  
4 road and bridge construction practices  
5 in the 1970s and I don't know what he is  
6 relying on to base any type of opinion  
7 at this point in time. So that's now  
8 objection.

9 HEARING OFFICER HALLORAN: Well,  
10 part of the objection, if not all, is  
11 regarding the April 26th order, correct,  
12 regarding --

13 MS. BRICE: Portions of it, yes.  
14 At this point, I'm not sure that they  
15 have here on the record established --  
16 he said -- I think he's never seen  
17 construction drawings from the 1970's --  
18 construction plans from the 1970's. He  
19 is purporting to be an expert on road  
20 and bridge construction practices in  
21 the 1970s, which is what I brought up  
22 in my motion.

23 HEARING OFFICER HALLORAN: Right,  
24 he has looked at other projects in the '80s

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1 and '90s. I think he testified in the late  
2 '70s possibly.

3 MS. BRICE: If he's talking about  
4 the documents themselves, that's one thing.  
5 But if he's talking about practices that  
6 happened in the 1970s, I don't think he has  
7 any expertise. It's not like he's being  
8 offered as a standard of care expert on  
9 how -- he's not talked to anyone from the  
10 1970s. He's not talked to anybody on this  
11 project. I don't know how he can be an expert  
12 in that.

13 HEARING OFFICER HALLORAN: Well,  
14 I think he's, I guess, more than an ordinary  
15 person. He definitely knows more than the  
16 layperson. So your objection is noted and  
17 overruled.

18 MS. BRICE: Okay. I'm not sure  
19 what the bases are for his opinion, if there  
20 is one, on the table.

21 HEARING OFFICER HALLORAN: Okay.  
22 You may proceed.

23

24 BY MS. O'LAUGHLIN:

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# EXHIBIT I

May 25, 2016

Page 1

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

JOHNS MANVILLE, a Delaware corporation,

Complainant,

vs

ILLINOIS DEPARTMENT OF TRANSPORTATION,

Respondent.



ORIGINAL

No. PCB 14-3

RECEIVED  
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JUN - 3 2016

STATE OF ILLINOIS  
Pollution Control Board

TRANSCRIPT FROM THE PROCEEDINGS taken before HEARING OFFICER BRADLEY HALLORAN by STEVEN BRICKEY, CSR, a notary public within and for the County of Cook and State of Illinois, in Room 9-031 at the James Thompson Center, 100 West Randolph Street, Chicago, Illinois, on the 25th day of May, 2016, A.D., at 9:00 a.m.

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1 HEARING OFFICER HALLORAN: He can  
2 answer if he is able.

3 BY THE WITNESS:

4 A. In construction back then, they  
5 would have -- the department would have specified  
6 that there would have been a certain type of pipe  
7 requirement that would have to go in to whether it  
8 was drainage, storm sewer, water line or whatever  
9 they're building or need to have and the spec book  
10 allows what types of pipes meet those types of  
11 qualifications.

12 BY MS. O'LAUGHLIN:

13 Q. Okay. But I'm asking you about  
14 paragraph ten. In reference to asbestos pipe,  
15 could the reference to asbestos pipe could it have  
16 been referred to other pipes such as storm sewers  
17 or cement underdrains, for instance?

18 MS. BRICE: Objection. Calls for  
19 speculation.

20 HEARING OFFICER HALLORAN: Ms.  
21 O'Laughlin?

22 MS. O'LAUGHLIN: I think  
23 Mr. Gobelman is more than qualified to comment on  
24 what type of pipes would be in a project like

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1 this.

2 HEARING OFFICER HALLORAN: And why  
3 is that?

4 MS. O'LAUGHLIN: He -- as we brought  
5 out yesterday in his testimony, he has reviewed  
6 thousands of construction plans, reviewed -- he  
7 actually worked on this response. I can ask him  
8 why he might be familiar if you want more  
9 information.

10 HEARING OFFICER HALLORAN: Thank  
11 you. I know how I was going to rule. I just  
12 wanted to hear it on the record. Overruled.

13 MS. BRICE: Can I respond, please?

14 HEARING OFFICER HALLORAN: I'm  
15 sorry.

16 MS. BRICE: I can't respond?

17 HEARING OFFICER HALLORAN: You can  
18 respond.

19 MS. BRICE: Sorry. I thought I was  
20 going to respond. He has testified that he has  
21 absolutely no -- he has never seen a construction  
22 plan from the 1970s, he wasn't working for IDOT  
23 during the 1970s. In his deposition, he said he  
24 had no -- nothing to do with response number ten.

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1 HEARING OFFICER HALLORAN: I  
2 thought -- didn't you testify yesterday that you  
3 did look at some construction plans from the late  
4 '70s, possibly late '70s, early '80s?

5 THE WITNESS: Yes.

6 MS. BRICE: '80s. He said '80s.

7 HEARING OFFICER HALLORAN: I think  
8 he said late '70s, too, because I took note of  
9 that. Overruled. You may answer.

10 BY THE WITNESS:

11 A. Well, the spec book at the time that  
12 this project allows for the use of  
13 asbestos-containing material in construction  
14 projects. So in part of doing work whether it's  
15 with the state or local or a county doing work  
16 that refers to the spec book, they -- they -- the  
17 contractor can use whatever pipe that he can use  
18 in building storm sewers, drainage pipes, anything  
19 else. So there would be no way of knowing when  
20 we're building a project, this particular project,  
21 what types of pipes we would be encountering, you  
22 know, if we hit pipe.

23 BY MS. O'LAUGHLIN:

24 Q. And the reference to project, is

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1 large deduction of that stating that none of this  
2 material -- a lot of this material it did not  
3 occur.

4 Q. How do you know that?

5 A. Because there was a deduction of  
6 quantities and if you look at the original bid  
7 item of the quantities that were in play.

8 Q. Would that be Exhibit 20?

9 A. Yes, it would be the pay items that  
10 Bolander bid on or basically listed in Exhibit 20  
11 75 through 79 and so if -- and if you look at the  
12 historical record, there were no other additions  
13 put into the contract plans for those particular  
14 pay items. So, in essence, the total volume being  
15 removed and was -- was deducted. So there was --  
16 there was a percentage that was not being used.

17 Q. And so what is the significance of  
18 that in terms of the fill for the embankment?

19 A. Well, to me, it would show that --  
20 can I draw a picture?

21 Q. Sure.

22 A. Will it be easier --

23 MS. BRICE: Can I make an objection?

24 There is no opinion in his report relating to this

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1 It's talking about general materials and that's  
2 the background section, not that it was placed in  
3 the embankment in 6.

4 HEARING OFFICER HALLORAN: If you  
5 can speak up.

6 MS. BRICE: Sure. Sorry.

7 HEARING OFFICER HALLORAN: I need  
8 Mr. Brickey to take this down. Yeah, I don't  
9 really see it's a stretch to argue -- to argue  
10 that it's in here what he is testifying to today.  
11 So what I'm going to do is sustain Ms. Brice's  
12 objection, but I'll take it as an offer of proof  
13 and let me know when you're outside that offer of  
14 proof and get back into --

15 MS. O'LAUGHLIN: I --

16 HEARING OFFICER HALLORAN: Go ahead.

17 MS. O'LAUGHLIN: Excuse me. We'd  
18 also like to support some cases in our support on  
19 our behalf that what Mr. Gobelman is testifying is  
20 consistent with his expert opinion and we're  
21 allowed to elicit testimony from him in this  
22 regard in the support --

23 HEARING OFFICER HALLORAN: You can  
24 put that in your post-hearing brief, but as far as

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1 topos as a guide --

2 HEARING OFFICER HALLORAN: Ms.

3 Brice, could you slow down?

4 MS. BRICE: Yes. Sorry.

5 HEARING OFFICER HALLORAN: Thank  
6 you. We have a court reporter feverishly trying  
7 to type this.

8 MS. BRICE: I apologize.

9 BY MS. BRICE:

10 Q. Answer: In using the topos as  
11 your guide and under your theory, that is  
12 possible, yes.

13 Do you see that?

14 A. Yes.

15 Q. Did you say that during your  
16 deposition?

17 A. Yes.

18 Q. Actually, in your report, you said  
19 that the fill, quote, most likely came from the  
20 waste products from a coal fired power plant  
21 Midwest Gen, didn't you?

22 MS. O'LAUGHLIN: I object. It seems  
23 we've clearly moved out of the offer of proof by  
24 now. We're going to his opinions regarding what

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1 he has testified to and I'd like to ask my own  
2 questions first about the fill material before  
3 Ms. Brice --

4 HEARING OFFICER HALLORAN: Yeah,  
5 this is going a little far upfield of what your  
6 original objection on nondisclosure was.

7 MS. BRICE: I was just going to the  
8 marshy area.

9 HEARING OFFICER HALLORAN: All  
10 right. Well, let's not. You can address that on  
11 your cross.

12 MS. BRICE: All right. Sounds good.

13 HEARING OFFICER HALLORAN: We're  
14 outside the offer of proof. Ms. O'Laughlin?

15 BY MS. O'LAUGHLIN:

16 Q. Mr. Gobelman, in order to build --  
17 in order to have a parking lot exist on Site 3,  
18 what needed to have been done to the surface?

19 A. Material had to be added to bring  
20 the area that you wanted to use as a parking lot  
21 up to the existing grade of Greenwood Avenue.

22 Q. And do you know what was added to  
23 the area to bring it up to grade?

24 A. The only thing that has any record

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# EXHIBIT J



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**CERTIFICATE OF SERVICE**

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

I, EVAN J. MCGINLEY, do hereby certify that, today, June 21, 2016, I caused to be served on the individuals listed below, by electronic mail, a true and correct copy of Respondent, Illinois Department of Transportation's "IDOT Amended Trial Exhibit List."

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Illinois Pollution Control Board  
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s/ Evan J. McGinley  
Evan J. McGinley

Johns Manville v. IDOT  
 PCB NO. 2014-003  
 IDOT Amended Trial Exhibit List (Revised 6-21-16)

No.	Exhibit Description
4A	Deposition of Douglas Dorgan with Exhibits, taken May 6, 3025
4B	Deposition of Douglas Dorgan with Exhibit, taken September 29, 2015
4C	Deposition of Steven Gobelman with Exhibits, taken July 10, 2015
4I	Exhibit to deposition of Fortunato, taken May 9, 2016. Trial exhibit pages 286 to 326
7	Affidavit of Douglas G. Dorgan dated February 15, 2016, attached to JM's Responses to IDOT's Motions in Limine
8	Expert Rebuttal Report of Steven L. Gobelman with appendices dated May 29, 2015
19	Excerpts from IDOT Standard Specification for Road and Bridge Construction dated January 2, 1971 (IDOT 001068-001103, IDOT 002654)
20	Notice to Bidders, Specifications, Proposed Contract and Contract Bond dated September 3, 1971 (JM 000604-000683)
21A	As Built IDPW Plans for Proposed Federal Aid Highway F.A. Route 437 – Section 8 – HB& i-VB Lake County (JM001132-001235)
21B	As Built IDPW Plans for Proposed Federal Aid Highway F.A. Route 437 – Section 8 – HB& i-VB Lake County (IDOT 003355-003447)
22	Letter from S. Ziejewski to W.E. Baumann dated September 24, 1970 (IDOT 000261)
23	Letter from H. Bonham to S. Ziejewski dated August 19, 1971 and attachments (IDOT 00275-00284)
24	Letter from W. Cellini to E. Bollander dated September 30, 1971 (IDOT 000260)
25	Letter to R. Schmidt to S. Ziejewski dated November 15, 1971 (IDOT 000247-000249)
26	Schedule of Prices (IDOT 000041-000063)
27	Letter to R. Golterman to E. Rosenberg dated December 7, 1971 (IDOT 000247-000249)
28	Letter to G. Moberly to R. Schmidt dated May 25, 1972 (IDOT 000137-000139)
29	Supervision Engineering Report dated October 17, 1972 (IDOT 000154)
30	Construction Audit [undated] (IDOT 000143-000144)
31	Memo and Authorization for Contract Changes dated October 19, 1972 (IDOT 000294-000300)
32	Authorization for Contract Changes dated November 14, 1973 (IDOT 000318-000319)
33	Explanation for Deviations from Contract (IDOT 000327-000328)
34	Letter to R. Schmidt from S. Ziejewski dated September 30, 1974 (IDOT 000109)

35	Authorization for Contract Changes dated May 5, 1975 (IDOT 000329)
36	Job Completion Notice dated February 18, 1976 (IDOT 000075)
38	Letter and Resolution re Joint City State Improvement Route 137 dated October 20, 1965 (IDOT 000068-000074)
40	Letter and Resolution re Joint County State Improvement Route 137 dated April 7, 1966 (Exhibit 7 to Deposition of K. Stoddard)
41	Grant for Public Highway dated August 3, 1971 (IDOT 002808-002814)
42	Grant for Public Highway notarized January 16, 1974 (IDOT 002846-002853)
43	Letter to S. Ziejeswki from ComEd dated July 24, 1984 with attachment of Grant for Public Highway (IDOT 001031-001040)
44	Highway Jurisdiction Guidelines for Highway and Street Systems dated March 2006 (IDOT 011385-011524)
46	Revision of Title Commitment prepared for IDOT dated March 30, 2016 (IDOT 008160-008171/Exhibit F to IDOT's Rule 213(f)(3) Disclosure Statement for Keith W. Stoddard)
49	Access Agreement dated February 12, 2008 between JM and the City of Waukegan (JM 0006649-0006654)
50	License Agreements From Commonwealth Edison Company dated November 16, 1956 (JM 0007094-0007098) and dated November 1, 1961 (JM 0007099-007104), and Affidavit of Brent Tracy dated April 13, 2016
52	Photograph of Aerial Photo late 1950s (JM 001296)
53B	Aerial Photograph 1972 (JM0005826)
53K	Aerial Photograph 1974 (JM0005835)
53L	Aerial Photograph 1967 (JM0005836)
53P	Aerial Photograph 1939 (JM 0005840)
54A	Aerial Photograph 1939, (IDOT 2632)
54E	Aerial Photograph 1972, (IDOT 2636)
54Q	Aerial Photograph 10-26-72, (IDOT 2648)
54R	Aerial Photograph 10-26-72, (IDOT2649)
54S	Aerial Photograph 1970 (IDOT 002650)
54T	Aerial Photograph, 6-11-70, (IDOT 2651)
56	Emails between S. Gobelman and P. McQuillan dated December 16, 2013 and attached topographic maps (IDOT 003268-003277)
57	ELM Subsurface Characterization Report dated December 1999 (JM 000030-000580)
58	Letter from USEPA to K. Brown of IDOT and 104(e) Request Attachment dated September 29, 2000 (IDOT 000378-000391)

59	IDOT Memo from E. Gower to K. Brown dated November 16, 2000 regarding 104(e) Request (IDOT 00393-00398)
60	IDOT 104(e) Response dated November 27, 2000 (JM 000581-000585)
62	Administrative Order on Consent dated June 11, 2007 (JM 001248-001282)
63	EE/CA Revision IV and all attachments, April 2011 by Arcadis (JM 001652-002370)
64	EE/CA Modification Letter dated February 1, 2012 (JM 002372-002399)
65	USEPA Enforcement Action Memorandum dated November 30, 2012 (JM 002423-002549)
66	Cover Letter and Removal Action Work Plan Revision II dated March 31, 2014 (JM 004655-005767)
67	Cover Letter and Removal Action Work Plan Revisions IV dated February 2016 and comparison with previous RAWP (JM 0006027-0006647)
71	Letter from Tat Ebihara to B. Tracy, De. Clinton dated January 25, 2016 with attachments (JM 0006019-006024)
73	Letter from USEPA to AECOM dated September 26, 2014 (JM 005791)
74	Letter to John Van Vranken from LFR with attachments dated July 8, 2008 (JM 001285-001293)
78	JM Response to 104(e) Request dated July 1, 1999 (JM 000011-000029)
80	Illinois beach State Park Final Report of Findings January 20, 2006 (JM 0005884-0005939)
84	Soil Boring Cross Sections Figures dated May 6, 2016 (JM 0007191-0007192)
90	Sidwell Maps 2014 (IDOT 012085-86)
92	Authorization for Contract Change dated 8/13/73 (IDOT 000315)
93	Request for Authorization dated 10/18/71; Document from W.E. Baumann relating to sewer Approval dated 10/28/71 (IDOT 000287-89)
94	Shoo Fly Road Proposal dated October 26, 1971 (IDOT 000223-226)
95	Engineer's Report dated 8/2/72 (IDOT 000171)
102	Second Five-Year Review Report prepared by USEPA for Johns Manville dated May 2, 2003 (former 2.i.)
104	Letter: W. Bow (ECOM to M. Ohl (USEPA) attaching Respondents Response Document to Engineering Evaluation/Cost Analysis (EE/CA), Revision 4, as Modified and Approved by USEPA; Southwestern Site Area, Waukegan, IL (Former 24) (JM 2400-2414)
107	Topographical Map, 1939, (Former 10C) (IDOT 003261)
108	Topographical Map, 1960, (Former 10D) (IDOT 003262)
109	Topographical Map, 1972 (Former 10E) (IDOT 003263)
120	USEPA Comments on Engineering Evaluation Cost Analysis Report Revision 1 dated February 3, 2010 (former 20) (JM 001446 to 1451)

123	July 6, 2000 Email: Bruce Ray to Coyle Ann re: Waukegan Additional Site No. 3; documentation on parties excluded from enforcement (Former 25) (JM 002415)
129	AECOM Removal Action Work Plan for Southwestern Site Area, Sites 3m 4/5, and 6, Waukegan, Illinois (Former 33), Nov. 2013 (JM 2593-3724)
132	Southwestern Site Area, Sites 3,4/5 and 6 Removal Action Plan Scope of Work and Implementation Issues (Former 37) (JM 005814-21)
133	April 30, 1998 Letter: B. Bradley (USEPA) to D. Clinton (JM) re: Approval of Work Plan (Former 38) (JM 5841 to 5842)
140	Sept. 21, 1970 Memo from Sigmund Ziejewski to W.E. Berman re: Special Provisions to be adjusted for "Status of Utilities" (Former 45) (IDOT 962)
141	Nov. 10, 1971, Change Order for Special Excavation (former 47) (IDOT 221)
161	Feb. 18, 2008 Email: B. Tracey (Johns Manville) to Various Individuals cc: D. Clinton (former 55) (JM 7805)
162	Quitclaim Deed dated April 18, 1895 (former 56) (IDOT 12093)
163	Quitclaim Deed dated January 20, 1915 (former 57) (IDOT 12094)
164	Cross Section A-A; Cross Section B-Band Greenwood Avenue dated May 2016 (former 58) (IDOT 12082-84)
166	Memo: B. M. Borrud to Stahl Renwick and Mason Nicholson re: Agreement executed between City of Waukegan and State of Illinois dated April 20, 1966 (former 60) (IDOT 12116 to 12137)
167	Right of Way Notice Letter (former 61) (IDOT 12139)
200	Cover page of as built drawings, enlarged and with a modification by S.Gobelman
202	Updated Demonstrative prepared by S. Gobelman

# EXHIBIT K

**EXPERT REBUTTAL REPORT OF STEVEN GOBELMAN  
ON DAMAGES ATTRIBUTABLE TO IDOT  
BASED ON IPCB ORDER OF DECEMBER 15, 2016**

Johns Manville  
vs  
Illinois Department of Transportation

**AUGUST 22, 2018**

*Prepared by:*



**ANDREWS**  
ENGINEERING, INC.

3300 Ginger Creek Drive  
Springfield, Illinois 62711  
Telephone: 217.787.2334

- ComEd
- Utility/Asbestos Containing Material (ACM) Excavation
- North Shore Gas
- Dewatering
- Northeast Excavation
- Filling and Capping
- Ramp
- General Site/Site Preparation
- Health and Safety
- EPA Oversight
- Legal Support Services

#### **4. Project Management and Reasonableness of Implementation Cost**

Mr. Dorgan opined that the implementation costs Johns Manville (JM) incurred were reasonable. Based on my review of the information, I have no reason to dispute the accuracy of the costs paid by JM.

#### **5. Cost Attributed to IDOT's Responsibility as Defined by IPCB**

##### **5.1. Base Map Creation (Gobelman: Figure 1)**

As stated in the IPCB opinion and order (2), "...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)."

In order to assess the costs attributed to IDOT based on the above order, I 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. My review of the various figures showing the location of Sites 3 and 6 revealed the location of Sites 3 and 6 were not consistently located on the various figures. For example, the Plat of Topographic Survey (Atwell Survey Exhibit G of Mr. Dorgan's Report) (1) does not match up with surveyed corners of Site 3 as presented on Figure 2 in the AECOM Final Report (3) or Mr. Dorgan's Figure 1 (1), as shown in Appendix C, Ex 1.

To evaluate the existing figures of Site 3, I started with the assumption that Mr. Dorgan's Exhibit G Atwell Survey was a correct survey of Site 3. To confirm that assumption, I used Figure 2 in the Final Report that contained grid coordinates of the four corners of Site 3. The corner grid coordinates did not match the corners located by the Atwell Survey. I then used Mr. Dorgan's Report Figure 1 and overlaid that figure over the Atwell

Survey and Final Report Figure 2. As shown in Appendix C, Ex 1 provides the results of the overlay.

Based on the inconsistent location of Site 3, I created a site map utilizing current existing conditions. The site map utilized a background Google 2018 image of Site 3 showing the fencing around Site 3, as shown in Figure 1 of this report (Gobelman: Figure 1). I assumed that Site 3 was contained within the shown fencing except in the northwest and northeast corner of Site 3. In the northwest corner of Site 3 the fenceline appears to drop along the embankment slope. Site 3 was extended to the north in the northwest corner across the embankment to connect to the western boundary of Site 3. The northeast corner of the fence extends beyond the location of Site 3. The fenceline in the northeast corner extends further east than the boundary of Site 3, as shown in Final Report Figure 1 (JM004034). I compared the base map created (Gobelman: Figure 1) with the overlay prepared in Ex-1 and presented the results in Appendix C, Ex-2.

The location of Parcel 0393 was located on Gobelman: Figure 1 based on the legal description from the Grant for Public Highway dated August 3, 1971 (Hearing Exhibit 41 - 1) (4) and IDOT as-build plans pages 23 and 24 (JM001153 and JM001154, Hearing Exh. 21A-23 & 24) (5). Parcel 0393 begins at the intersection of the easterly line of Pershing Road (former Sand Street) and the south line of Greenwood Avenue. The 1971 plan sheets (5) show that IDOT Stationing 7+00 on Greenwood Avenue is at the eastern edge of Parcel 0393.

Soil sampling locations were placed on the base map based on Site 3 ELM Figure 15 (6) (JM000565, Hearing Exh. 57-536). The lengths of the western and southern boundary were marked on Figure 15. The western boundary stated the length to be 267.5 feet and the southern boundary length to be 493 feet. The Gobelman: Figure 1 indicates that the western boundary length is 267 feet and the southern boundary length is 497 feet. The difference in the southern boundary lengths could be based on fence line being used as the southern boundary of Gobelman: Figure 1.

The scale on Figure 15 indicates that the soil sampling location of B3-26 is 23.1 feet from the western boundary of Site 3 and soil sample locations B3-25, B3-1, B3-50, and B3-45 are approximately 19.7 feet south of the line drawn representing the northern extent of Site 3. This distance disagrees with the scaled distance of 15 feet used in the Mr. Dorgan's Figure 1. Mr. Dorgan does not explain in his report how he developed Figure 1. The 4.7 feet difference between Gobelman's: Figure 1 of 19.7 feet and Mr. Dorgan's Figure 1 of 15 feet is important to the location of soil sample location B3-45.

Mr. Dorgan's Report places the location of soil sample location B3-45 slightly in or on the boundary of Parcel 0393, whereas Gobelman: Figure 1 places the location approximately 3 feet outside of Parcel 0393.

Soil sampling locations (1S – 9S) along the south side of site 6 were marked on Gobelman: Figure 1 based on AECOM's Work Plan rev 2, March 13, 2014, Sheet C-0022 (7) JM004753 (Hearing Exh. 66-99). Based on Sheet C-0022 the distance from

the western edge of Site 6 to soil sampling location 9S is 419 feet. All figures developed included Mr. Dorgan's Figure 1 (1) showed that soil sampling location 8S is at the northeast corner of Site 3 and is also shown on Sheet C-0022. Based on the scale of Sheet C-0022 the remaining sampling locations on Site 6 were placed on the Gobelman: Figure 1 base map.

The location of the Northeast Excavation was also based on Sheet C-0022 (7) JM004753. Sheet C-0022 shows the length of the Northeast Excavation to be 150 feet and the western edge of the Northeast Excavation to be located east of soil sampling 3S and the eastern edge to be located slightly east of sampling 6S. Based on the scaling of Sheet C-0022 the distance from soil sampling location 9S to the eastern edge of the Northeast Excavation is approximately 140 feet.

The location of the Nicor line, North Shore Gas line, and City of Waukegan Water line were located based on the AECOM's Final Report: Southwestern Site Area – Site 3, 4/5, and 6, dated March 20, 2018 (3) JM 0040322. The locations of the AT&T lines were located based on Mr. Dorgan's Report (1) Figure 1.

## **5.2. Site 3 Area within IDOT's Responsibility as Defined by IPCB**

IDOT's responsibility as defined by IPCB within Parcel 0393 includes the soil boring locations B3-25, B3-15, B3-16, B3-50, and B3-45 (to the extent sample B3-45 falls on Parcel 0393). Therefore, the extent to the west within Parcel 0393 to soil sample location B3-26 (first soil sample location that did not detect ACM at any depth). As previously discussed, I located soil sample locations B3-45 outside of Parcel 0393 and, therefore, the extent within Parcel 0393 to the east would be the mid-point between soil sample location B3-50 and B3-45. However, for allocation costs in Site 3 within IDOT's responsibility as defined by IPCB, I will utilize the eastern edge of Parcel 0393. Making the extent of the eastern edge of Parcel 0393 removes arguments of the location of B3-45 given the difference between my location and Mr. Dorgan's location is 4.7 feet and the location of B3-45 is scaled off a map and the exact location was not identified.

In Mr. Dorgan Report, he incorrectly interprets the IPCB defined area of IDOT's responsibility to include all costs within Parcel 0393 with no consideration to the IPCB's defined area based on soil sample locations within Parcel 0393.

## **5.3. Site 6 Area within IDOT's Responsibility as Defined by IPCB**

Mr. Dorgan is correct that the IPCB found IDOT liable for only soil sampling locations 1S through 4S along the south side of Site 6. However, the IPCB did not define IDOT liable for any impacts along the south side of Site 6 associated with soil sample locations 5S through 8S.

Soil sampling logs in the Engineering Evaluation/Cost Analysis, Revision 4 (8) (JM001945, JM001947, JM001949, and JM001951, Hearing Exh. 63-294, 269, 298, and 300) showed that the test pits went down to a depth of 3 feet in soil sampling location 5S

# EXHIBIT L

Transcript of the Testimony of  
**RIAH DUNTON**

**Date:** July 24, 2019

**Case:** JOHNS MANVILLE VS. ILLINOIS DEPARTMENT OF  
TRANSPORTATION

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1 into drawings that you're creating?

2 **A I don't know about interpret. I don't**  
3 **understand what you mean by that.**

4 Q Maybe a better way to put it is you're  
5 taking drawings from other people, from perhaps  
6 other consulting firms or something like that; is  
7 that right?

8 **A Yes, correct.**

9 Q When you take those drawings from other  
10 consulting firms, and your project manager comes to  
11 you and says, Riah, I would like you to do a diagram  
12 that shows, you know, the site of this landfill,  
13 right, I mean do you ever do work on landfills?

14 **A I have done some work, yes.**

15 Q Okay.

16 **A And it's pronounced Riah.**

17 Q Riah, I'm sorry.

18 **A And Miss Dunton would be fine.**

19 Q Okay. Sure. I apologize, I didn't mean no  
20 offense.

21 When you are doing a diagram for a  
22 landfill, you, presumably, are getting a plan from  
23 somebody upon which you're making, you're using  
24 those plans in order to make whatever diagram you