**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

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

**NOTICE OF FILING**

To: See Attached Service List

PLEASE TAKE NOTICE that on August 12, 2016, I caused to be filed with the Clerk of the Pollution Control Board of the State of Illinois, *Complainant's Post-Hearing Brief*, 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: August 12, 2016

Respectfully submitted,

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**COMPLAINANT JOHNS MANVILLE'S POST-HEARING BRIEF**

Complainant JOHNS MANVILLE ("JM") hereby submits its Post-Hearing Brief:

**INTRODUCTION**

The Illinois General Assembly has found that the Illinois Environmental Protection Act (the "Act") "shall be liberally construed so as to effectuate the purposes" of the Act. 415 ILCS 5/2(c); *People ex rel. Ryan v. McFalls*, 313 Ill. App. 3d 223, 226 (3d Dist. 2000). "A primary purpose of the Act is 'to assure that adverse effects upon the environment are fully considered and borne *by those who cause them.*'" *Nat'l Marine, Inc. v. Ill. E.P.A.*, 159 Ill. 2d 381, 386 (1994) (emphasis added); *see also* 415 ILCS 5/2(b) (same). "Those who cause them" undoubtedly includes the State of Illinois and its agencies. *See* 415 ILCS 5/2(a)(iv) (the General Assembly finding that it is the "obligation of the State Government to manage its own activities so as to minimize environmental damage").

This case involves two parcels of land referred to herein as Sites 3 and 6 (collectively, the "Sites"). These Sites generally abut the southern boundary of the former JM manufacturing facility in Waukegan, Illinois. Site 3 is owned by Commonwealth Edison ("ComEd") and is

located at the southeast intersection of Greenwood Avenue and Sand Street (now Pershing). Site 6 is generally comprised of the elevated shoulders of Greenwood Avenue. Asbestos containing material ("ACM") and microscopic asbestos fibers have been found on the surface of and buried a few feet from the surface on these Sites. JM is currently removing the ACM and fibers found on Sites 3 and 6 pursuant to an Enforcement Action Memorandum ("EAM") issued by the United States Environmental Protection Agency ("USEPA") in November 2012.

JM admits that it bears some responsibility for the waste on the Sites because it placed ACM, in the form of asbestos-containing concrete Transite pipes, on the surface of Site 3 in the late 1950s and left it there. In 1956, JM entered into a license agreement with ComEd to use a portion of what is now Site 3 as a parking lot for its employees ("Parking Lot"). JM used the concrete Transite pipes as wheel stops on the surface of the Parking Lot and to outline the perimeter of the Parking Lot. In 1969, or shortly before, IDOT began work on the construction of a new expressway in Waukegan, the Amstutz Expressway, that ran immediately west of the ComEd and JM facilities (the "Project"). The Project plans required IDOT to build a detour road ("Detour Road A") through what is now Site 3 and to build elevated embankments along what is now the west end of Site 6 and the north portion of Site 3 (the "Embankments"). In order to do this work, IDOT acquired a Grant for Public Highway from ComEd (the "Grant"). The Grant included a temporary easement relating to Detour Road A and a permanent easement relating to the Embankments.

The evidence shows that early on in the Project, IDOT dismantled the Parking Lot. This involved disposing of the concrete Transite pipes JM had left on its surface. Because the pipes, in the words of IDOT's expert, "have a value" and could be used in the Project (Transcript ("Tr.") May 25, pp. 161:24-162:22), IDOT disposed of them by crushing them on site and then

using the pieces of pipe as part of its mix of fill material. After all, this was a "win-win" for IDOT and its contractor. The contractor did not have to pay to haul the pipes offsite and money was saved by using the pipes in lieu of additional borrow material. The evidence demonstrates that IDOT used the ACM pieces to build the Embankments and Detour Road A and to restore Site 3 to its original condition as required by the Project contract. (Exhibit "Ex." 08-7, 08-18.)

JM demonstrated at hearing that IDOT's conduct violated and continues to violate the current and historical versions of Section 21(a), (d) and (e) of the Act. JM also showed that IDOT's violations of the Act have caused USEPA to demand a more expansive remedy than would have been required if JM just needed to remove the pipes it had left on the surface of Site 3. Instead of requiring a surficial pick up of ACM, the EAM requires JM to remove all ACM fragments and asbestos fibers attributable to IDOT's conduct. (Ex. 65.)

IDOT, however, continues to deny *any* liability despite overwhelming evidence to the contrary presented at hearing. JM demonstrated that IDOT is liable under three independent theories. (*See, e.g.,* Tr. May 23, p. 233:2-15; June 24, p. 235:9-21 (opining that IDOT violated Section 21 of the current version of the Act based upon what Mr. Dorgan has "seen IEPA do in other circumstances of a similar nature" and the historical versions of the Act based upon his review of the corresponding historical provisions).) First, IDOT is liable for violating the Act through its own conduct. This undeniable liability was demonstrated through a cascade of evidence, including that: (1) ACM, including concrete Transite pipe, is found buried at the depths and in the locations where the IDOT Project construction plans called for IDOT to place fill material; (2) the IDOT Specifications for Road and Bridge Construction Projects from 1970 ("Specifications") prohibited IDOT from wasting materials, including "obstructions" such as concrete Transite pipe, found at the Project and instead encouraged IDOT to break up such pipe

and bury it on the Project; (3) the location and size of the buried pieces of concrete Transite pipe are consistent with the Specification requirements applicable to "disposing of" concrete Transite pipe; (4) IDOT's Resident Engineer for the Project admitted to dealing with concrete pipe on Site 3 during the Project and burying it; and (5) IDOT's own expert's discussion of IDOT construction practices leads to the conclusion that IDOT crushed and buried the concrete Transite pipes on the Sites.

Second, IDOT is liable because it held ownership interests in portions of the Sites when the acts constituting the violations occurred and it still holds those interests in areas where USEPA has determined that releases of ACM and fibers are ongoing. It is uncontroverted that IDOT held temporary and permanent easements on the Sites where ACM and fibers were buried during the Project and that IDOT still holds permanent easements in the Embankment areas. It is also undisputed that these easements are equivalent to a "direct interest" in land. (Ex. 18-9.) Thus, IDOT is liable as an owner of the Sites irrespective of who actually disposed of the waste.

Third and finally, IDOT is liable because it had the ability to control and/or did control the Sites when the violations occurred and continues to control the portions of the Sites where it holds ownership interests. IDOT admits that it controlled the Sites during the Project and admits that it continues to use the Embankment areas for a "highway purpose." Without these Embankments, which raised the grade of Greenwood Avenue to connect it to the Amstutz Expressway, traffic could not flow between Greenwood and the Amstutz Expressway. According to IDOT, no one can remove the Embankments filled with ACM without IDOT's permission, irrefutably demonstrating that IDOT currently has control over the buried ACM and the areas where it is buried. Given IDOT's historic and current control, IDOT is liable for the waste buried on the Sites.

Once liability is established, the Board must consider the factors set forth at Section 33(c) to determine the "reasonableness of the emissions, discharges or deposits involved," taking into account "all the facts and circumstances" of the case. 415 ILCS 5/33(c). Here, the evidence presented undeniably established that each of these factors not only weighs heavily against IDOT, but also that aggravating factors exist here that argue in favor of fashioning a remedy that reprimands IDOT. *See, e.g., Standard Scrap Metal Co. v. Pollution Control Board*, 142 Ill. App. 3d 655, 662 (1st Dist. 1986) (holding that the record revealed a continuing lack of good faith which was pertinent to the determination of sanctions); 35 Ill. Admin. Code 101.800, 802 (providing for Board to order sanctions).

More specifically, the evidence reveals a disturbing pattern of half-truths and representations made by IDOT with respect to basic information establishing its liability that were shown at hearing to be false and misleading. These misrepresentations, which largely concern IDOT's ownership interest in portions of Sites 3 and 6, began when IDOT responded to a CERCLA 104(e) Request issued by USEPA in 2000 concerning Site 3 ("104(e) Response" (Ex. 60)) and continued through hearing. As a result of these misrepresentations, neither JM nor USEPA fully grasped the extent of IDOT's culpability for the ACM contamination on the Sites. But IDOT did. When JM sought to amend the Complaint after learning of these misrepresentations, IDOT argued that "JM's new claim *substantially expands* the potential liability that IDOT faces in this case." (*See* IDOT's Response to Motion for Leave to File Second Amended Complaint, filed February 23, 2016, p. 2 (emphasis in original), p. 5.)

The Board should not tolerate such conduct from anyone, particularly an *agency* of the State. In light of the evidence discussed herein and the Section 33 factors, JM requests that 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. *See* 415 ILCS 5/33(b); *Kaeding v. Pollution Control Bd.*, 22 Ill. App. 3d 36, 38 (2d Dist. 1974) (stating that the Board possesses "powers that are reasonably necessary to accomplish the legislative purpose of the administrative agency; specifically . . . and necessarily, the power to order compliance with the Act"), *aff'd sub nom. N. Shore Sanitary Dist. v. Pollution Control Bd.*, 62 Ill. 2d 385 (Ill. 1976); *Discovery S. Grp., Ltd. v. Pollution Control Bd.*, 275 Ill. App. 3d 547, 560 (1st Dist. 1995) (finding that final order was exercise of the Board's power to order compliance); *Lake Cnty. Forest Pres. Dist. v. Ostro*, PCB 92-80, 1994 WL 120267, *9 (Mar. 31, 1994) (ordering investigation and remediation of contamination).

If the Board were to find that JM can seek past costs without running afoul of any affirmative defense, JM further requests to recover investigation costs incurred since the EAM in the amount of $685,000. *See, e.g., Ostro*, 1994 WL 120267, at *9 (citing broad grant of authority under Section 33(a) of the Act, which "allows the Board to enter such final orders as it deems appropriate" and finding the Board has authority under this provision to award cleanup costs for violations that occurred more than ten years prior); *Malina v. Day*, PCB 98-54, 1998 WL 29953, *2 (Jan. 22, 1998) (finding that the plaintiff could seek recovery or remediation costs in an enforcement action for open dumping violations).

## FACTS PROVEN AT HEARING

### I. JM Operations

JM began operating a manufacturing facility just north of Sites 3 and 6 in 1922. (Tr. May 23, pp. 34:17-35:5; 42:13-18.) JM manufactured all types of products at the facility, including roofing material, pipe insulation, Transite pipe, packing and friction materials, gaskets and brake

shoes, many of which contained asbestos. (*Id*., pp. 42:19-43:3.) Asbestos was used "either as a fire resistant ingredient in the products to make it temperature resistant and/or it was used as a reinforcement in the product, for example, in the Transite pipe." (*Id*., p. 43:4-11.) The Transite pipe made in Waukegan ranged from 2-48 inches wide and 10-12 feet long. (*Id*., p. 44:11-17.)

**II. Development of Sites 3 and 6**

Based upon a review of historical records, Site 6 was utilized as a roadway dating back to at least the 1930s. (*Id*., p. 165:2-8; Ex. 06-4.) It is still used as a roadway. (Ex. 06-4.) Site 3 historically has been owned by ComEd. (Ex. 06-7, § 2.2.1.) The first developed use of Site 3 occurred in the late 1950s. (Tr. May 23, pp. 131:10-132:5; Ex. 06-4, 06-7, § 2.2.1.) In 1956, JM entered into a license agreement with ComEd to use a portion of what is now Site 3 as a parking lot for its employees ("Parking Lot"). (Tr. May 23, pp. 34:17-22; 45:11-20; 46:16-19; 47:13-17; 49:12-23; Ex. 50-1 (granting license "for the purpose of parking automobiles of employees of Licensee and for no other purpose").)

The 1956 license agreement between JM and ComEd states that JM must "install and maintain, at its expense, suitable barriers on the perimeter of said parking area and to confine Licensee's use thereof to the area specified" and mandates that JM "at its sole cost and expense, shall also install and maintain wheel stops to provide an orderly alignment of the rows of cars in said parking area." (Tr. May 23, pp. 49:24-50:13; Ex. 50-2.) The license agreement did not permit JM to import fill onto ComEd's property in order to erect the Parking Lot and there is no evidence that JM did so. (*See generally* Ex. 50; *see also* Exs. 16-9, 16-10.) At the time the Parking Lot was put in place, Site 3 was "relatively level ground." (Tr. May 23, p. 134:8-16; Ex. 21A-23 (showing relatively level ground in Parking Lot area profile).) The level ground allowed JM to lay concrete Transite pipe, split in half, on the ground for the required wheel stops and to

delineate the perimeter boundary. (Tr. May 23, pp. 45:21-46:6; 50:7-52:18; 122:17-123:14; 133:4-135:9; 260:11-18; Ex. 65-2, § II.B (USEPA stating that "[a]sbestos-containing pipes were split in half lengthwise and used for curb bumpers on Site 3").) The Parking Lot, the wheel stops and the perimeter boundary are all clearly visible in an aerial photograph from the late 1950s, as well as one from 1967. (Exs. 52, 53L.)

At trial, IDOT's purported expert, Mr. Steven Gobelman, offered the unsupported opinion that JM used ACM fill to build the Parking Lot. However, he only relied upon one piece of evidence for this opinion, a statement contained in a 1999 environmental report that said, "[a]ccording to JM, the parking lot was constructed with materials containing ACM." (Exs. 57-11, 8-10; Tr. June 23, pp. 62:16-64:7; Ex. 04C-173, lines 7-16.) Mr. Gobelman, however, did not bother to do any work to confirm the accuracy of this statement. (Tr. June 23, pp. 64:17-65:12; Ex. 04C-175, lines 1-4.) But JM did. At hearing, JM's project manager for environmental work at the Sites, Mr. William Dennis Clinton, testified that he was the person who communicated the Parking Lot history to the consultant who wrote the 1999 environmental report and that he told them *only* that the Parking Lot had "asbestos-containing Transite as wheel bumpers . . . on the surface" and that he *never* told the consultant that the parking lot "was constructed with ACM other than the concrete Transite pipe on the surface of the parking lot." (Tr. May 23, pp. 54:4-55:12; June 23, pp. 68:13-73:2; Exs. 16-9, 04D-49 line 22- 04D-50, line 4; Ex. 16-9.) In fact, later in that very same 1999 report Mr. Gobelman relies so heavily upon, it describes the Parking Lot history as follows: "[h]istorical aerial photographs indicate that pipes were used in the parking area to aid in determining parking spaces," noticeably not mentioning anything about the Parking Lot being constructed with "fill material." (Ex. 57-16; Tr. June 23, pp. 66:3-23.) Mr. Gobelman did not think this contradictory statement was significant. (Tr. June

23, pp. 66:3-67:6.) In fact, Mr. Gobelman did not even bother to read Mr. Clinton's deposition, which discussed the intent behind the phrase in the 1999 environmental report that he found so persuasive, before testifying at trial. (*Id*., pp. 67:7-68:12.)

## III. Grants For Public Highway

On or about August 3, 1971, ComEd granted to the State of Illinois, acting by and through the Department of Public Works and Buildings (IDOT's predecessor), a "Grant for Public Highway" (recorded in the Lake County Recorder's Office, document number 1517501), providing IDOT the "right to use for highway purposes only" certain tracts of land. (Ex. 41; Tr. May 24, pp. 123:24-125:6.) These tracts of land included two areas relevant to this case.

### A. Temporary and Permanent Easement Parcels

One parcel granted to IDOT was a temporary easement depicted on Exhibit 15 as Parcel No. E393, which runs along Detour Road A and intersects with Greenwood Avenue. (Tr. May 24, pp. 144:23-145:24.) This easement was used to build, maintain and remove Detour Road A. (*Id*., pp. 126:9-127:7; 145:2-24.) The other relevant parcel granted to IDOT is a permanent easement also depicted on Exhibit 15. The "Grant is an existing permanent easement in favor of" IDOT and "exists today as a permanent property right in IDOT." (*Id*., pp. 115:7-23; 127:11-128:1; Ex. 18-9, § V.A; Tr. June 23, p. 242:3-19; June 24, pp. 121:13-122:6; 130:7-10.) It is identified as Parcel No. 0393, which runs along the southern side of Greenwood Avenue. (Ex. 15; Tr. May 24, pp. 122:6-123:17.) Parcel No. 0393, in conjunction with a right of way on the north side of Greenwood, was used by IDOT to build the Embankments that raised the grade of Greenwood and connected Greenwood to the Amstutz Expressway and extend many feet to the south into Site 3. (Tr. May 25, pp. 52:9-53:16; June 23, pp. 223:24-224:5; June 24, pp. 120:22-121:1; 210:21-211:20; *see also* Ex. 21A-72.)

The Grant was re-recorded on or about June 16, 1974 as document number 1649468 (Ex. 42; Tr. May 24, p. 125:7-19; Ex. 18-7, 18-9.) In 1984, the 1971 Grant was again recorded (as document number 2288725), but was amended "to correct the intent and legal descriptions" of the 1974 Grant (Exs. 43-9, 85; *see also* Exs. 18-7, 18-9.) The amendment clarified which easements were permanent and which were temporary. (Exs. 43, 18-9, § V.A.1; Tr. May 24, pp., 125:20-127:16; June 24, pp. 123:5-124:7.) Parcel No. E393 was identified as temporary whereas Parcel No. 0393 was noted as permanent. (*Id*.; *see also* Ex. 85-10.)

**B. Ownership Interest Conveyed By the Grants**

According to the uncontroverted testimony of JM's easement law expert, Mr. Joseph Fortunato, Esq., the Grant was a conveyance of a "direct" ownership interest in land. (Tr. May 24, pp. 142:19-143:5; Ex. 18-9, § V.A.1 ("Under Illinois law, the Grant . . . is a direct interest in Parcel No. 0393.").) He also testified that the Grant extended to the subsurface of the land conveyed. (Tr. May 24, pp. 143:6-144:3; *see also* Ex. 18-10, § V.A.2.) IDOT presented no evidence to dispute either point. Thus, during the Project, IDOT directly owned the land and subsurface associated with Parcel No. E393 and Parcel No. 0393. (*Id*.)

**C. The Significant Control Given to IDOT over the Sites**

Mr. Fortunato testified that "the right to control, in [his] opinion, has been an ongoing right" afforded to IDOT by virtue of the Grant. (Tr. May 24, pp. 146:1-147:7.) Even IDOT's expert, Mr. Gobelman, agreed that a Grant for Public Highway transfers control. (Tr. June 23, pp. 237:17-238:14; Ex. 04C-101, lines 11-18 ("The right-of-way is the complete footprint that IDOT is taking control of . . .").) The control conveyed to IDOT by the Grant is exemplified by the rights afforded an easement holder for "highway purposes" under Illinois law. As noted above, these rights and duties apply to both the surface and subsurface of the easement area.

(Ex. 18-10, § V.A.2.) The rights include the right "to operate on," "to construct improvements in, on, and under," "to maintain," "to access," "to prevent third parties from interfering with," "to control," and "to repair" the easement areas. (*Id*.; Tr. May 24, pp. 143:6-144:3; 146:1-147:7.) The duties imposed include the duty to "maintain and repair the real property," "not to damage or cause diminution in value," "to prevent waste," and "to maintain public safety." (Tr. May 24, pp. 147:8-148:1; Ex. 18, § V.A.3.) It is axiomatic that the easement holder cannot exercise these rights and duties without the ability to control the land in question. IDOT presented no evidence rebutting Mr. Fortunato's testimony on the scope of the rights and duties conveyed to IDOT under the Grant. In fact, IDOT's disclosed expert, Mr. Keith Stoddard, who did not offer opinions for IDOT at hearing, testified that the Grant gave IDOT the ability to "do anything related to highway purposes" on the granted parcels, including whatever was necessary to "maintain the property for highway purposes," such as "maintaining public safety" and "maintaining traffic flow." (Tr. June 24, pp. 118:17-119:13.) As such, IDOT plainly possessed the power to control both Parcel No. E393 and Parcel No. 0393 during the Project and as long as IDOT's interest in Parcel No. 0393 continues.

## IV. Overview of Relevant IDOT Amstutz Work 1969-1976

The Project plans called for IDOT to impact both Sites 3 and 6. During the Project, IDOT built Detour Road A that transected the Parking Lot and intersected with Greenwood Avenue, thereby impacting both Sites 3 and 6. (Ex. 21A-23; Tr. May 23, pp. 154:3-156:5.) IDOT also constructed the Embankments on the north side of Site 3 and the west end of Site 6 (both north and south of Greenwood) in order to elevate Greenwood Avenue. (Tr. May 23, pp. 165:9-14; 167:4-6.) These embankments raised Greenwood about 20 feet in some places and were needed to "bring Greenwood Avenue up and over the railroad tracks," or, stated differently,

to "allow traffic then to go over the railroad tracks and then ultimately tie into the freeway project." (*Id.*, pp. 165:9-167:8.) Neither Detour Road A nor the raised Embankments existed before the Project. (Ex. 21A-23; Tr. May 24, p. 26:17-23.) Stated differently, IDOT built them. (Tr. May 24, pp. 25:17-27:1.)

### A. IDOT Dismantled the Parking Lot and Disposed of Pipes During Its Preliminary Work On the Project.

The evidence presented at hearing demonstrates that the Parking Lot was dismantled by IDOT. USEPA stated in its EAM that the Parking Lot was "taken out of service . . . when the Amstutz Expressway was constructed." (Ex. 65-2, § II.B.) Moreover, JM's expert witness, Mr. Douglas Dorgan, Jr., opined that the evidence supports the conclusion that the Parking Lot was "removed by IDOT in the late 1960s or early 1970s as part of its work on the Amstutz Expressway Project." (Exs. 06-4, 06-14 (stating that Parking Lot was "destroyed" by IDOT).)

A review of the plans and aerial photographs support this opinion. The plans identify the Parking Lot and call for IDOT to build Detour Road A through the Parking Lot. (Ex. 21A-8, 21A-23; Tr. May 23, pp. 159:19-160:19; 162:5-17.) If the Parking Lot had not existed at the time, it would have made little sense for IDOT to have identified it in its drawings. (Tr. May 24, pp. 24:15-25:2.) The aerial photographs confirm that IDOT took apart the Parking Lot and, in doing so, disposed of the concrete Transite pipes. In 1967, "the Parking Lot on Site 3 is readily discernible." (Tr. May 23, pp. 141:6-142:6; Ex. 53L.) By 1969, IDOT had begun work on Sites 3 and 6, including conducting surveys and doing geotechnical work. (Tr. June 23, pp. 78:2-80:22 (Gobelman admission); Ex. 04C-97 line 23- 04C-98 line 5 (Gobelman agreeing soil work would have been done before 1970); Tr. of May 23, pp. 146:14-19; 151:17-23; Ex. 16-4, § 2.1.1.) In June 1970, at least six months later, an aerial photo shows that the Parking Lot has been disturbed. (Ex. 54S.) The concrete Transite pipes (white lines) are still apparent, but they

appear to have been reconfigured, suggesting that IDOT moved them around when they did their initial work on the Sites. (*Id*.; Ex. 53B; Tr. June 23, pp. 80:23-81:10 (Gobelman admitting that the "white lines" demarcating Parking Lot are still there in photo).) By 1972, however, one can no longer "make out the parking lot" and the pipes are "no longer evident." (Tr. May 25, pp. 190:11-191:13; Exs. 06-15, 54Q.) Rather, Detour Road A is located where the Parking Lot used to be. (*Id*.; Tr. May 23, pp. 157:8-159:7; Ex. 53B.) This evidence proves that IDOT disposed of the concrete Transite pipes when it removed the Parking Lot. In fact, in responding to a question about Site 3, IDOT's Resident Engineer admitted to "dealing with asbestos pipe during the project and burying some of it." (Exs. 60-4, 60-5.) According to Mr. Gobelman, when the Engineer said this, he was referring to concrete *Transite* pipe. (Tr. May 25, pp. 82:24-83:12.)

**B. <u>IDOT Crushed and Buried the Concrete Transite Pipes and other ACM During Construction of the Project.</u>**

The evidence presented also conclusively showed that IDOT crushed, buried, dumped, left, placed, disposed of, stored and/or abandoned concrete Transite pipe as well as non-transite ACM on Sites 3 and 6. Despite testifying as IDOT's expert, Mr. Gobelman ultimately agreed with this point twice at hearing. (Tr. June 23, p. 205:17-22 (agreeing that Transite pipe is located within the "embankment fill of the road construction project" conducted by IDOT); June 24, p. 10:10-16 ("Q: And does your report address what the contractor obviously -- ultimately did with any pipes he might have encountered during the project? A: No. ***It only stated that it went into the embankments, which was associated with 3 and 6***.") (emphasis added).)

Mr. Dorgan likewise opined that IDOT crushed and buried ACM on Sites 3 and 6. Based upon the record, he determined that:

> 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 material it spread across and buried at the Site.

(Tr. May 23, pp. 184:9-185:6; Ex. 06-14, § 3.2.) Mr. Dorgan's opinion was based upon numerous lines of evidence discussed below.

**1. *Construction Drawings Show ACM Is Located Within Fill Placed By IDOT.***

Compellingly, the locations of the ACM found buried on Sites 3 and 6 align with "the areas that were excavated and filled or simply filled at the direction of IDOT and in accordance with the plans drafted by IDOT." (Ex. 16-4, § 2.1.1; Ex. 21A; Tr. May 23, p. 200:14-18.) The fact that ACM is located where fill material is called for and at the depths fill material is called for in the IDOT construction plans is plainly illustrated by various Exhibits. Exhibits 06-25 to 06-28, 16-18, 84, and 202 (**see also* related versions Exs. 90, 164) all depict where ACM has been found during sampling done since 1999. These exhibits, including Mr. Gobelman's demonstrative Exhibit 202*, all show that the ACM detected — whether concrete Transite pipe, non-Transite pipe or asbestos fibers — is found in a location where IDOT did work. In many instances, the ACM is found exclusively within the zone of fill placed by IDOT, meaning at or above the base of fill depth called for in the plans. (Tr. June 24, pp. 188:9-203:24.) For example, Ex. 06-27 shows that the "asbestos that has been detected along the detour road is within the fill material placed by IDOT." (*See* Tr. May 23, pp. 198:14-200:18; June 24, p. 188:9-22.) This was true also of the surficial ACM that was picked up by ELM. (Tr. May 23, pp. 222:6-223:15 (there was a "strong correlation of Transite pipe located aligned with Greenwood and the Detour Road A.").)

Likewise, Exhibit 06-28 demonstrates that the ACM materials being identified along the Site 6 Embankment "are located within the fill placed [by IDOT] as part of the Greenwood

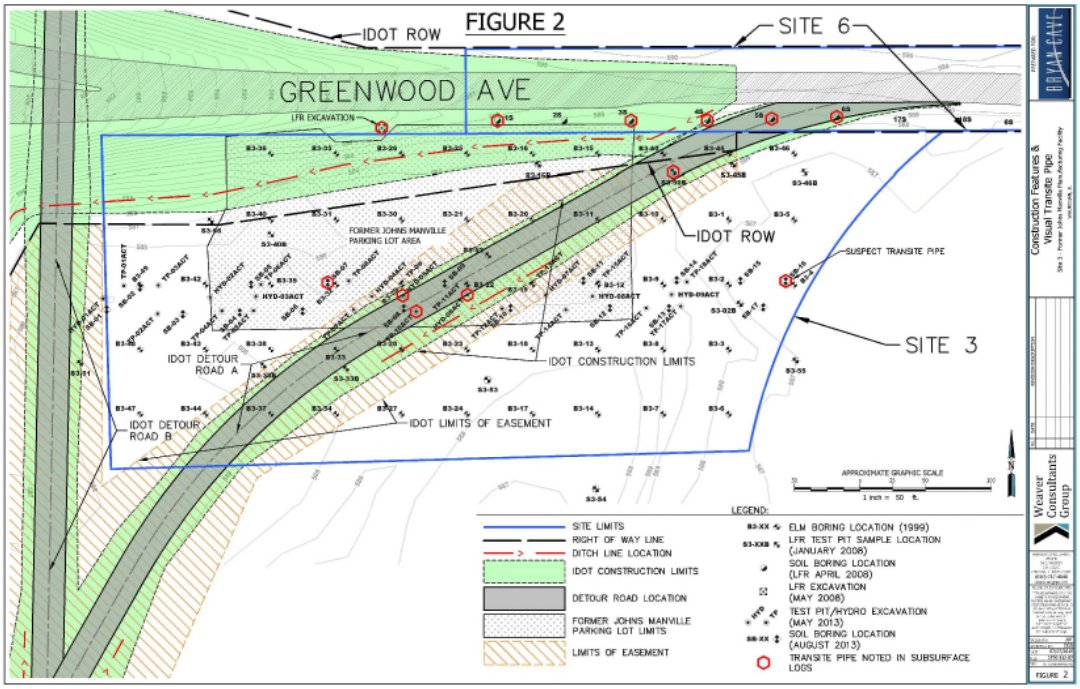
construction project." (Tr. May 23, pp. 205:15-206:9; 212:24-215:4.) Exhibit 84 similarly shows that the Transite and non-Transite asbestos materials located in the Embankments "are located within the IDOT fill material above the limits where the excavation occurred." (*See also* Tr. May 23, pp. 216:23-221:3; June 24, pp. 191:20-192:14 (discussing Ex. 84 and indicating non-Transite ACM is above "fill material placed by IDOT").) Stated differently, there is no "asbestos-containing material found below the line" depicted on the Exhibit "as base elevation of fill material." (Tr. May 23, p. 220:11-22.). In fact, IDOT's own expert prepared Exhibit 202*, which depicts different types of ACM within the zone of fill placed by IDOT both on the south side as well as the north side of Greenwood. (Tr. June 24, pp. 200:1-203:24 (indicating that Exhibit 202* shows that the ACM depicted on the north side of Greenwood is "within the fill material placed during the IDOT construction project").)

At hearing, Mr. Gobelman disagreed with Mr. Dorgan's view that fill was needed at some of these locations. But his arguments could not withstand cross examination. For example, Mr. Gobelman argued that IDOT did no work east of Station 7 along Greenwood. (Tr. May 24, p. 300:4-7; June 23, p. 183:7-15.) But Mr. Gobelman later admitted that this was untrue. (Tr. June 23, pp. 171:19-176:5 (explaining how his own Exhibit shows that IDOT did work east of Station 7 along Greenwood); 186:8-190:19 (admitting that IDOT placed fill east of Station 7 where Greenwood and Detour Road A intersect); 198:7-199:7 (describing the work done east of Station 7); Exs. 21A-23, 202*.)

He also claimed that IDOT did not remove unsuitable material at Stations 7-9 along Greenwood and thus IDOT did not replace the unsuitable material at these locations with fill material. (Tr. June 23, pp. 185:1-186:7.) But, once again, his argument lacked any evidentiary support and thus was emasculated on cross examination. (Tr. June 23, pp. 193:11-199:11

(conceding that plans called for excavation and more than three feet of "backfill . . . to get to the grade they need" at Stations 7, 8 and 9); 206:6-207:13; 212:1-213:24 (demonstrating Mr. Goblelman's misplaced reliance and gross exaggeration of the scope and content of Exhibit 35); June 24, pp. 189:12-190:3; 201:6-20.)

The evidence at hearing showed that not only did IDOT place fill material in locations where the construction plans called for it, but also that IDOT placed fill material at other locations where ACM was found. For example, IDOT constructed a number of ditches on the Sites, which are depicted on Exhibits 16-18 and 202* with red arrows (Tr. May 23, p. 127:4-14):




Exh. 16-18

These ditches were quite large. (Tr. June 23, p. 125:3-12.) The ditch just south of Greenwood was 25 feet wide below Greenwood Station 9 and 40 to 42 feet just below Greenwood Station 10. (Tr. June 24, pp. 210:21-213:9 (discussing Ex. 21A-72); *see also* Ex. 06-28 for Greenwood Station locations.) IDOT also built ditches to deal with drainage issues encountered on Site 3, including a ditch along Detour Road A. (Tr. May 23, pp. 234:19-235:15; Ex. 31-2.) There are

no ditches present at these locations today. (Tr. May 23, p. 213:6-12; June 23, p. 158:4-10.) Mr. Gobelman conceded that Site 3 was restored to its original grade at the end of the Project. (Tr. June 23, pp. 156:21-157:2.) This would have required the use of fill materials. (Tr. June 24, pp. 213:13-214:3.) Not surprisingly, ACM is found at these ditch locations on Site 3. (*Id*.) As Mr. Dorgan pointed out, ACM is located along the northern ditch at locations B3-25, B3-16 and B3-15 and along the Detour Road A ditch at locations TP-11, B3-22, HYD-TP-06A and TP-16. (*Id*., pp. 213:24-214:10; 216:5-13; Ex. 06-25, 06-26.) A close inspection of Exhibits 202* and 16-18 indicates that 4S, 3S and B3-50 also fall within the northern ditch location.

The record reflects that IDOT also installed a temporary culvert under Detour Road A on Site 3. (*See* Ex. 31; Tr. May 23, p. 235:2-23.) In order to do this, IDOT needed to dig under Detour Road A. (Tr. May 24, pp. 48:19:49:9.) As with the ditches, IDOT would have had to dig out and remove the culvert at the end of the Project and then restore the area with fill. (Tr. June 23, p. 159:12-17.) ACM is also embedded within the fill material at the location of the former culvert. (Tr. June 24, p. 216:14-21.)

Mr. Gobelman argued that the contractor would have only worked within the construction limits and because a few of the sample locations fall outside those limits, IDOT did not bury the ACM. Mr. Gobelman, however, has no evidence to support this claim, just his say-so that the contractor would have operated within the construction limits. (Tr. May 25, pp. 155:22-156:24; Ex. 08-13.) But Mr. Gobelman's say-so is belied by the facts. For example, the record reflects that the culvert described above extended outside of IDOT's construction limits as well as outside of IDOT's easement limits for Detour Road A. (Tr. May 24, pp. 47:3-7; 48:19-51-7; Exs. 31-4; 16-17.) Additionally, the 1972 aerial photo shows "quite a bit of disturbance" around Site 3, which demonstrates that IDOT worked outside of its construction limits. (Tr. May

23, pp. 157:9-160:22; Tr. May 24, pp 44:4-45:4; Exs. 16-17, 53B.) Finally, Project change orders state that IDOT disturbed a larger area around the Detour Roads than anticipated by the Project plans. (*See* Ex. 33; Tr. June 23, pp. 265:19-267-11.) Thus, the assertion that IDOT did not do work outside of the construction limits is wrong.

Mr. Gobelman also attempted to distance IDOT from the ACM contamination by claiming that, during the Project, IDOT's role was limited to "oversight" and that it was the "contractor's responsibility to determine how materials will be managed," but this argument, like many of his others, also did not hold up under cross examination. (Tr. June 23, p. 223:8-16; Ex. 08-10, § 8.) Mr. Gobelman conceded that the contractor could not have deviated from the IDOT plans without IDOT's approval because it is "IDOT's project." (Tr. June 23, pp. 226:24-227:9.) Moreover, he agreed that the contractor was required to follow IDOT's plans and specifications and the decisions of the Resident Engineer. (*Id*., pp. 225:21-226:9.) The "decision of the Resident Engineer" included decisions central to this case.

The IDOT Resident Engineer, for example, was responsible for approving fill materials to be used on the Project and for determining where excess materials, such as concrete Transite pipe, could be disposed of during the Project. (*Id*., pp. 225:7-20 (embankments could only be constructed of materials "satisfactory to the [IDOT] engineer"); 129:24-130:8 (testimony of Mr. Gobelman that Specifications would have treated concrete Transite pipes as "obstructions"); 141:12-143:19 (contractor could "bury" obstructions "outside of the right-of way with the resident engineer's approval" and "dispose of" them within the right-of-way only "at locations designated [by] the engineer"); Tr. May 23, pp. 144:12-145:23 (Dorgan discussing engineer's role).) Thus, IDOT exercised great control over the Sites and, more importantly, the concrete Transite pipes during the Project.

Mr. Gobelman also claimed that some of the waste might have been buried or re-buried when utilities were installed or maintained. However, he could offer no evidence that any utilities have been installed or maintained on Sites 3 or 6 since the Project ended. (Tr. June 23, pp. 94:23-95:18.) Moreover, the record reflects, and IDOT did not dispute, that IDOT contracted with persons to relocate utilities that were creating a conflict with IDOT's work on Sites 3 and 6 during the Project. (Ex. 91; Tr. May 24, pp. 208:16-209:20; 211:2-212:17.) One of these utilities is the water main that runs through Sites 3 and 6. (Tr. May 24, pp. 211:12-212:17.) In discovery, JM requested information IDOT could provide regarding the relocations of these utilities. IDOT responded that the documents had been destroyed in a flood in the 1970s. (*Id*., pp. 212:18-213:15; Ex. 91-9.) USEPA is requiring JM to conduct an additional $70,000 investigation of this water line that was relocated during the Project. (Tr. May 23, pp. 85:14-86:21.) Since IDOT was ultimately responsible for the relocation of that water line, which required excavation on the Sites as well as further east on Site 6, it follows that IDOT is responsible for ACM found in or around the water main as well as other relocated utilities.

**2.** ***IDOT Encouraged and Incentivized The Contractor to Incorporate the Concrete Transite Pipes into the Project.***

The fact that IDOT crushed and buried the concrete Transite pipes is further supported by the Specifications. As explained by Mr. Dorgan, these IDOT 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).

(Ex. 16-5.) While Mr. Gobelman disagreed with Mr. Dorgan's interpretation of the Specifications in his Expert Report, he embraced it at hearing. (Tr. May 25, pp. 162:4-22; 165:2-

10 (opining that the pipes had "value" to the contractor and that they would have been buried during the Project).) In fact, Mr. Gobelman pointed out that, consistent with Specifications, it was the contractor's responsibility to remove the concrete Transite pipe "at their own expense." (Ex. 08-11; Tr. June 23, p. 137:5-11.)

More specifically, both IDOT and JM agree that the concrete Transite pipe IDOT encountered would have been classified and treated as an "obstruction." (Tr. May 23, pp. 223:16-224:17.) Section 201.03 of the Specifications dictates that obstructions "shall be removed and *disposed of* as required by these specifications." (Ex. 19-3 (emphasis added).) Section 201.08 then provides that such *disposal* "shall be done in accordance with Article 202.03." (Ex. 19-4.) Section 202.03 provides that if broken concrete cannot be placed in embankments, it should be "*disposed of* at locations designed 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." (Ex. 19-5 (emphasis added).) Section 202.03 also provides that surplus material "shall be used to widen embankments, flatten slopes or be disposed of otherwise within the right of way as the engineer may direct;" if it cannot be used or disposed of on site, "it shall be disposed of by the contractor at his expense outside the limits of the right of way." (*Id.*; Tr. May 23, pp. 225:14-226:22.)

Exhibit 16-18 demonstrates that the pieces of concrete Transite pipe found on Sites 3 and 6 are buried in a manner consistent with Section 202.03 of the Specifications. The identified pipe pieces are located within the right of way (with one exception) and either embedded in the embankment or buried along Detour Road A. (*See* Ex. 16-18.) After all, if the contractor had not buried the crushed pipe, he would have had to pay to haul it off site. Thus, there was a "strong economic driver on the contractor's part to be sure that any of these types of materials

that are encountered on the site get used in the way that avoids having to haul them offsite." (Tr. May 23, p. 226:2-17.)

Under the Specifications, in order for the contractor to use the concrete Transite pipes, both IDOT and JM agree that he would have had to crush them first. The Specifications require that the concrete must be broken up before it is used. (Ex. 04C-85, lines 2-15.) Section 207.04(a) states that no "broken concrete more than 4 inches" can be permitted within 12 inches of the surface and that only pieces of concrete less than "2 square feet" can be placed in fill without being broken up. (Ex. 19-12.) In order to break up the pipes, IDOT concedes that the contractor needed to use "bulldozers, blade graders or other equipment approved by the Engineer." (*Id.*; Tr. June 23, pp. 168:24-169:21.) Consistent with this mandate, there is no dispute that no 10 to 12 foot pipes (the size JM made at the facility) are found buried on the Sites. (*Supra* at 7.) Rather, the ACM found buried on Sites 3 and 6 is generally very small, about 2 to 4-inch pieces. (Tr. May 23, p. 72:15-19.) This crushing of the concrete Transite pipes with the heavy equipment caused the release and dispersion of "asbestos fibers" into the "surrounding soils." (Tr. May 24, pp. 58:19-59:5 Ex. 06-17.)

Given that the ACM is found not only within the fill placed by IDOT, but also in the locations, as well as the size and form consistent with the Specifications applicable to the Project, it is undeniable that IDOT crushed and buried the pipes on the Sites when it constructed Detour Road A, built the Embankments and restored Site 3 to its original condition.

**3. *IDOT's Resident Engineer Admitted Burying Transite Pipes***

On top of all of this evidence that IDOT buried ACM, Duane Mapes, IDOT's Resident Engineer for the Project, "recalled dealing with asbestos pipe during the project and burying some of it." (Tr. May 23, pp. 197:9-198:13; Ex. 60-4.) While Mr. Gobelman interpreted Mr.

Mapes' statement as referring to the entire Project (Tr. May 25, pp. 86:24-87:9), this view cannot withstand scrutiny. Mr. Mapes was responding to a 104(e) Request from USEPA about IDOT's work, specifically on ***Site 3,*** not on the entire Project site. (Ex. 58-6, 58-14; Tr. May 24, pp. 36:16-39:10.) The most logical and reasonable view of IDOT's 104(e) Response is that Mr. Mapes was "acknowledg[ing] that as part of their construction efforts, there was Transite pipe buried on the site." (Tr. May 23, pp. 193:7-194:17 (discussing Exs. 58-6 and 58-14); 196:18-198:13 (discussing Exs. 60-4, 60-5. 16-4 and 16-5).)

**4. *The Project Sequencing Made Sense for IDOT to Use Concrete Transite Pipes in and around the Embankments and Detour Road A.***

Mr. Gobelman testified that the concrete Transite pipes had "value" to the contactor and that he would not want to "take them offsite someplace and to discard them." (Tr. May 25, pp. 161:7-162:16.) Rather, he said, the contractor would "most likely" have used them in "current structures being built" that needed a lot of material, such as an embankment. (*Id.*, p. 162:4-22.) In fact, he called them a "viable product that can be used in embankments" because, in part, they "reduce the amount of material that he [the contractor] is going to have to try and find from a borrow source." (*Id.*, pp. 163:10-164:8; 165:2-10.)

Mr. Gobelman's trial testimony — standing alone — affirms the conclusion that IDOT did in fact crush the concrete Transite pipe on top of the Parking Lot thereby releasing ACM fibers and then buried the "valuable" pieces in the Embankments and along Detour Road A, where the pipe happens to be located. The pipes were originally situated on Site 3 Parking Lot, just south of the Embankments. (Exs. 52, 21A-23.) Mr. Gobelman agrees that in order to use the Transite pipes on the Project, the contractor would have broken them up first and he also concedes that there was "room in the parking lot area to do the breaking up of these pipes." (Tr. June 23, p. 147:5-11.) Furthermore, Mr. Gobelman was adamant that the contractor "does not

like to move things twice" (*id.*, pp. 139:20-140:2; 147:12-15), and that in construction, contractors tend to use what is "readily available, whatever's close to them to do construction of temporary type things." (*Id.*, p. 147:16-20.)

Here, Mr. Gobelman agrees that the contractor would have had to move the pipes once to get them out of the way to build Detour Road A. (*Id.*, pp. 146:21-147:4.) Therefore, it would be inconsistent with his own opinion on construction practices for the contractor to have again moved the pipes over to Sand Street or even further west where other work was being done. Rather, it made much more sense for the contractor to crush the pipes on the Parking Lot (thereby dispersing ACM and fibers and leaving small pieces of pipe on the ground), set them to the side and then use them in Detour Road A and the Embankments, which were by far the closest embankments to the Parking Lot. (*Id.*, pp. 105:7-106:16; Ex. 06-17). In short, the evidence presented at trial shows that IDOT caused, allowed and conducting the dumping, consolidation, disposal, storage or abandonment of ACM on the Sites.

**V. The Sites Post-Amstutz Project**

There is no evidence that any development occurred on Sites 3 or 6 after the Project was completed. (Tr. May 23, pp. 164:22-165:1 (as to Site 3); *compare* Ex. 53K (1974 aerial photograph) *with* Ex. 53C (2014 aerial photograph) (as to Site 6); Ex. 06-4 (Site 3 is "vacant land" and the "road still exists" on Site 6).) However, as discussed above, IDOT did re-record its Grant in 1974 and again in 1984. (*See* Exs. 42, 43.)

**VI. Investigations and USEPA Mandated Remedy for ACM and Fibers**

ACM was identified on the surface of Site 3 in 1998. (Ex. 65-2; Tr. May 23, pp. 44:23-45:4.) ACM was discovered on Site 6 in near surface soils in 2002 as part of a Park District Study. (Ex. 63-12.) Little activity occurred on the Sites between 1999 and 2007. (Ex. 06-9, §

2.3.1; Tr. May 23, pp. 167:23-168:2.) In 2007, JM and ComEd entered into an Administrative Order on Consent with USEPA ("AOC") in which they committed to investigate the Sites and, if warranted by the investigation, conduct some type of clean up. (*Id*, pp. 168:8-169:21.)

The final EE/CA was submitted in April 2011. (Ex. 63.) It discussed the investigation and, based upon those results, recommended a removal action for the Sites. (*Id*.) For the southern side of Site 6 (sample locations 1S-9S), the recommended alternative was Alternative 3, a soil barrier. (Exs. 63-34, 63-56, 63-93, 63-96.) For Site 3, the recommended alternative was Alternative 3, which also focused on a soil barrier over the Site as well as some limited, shallow excavation in the northeast corner. (*Id*., 63-31, 63-56, 63-93.) USEPA rejected JM's recommended action and imposed a new removal action that drastically departed from the soil barrier action set forth in the EE/CA Version IV. The new remedy, set forth in the EAM, generally required the "removal of all asbestos-impacted soils and the creation of clean corridors for all utilities running through the Sites." (Tr. May 23, p. 176:11-24 (discussing Ex. 06-11); Ex. 65.) Using the USEPA imposed remedy, JM developed a Removal Action Work Plan. (Ex. 67.) The most recent Removal Action Work Plan requires the following for both Sites: the relocation and abandonment of utilities, the creation of clean corridors along utilities, removal of impacted soil and, for Site 3, vegetative soil cover. (Tr. May 23, pp. 183:9-184:8.)

According to USEPA, "[c]onditions at the site present an imminent and substantial endangerment to public health, or welfare, and the environment." (Ex. 65-7, § III; Tr. June 23, p. 235:1-11.) This is, in part, because the pollution is ongoing. USEPA has determined that at the Sites, "broken scraps of asbestos tend to move differentially upward through the soil with each freeze/thaw cycle. Thus, ACM and/or asbestos fibers currently covered with soil can, over time, reach the soil surface increasing asbestos contamination of surface soils and asbestos fibers may

become readily releasable to the air." (Ex. 65-8, § III.B; Tr. June 23, pp. 235:12-236:9; *see also* Tr. May 23, pp. 178:20-180:24; Ex. 06-19.) USEPA also noted that "as ACM and asbestos fibers come to the surface" at Sites 3 and 6 and "become airborne," potential receptors include "residents approximately one-third to one-half of a mile to the west of the Sites" and workers on the Sites. (Ex. 65-6; Tr. May 23, pp. 179:15-180:24.)

JM's damages/costs are unchallenged by IDOT. Since the EAM, JM has incurred approximately $685,000 in investigation costs related to Site 3 and the western portion of Site 6. (Tr. May 23, p. 77:12-24.) Moreover, based upon the current removal remedy, JM is required to spend at least $5,265,000 million in the future to clean up Sites 3 and 6 ($1.907M + $3.148M + $70K + $140K). (*Id*., pp. 81:19-83:7; 85:14-86:21; 90:18-91:9; 229:15-230:8; Ex. 71.) The cost for Site 3 is at least $2,110,000 (Tr. May 23, pp. 83:1-4; 86:6-21; 230:3-6) and the cost for the western end of Site 6 is at least $787,000. (*Id*., pp. 231:24-232:7.)

**VII. IDOT's Current Ownership and Control over Portions of the Sites**

IDOT has not conveyed, divested, lost, or abandoned its interest in Parcel No. 0393 in any way or at any time. (Tr. May 24, pp. 149:10-155:20; Exs. 37-2, 46, 18-9, § V.A.1.) As such, IDOT still holds a permanent easement in Parcel No. 0393. (Tr. June 24, pp. 118:11-119:7 (IDOT's expert on easements, Mr. Keith Stoddard, agreeing that "IDOT has a permanent easement in Parcel 0393"); 123:5-21; May 24, p. 115:7-23; Ex. 18-9, §V.A; June 23, p. 242:3-19.) Mr. Stoddard elaborated:

> Q. IDOT's permanent easement in Parcel 0393 is an existing right-of-way to this day, correct?
> A. That is one way right-of-way can be classified and as it currently stands, the road is still there. So it would still be effective, in my opinion.
> Q. And so because the road is still there, the grant for public highway conveyed to IDOT is still necessary?
> A. I believe so.

> Q. So as long as the road abutting Parcel 0393 is being used for highway purposes, IDOT's easement on Parcel 0393 is still in affect?
> A. That would be correct.
> Q. And it would still be necessary?
> A. Yes.

(Tr. June 24, pp. 121:13-122:6.) Mr. Gobelman also agreed, testifying that IDOT holds its right-of-way interests given by the Grant on both the north and south side of Greenwood. (Tr. June 23, p. 242:3-19.) Mr. Gobelman depicted these two "IDOT ROWs" on Exhibit 202*, which also indicates that these two IDOT right-of-ways fall within Sites 3 and 6 and contain buried ACM. (Tr. May 25, pp. 149:21-152:10; June 23, pp. 170:13-24; 217:9-20; June 24, pp. 197:13-199:7; 201:21-202:22; 203:18-24; 207:16-208:4.)

Moreover, both JM and IDOT produced title company documents, specifically a tract search and a title commitment, showing that the Grant to IDOT remains valid and that no subsequent conveyances have impacted or extinguished the rights given to IDOT by the Grant. (Exs. 37-2, 46; Tr. May 24, pp. 150:19-155:20.) Consequently, because a permanent easement grant conveys a direct ownership interest, there can be no question that IDOT continues to hold a direct ownership interest in Parcel No. 0393.

The evidence presented at hearing firmly established that IDOT not only has the ability to, but in fact does control Parcel No. 0393. The rights and duties conveyed by way of the Grant never ceased. As stated by Mr. Fortunato, "IDOT still holds these rights" and "IDOT still owes and is subject to these duties." (Ex. 18-10, § V.A.2; 18-11, § V.A.3; *see also* Tr. May 24, p. 143:6-144:22; 146:1-147:7; May 25, pp. 54:13-55:3; June 24, p. 119:3-120:1.) This is exemplified by the fact that IDOT continues to "operate" on Parcel No. 0393 and use it for a "highway purpose." (Tr. May 24, pp. 120:13-22; 155:21:156:18; Ex. 18-7, § III; Ex. 18-9, 18-10, § V.A.1; 18-12, § V.B; Tr. May 25, p. 63:18-21.)

Parcel No. 0393 is part of a still-existing ramp that travels from the east side of Greenwood Avenue up and over the railroad tracks and then connects with the Amstutz. As explained by Mr. Stumpner, an IDOT Bureau Chief:

> Q. And so on parcel 0393 because Greenwood Avenue was at the same grade as the bridge, IDOT had to raise the road over Greenwood Avenue, isn't that right?
> A. They had to raise Greenwood Avenue itself, yes.
> Q. So they needed an easement or right of way to go on to Parcel 0393 to raise that road?
> A. Yes.
> Q. That road and the grade of the road along Greenwood Avenue still exists today?
> A. Yes, that is correct.
> Q. So the embankment that helps prop up the grade of that road on Greenwood Avenue still exists today?
> A. Yes, that is correct.

(Tr. May 25, pp. 52:21-53:12.) According to Mr. Stumpner, Mr. Stoddard, and Mr. Fortunato, Parcel No. 0393 currently serves as part of the "grade separation" and is necessary to "maintain the flow of traffic" between Greenwood and the Amstutz. (Ex. 04H-81 line 18- 04H-83, line 4; Tr. May 24, pp. 121:19-122:5; 155:21-156:18; Ex. 18-9, § V.A.1.) If the ramp were to be removed, there would be no way to access the Amstutz from the east side of Greenwood and vice versa. As such, IDOT admitted that no one could remove the Embankment on Parcel No. 0393 without IDOT's permission. (Tr. May 25, pp. 54:13-55:3 (IDOT stating that City would need "IDOT approval" to tear down the Embankment); Ex. 04H-126 line 12-04H-127 line 8; *see also* Ex. 18-8, 18-10, § V.A.2; 18-12, § V.C; Tr. May 24, p. 146:1-147:7.) Accordingly, IDOT is "continuing to operate and maintains control over the entire embankment, including the surface and subsurface, on Parcel No. 0393." (Ex. 18-12, § V.C.)

The record reflects that in addition to using Parcel No. 0393 for enabling highway access, IDOT has also recently exercised control over Parcel No. 0393 in other ways. In 2011-2012, IDOT exercised its easement rights to Parcel No. 0393 in conjunction with a bridge conditioning

project on Greenwood Avenue over the Amstutz Expressway. (Exs. 77, 18-11, 18-12, § V.B; Tr. May 24, pp. 63:13-19; 65:8-21.) As part of that work, IDOT conducted an environmental study on Parcel No. 0393, which included taking soil samples on Sites 3 and 6 and performing a Special Waste Assessment. (Tr. May 24, pp. 68:1-69:24; 70:22-73:21; Ex. 77-14, 77-116-117, 77-146.) In the project documentation, which IDOT maintained in discovery was wholly irrelevant to this case, IDOT identifies Parcel No. 0393 as well as the right of way on the north side of Greenwood as an "existing ROW" and determined that IDOT did not need to acquire additional ROW for the work. (Ex. 77-32, 77-35, 77-46, 77-220; Ex. 75-41; Tr. May 24, p. 77:4-8.) Rather, IDOT could just rely upon its existing easement rights afforded by the Grant. (Tr. May 24, pp. 73:18-21; 77:4-11; 80:19-81:11; 101:4-102:7; Ex. 04E-23 lines 10-20.) (JM's Motion to Compel more information on the project was denied on 4/28/16). IDOT does not dispute that it currently has the right to do these things, such as access Parcel No. 0393, do survey work on it, and to conduct subsurface investigations on it. (*Id.*; Tr. May 24, pp. 69:5-24; June 25, pp. 119:22-120:1.) IDOT plainly continues to control the Embankments.

## EXPERT WITNESS CREDIBILITY

At hearing, JM presented two expert witnesses and IDOT presented one. JM relied upon Mr. Doug Dorgan's testimony to assess the facts and opine about whether IDOT violated the Act though IDOT's own conduct and whether that conduct caused damages.

### I. Mr. Douglas Dorgan, Jr. (JM Expert)

Mr. Dorgan "has over 25 years of experience working as an environmental consultant" and is currently the Manager of Weaver Consultant Group's Environmental Practice as well as its Site, Building and Infrastructure Consulting Group, which "concentrates on civil engineering projects." (Ex. 06-5, 06-6 § 1.2; Tr. May 23, pp. 110:18-112:18.) He has a Bachelor's of

Science in Earth Science, a Minor in Geology, a Master's of Science in Geography with a Concentration in Environmental Sciences and he is a Licensed Professional Geologist. (*Id*.) He has significant experience doing hands-on engineering work, including "extensive experience reviewing constructions drawings both design [and] as built sets of plans" and doing "roadway design" work. (Tr. May 23, pp. 112:19-115:10; 118:3-119:1; Tr. May 24, pp. 20:10-23:8; Ex. 07.) He has worked on sites involving asbestos and routinely works on projects where he is investigating the source of contamination. (Tr. May 23, pp. 115:11-117:2.) Additionally, he has "worked with IEPA since the beginning" of his career and has been "heavily involved in going through their various permitting and regulatory programs" and representing clients facing notices of violation. (*Id*., p. 117:3-15.) Likewise, he has been involved in CERCLA projects "across the board," including clean up, clean up design, allocation, NCP compliance, remedial investigation/feasibility studies, and designing and implementing Records of Decision. (*Id*., pp. 117:16-118:2.)

**II. Mr. Steven Gobelman (IDOT "Expert")**

To rebut Mr. Dorgan, IDOT relied upon the testimony of Mr. Steven Gobelman, an unqualified "expert" in IDOT "historic practices and construction methodologies" (Tr. May 25, pp. 211:10-13; 227:15-22), who could not articulate any sound bases for his opinions. (*See also* JM's Motion to Exclude Testimony of Mr. Gobelman, filed February 8, 2016), which was renewed at hearing (*see* Tr. of June 23, p. 258:15-20).) In fact, at hearing, it was disclosed that Mr. Gobelman based all of his opinions on the Bid Plans, not the final As-Built Plans, though even he agreed that As-Built Plans are more representative of what actually occurred on the Project. (Tr. June 23, pp. 41:2-17; 45:12-21.)

Mr. Gobelman's overreaching was obvious at hearing. He was impeached more than 20 times during his testimony. His Expert Rebuttal Report, his deposition, his direct testimony and his testimony on cross-examination all contradicted one another; Mr. Gobelman even repeatedly disagreed with himself within a matter of minutes while testifying on the stand. (*See* Chart of Gobelman Inconsistencies, attached hereto as **Ex. A**.)

It is obvious from his testimony that Mr. Gobelman was willing to say just about anything to help IDOT's case. Indeed, up until the end of the hearing, he was "100 percent" certain that IDOT did not bury any ACM. (Tr. May 25, p. 233:11-15.) Rather, he offered the outlandish theory that the ACM could have become buried through nature or gravity. (*Id.*, pp. 249:6-251:2; Ex. 04C-182 line 18- 04C-183 line 7.) But his testimony on this pivotal fact flipped too, when Mr. Gobelman admitted that ACM is found in fill material that was placed by IDOT. (Tr. June 23, p. 205:10-22 (agreeing that Transite pipe is located within the "embankment fill of the road construction project" conducted by IDOT); June 24, pp. 10:10-16 ("Q: Does your report address what the contractor obviously -- ultimately did with any pipes he might have encountered during the Project? A: No. ***It only stated that it went into the embankments, which was associated with 3 and 6***.") (emphasis added).)

Mr. Gobelman's vacillating and disjointed testimony can perhaps best be explained by his bias toward IDOT. Mr. Gobelman was employed by IDOT for 20 years until July 2015. (Tr. May 24, p. 237:9-20; Tr. May 25, pp. 79:17-80:3.) Shortly after being deposed in this case, Mr. Gobelman joined Andrews Engineering, a private, outside IDOT consultant. (*Id.*; Tr. May 25, pp. 214:4-24.) He admitted that in the less than a year that he has worked at Andrews, he has handled several contracts and about 30-40 IDOT work orders. (Tr. May 25, pp. 215:1-216:6.) In other words, IDOT still pays Mr. Gobelman's paycheck.

Mr. Gobelman also has a personal vested interest in IDOT winning this case. Mr. Gobelman actually worked on matters involving Site 3 and 6 while at IDOT. First, he was involved in preparing IDOT's 104(e) Response to USEPA in 2000, which denied that IDOT was liable for ACM waste at Site 3. (Exs. 58, 60-4; 60-5; Tr. May 25, pp. 81:8-82:3; 132:5-21.) Second, despite initially denying it at hearing (Tr. June 23 p. 245:19-21), the evidence is clear that Mr. Gobelman oversaw work relating to Preliminary Environmental Site Assessment done on the Sites in 2011 ("PESA 2308"). (Tr. May 25, pp. 220:19-222:2 (explaining that from 2011-2015, he was the person that worked with the District to "task" the statewide consultants to do the PESA work and to oversee that work); Ex. 77-149 (document indicating Mr. Gobelman should be contacted about PESA 2308); Tr. June 23, pp. 250:16-252:14 (impeaching Mr. Gobelman's denial of involvement with PESA with his admission that he hired and worked on PESA 2308 with Weston Consultants).) Eventually, on the last day of hearing, Mr. Gobleman admitted his involvement. (Tr. June 24, pp. 28:10-23 (Mr. Gobelman contradicting prior testimony and conceding that he was the person who sent the work order to the consultants regarding PESA 2308 and that he would have been the person "overviewing the work done by the consultant" regarding PESA 2308).)

Mr. Gobelman's connection to PESA 2308 is important because work done in connection with that PESA, which Mr. Gobelman admittedly oversaw, identifies Parcel No. 0393 as an "existing" IDOT right-of-way. (Exs. 77-32, 77-35, 77-46, 77-220; Tr. May 24, p. 77:3-23.) Mr. Gobelman plainly knew this prior to his deposition, yet he told a different story at that time. (Tr. June 23, pp. 247:21:248:15; Ex. 04C-222-223 (admitting he read the PESA prior to issuing his Report that he inquired about the scope of the "further investigation" work he oversaw regarding the PESA area to ensure it was outside of the Sites)). He stated in his deposition that the City of

Waukegan "owns the right of way and jurisdiction of the road . . . The right of way at Sands and Greenwood Avenue." (Tr. June 23, pp. 242:7-19; Ex. 04C-39:7 line 7- 04C-40 line 1). This was wrong and Mr. Gobelman knew it.

Mr. Gobelman's history with IDOT and bias in favor of IDOT and his personal financial stake (in the form of expert witness fees and continued business from IDOT) severely undermines his testimony. *See Boland v. Kawasaki Motors Mfg. Corp. USA*, 309 Ill. App. 3d 645, 652 (4th Dist. 2000) ("[T]he principal safeguard against errant expert testimony is the opportunity of opposing counsel to cross-examine, which includes the opportunity to probe bias, partisanship, or financial interest. It is important to bring to the jury's attention facts that may discount the credibility of an expert's testimony."); *In re Zimmer Nexgen Knee Implant Prods. Liab. Litig.*, No. 12 C 6279, 2015 WL 5050214, *7 (N.D. Ill. Aug. 25, 2015) ("Reliability analysis under Daubert calls for the court to determine whether the expert's testimony is based on reliable methods rather than 'his own subjective experience or bias.'").

**III. Mr. Joseph Fortunato (JM Expert)**

On the issue of ownership and control over the Sites, JM primarily relied upon Mr. Joseph Fortunato, a real estate expert and attorney for over twenty years who has drafted and negotiated Grants for Public Highway as Special State's Attorney for DuPage County. (*See* Ex. 18-5, § II; Tr. May 24, pp. 104:24-113:8; 117:19-13.) Mr. Fortunato has specialized his law practice in real estate transactions, including heading Momkus McCluskey's real estate practice group, serving as outside general counsel for the Mainstreet Organization of Realtors and as a title insurance agent for Greater Illinois Title, Chicago Title, First American Title, and Attorneys Title Guaranty Fund, and lecturing extensively for numerous bar associations. (*Id.*) In these

roles, among others, Mr. Fortunato gained significant experience reviewing easements and title commitments and analyzing the rights and duties associated therewith. (*Id*.)

**IV. Replacement of Mr. Keith Stoddard with Mr. James Stumpner (IDOT Witnesses)**

IDOT, by contrast, elected not to use its expert, Mr. Keith Stoddard, the Chief of Plats and Plans for IDOT District 1, Land Acquisition, who is responsible for the preparation of the plats of highway and legal descriptions used in IDOT's acquisition process. (Tr. June 24, p. 74:2-12.) This decision was presumably made after Mr. Stoddard's deposition was taken, in which he agreed with JM's expert that IDOT held permanent ownership interests in portions of the Sites and during which he contradicted IDOT's discovery responses and his own Expert Disclosure Statement, which was originally drafted by the Attorney General's office. (Ex. 04H-51 lines 2-13, 04H-68 line 9- 04H-71 line, 04H-82 lines 12-17, 04H-84 lines 17-21; Tr. June 24, p. 127:8-11 (admitting that the Attorney General drafted his disclosure statement).)

In his place, IDOT chose to call as fact witness, Mr. James Stumpner, IDOT's Bureau Chief of Maintenance. (Tr. May 25, p. 9:6-10.) Mr. Stumpner did not and could not address the scope of the Grant. (*Id*., pp. 39:1-40:10; 46:10-17; 47:3-14; 56:18-58:19; 63:22-64:13; 66:3-67:15.) In fact, he admitted that he had never reviewed grant documents and had no experience interpreting them or evaluating the legal rights granted by them. (*Id*., pp. 68:13-69:1.) Rather, he focused on the red-herring issue of IDOT's maintenance responsibilities over the Sites. (*See, e.g., id*., pp. 32:17-33:10.) Like Mr. Gobelman, Mr. Stumpner repeatedly contradicted himself at hearing, including on whether IDOT, the City of Waukegan, or ComEd has maintenance responsibility over Parcel No. 0393, the reason IDOT acquired Parcel No. 0393, and even on whether he had reviewed JM's interrogatories to IDOT before verifying the responses under

oath. (*Id*., pp. 44:10-45:3; 48:14-50:9; 51:16-53:16; 60:5-63:1; 65:5-66:2; Ex. 04G-110 lines 6-13, 04G-15 line 1- 04G-16 line 12, 04G-17 lines 1-14.)

**IDOT VIOLATED SECTION 21 OF THE ACT**

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)(1). "Person" is defined under the Act to include a "state agency." 415 ILCS 5/3.315. It is undisputed that IDOT, formerly known as the Division of Highways, is an agency of the State of Illinois, and thus, a "person." (Ex. 2C-4, ¶ 3 (admitting allegation).)

It is well established that the Act can apply retroactively. The appellate court has found that "it is clear that the legislature intended the Act to address ongoing problems, which by definition existed at the time that the Act was enacted," and therefore the legislature generally intended the Act to "be given retroactive application." *State Oil Co. v. People*, 352 Ill. App. 3d 813, 819-20 (2d Dist. 2004). The Board has reached the same conclusion. *Casanave v. Amoco Oil*, PCB 97-84, 1997 WL 735028, *4 (Nov. 20, 1997); *Ostro,* 1994 WL 120267, at *5 (finding that respondents violated current version of Act based on disposal of waste in the 1970s and 1980s). Here, all of IDOT's conduct at issue took place after the Act was put in place in 1970. Accordingly, it should be sufficient for JM to show that IDOT violated the current version of the Act. Nonetheless, below, JM explains that in all material respects, the prior and current versions of the Act prohibit the same conduct.

**I. The Current and Historical Version of the Act Are the Same.**

Section 21 of the current version of the Act, 415 ILCS 5/21, provides, in pertinent part:

No person shall:

> (a) Cause or allow the open dumping of any waste;
>
> (d) Conduct any waste-storage, waste-treatment or waste-disposal operation: (1) without a permit issued by the Agency . . . (2) in violation of any regulations or standards adopted by the Board under this Act; [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.

Section 1021 of the Act, IL ST CH 111 ½ ¶ 1021 (P.A. 76-2429, eff. July 1, 1970), which was in place in the 1970s similarly provided:

> No personal shall:
>
> (b) Cause or allow the open dumping of any other refuse in violation of regulations adopted by the Board[1];
>
> (e) Conduct any refuse-collection or refuse-disposal operations, except for refuse generated by the operator's own activities, without a permit granted by the Agency upon such conditions, including periodic reports and full access to adequate records and the inspection of facilities, as may be necessary to assure compliance with this Act and with regulations adopted thereunder, after the Board has adopted standards for the location, design, operation, and maintenance of such facilities; or
>
> (f) Dispose of any refuse, or transport any refuse into this State for disposal, except at a site or facility which meets the requirements of this Act and of regulations thereunder.

(Ex. 81-39.) The key difference between the two sections is the use of the word "waste" in the current version in lieu of the word "refuse" in portions of the prior version. (Tr. June 24, p 234:2-18.) But this is an immaterial difference. According to the Illinois Appellate Court, "'refuse' means 'waste' and 'waste' includes 'garbage or other discarded material.'" *N. Ill. Serv. Co. v. Ill. E.P.A.*, 2016 IL App (2d) 150172, ¶ 16; *E.P.A. v. Pollution Control Bd.*, 219 Ill. App. 3d 975, 979 (5th Dist. 1991) ("'Refuse' is the same thing as 'waste'."); *see also* 415 ILCS

[1] The regulations in place at that time contained a blanket prohibition on open dumping. (*See* Ex. 81-13.)

5/3.385 ("'Refuse' means waste."). Indeed, both terms are defined to include "discarded materials." (*Compare* Ex. 81-22 (Rule 104(o), (s)) *with* 415 ILCS 5/3.535.)

## III. The Pieces of ACM and Asbestos Fibers On Sites 3 and 6 are Waste and Refuse.

The broken pieces of ACM and dispersed fibers on Sites 3 and 6 qualify as "waste" and thus "refuse" within the meaning of the Act. (Ex. 02A-15, ¶ 42 (admitting allegation); Tr. May 23, pp. 233:16-234:2 (Dorgan offering opinion that "regulators would treat the ACM material as discarded material that would qualify as waste" based on experience with similar violations of Section 21 of the Act).) Indeed, here the ACM was discarded as waste multiple times. The concrete Transite pipes were originally a JM product. (Tr. May 23, p. 42:19-24.) Thereafter, JM used them for parking lot wheel stops and to demarcate the Parking Lot. (*Id*., pp. 45:21-46:6; 51:4-9; 133:4-134:16; Ex. 52.) JM left them on the Parking Lot in the late 1960s and IDOT moved them around during its initial Project work (Ex. 54-S, *supra* at 12-13) and then crushed them, dispersing the ACM and allowing the asbestos fibers to be released into the soil and the air. By this point, the pipes had clearly been discarded. *See Ostro,* 1994 WL 120267, at *5 (empty paint barrels were "waste" after they were left at the site); *E.P.A*, 219 Ill. App. 3d at 978-979 (demolition debris was waste when "consolidated" and not "cleared away to another location before it is allowed to be dissipated back into the environment or emitted into the air . . ."). IDOT again discarded the broken scraps of ACM and fibers by scattering and burying them on the Sites. *See NISC v. E.P.A.*, 381 Ill. App. 3d 171, 176 (2d Dist. 2008) (uprooted dead trees deposited on property may constitute "waste" if the trees are not collected, separated or processed and returned to the economic mainstream in the form of raw materials or products).

## IV. IDOT Has Violated Sections 21(a)/1021(b) and 21(e)/1021(f) of the Act By Engaging in Open Dumping and Disposing of or Storing Waste at Unpermitted Sites.

### A. <u>The Sites are Not Permitted Waste Disposal Sites.</u>

Sections 21(a)/1021(b) prohibit the "open dumping" of waste. Both the historic and current versions of the Act define "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." *Compare* 415 ILCS § 5/3.305 *with* IL ST CH 111 ½ ¶ 1003(h). As noted above, "refuse" means "waste." A "waste disposal site" is "a site on which solid waste is disposed." 415 ILCS 5/3.540. A "sanitary landfill" under the previous and current regulations is a facility permitted by the Agency for the disposal of waste. *Compare* 415 ILCS 5.3.445 *with* IL ST CH 111 ½ ¶ 1003(l). IDOT admits that the Sites are not permitted waste disposal sites or facilities. (Ex. 02C-26, ¶ 66; Ex. 03I-5-6, Nos. 7, 8 (admitting that IDOT has never held permits issued by the Illinois Environmental Protection Agency regarding Parcel 0393); *see also* Ex. 06-22; Tr. May 23, p. 234:3-11 (stating that IDOT has not had a permit for Site 3 or 6).)

Sections 21(e)/1021(f) generally prohibit any person from disposing, storing or abandoning any waste at a site or facility that fails to meet the requirements of the Act or regulations.[2] In addition to not being permitted, IDOT admits that the Sites are not sites or facilities that meet the requirements of the Act or its regulations as they relate to the disposal or abandonment of waste. (Ex. 02C-26, ¶ 66.)

**B. IDOT's Acts Constitute Open Dumping.**

Section 21(a)/1021(b) and Section 21(e)/1021(f) apply to persons who dump, consolidate, dispose of, store or abandon waste on unpermitted waste disposal sites. This includes persons who "place" and "leave" waste at an illegal dump site. *See, e.g., Ostro*, 1994 WL 120267, at *5 (holding that respondents "placed" the barrels on the property in violation of Section 21(a) and "left" the barrels on the property in violation of Section 21(e)); *E.P.A v. J.M. Cooling*, PCB 70-2, 1970 WL 3670, *5 (Dec. 9, 1970) (holding that respondent caused and allowed open dumping of

[2] Section 1021 referred to "disposing" or "transporting."

refuse in violation of then Section 21(b) and Rule 3.04 where refuse was dumped on site and left in an uncovered condition); *E.P.A v. Gearhart, Jr.*, PCB 73-76, 1973 WL 5639, **1-2 (June 7, 1973) (holding respondent liable for causing or allowing open dumping in violation of then Sections 21(a), (b), and (e) of the Act and Rule 3.04 of the Rules and Regulations for Refuse Disposal Sites and Facilities where photographs showed materials dumped on the property). As demonstrated in Fact Section IV, *supra* at 12-21, IDOT placed, left, dumped, consolidated, disposed of, buried, stored and/or abandoned ACM waste on Sites 3 and 6 and is therefore liable for violating Sections 21(a)/1021(b) and 21(e)/1021(f) of the Act.

## V. IDOT Has Violated Sections 21(a)/1021(b) and 21(e)/1021(f) As an Owner of the Sites.

### A. IDOT Owned the Sites During Disposal.

Persons also violate Section 21(a)/1021(b) and Section 21(e)/2012(f) when they own the disposal or storage site in question, irrespective of whether they actually did the dumping. *People v. Doren Poland, Lloyd Yoho, &Briggs Indus. Inc.*, PCB 98-148, 2001 WL 1077824, *5 (Sept. 6, 2001) (finding that "open dumping did occur on a site that is not permitted to receive waste . . . As owners of the site, [respondents] are clearly liable for the violations alleged in count I of the complaint."); *Gonzalez v. Pollution Control Bd.*, 2011 IL App (1st) 093021, ¶ 33 ("Property owners are responsible for the pollution on their land unless the facts establish the owners either 'lacked the capability to control the source' or 'had undertaken extensive precautions to prevent vandalism or other intervening causes' and holding owner responsible for waste that existed prior to purchase when owner did not clean it up for 14 months"); *E.P.A v. City of Du Quoin & United Elec. Coal Co.*, PCB 72-200, 1973 WL 6002, *2 (Mar. 29, 1973) ("[Respondent] is found in violation [of causing the open dumping of refuse in violation of Sections 21(a), (b), and (e) of the Act and Rule 3.04 of the Rules for Refuse Disposal Sites and

Facilities] although they did not actively participate in the operation. We have consistently held that ownership confers responsibility on the owner to comply with the law."); *E.P.A v. Bromberek*, PCB 72-384, 1973 WL 6015, **1-2 (Apr. 5, 1973) (holding owner of facility liable for continued violation of causing or allowing open dumping of garbage and refuse).

The Board has defined ownership broadly in its regulations. It views those that have "an interest, directly or indirectly, in land, including a leasehold interest" to be "owners." *E.g.*, 35 Ill. Admin. Code 807.104; 35 Ill. Admin. Code 810.103. Here, it is uncontroverted that IDOT acquired both temporary and permanent easements in the form of a Grant in Parcel No. E393 and Parcel No. 0393 in order to do work on Sites 3 and 6. It is also undisputed that these easements conferred upon IDOT a "direct ownership interest." (Tr. May 24, pp. 142:19-143:5; Ex. 18-9 ("[T]he Grant was a permanent easement and is a direct interest in Parcel No. 0393.").)

ACM has been found within easement E393 at boring locations B3-33, S3-33B, B3-22, SB-09, TP-ACT-10, HYD-05ACT, B3-45, S3-50B and B3-50 and within easement parcels along the Embankments at boring locations LFR, 1S, 2S, 3S, 4S, 5S, 6S, 7S, 8S, B3-25, B3-16, B3-15, B3-45, B3-50, B3-41, 1N, 2N, 6N and 7N. (Exs. 06-25, 06-26, 202.) Since IDOT owned these areas when "open dumping" occurred, IDOT is responsible for the violations of 415 ILCS 5/21 and IL ST CH 111 ½ ¶ 1021, no matter who actually performed the dumping.

**B. IDOT Continues to Own the Permanent Easement Parcels.**

In the same vein, there is a "long line of well settled environmental law standing for the proposition that the owner of a pollution source is liable for any ongoing violation of the Act and Board regulations." *People v. Gilmore*, PCB 99-27, 2000 WL 1246533, *6 (Aug. 24, 2000) (holding that owner of pyrite pile, who did not know that water had seeped into pile and caused contamination to flow into creek, was liable for causing or allowing water pollution and citing

*Meadowlark Farms, Inc. v. Pollution Control Bd.*, 17 Ill. App. 3d 851 (5th Dist. 1974)); *Freeman Coal Mining Corp. v. Pollution Control Bd.*, 21 Ill. App. 3d 157, 160-161 (5th Dist. 1974) (holding discharges that were the result of rain water interacting with gob pile that was created before 1970 was not a defense and holding that petitioner allowed discharge).

Here, the pollution sources include the Embankments and areas along Detour Road A. As discussed in Fact Section VI, *supra* at 24, USEPA has determined that the release of pollution at these locations is ongoing and in a location where "broken scraps of asbestos tend to move differentially upward through the soil with each freeze/thaw cycle" and that the "asbestos fibers may become readily releasable to the air." Since IDOT still holds a direct ownership interest in Parcel No. 0393 that covers the Embankments as well as the intersection of Detour Road A with Greenwood Avenue where this pollution is occurring, IDOT is liable for violating Sections 21(a) and (e) no matter when the ACM was first buried or who buried it. This would include the re-deposit and dispersion of ACM by third parties after the ACM's initial burial. IDOT argued at hearing the ACM was buried when utilities were installed, removed or maintained. (Tr. May 25, pp. 200:14-19; 201:5-202:19 (opining that there is a "strong indication that the asbestos-containing material follows a lot of the utility lines" and explaining how such work could cause "ACM on the surface to be buried").) Under this theory, IDOT is liable for each re-burial or dispersion of ACM or ACM fibers that has occurred, including during utility work or even during investigatory work since the Project ended.

## VI. IDOT Has Violated 21(a)/1021(b) and 21(e)/1021(f) Under a Control Theory.

### A. IDOT Controlled the Sites During Disposal.

Even if IDOT did not qualify as an "owner" of any portion of the Sites, IDOT is likewise liable for violating Section 21(a)/1021(b) and Section 21(e)/1021(f) under a control theory.

Illinois law provides that persons are also liable under these Sections of the Act if they had/have the "capability of control over the pollution" or were/are "in control of the premises where the pollution occurred." *People v. Waste Hauling Landfill, Inc*., PCB 95-51, 1998 WL 278638, *18 (May 21, 1998); *Gonzalez v. Pollution Control Bd*., 2011 IL App (1st) 093021, ¶ 33; *Casanave*, 1997 WL 735028, at *4 (holding that person is liable under Sections 21(a) and (e) if person "had some sort of ownership, possession, control, or authority over the property or source of pollution after the effective date of the cited provisions") (collecting cases). IDOT plainly satisfies either of these two criteria.

Under the law of easements, a grant of an easement interest entitles that easement holder to the use and control of that property. *See, e.g., McDermott v. Metro. Sanitary Dist*., 240 Ill. App. 3d 1, 25- 26 (1st Dist. 1992) (holding that retention of easement interest rendered easement holder liable for the failure to maintain or repair the easement property as the easement holder had control over the easement property) (collecting cases). As discussed in Fact Section III.C, *supra* at 10-11, IDOT had the ability to control both the pollution source and the pollution site during the Project. As set forth in Fact Section IV.B.1, *supra* at 18, IDOT's Resident Engineer dictated what materials could be used as fill and determined where obstructions, such as asbestos concrete pipe, could be disposed. Thus, IDOT was in control of the pollution source — the waste — disposed of on the Sites during the Projects. *See People v. Intra-Plant Maintenance Corp*., PCB 12-21, 2013 WL 3970883, **6-7 (July 25, 2013) (finding that contractor, who neither owned nor controlled the site in question, was liable when it was in control over the disposal of the pollution, which was unusable, excavated fill). Likewise, it is indisputable that IDOT was in control over the pollution sites during the Project. IDOT admitted as much in its 104(e) Response to USEPA, conceding that it had control over the Sites during construction.

(Ex. 60-3.) Consequently, IDOT violated the Act by controlling the waste as well as by controlling the areas where the "open dumping" of waste occurred during the Project.

**B. IDOT Continues to Control the Permanent Easement Parcels.**

IDOT still has the capability to control the pollution and the Sites. (*See* Fact Section VII, *supra* at 25-27) IDOT concedes that no one can remove its asbestos-containing embankment without its permission, *supra* at 27, and its easement rights include "the right to enter upon any part of the way and improve it in a manner to render it available for its contemplated use, if in so doing there is no unreasonable interference with the co-owner's rights." *Ill. Dist. of Am. Turners, Inc. v. Rieger*, 329 Ill. App. 3d 1063, 1075 (2d Dist. 2002) (internal citations and quotations omitted). IDOT is also allowed "full enjoyment of the easement" and the "right to do such things as are reasonably necessary to maximize use of the right-of-way." *Id*. at 1076-1077. According to the uncontroverted testimony of Mr. Fortunato, this right to control the ROW areas is ongoing. (Tr. May 24, pp. 146:1-147:7; 155:21-156:9.) This "right to control" includes the right to prevent third parties from interfering with or removing the embankments constructed on these easements. (*Id*.; Ex. 18-10, § V.A.2; 18-12, § V.C; May 25, pp. 54:13-55:3.) Thus, IDOT has been capable of controlling the ACM in the Embankments as well as the premises where "open dumping" occurred and therefore continues to be liable for ongoing waste.

## VII. IDOT Has Violated Sections 21(d)/1021(e) of the Act By Conducting a Waste Disposal/Storage Operation Without a Permit.

Section 21(d)/1021(e) requires those conducting a waste/refuse disposal or storage/collection operation to obtain a permit and to comply with the applicable regulations. 415 ILCS 5/21(d); *E.P.A v. Burch*, PCB 81-202, 1983 WL 25723, *1 (Mar. 24, 1983) (referring to Section 21(d) as "formerly Section 21(e)"). As noted above, there has never been a permit associated with Sites 3 or 6. Because of this, the operations at Sites 3 and 6 have never

complied with applicable regulations. "The Board takes a broad view of what types of activities might constitute 'operating' a waste disposal site." *People v. Community Landfill,* PCB 3-191, 2006 WL 529441, *13 (Feb. 16, 2006) (explaining that in addition to those that do the disposal, those who receive any type of benefit from the disposal of the waste are operators); *Poland,* 2001 WL 1077824, at * 7 (Sept. 6, 2001) (finding that generator, who did not profit from operation, but received a "good deal" from it, qualified as an "operator").

**A. IDOT Conducted A Waste Disposal Storage Operation During the Project.**

Because IDOT disposed of and stored ACM on the Sites without a permit and not in conformance with applicable regulations, *see* Fact Section IV, *supra* at 12-21, it has unquestionably conducted a waste storage/disposal operation in violation of the Act during the Project. *People v. Fisher et al*., PCB 13-3, 2013 WL 2298396, *8 (May 16, 2013) (holding that by disposing of wastes at the property without a permit from the Agency respondents "conducted a waste-storage or waste-disposal operation" in violation of Section 21(d)(1) of the Act"); *People v. 87th & Greenwood, LLC et al.*, PCB 10-71, 2010 WL 3303193, **1, 7 (Aug. 19, 2010) (holding the respondent violated Section 21(d)(1) by accepting the disposal of truckloads of waste at the respondent's site); *People v. Prior et al*., PCB 2-177, 2004 WL 1090239, *13 (May 6, 2004) (finding that the respondent violated Section 21(d)(1) where he discharged and accumulated waste over time and where he never acquired a permit from the Agency).

**B. IDOT Continues to Conduct A Waste Disposal Storage Operation.**

IDOT continues to conduct its waste storage/disposal operation on portions of the Sites in violation of the Act. As detailed above in Fact Section VII, *supra* at 25-28, IDOT still owns, within the meaning of the Act, and has control over the permanent easement parcels and still uses them for "highway purposes." In fact, the asbestos-containing Embankments at issue are

serving to, among other things, "maintain the traffic flow" between Greenwood Avenue and the Amstutz. The ACM IDOT dumped on these areas remains in situ and the evidence is un-contradicted that IDOT has done nothing to remediate this ongoing pollution problem. (Tr. May 23, pp. 77:6-11; 120:2-121:6; May 24, p. 192:13-24.) Consequently, even if IDOT did not own these areas (which it does), IDOT is liable today for illegally conducting a waste storage/disposal operation. *Poland*, 2001 WL 1077824, *8 (finding that involvement in unpermitted site constituted "operation" and rendered the respondent liable for violations of Section 21(d) and (e) of the Act).

**VIII. IDOT Has Violated Sections 21(d)/1021(e) as an Owner.**

**A. IDOT Owned Portions of the Sites During Disposal.**

Similar to Sections 21(a) and (e), "owners" of waste disposal sites are routinely held liable for violating Section 21(d)/1021(e) even when they did not do the actual dumping. *See, e.g., People v. Prior et al.*, PCB 93-248, 1995 WL 415822, **9-10, 12 (July 7, 1995) (holding owner liable under 21(d) when previous operator abandoned the site); *Termaat v. Anderson et al.*, PCB 85-129, 1986 WL 27133, *3 (Oct. 23, 1986) (finding that County/City owners of landfill site were also operators of site and conducted waste disposal operation where County/City assumed responsibility for site and independent contractor was under supervision of County/City); *E.P.A v. Rader*, PCB 82-40, 1982 WL 25545, *1 (Sept. 15, 1982) (stipulating that respondent owned 8 acres of land and that respondent improperly allowed the disposal of wastes at the site without the requisite permits in violation of Section 21(d)). In other words, ownership generally equates to liability under Section 21(d)/1021(e). Because IDOT owned Parcel No. E393 and Parcel No. 0393 during the Project, IDOT is liable for historically operating a waste disposal/storage operation without a permit.

**B. IDOT Continues to Own/Operate Portions of the Sites.**

Likewise, since IDOT still owns Parcel No. 0393, it is currently violating Section 21(e)/1021(f) under a current ownership theory. Indeed, under Board regulations, site owners are deemed "operators" and liable for violations of the Act if there is no active operator at the location. *Prior*, 1995 WL 415822, *9 (owner of property deemed operator after operations by others ceased); 35 Ill. Admin. Code 807.104; 35 Ill. Admin. Code 810.103. Here, other than IDOT, there is no one actively disposing of waste at the Sites. (Tr. May 24, pp. 156:19-157:5.)

In conclusion, IDOT is liable for violating the Act in three separate ways under Illinois law: (1) through its own conduct, (2) by virtue of its ownership interests held in the Sites and (3) through its ability to control the Sites.

**IX. IDOT's Conduct Has Increased the Scope of the Remedy.**

It is indisputable that USEPA's rejection of the remedy offered by JM in the EE/CA and its corresponding imposition of a new remedy was driven by USEPA's concern about buried asbestos and fibers, not surficial pieces of ACM. (*See* Fact Section VI, *supra* at 24-25.) As justification for its expanded remedy, USEPA stated several times in the EAM that "in frost-susceptible areas like 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, ACM and/or asbestos fibers currently covered with soil can, over time, reach the soil surface and become readily releasable to the air." (Exs., 65-6, 06-18, 06-19; Tr. May 23, pp. 178:20-180:24.) IDOT does not dispute this. (Tr. June 23, pp. 235:1-236:9.)

During hearing, Mr. Gobelman misapprehended Mr. Dorgan's opinion, which is that the ACM and asbestos fibers buried by IDOT are driving USEPA's remedy change and that but for the fact the ACM and fibers were *dispersed and buried by IDOT* as opposed to merely sitting on

the surface of the Parking Lot where JM left the pipes, no remedy would have been needed for Site 6 (as JM had not placed any pipes on that Site) and a much more limited remedy would have been required for Site 3. (Ex. 06-20; Tr. June 23, p. 228:2-230:6; Tr. June 24, pp. 236:19-238:13 (Dorgan explaining how Gobelman misunderstood his opinion).) In an attempt to rebut this testimony, Mr. Gobelman opined about the presence of the pipe itself, not the fact that the pipe was dispersed and buried. He said, "if you took away the concrete Transite pipe, the remedy USEPA is requiring in Site 3 and Site 6 would be the same." (Tr. June 23, p. 228:15-20; May 25, p. 205:13-18.)

But Mr. Gobelman's testimony misses the point. Since IDOT violated the Act by dispersing and burying the ACM and fibers, by owning the Sites and by controlling the Sites, it cannot escape the fact that the dispersed and buried asbestos fibers and pieces of asbestos caused USEPA to require a comprehensive and expensive removal plan. After all, if the ACM had not been buried during the Project, then USEPA would not be requiring JM to dig out buried ACM and create clean utility corridors. To the contrary, no remedy would be required for Site 6 because no pipes were placed by JM on Site 6. (Ex. 06-19, 06-21; Tr. May 23 pp. 231:8-23.) As for Site 3, as Mr. Dorgan opined, "it is unlikely that any response action would have been necessary at the site other than surface ACM removal efforts." (Ex. 06-18; Tr. May 23, pp. 227:15-229:8.) Mr. Gobelman presented no alternative in response.

Importantly, as noted above in Fact Section VI, *supra* at 25, IDOT has not challenged the removal costs presented at hearing. (Ex. 04C-216 lines 7-19.)

## X. The Section 33 Factors Dictate that the Board Should Hold IDOT Fully Accountable for the Damage it has Caused.

Under Section 33(c) of the Act, "[i]n making its orders and determinations, the Board shall take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions, discharges or deposits involved including, but not limited to:

(i) the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;

(ii) the social and economic value of the pollution source;

(iii) the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved;

(iv) the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges, or deposits resulting from such pollution source; and

(v) any subsequent compliance."

415 ILCS 5/33(c).

The Board considers these factors in determining whether to grant the relief requested by the complainant. *See Ostro*, 1994 WL 120267, at *9 (considering Section 33(c) factors in deciding whether to issue an order to remove stockpiled soil and remediate excavation pit, as requested by complainant). Each of these factors weighs in favor of awarding JM its requested relief as well as fashioning a remedy that reprimands IDOT.

**A. The character and degree of injury to, or interference with the protection of the health, general welfare and physical property weigh against IDOT.**

Where the alleged pollution at issue involves the mishandling or improper disposal of hazardous materials the Board has held that such activities "endanger the health, general welfare, and physical property of the people" and will typically find that such activities weigh against the respondent. *See People v. Champion Envt'l Servs., Inc.*, PCB 5-199, 2014 WL 340171, **11-13 (Jan. 23, 2014) (imposing $34,000 penalty based on Section 33(c) and Section 42(h) factors

where asbestos-containing material was improperly handled during demolition and removal activities and dumped in violation of Sections 21(a) and (e)); *People v. Ward et al.*, PCB 10-72, 2011 WL 6147592, *6 (Nov. 17, 2011) (finding potential significant injury where respondents open dumped electrical transformers that subsequently leaked PCBs); *People v. AET Envt'l, Inc*., PCB 7-95, 2012 WL 4024871, *15 (Sept. 6, 2012) (holding that the storage and disposal of hazardous waste without following statutory and regulatory requirements endanger the health, general welfare, and physical property of the people). The improper disposal of ACM undoubtedly qualifies as such an activity.

Here, USEPA has already found that "[c]onditions at the site present an imminent and substantial endangerment to public health or welfare or the environment," that "human populations and animals are exposed or potentially exposed to the pollution associated with [the Sites] in the form of ACM and/or asbestos fibers in the soils" and that "exposure to soils" containing ACM and fibers have been "associated with" significant health effects, including cancer. (Exs. 65-6-65-8; Tr. May 23, pp. 173:10-174:22; 175:1-179:14; June 23, p. 235:1-11.) Thus, here, the degree of injury factor clearly weighs against IDOT.

**B. The lack of social/economic value of pollution source weighs against IDOT.**

Where the pollution source is a waste that has been improperly disposed of and is not associated with an ongoing business, Board cases have routinely held that there is no social or economic value in that pollution source and weighs this factor against the respondent. *See People v. Community Landfill*, PCB 3-191, 2009 WL 1747988, *28 (June 18, 2009) ("While properly-run, closed, monitored and cared for landfills have economic and social value, the Board agrees that the Landfill in its current state is an environmental liability. The Board weighs this factor against respondents."); *Ostro*, 1994 WL 120267, at *9 (finding no inherent social or

economic value in discarded barrels containing wastes); *Lefton Iron & Metal Co., Inc. v. City of E. St. Louis*, PCB 89-53, 1990 WL 116997, *3 (Apr. 12, 1990) (finding no social or economic value associated with waste disposed at an unpermitted site). Here, IDOT's improper disposal of ACM waste at an unpermitted location, at the expense of endangering public health and welfare, requires that the Board weigh this factor against IDOT in fashioning a remedy in this case.

**C. The unsuitability of the pollution source to the area in which it is located weighs against IDOT.**

When waste is disposed of in an unpermitted location, the pollution source should generally be considered de facto unsuitable to the location area. *See Standard Scrap*, 142 Ill. App. 3d at 663-64 ("[W]hile the operation may be suited to the area if properly operated, it is not so suited if it is operated without controls."); *Champion*, 2014 WL 340171, at *11 (removal of ACM is appropriate only if done properly and, therefore, this factor weighs against respondent); *AET Envt'l*, 2012 WL 4024871, at *15 (holding that waste was unsuitable for site not permitted for such waste); *People v. Cash*, PCB 96-75, 1998 WL 12149, *5 (Jan. 8, 1998) ("Open dumping anywhere other than an approved pollution control facility is likewise unsuitable."); *Ostro*, 1994 WL 120267, at *9 (finding that discarded barrels containing waste materials are unsuitable for the area). Here, it is undisputed that the disposal location is unpermitted. This alone renders the Sites unsuitable for the ACM that IDOT disposed on them.

This is particularly so where USEPA has already recognized that the location of the buried ACM poses a health risk to "the nearby human population," including utility workers, construction workers, passers-by, individuals off-site, and even trespassers. (Exs. 65-1, 65-4, 65-5, 65-7, 65-8, 65-9.) Further, USEPA found that this threat from the burial of ACM extended to "residents approximately one-third to one-half of a mile to the west of these Sites, workers on or

around each of Sites 3, 4/5, and 6, users of Greenwood Avenue, and wildlife in Illinois Beach State Park." (*Id*., 65-6.) The Sites are not suitable for ACM and the factor weighs against IDOT.

**D. The technical practicability and economic reasonableness of reducing or eliminating the contamination weigh against IDOT.**

As an initial matter, it is IDOT's burden to introduce evidence regarding technical feasibility and economic reasonableness under Section 33(c)(iv). *See Roti v. LTD Commodities*, PCB 99-19, 2002 WL 31545468, *1 (Nov. 7, 2002); *E.P.A v. Archer Daniels Midland*, PCB 80-151, 1986 WL 26804, *4 (Mar. 27, 1986) ("The Board has previously held that the burden of proof is on the respondent to show that 'compliance is not technologically practicable or economically reasonable.'"). Like in *Archer Daniels*, IDOT failed to present such evidence at hearing and cannot meet its burden.

USEPA has already determined that the buried ACM should be (and can reasonably be removed) through its chosen remedy of excavation and the creation of clean corridors. USEPA had stated that eliminating the potential emissions, discharges, or deposits from the buried ACM on the Sites to be "technically and administratively feasible," coordination of the cleanup to be "easily carried out," and complete removal of ACM to be "relatively simple." (Ex. 65-17, § E.) USEPA also found the costs associated therewith to be "proportional to its overall effectiveness." (Ex. 65-18, § F.) Further, USEPA found that the planned removal action will effectively "mitigate the imminent and substantial threats posed to human health from hazardous substances in soils at the Site that have the potential to migrate from the Site." (Ex. 65-9, § V; *see also* 65-16, 65-17.) Thus, the Board should weigh this factor against IDOT.

But even if it had not made these findings, Illinois law provides that "compliance with the law" is both technically practicable and economically feasible. *See Champion*, 2014 WL 340171, at *12 (finding that proper handling and disposal of materials is technically practicable

and economically reasonable); *People v. Isaac*, PCB 11-58, 2012 WL 4467204, *7 (Sept. 20, 2012) (finding that applying for a permit and properly constructing a sewer line is technically practicable and economically reasonable). Consequently, it should be deemed technically practicable and economically feasible for IDOT to come into compliance with the Act and Board regulations, especially where it would have been technically practicable and economically reasonable for IDOT to have properly disposed of the ACM in the first place. *See Prior*, 2004 WL 1090239, at *26. This factor also weighs against IDOT.

**E. The lack of subsequent compliance weighs against IDOT.**

Here, it is without question that IDOT has not subsequently complied with the Act. In fact, IDOT has not taken a single step to even attempt compliance and continues to deny any responsibility for the contamination and to defy the law. (Tr. May 23, p. 77:6-11; May 24, p. 192:13-24; *see* Ex. 02C (generally denying allegations of Complaint).) Such inaction weighs heavily against IDOT. *Peter v. Geneva Meat & Fish Market*, PCB 89-151, 1991 WL 88335, *3 (Feb. 28, 1991) (weighing factor against the respondent where violations had continued for four years, "compliance has not been achieved to date, and no indication has been made that compliance would be forthcoming"). And even if IDOT were to have attempted any semblance of compliance since the case was filed, which it has not, this would still not be deemed a mitigating factor. *People v. Patrick Roberts*, PCB 1-135, 2002 WL 31132884, *5 (Sept. 19, 2002) ("It should not be deemed a mitigating factor if compliance is achieved only after enforcement proceedings are initiated."). This factor, too, argues in favor of granting JM all of its requested relief.

In the same vein, the polluter's attitude toward compliance is considered by the Board in fashioning a remedy. *See, e.g., Bresler Ice Cream v. Pollution Control Bd.*, 21 Ill. App. 3d 560,

563 (1st Dist. 1974) (finding it significant that "[r]ather than demonstrating an attitude of defiance or recalcitrance, the facts evince a sincere desire on the part of [respondent] to cooperate with the Board in achieving the statutory objective expressed in the Environmental Protection Act"); *Archer Daniels Midland v. Pollution Control Bd.*, 149 Ill. App. 3d 301, 306 (4th Dist. 1986) (finding that where polluter had taken "substantial steps to eliminate" environmental problems, spent millions of dollars for environmental improvements, and was ready to spend more mitigated against a higher penalty).

Here, unlike in *Bresler* or *Archer Daniels,* IDOT has refused to acknowledge *any* responsibility let alone evince any desire to have the Sites properly remediated. (Tr. May 23, pp. 26:21-27:1 (IDOT denying liability); Ex. 02C.) In fact, IDOT completely ignored JM's settlement overture at the beginning of the case, "including an offer to stay the litigation" and instead chose to "litigate and to not engage in our [JM's] offer to discuss any sort of resolution." (Ex. 05; Tr. May 24, p. 191:2-192:24.) IDOT then continued on its dogged path of denial for 3 years.

But what sets this case apart from most other cases is the disturbing conduct taken by IDOT in order to hide fundamental facts from JM, the Board, and USEPA. It is well-established that good faith, or lack thereof, is a consideration under 33(c) in the Board's decision to fashion a remedy. *See, e.g., Standard Scrap,* 142 Ill. App. 3d at 662 (finding that polluter's failure to cooperate with Agency efforts to bring the facility to compliance, *i.e.* its good faith, or lack thereof, was "pertinent to the determination of sanctions" under Section 33(c)); *Archer Daniels*, 149 Ill. App. 3d at 305 (good faith is factor in Board's analysis in making orders and determinations under Section 33); *City of Chi. v. Pollution Control Bd.*, 57 Ill. App. 3d 517, 521

(1st Dist. 1978) (finding that whether polluter had "a sincere desire to eliminate or reduce pollution" is a factor to consider).

In addition to IDOT's utter disregard for the facts, IDOT has been anything but forthcoming with the Board, USEPA, and JM, especially through its misrepresentation of its ownership interests regarding the Sites. The evidence at trial established, without question, that IDOT acquired Parcel No. E393 and Parcel No. 0393 and that IDOT continues to hold a permanent easement over at least Parcel No. 0393. (Fact Sections III, VII, *supra* 9, at 25-28.)

Nevertheless, since at least 2000, IDOT has attempted to perpetrate the myth that it does not hold any interest in the Sites. In its 104(e) Response, IDOT conveniently ignored the fact that it had acquired any permanent easements over portions of the Sites during the Project, rather focusing solely on the fact that it had acquired temporary easements, which terminated in 1976. (Exs. 58, 60-4 (failing to note IDOT's acquisition of permanent easements); Tr. May 24, pp. 196:14-197:18 (offer of proof).)[3] Years later, while IDOT knew that JM was under the misimpression that the City (not IDOT) had acquired the easement in Parcel No. 0393, IDOT did nothing to correct this misimpression. Instead, IDOT took steps to promote JM's misunderstanding of the ownership issue.

For example, JM alleged in its Amended Complaint that the City owned Site 6, where the Easements are located. Instead of denying it, IDOT answered that it "lacks sufficient information to either admit or deny" the allegation. (Ex. 02B-6, filed October 6, 2014, ¶ 12.) But IDOT knew at that time that it held existing rights of way on Site 6. As noted in Expert

[3] IDOT's reluctance to disclose facts in its 104(e) Response extended beyond the right of way issue. Mr. Gobelman retrieved stereoscopic sets of aerial photographs for the Response and "would have looked at them at that time," but IDOT did not disclose him as a person who participated in the Response despite being asked. (Tr. June 23, pp. 83:1-84:6; Exs. 58-5, 60-2, 60-3.) Moreover, aerials were not discussed or disclosed in the Response, which sought "all documents consulted, examined, or referred to in the preparation of the answers to these questions." (Exs. 58-5, 60-3; Tr. June 23, pp. 84:7-11.)

Credibility Section II, *supra* at 31-32, IDOT conducted studies in 2011/12 on the Sites and identified Parcel No. 0393 as an "existing right of way" in connection with those studies. (*See* Ex. 77-32, 77-35, 77-46, 77-220.) While Mr. Gobelman was involved in that work, he hid this fact from JM when asked about it in his deposition and IDOT fought to keep the information from JM. (*Supra* Expert Credibility at 31-32; *see also* Ex. 03F (IDOT's Responses to JM's Third Set of Interrogatories); Ex. 03G (IDOT's Revised Responses to JM's Third Set of Interrogatories); IDOT's Motion for Protective Order, filed March 21, 2016.)

In his Expert Report, Mr. Gobelman actively fostered JM's misapprehension of the facts. He quoted a 1966 document that said "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," wrongly implying that the City purchased and still owned the ROW. (Ex. 08-9; Tr. June 23, p. 241:3-21; 242:7-17.) In his deposition, Mr. Gobelman was asked about the ownership of the right-of-way (Parcel No. 0393) associated with Site 6. He testified:

> Q. And for how long did IDOT own the right of way and the easements?
> A. I am not sure when IDOT gave up the right of way, but the easements in association with Site 3 were reverted back once construction is complete.
> Q. Right. How about the right of ways, though? I mean, does IDOT still own those right of ways associated with Site 3 and Site 6?
> ***A. From my -- the information that I have that I found that Wauk- -- City of Waukegan owns the right of way and jurisdiction of the road. The right of way of Sands and Greenwood Avenue.***
> Q. Which right of way?
> ***A. The right of way of Sands and Greenwood Avenue.***
> Q. And when did Waukegan take over that right of way from IDOT?
> A. I did not investigate that aspect.

(Ex. 04C-39 line 7- 04C-40, line 1 (emphasis added).)

This too was false and Mr. Gobelman and IDOT knew it based upon two independent pieces of evidence. As discussed in Expert Credibility Section, after repeated denials, Mr.

Gobelman eventually admitted that he oversaw work done at the Sites relating to the 2011 PESA 2308. (Tr. June 24, p. 28:10-23.) He even followed up with two people, including one from Weston Consultants, about "further investigation" work he oversaw relating to the PESA just a few days before his Expert Report was due. (Tr. June 23, pp. 249:8-252:18; Ex. 04C-491, 04C-493.) He explained that in his call with Weston, he was confirming that the PESA work did not involve the Sites. (*Id.*) But, as noted above, the PESA 2308 work indisputably involved samples taken on Sites 3 and 6. Curiously, Mr. Gobelman's call log notes regarding the call with Weston merely state "not in sent email." (Ex. 04C-493.)

The record also establishes that Mr. Gobelman knew that Parcel No. 0393 was an existing IDOT right-of-way/easement through his own investigations. While he initially stated that he did not investigate the transfer of the easement comprising Parcel No. 0393, *supra* at 54, he eventually came clean when presented with documents contradicting his position. (Tr. June 23, pp. 242:20-243:5 (admitting to inquiring about ownership of right of way when preparing report); 243:23-245:3; Ex. 13 (copying Mr. Gobelman on response about rights-of-way).) But he qualified his response by claiming that no one ever responded to his inquiry. (Tr. June 23, pp. 242:23-243:22). At best, this is because IDOT deliberately avoided having that question answered with an associated paper trail; at worst, this is flatly untrue.

On May 20, 2015, IDOT employee, Mr. Steven Warren, asked Mr. Stoddard (on Mr. Gobelman's behalf) "if IDOT owns the ROW at this intersection [Greenwood and Sands]," or Parcel No. 0393. (Ex. 12.) Instead of answering the question posed, Mr. Stoddard oddly only responded with respect to temporary easements held by IDOT, which plainly were not considered "ROWs." (Ex. 13; Tr. June 24, pp. 170:8-172:14; 175:3-176:16; Ex. 04H-36 line 3- 04H-37 line 5.) According to Mr. Stoddard, he was specifically instructed in a subsequent

phone call to focus on the temporary easements and not the relevant right-of-way that was the topic of the initial inquiry. (*Id*.)

If that were not strange enough, both Mr. Stoddard and Mr. Gobelman claim to have never discussed the easements. (Tr. June 24, pp. 176:17-177:8; Ex. 04H-27 lines 5-15, 04H-29, lines 2-4). But Mr. Gobelman's own call log shows that on the same day he received Trial Exhibit 13 and the same day he submitted his Export Report, May 29, 2015, he participated in a phone call with Mr. Stoddard ("Keith D1"), District 1, and the Attorney General's Office in which the topic was the easements that "IDOT bought." (Ex. 04C-494; Tr. June 23, pp. 252:21-255:16; Ex. 43.) The foregoing evidence leads to the conclusion that IDOT took affirmative steps to mislead JM about the ownership of Parcel No. 0393. It should be noted that when Mr. Stoddard swore at deposition and at trial that he had not had a call with anyone, let alone Mr. Gobelman, regarding the ownership of Parcel No. 0393 (Tr. June 24, pp. 176:17-177:8; Ex. 04H-27 lines 5-15, 04H-29 lines 2-4), he was represented by the Attorney General's office, whom the evidence shows participated in that May 29th call. (Ex. 04C-494.)

IDOT's lack of candor continued in 2016 up until hearing, as IDOT continued to misrepresent the existence and nature of its interest in Parcel No. 0393. Even after receiving its own Title Commitment in March 2016 (Ex. 46), verifying JM's allegation that IDOT's interest in Parcel No. 0393 was still effective, IDOT continued to *outright deny* that it "owned, held an interest in and/or controlled portions of Site 6, including a right of way on the southern side of Greenwood Avenue." (Ex. 02C-7, ¶ 12, filed April 12, 2016.) IDOT then made statements in its discovery responses that were later contradicted by its own witnesses. For example, most egregiously, IDOT's responses to JM's Requests for Admission ("RFA Responses") denied that IDOT had a right to use Parcel. No. 0393 since 1971 and denied that

IDOT had never transferred, conveyed, divested itself of its interest in, vacated, or abandoned Parcel No. 0393. (*Compare* Ex. 03F-4, 03F-5, 03F-6, Interrogatory Responses Nos. 1, 2, 4 *with* Tr. May 24, pp. 129:22-135:4; *compare* Ex. 03I-3, 03I-4, 03I-5, RFA Responses Nos. 3, 4, 5, 6; *with* Tr. May 24, pp. 135:5-138:15.)

This is unsurprising given that Mr. James Stumpner, an IDOT employee who verified IDOT's responses to these interrogatories and requests for admission as being "true, accurate, and complete" (Exs. 03H-3, 03I-11) testified that he never saw the interrogatory questions themselves and did nothing to investigate the accuracy of the responses. (*See* Tr. May 25, pp. 58:20-67:15; Ex. 04G-15 line 1- 04G-16 line 12, 04G-17 lines 1-14.)[4] This is also not surprising given that IDOT's designated Rule 206(a)(1) representatives were woefully underprepared to discuss at deposition (or at trial) the topics on which they were designated as being most knowledgeable. (*See* Ex. 89; Tr. May 24, pp. 82:19-85:20; Tr. May 25, pp. 55:11-58:19.) IDOT refused to admit the truth until Mr. Stoddard's deposition was taken. At that time, after months of expensive discovery demanded by IDOT, Mr. Stoddard testified that "0393, in my opinion, would be treated more as a permanent easement for highway purposes. As long as the road is there and being used for highway purposes, that easement is in effect." (Ex. 04H-51 lines 2-16.) But despite this admission from its own expert, IDOT refused to share this fact with the Board, electing not to even call Mr. Stoddard at hearing to offer his opinions. (Tr. May 25, pp. 280:2-282:5 (JM objecting to IDOT not calling Mr. Stoddard).) IDOT's utter lack of forthrightness should weigh heavily against it in the Board's assessment of an award in this case.

## CONCLUSION

WHEREFORE, Complainant JOHNS MANVILLE respectfully requests that the Board enter an Order against Respondent ILLINOIS DEPARTMENT OF TRANSPORTATION that:

[4] IDOT's revised interrogatory responses (Ex. 03G) were never verified at all.

A. Finds that the Respondent has violated the current and historical versions of Sections 21(a)/1021(b), 21(d)/1021(e) and 21(e)/1021(f) of the Act, 415 ILCS 5/21 and IL ST CH 111 ½ ¶ 1021;

B. Requires Respondent to cease and desist violating the Act and to come into compliance with the Act by participating in the implementation of JM's CERCLA removal action regarding the Sites so to remove all waste associated with its violations (the removal action, which is outlined in the Removal Work Plan (Ex. 67), has just begun and is 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);

C. Awards JM past clean-up costs incurred since the EAM attributable to Respondents conduct in the amount of $685,000, to the extent available in this case (*supra* at 6);

D. Sanctions Respondent for the repeated misrepresentations about the ownership interests it holds in the Sites during discovery, including precluding Respondent from offering any defenses regarding any liability associated with Parcel No. 0393 (Ill. Admin. Code 101.800(b)(3)) and/or awarding JM reasonable legal fees/expenses incurred to extract the truth about IDOT's interests in the Sites. (Ill. Supreme Court Rule 137.) (JM will prepare a fee petition upon request).

E. Requires Respondent to comply with such further relief the Board deems necessary.

Dated: August 12, 2016

Respectfully submitted,

BRYAN CAVE LLP

Attorneys for Complainant Johns Manville

By: __*/s/ Susan E. Brice*_____

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**CERTIFICATE OF SERVICE**

I, the undersigned, certify that on August 12, 2016, I caused to be served a true and correct copy of *Complainant's Post-Hearing Brief* 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 E. Brice*
Susan E. Brice

**SERVICE LIST**

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# EXHIBIT A

INCONSISTENCY CHART

*This chart does not point out where Mr. Gobelman was impeached or new opinions he offered for the first time at trial (which were objected to at that time); rather, it only points out the wholly inconsistent positions he took over the course of the case on various topics.

| Issue | Report | Deposition | Hearing Testimony |
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| **Use of Concrete Transite Pipe During Project** | The contractor would have "cleared" materials on the surface of Parking Lot and therefore would have taken the concrete Transite pipes off the Project Site.<br>(Ex. 08-8, § 4) | "[I]t's very unlikely" that the contractor would have used concrete Transite pipes in the Embankments.<br>(Ex. 04C-77 lines 5-12) | The contractor would have used concrete Transite pipes in Embankments, just not the Embankments where JM has found the ACM.<br>(Tr. June 23, pp. 145:21-146:2; Tr. June 24, p. 10:10-16; Tr. May 25, pp. 161:7-162:16)<br><br>*But see later contradictory testimony…*<br><br>The contractor placed concrete Transite pipes/ACM in the Sites 3 and 6 Embankments. (Tr. June 23, pp. 205:17-22; Tr. June 24, p. 10:10-16) |
| **Value of Pipes** | The contractor had to remove the pipes at "their own expense."<br>(Ex. 08-10, 08-11, § 8)<br><br>"The contractor had no financial | Contractor was getting paid to haul the concrete Transite pipes offsite.<br>(Ex. 04C-85 lines 2-21) | Concrete Transite pipes have "value" to the contractor and "the contractor isn't going to want to remove these pipes and take them offsite someplace and to discard them."<br>(Tr. May 25, p. 162:4-22) |

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| | incentive to crush and use the Transite pipes as part of their fill." (Ex. 08-13, § 12) | | The contractor would have used pipes in lieu of additional borrow material. (Tr. May 25, pp. 163:10-164:8; 165:2-10) |
| **Cut and Fill** | No materials from Site 3 would have been used in the Embankments. It would have been used in in detour roads and there was no excess cut from the roads. (Ex. 08- 13, § 12) | No materials from Site 3 would have been used in Embankments because there was no excess cut from construction of detour roads. (Ex. 04C-74 line 19-04C-75 line 17)<br><br>*But see later contradictory deposition testimony…*<br><br>"They would use that material [excess cut from the detour roads] to build embankment." (Ex. 04C-146 line 2-04C-147 line 24) | There was no excess cut from detour roads. (Tr. May 24, pp. 292:1-12)<br><br>*But see admission that he offered two opposing positions in his deposition* (Tr. June 23, pp. 96:24-102:8)<br><br>Based upon sequencing in the record, there was 3,165 yards of excess cut from detour roads that could have been used in the Embankments. (Tr. June 23, pp. 100:4-102:8; 103:22-104:24) |
| **Parking Lot Removal** | JM's Parking Lot was never removed in order to construct Detour Road A based solely on his belief that there was a typo in Exhibit 32. | Same as Report | He misinterpreted Exhibit 32, but maintains his position. He concedes that he has absolutely no evidentiary support for his position. (Tr. June 23, pp. 112:4-16; 116:17-21; 117:3-119:8) |

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| | (Ex. 08-7, 08-8, § 3) | | |
| **Asphalt on top of Parking Lot** | The contractor would not have crushed pipes on top of the Parking Lot because he did not want to damage its stability.<br>(Ex. 08-8, § 4) | Same as Report, but explains that Parking Lot was covered with asphalt, which could be damaged by crushing.<br>(Ex. 04C-76 line 10-04C-77 line 1, 04C-150 lines 2-8, 04C-159 lines 10-18) | Says he has no opinion on whether Parking Lot had asphaltic cover.<br>(Tr. June 23, pp. 112:4-16; 117:3-119:8) |
| **Condition of Site 3 in 1960** | Topographic maps indicate Site was "no longer depicted as a wet area," i.e. it was depicted as a dry area, in 1960.<br>(Ex. 08-10, § 7) | Same as Report | Maps indicate Site is "still wet. It showed marshy areas," i.e. wet areas, in 1960.<br>(Tr. May 25, p. 136:2-7)<br><br>*But see testimony moments later denying earlier testimony…*<br><br>"Q: So you're saying here that the area is still wet in 1960, right? That's what you said --- a moment ago? A: No." Rather, what he had said earlier was that purportedly that the area is "no longer depicted as wet" in 1960.<br>(Tr. May 25, pp. 137:1-138:24) |
| **Scope of Opinion on Utilities** | Utility installation and maintenance work "would have disturbed | His opinion in his report is <u>not</u> an opinion on how ACM became buried in the first place by | There is a "strong indication that the asbestos-containing materials follows a lot of the utility lines" and such |

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| | the existing conditions and potential asbestos material could have been buried when these underground utility lines were installed or during maintenance." (Ex. 08-9, § 6) | utilities, rather opinion on how work could have redistributed already buried ACM. (Ex. 04C-65 line 13-04C-67 line 9, 04C-175 lines 5-18) | work is "a process by which ACM on the surface could cause to be buried." (Tr. May 25, pp. 200:14-19; 201:5-202:19)<br><br>His opinion in his report <u>is</u> an opinion on how ACM became buried in the first place by utilities. (Tr. June 23, pp. 29:16-30:3)<br><br>But see testimony moments later…<br>"I don't believe I was making any opinion on the origin of the asbestos-containing material that was on Sites 3 and 6." (Tr. June 23, p. 32:9-19) |