BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

COMPLAINANT'S MOTION TO EXCLUDE OPINION TESTIMONY OF STEVEN GOBELMAN

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

INTRODUCTION

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

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

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

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

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

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

FACTUAL BACKGROUND

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

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

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

- Prior to the construction of Detour Road A, the shoulder of Greenwood and the embankments along Greenwood (all parts of Sites 3 and 6) and during the time IDOT was conducting survey work and preparing the engineering drawings, a 1970 aerial photograph shows concrete Transite pipe bumpers on the surface of the Site 3 Parking Lot, including lines marking the outline of the parking lot. *See* Gobelman Dep. at 200:18-201:8; 203:8-24. But after Detour Road A was removed and the shoulder and embankment along Greenwood were built, the concrete Transite pipes are no longer apparent in the photographs.

- IDOT's resident engineer for the Project admitted in a Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") Section 104(e) Response to "dealing with asbestos pipe during the project and burying some of it" during construction of the Project. *See* Gobelman Dep. at 235:18-236:18.

- IDOT's Standard Specifications for Road and Bridge Construction enacted on January 2, 1971 (the "Specifications"), which indisputably applied to the Project, directed IDOT to recycle concrete found at the Project site and ordered that "broken concrete" encountered either be placed in embankments during construction or buried under two feet of earth cover on the Project site as directed by the IDOT Resident Engineer. *See* Gobelman Dep. at 78:21-81:2; excerpts from Specifications at §207.04(a); §202.03; §202.04, attached as Exh. 6.

- Based upon the Project construction documents, the ACM that USEPA has ordered to be removed are located almost exclusively within the zone of fill material IDOT placed on Sites 3 and 6. *See* Gobelman Dep. at 187:2-16.

EXPERT REPORTS AND OPINIONS

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

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

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

> Q. Okay. Let's look at your report. Where are the opinions found in this report? It seems like you have certain things that are underlined. Are those the opinions or are they somewhere else?
> A. Yeah. I would say the underlined portions are sort of the opinions.

Q. Okay. Sort of or they are the opinions?
A. Well, yeah, okay. If you want to -- yeah. I don't necessarily look at them as opinions.
Q. Okay. Well, I --
A. But they were a -- sort of like the, in your realm, the opinions.
Q. Okay. So just for procedural purposes, we need to know exactly what your opinions are because that's what I need to ask you the questions about.
A. Okay.
Q. So other than what is underlined, do you have other opinions in this report?
A. No.

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

The 11 underlined portions of the Report are as follows:

1. "Excavated unstable and unsuitable materials were excavated from Site 3 would not have been placed back on Site 3; there was no room within the right of way for this material to be placed" ("Comment 1") (Gobelman Rep. at p. 5);

2. "[b]ased upon the record, Johns Manvile's [sic] parking lot was never removed in order to construct Detour A road" ("Comment 2") (Gobelman Rep. at p. 5);

3. "[a]ny materials on the surface of the parking lot include the Transite® pipes used as curb bumpers would have been cleared in accordance with Article 201.01 of the Standard Specification because this material would have been in the way and removed from the construction project as with any other obstructions" ("Comment 3") (Gobelman Rep. at p. 6);

4. "[i]t is my opinion that over the years the installation and maintenance of these lines would have disturbed the existing conditions and potential asbestos material could have been buried when these underground utility lines were installed or during maintenance" ("Comment 4") (Gobelman Rep. at p. 7);

5. "[t]he Department did not use, spread, bury, place and dispose of ACM regarding site 3 and 6, the Department's only involvement was construction oversight and it was the Contractor's responsibility to determine how materials will be managed" ("Comment 5") (Gobelman Rep. at p. 8);

6. "[t]he contractor may have managed asbestos cement pipes (Transite®) at some time along the construction project" ("Comment 6") (Gobelman Rep. at p. 9);

7. "Mr. Dorgan's opinion did not take into account the construction projects sequencing of work" and "[b]ased on the sequencing of the Department's construction project, the Contractor would not have placed any asbestos containing materials into Site 6 from Site 3" ("Comment 7") (Gobelman Rep. at pp. 11, 13);

8. "[i]t was never specified what types of ACM was used to create the parking lot. Based on the materials found in the test pits and the fact that Johns Manville used Transite® pipes to create curb bumpers and they used ACM to build the parking lot, economics would suggest that Johns Manville would have used all types of ACM material including Transite® pipes to build the employee parking lot" ("Comment 8") (Gobelman Rep. at p. 7);

9. "Johns Manville would not have any economic motivation to remove broken and unusable Transite® pipes that were used as a curb bumper but would have moved them off the edge of the parking lot" ("Comment 9") (Gobelman Rep. at p. 9);

10. USEPA's "remedial strategy are based on protecting all future asbestos exposures" ("Comment 10") (Gobelman Rep. at p. 13); and

11. "[t]he potential freeze thaw cycles did not play a part in USEPA's decision making process because the freeze thaw cycles would only come into play if no remedial action was conducted" ("Comment 11") (Gobelman rep. at p. 13).

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

ARGUMENT

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

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

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

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

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

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

> Q. Okay. And does this figure not show that there is asbestos-containing material within that area that was filled by IDOT's contractor, so the area between the unsuitable material and the final grade line?
>
> A. Yes. I think the analytical results show that there was asbestos-containing material found in those borings.
>
> Q. And, again, you believe that got there how?
>
> A. I don't believe I rendered an opinion how it got there.
>
> Q. Okay. Who put it there?
>
> A. I have no idea who put it there ….

Id. at 187:2-16.

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

> Q: Right. But I want to know what your opinion is. How did it get there? How did the asbestos on Sites 3 and 6 that's buried on Sites 3 and 6 get there? Are you offering an opinion on that or not?
>
> A: I believe the only opinion that's in my report had to do with utilities and their being installed through asbestos-containing material and being maintained in asbestos-containing material. (emphasis added).
>
> Q. Okay. But are you saying that that's how it got there or that's a possibility?
>
> A. I'm saying that those -- material was there and the installation of utilities would have potentially moved that to a different horizon from which it originally was in.
>
> Q. Okay. Well, how did it get there in the first place?
>
> A. I do not believe in my report I render any opinion on how it was got there other than the factual evidence that was in the reports from Johns Manville.

Id. at 66:6-67:3.

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

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

Illinois Rule of Evidence 702 provides:

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

(emphasis added).

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

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

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

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

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

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

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

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

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

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

Gobelman Dep. at 37:10-21.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> Q. Okay. So is there any reason why they couldn't have moved those pipes over to a different part of the parking lot area or a different portion within the right of way and done the crushing there?
>
> A. It's possible, but that would require the contractor was going to have to take his -- make a lot of effort to do that on something that is going to be removed anyway. (emphasis added).

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

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

[1] Mr. Gobelman's belief that the Site 3 Parking Lot was sufficiently stable is contradicted by the record. Mr. Gobelman believes the historical file, however, contains a typo. Gobelman Rep. at p. 6.

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

Section 202.03 of the Specifications states, in pertinent part:

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

Specifications at §202.03 (emphasis added).

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

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

Specifications at §207.04 (emphasis added).

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

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

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

> Q. Okay. Have you looked at any records regarding installation or removal of or maintenance of utilities on Site 3 or Site 6?
>
> A. No, I have not looked at any utilities.
>
> ***
>
> Q. Okay. Do you know if maintenance was ever done on any of these utilities?
>
> A. I have no indication whether or not there were any leaks or spills that required them to do maintenance.

Id. at 176:3-23.

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

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

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

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

decision process, Mr. Gobelman plainly cannot comment on "USEPA's decision making process," Comment 11. Indeed, if Mr. Gobelman had read the file, he would know that USEPA has repeatedly justified its remedy and the need for creating clean corridors on the freeze thaw cycle that Mr. Gobelman speculates is irrelevant to USEPA's thinking. *Id*. at 215:22-216:2 (conceding that EPA was "concerned with buried asbestos moving up to the surface [via the freeze thaw cycle] and then exposing people on the surface"). In short, Mr. Gobelman's purported testimony should be excluded as speculative and irrelevant. Indeed, his circular arguments and hypothetical scenarios lack an ounce of factual support and run the risk of confusing the issues and wasting the Board's resources.

CONCLUSION

Should IDOT's proposed witness, Mr. Steven Gobelman, be permitted to testify as an opinion expert in this case, the Board would be presented with nothing by uninformed, speculative "commentary" from an individual with no specialized knowledge or expertise on the areas on which he is testifying.

WHEREFORE, Complainant JOHNS MANVILLE respectfully requests that the Board enter an Order barring IDOT from eliciting opinion testimony or any testimony relating to the Comments from Steven Gobelman at the hearing in this case scheduled for March 15, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

/s/ Susan Brice
Susan Brice

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