BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	
JOHNS MANVILLE, a Delaware Corporation,	)	
	)	
Complainant,	)	PCB No. 14-3
	)	
v.	)	
	)	
ILLINOIS DEPARTMENT OF TRANSPORTATION,	)	
	)	
	)	
Respondent.	)	

NOTICE OF FILING

To: See Attached Service List

PLEASE TAKE NOTICE that on July 22, 2021, I caused to be filed with the Clerk of the Pollution Control Board of the State of Illinois, Complainant Johns Manville's Post-Hearing Brief, a copy of which is attached hereto and herewith served upon you via e-mail.

JOHNS MANVILLE

By: /s/ Susan E. Brice

Dated: July 22, 2021

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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a true copy of the foregoing Complainant Johns Manville's Post-Hearing Brief was filed on July 22, 2021 with the following:

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and that true copies were emailed on July 22, 2021 to the parties listed on the foregoing Service List.

/s/ Susan E. Brice

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COMPLAINANT JOHNS MANVILLE'S POST-HEARING BRIEF

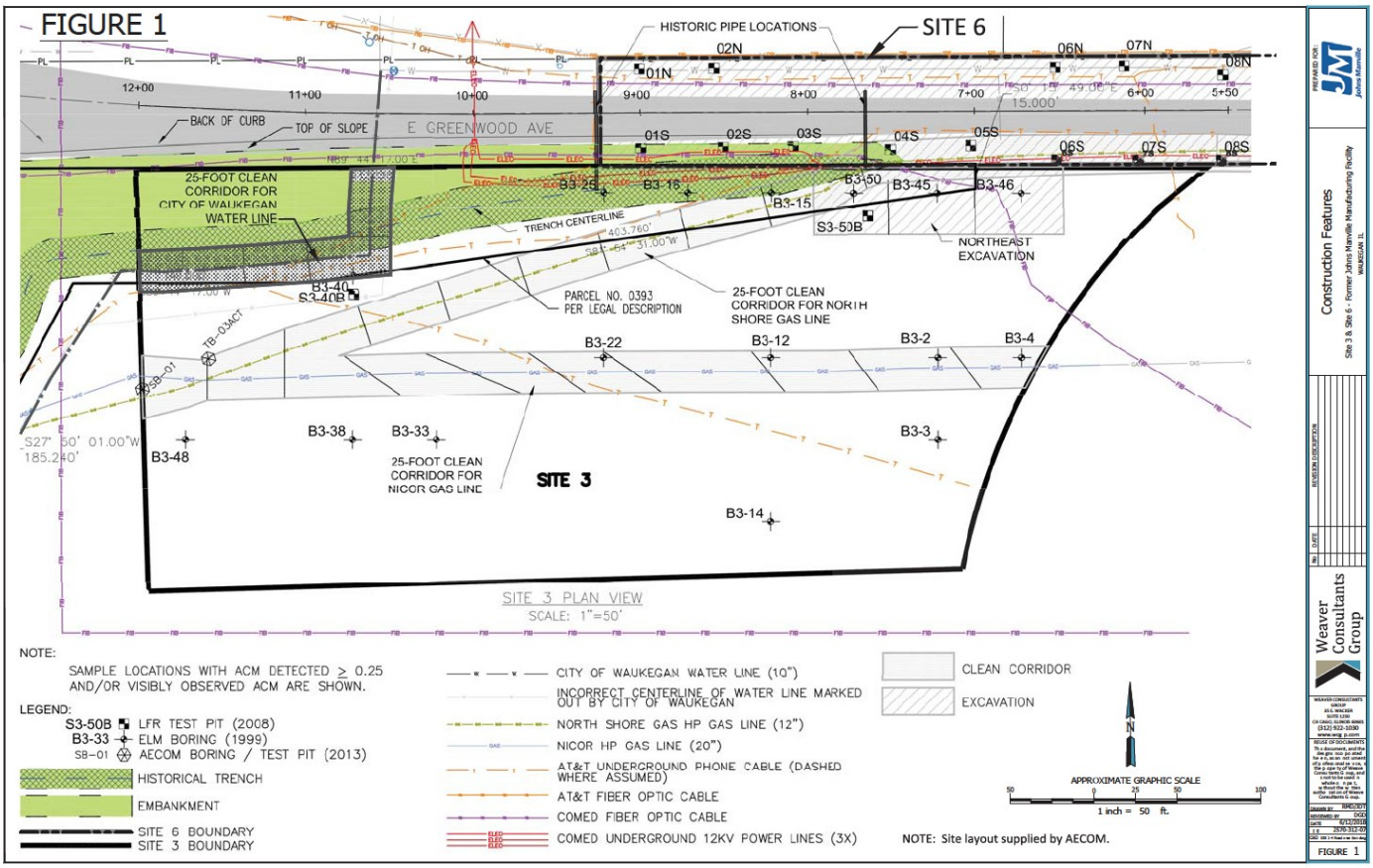
Complainant JOHNS MANVILLE ("JM") hereby submits its Post-Hearing Brief:

I. 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. Envtl. Prot. Agency*, 159 Ill. 2d 381, 386 (1994) (emphasis added) (*quoting* 415 ILCS 5/2(b)). "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"). Because the Board found in its December 15, 2016 Interim Order that the Illinois Department of Transportation ("IDOT") was liable for causing or allowing open dumping of asbestos containing material, IDOT is jointly and severally liable for the contamination it open dumped, and the Board should award JM a judgment for the total costs for remediation –

$5,579,794. Alternatively, the Board should find that IDOT must reimburse JM for the costs incurred by JM for the corrective actions taken and award JM $3,274,917.

This case involves two parcels of land referred to herein as Sites 3 and 6 (collectively, the "Sites"). (Exh. 204-38).



Exh. 204-38

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). IDOT holds an easement on a portion of Site 3 referred to herein as Parcel 0393. Site 6 is generally comprised of the shoulders of Greenwood Avenue. Asbestos containing material ("ACM") and microscopic asbestos fibers were found buried a few feet under the surface on these Sites. JM removed 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.

In the Interim Order issued on December 15, 2016, the Board found the Respondent, IDOT, liable for *causing and allowing* open dumping of ACM waste on Sites 3 and 6. (Exh. 203 (December 15, 2016 Interim Opinion and Order) (emphasis added). As to a remedy, the Board determined that JM was entitled to recover incurred cleanup costs. (Exh. 203-19, 20, 21). But the Board left the amount of those costs for another day, ordering a second Hearing on damages. The Board ruled, however, that "the requirement of Section 58.9(a) of the Act to determine IDOT's proportionate share of JM's costs does not directly apply because the sites are subject to a USEPA order. *See* 415 ILCS 5/58.1(a)(iv) (2014), 58.9(a); *see also* 35 Ill. Adm. Code Part 741." (Exh. 203-22). The Board further stated that IDOT must pay JM for cleanup costs JM incurred "as a result of [IDOT]'s violations," in part to ensure fulfillment of the Act's stated purpose that "adverse effects on the environment are borne by those who cause them." (Exh. 203-21). With respect to the second Hearing, the Board directed the Hearing Officer to conduct a hearing for evidence on the following issues:

1. The cleanup work performed by JM in the portions of Site 3 and Site 6 where the Board found IDOT responsible for ACM waste present in soil.
2. The amount and reasonableness of JM's costs for this work.
3. The share of JM's costs attributable to IDOT.

(Exh. 203-22).

There is no dispute on the first two issues – the scope of the work that JM performed and the fact that JM incurred and paid $5,579,794 to implement the USEPA's Administrative Order on Consent at Sites 3 and 6 (hereinafter referred to as "Implementation Costs"), which were reasonable. (*See* Exh. 228-3, 4).

Additionally, neither the various "Task Buckets" representing the work conducted at Sites 3 and 6 nor the amount of Implementation Costs allocated to each Task Bucket, set forth in the Table below, are in dispute. (Exh. 228-3, 4). All that remains to be decided is the share of JM's costs attributable to IDOT within the meaning of the Board's findings on liability and its Order. As set forth herein, IDOT's share of the costs is $5,579,794 or, at the very least, $3,274,917.

Tasks at Sites 3 and 6 and the Total Costs

Task Bucket	**Site 3**	**Site 6**	**Site 3 and 6**	**Total**
Nicor Gas	$218,090		$360	$218,450
City of Waukegan Water Line	$61,037	$86,674	0	$147,711
AT&T	$108,651	$284,266	$98,898	$491,815
ComEd/Utilities/AC M Soils Excavation[1]	0	$155,318	0	$155,318
Northshore Gas	$332,524	$234,861	$58,157	$625,542
Northeast Excavation	$49,934	0	0	$49,934
Dewatering	$259,084	$160,587	$39,175	$458,846
Filling & Capping	$426,254	$310,353	$352,012	$1,088,619
Ramp	$20,880	0	0	$20,880
General Site/Site Preparation	$932,730	$807,329	$74,300	$1,814,359
Health & Safety				$77,000
EPA Oversight	$233,805	$125,675	0	$359,480
Legal Support Services			$71,840	$71,840

(Exh. 228-3, 4).

[1] The Reports gave them different names, but they are the same Task.

II. IDOT IS JOINTLY AND SEVERALLY LIABLE TO JM FOR THE TOTAL COST OF THE CORRECTIVE ACTIONS AT THE SITES

When a site is remediated pursuant to a USEPA order, Illinois' proportionate share liability scheme does not apply. Here, since IDOT was the only entity found liable, it is jointly and severally liable for all of the costs associated with the remediation.[2] Indeed, in this case, the Board held in its Interim Order that the Act's requirement to determine IDOT's proportionate share does not apply here "because the sites are subject to a USEPA order," namely the Administrative Order on Consent with USEPA. (Exh. 203-22). More to the point, the Illinois Site Remediation Program's ("SRP") "Applicability" Section, 415 ILCS 5/58.1(a)(2)(i) and (iv), excludes sites, like Sites 3 and 6, where either "the Site is on the National Priorities List" or investigation or remediation at the site has been "required by … an order *issued by the United States Environmental Protection Agency*." (*Id*). (emphasis added). Both are true here. (Exh. 62); 40 CFR Appendix B to Part 300.

The Illinois Appellate Court's decision in *State Oil Co. v. People*, 822 N.E.2d 876, 880 (Ill. App. 2d Dist. 2004) supports the conclusion that the Sites are excluded from proportionate share liability and that joint and several liability applies. In that case, the site in question was excluded from the SRP pursuant to 415 ILCS 5/58.1(a)(2)(iii) because it was "subject to federal or State underground storage tank laws" (as opposed to, for example, a USEPA order (5/58.1(a)(2)(iv)). Because of the express statutory exclusion in Section 5/58.1(a)(2)(iii), the Court determined that joint and several liability applied, as opposed to proportionate share liability. The Court rejected the Respondents' attempt to avoid joint and several liability on the following grounds:

[2] Joint and several liability also applies to tort remedies involving the environment in Illinois. Section 735 ILCS 5/2-1118 provides that "in any action in which the trier of fact determines that the injury or damage for which recovery is sought was caused by an act involving the discharge into the environment of any pollutant, including any waste, hazardous substance, irritant or contaminant, including, but not limited to smoke, vapor, soot, fumes, acids, alkalis, asbestos, toxic or corrosive chemicals, radioactive waste or mine tailings, and including any such material intended to be recycled, reconditioned or reclaimed, any defendants found liable shall be jointly and severally liable for such damage."

> Put simply, one must enter through a door before one can throw something out of the window. In other words, Millstream is not entitled to invoke the provisions of Title XVII unless Title XVII is applicable to it in the first place. A statute must be read as a whole, and all relevant parts must be considered. *People v. Peco,* 345 Ill.App.3d 724, 731, 281 Ill. Dec. 157, 803 N.E.2d 561 (2004). Moreover, a statute should not be read in isolation, but in the context of the act of which it is a part. *People ex. rel. Birkett v. City of Chicago,* 202 Ill.2d 36, 49, 269 Ill. Dec. 21, 779 N.E.2d 875 (2002). Thus, section 58.9(a)(1) must be read in light of the rest of Title XVII, including section 58.1(a)(2). A plain reading of section 58.1(a)(2) shows that Millstream is excluded from the operation of Title XVII as a whole. Accordingly, Millstream's argument must fail.

Id. In short, the Court found that since the SRP did not apply to the site, Respondent could not use the SRP to circumvent joint and several liability.

The same logic applies here. Since the SRP is inapplicable to Sites 3 and 6 because of two express statutory exclusions (the fact the Sites are on the NPL and the USEPA Order), the Board is not circumscribed by the Act's proportionate share liability scheme. Rather, IDOT is jointly and severally liable for JM's response costs. *Id.*, *People ex rel. Ryan v. Agpro, Inc*., 345 Ill. App. 3d 1011, 1018, 1023-24 (2d Dist. 2004) (court applying joint and several liability for cleanup costs based on violations of the Act for costs incurred prior to 1996 (when the proportionate share rule was not enacted), but making a determination of causation in order to apply the proportionate liability rule for costs incurred after 1996); *Ill. Envtl. Prot. Agency v Bittle*, PCB 83-163, ILL. ENV. LEXIS 338 at *3 (June 10, 1987) ("[t]he Board continues to believe that the imposition of joint and several liability was proper in this instance"); *People v. Michel Grain Company*, PCB 96-143, ILL. ENV. LEXIS 585 at *10 (Oct. 2, 2003) ("[w]hether a respondent's cleanup liability, if any, is limited to its proportionate share or is joint and several, nothing in the current record indicates that the Board would be unable to fashion an appropriate order under the circumstances, regardless of the presence of other past titleholders as parties"); *Illinois EPA v. J&T Recycling and John A. Gordon*, PCB AC No. 01-122001 Ill. ENV LEXIS 53, at *4 (Jan. 18, 2001) ("[u]nless otherwise specified in the compliant [*sic*], joint and several liability is presumed in administrative citations.")

This is particularly so, given that the Board found that IDOT, and IDOT alone, violated the Act by engaging in open dumping at Sites 3 and 6 and allowing open dumping on Parcel 0393. (Exh. 203-22). With respect to allowing open dumping on Parcel 0393, the Board found that IDOT held an easement that "gave and continues to give [IDOT] control over open dumping" on Parcel 0393 and thus IDOT "continues to allow ACM waste in that soil" in violation of the Act. (Exh. 203-12, 13). The Board did not issue any findings regarding JM's liability. In fact, in 2017, the Board held that JM's liability was irrelevant and never at issue since no claim had been filed against JM; the "only one found to have violated the Act is IDOT. The December 2016 order did not find that 'JM, ComEd, or anyone else violated the Act. . . . Furthermore, no complaint has even been brought before the Board alleging that anyone else violated the Act.'" (*See* Board Order dated December 21, 2017, p. 4).

Accordingly, the only party held to be liable at Site 3 (including Parcel 0393) and Site 6 is IDOT. Any potential JM liability is not germane and the Board therefore could not possibly determine the JM's share of liability, if any. *Id*.[3] After all, "it is no defense [to liability] that another party may have been partially responsible for the pollution." *People v. A.J. Davinroy Contractors*, 618 N.E.2d 1282, 1287–88 (Ill. App. 5th Dist. 1993).

Moreover, the Board found that every single Section 33 mitigating factor weighed against IDOT and in favor of JM, bolstering the imposition of joint and several liability. (Exh. 203-18, 19). *see Kapp, Inc. v. Carlton*, PCB 05-196, 2005 Ill. ENV LEXIS 426 *5 (July 7, 2005) (stating that the Section 33(c) factors are evaluated to determine "what to order the respondent to do…to address the violation"); *see also, People v. ESG Watts*, PCB No. 96-107, 1998 Ill. ENV LEXIS 42 at *130

[3] The Administrative Order on Consent provides that JM does not admit any liability. (Exh. 62-3.) Further, the Board Order only requires a finding of "the share of JM's costs attributable to IDOT," not JM (Exh. 203-22.)

(Feb. 5, 1998) ([i]n considering the 33(c) factors "in fashioning any remedy, the Board must consider what action is best designed to achieve compliance with the Act.")

"The factors provided in Section 33(c) bear on the reasonableness of the circumstances surrounding the violation, such as the character and degree of any resulting interference with protecting public health, the technical practicability and economic reasonableness of compliance, and whether the respondent has subsequently eliminated the violation." *BNSF v. Indian Creek Dev.*, PCB 14-81, 2014 Ill. ENV LEXIS 101 at *28 (March 20, 2014). Since the Board ruled against IDOT on every single Section 33(c) factor, including finding that "IDOT has not taken any steps to comply with the Act," the Board impliedly held that IDOT's conduct was wholly unreasonable. (Exh. 203-18, 19); *see People v. J&F Hauling*, PCB 02-21, 2003 Ill. ENV LEXIS 56 at *11 (Feb. 6, 2003) (weighing all five factors against the Respondent and concluding that "[a]pplication of the uncontested facts in this case to the five Section 33(c) factors allows for a single conclusion: J&F's violations of the Act were unreasonable.")

In such situations, where all of the Section 33(c) factors weigh against a violator, Board precedent requires that the requested relief be granted. This was the case in *McCarrell v. Air Distrib. Assoc., Inc*., PCB 98-55, 2003 Ill. ENV LEXIS at 130 *11-14 (Mar. 6, 2003). Like here, *McCarrell* was a private cost recovery enforcement case involving violations of Section 21(a) of the Act. *Id*. In *McCarrell*, the Board found that each Section 33(c) factor weighed against the Respondent and determined that full recovery of the Complainants' remediation costs was proper. *Id.; People v. J&F Hauling*, PCB 02-21, 2003 Ill. ENV LEXIS at 56 *12-13 (Feb. 6, 2003) (all factors were weighed against respondent and all remedies requested by the complainant found to be "reasonable" were granted by the Board); *Theodore Kosloff Trust v. A&B Wireform Corp*., PCB No. 06-163, 2006 Ill. ENV LEXIS 552 at *3 (Oct. 5, 2006) (Complainant only needed to prove that remediation

costs were justified for the Board to issue default order and noting that proportionate share liability would be a "limit" on the costs it can award).

Here, IDOT has stipulated that JM paid $5,579,794 in reasonable Implementation Costs. (Exh. 228-3). Consequently, the Board should award JM the $5,579,794 requested.[4]

III. ALTERNATIVELY, IDOT IS LIABLE FOR COSTS IT CAUSED JM TO INCUR TO CONDUCT THE CORRECTIVE ACTIONS

In the alternative, JM asks the Board to award it $3,274,917 in response costs, which are the costs its expert determined were incurred "as a result of [IDOT]'s violations." (Exhs. 204-36; 203-21; Oct. 26 Tr., p. 240: 3-19; *see also* Board Order dated December 21, 2017, p. 2 (explaining that the Interim Order found it "appropriate that a party recover the cost of performing cleanup as a result of another party's violations")).[5] The proportionate share liability rule housed in Section 58.9(a)(1) of the Act, 415 ILCS 5/58.9(a)(1), provides that in no event shall any person:

> bring an action pursuant to this Act . . . to seek recovery of costs for remedial activity conducted by . . . *any person* beyond the remediation of releases of regulated *substances that may be attributed to being proximately caused by such person's act or omission* or beyond such person's proportionate degree of responsibility for costs of the remedial action of releases of regulated substances that were proximately caused or contributed to by 2 or more persons.

415 ILCS 5/58.9(a)(1) (emphasis added). Likewise, the regulation implementing this section of the Act, Section 35 Ill. Admin. Code Section 741.135, focuses on the recovery of costs caused by or contributed to by another. It states:

> In determining proportionate shares under this Part, the Board will consider any or all factors related to the degree to which the performance or costs of a response *result from a person's proximate causation of or contribution to the release* or substantial threat of a release. These factors include the following:

[4] It should be noted that these costs do not include any costs incurred prior to 2007 or any JM internal costs incurred in complying with the USEPA Order. (Oct. 26 Tr., pp. 50:1-51:1.)

[5] While IDOT's expert used a different and flawed methodology to reach his attribution opinions, he still concedes that IDOT owes JM $600,050. (Exh. 207-11.) Thus, there is **no dispute** that IDOT owes JM at least $600,050.

a) The volume of regulated substances or pesticides for which each person is responsible;

b) Consistent with the provisions of 35 Ill. Adm. Code 742 and the remediation of the site in a manner consistent with its current and reasonably foreseeable future use, the degree of risk or hazard posed by the regulated substances or pesticides contributed by each person;

c) The degree of each person's involvement in any activity *that proximately caused or contributed to the release* or substantial threat of a release of regulated substances or pesticides; and

d) Any other factors relevant to a person's proportionate share.

Id. (emphasis added).

Based upon the rules in Section 58.9(a)(1) and Section 741.135, JM's expert, Douglas Dorgan, applied the causation standard ─ firmly rooted not only in the Interim Order, but also in Illinois law ─ to determine the costs "caused" by IDOT. Thus, if the proportionate share liability rules were to apply here (which they do not, *see supra* Sec. II), the causation analysis prepared by JM's expert is the proper approach. In fact, the Board has previously based a party's proportionate share of liability upon the costs it caused a third party stemming from the initial party's violations of the Act. In *BNSF Railway Company v. Indian Creek Development et al*, the Board found that it was "authorized to order a party to pay its proportionate share of liability for remediation costs" resulting from the person's unlawful acts. *BNSF Railway Company v. Indian Creek Development et al.*, PCB 14-81, 2014 Ill. ENV LEXIS 101 at *25 (March 20, 2014). That case, like this one, was also a citizen enforcement action. *Id*. at *1. Other cases applying the proportionate share liability rule have reached similar results. *See People ex rel. Ryan v. Agpro, Inc*., 345 Ill. App. 3d 1011, 1024 (2d Dist. 2004) (finding that the trial court "should have determined the amount of remediation costs incurred . . . that were proximately caused by defendants' acts or omissions"). Thus, in the very least, if the Board applies the proportionate share rule here, it should look to the causation standard in calculating damages owed to JM.

IDOT, not surprisingly, disagrees. IDOT's expert, Mr. Steven Gobelman, did not consider causation. Rather, he found IDOT responsible for Implementation Costs only associated with work that was performed proximate to *boring locations* where the Board found IDOT liable at the first Hearing. But this approach does not square with Illinois law or the Board's order, which requested evidence on, among other things, "the share of JM's costs attributable to IDOT." (Exh. 203-22). The "share of costs attributable" to IDOT plainly encompasses much more than just costs associated with work done at the identified boring locations, which are about two-inches in diameter. (Oct. 26 Tr., p. 221:3-22). Moreover, this flawed methodology, along with how Mr. Gobelman applied it,[6] was unsound, inaccurate, and not credible. In such situations, Illinois courts have held expert testimony deserves no weight. *See John Crane Inc. v. Allianz Underwriters Ins. Co*., 2020 IL App (1st) 180223, ¶¶ 20, 31, 35 (upholding trial court's finding that expert's testimony on allocation was not credible when the methodology was suspect and the allocation was fundamentally flawed); *Kane v. Motorola, Inc.*, 335 Ill. App. 3d 214, 221-222 (1st Dist. 2002) (disregarding expert testimony and explaining that a court may reject an expert's conclusions when the scientific data upon which they rely is not related to the conclusion reached).

[6] *See* ***Complainant's Motion to Exclude Base Maps and Related Figures and Testimony at Hearing***, filed September 13, 2019, outlining fundamental issues with Gobelman's testimony. Mr. Gobelman's inaccurate opinions were discussed at length at Hearing. For example, JM showed that Mr. Gobelman erroneously assumed that work was done on the entire north side and south side of Site 6 for the AT&T lines and for Filling and Capping. The record reflected the scope of the work was much less. (*E.g*., Exh. 67-542: Oct. 26 Tr., pp. 56:5-74:18.) (Dr. Ebihara explaining that work on the AT&T lines extended from 1N – 27N on the north side of Site 6, instead of 58N, as Mr. Gobelman had assumed in his linear footage calculation) and 3S-38S on the south side of 6, instead of 58S, as Mr. Gobelman had assumed in his calculation); *id*., p. 111:5-10; *id*., pp. 159:3-160:20, Exh. 213-38.) Thus, his linear footage denominator of 5470, used in many of his attribution calculations, was flat out wrong. (Oct. 28 Tr., pp. 152:13-160:9.) Because his Construction Task Buckets attributions were used to calculate certain Oversight and Support Services Task Buckets, this mistake flowed through to impact not only his Site 6 AT&T, ACM Utility Soils (Oct. 28. Tr., pp. 162:20-164:11, Oct. 29, Tr., pp. 4:21-5:15) and Filling and Capping Task Buckets (Oct. 29 Tr., pp. 33:1-34:5), but also his General Site Prep Site 6, Site 3/6 General Prep., Health and Safety, Site 6 Oversight and Legal Task Buckets. (Exh. 245.)

A. IDOT AREAS OF LIABILITY

JM's expert, Mr. Dorgan, relied upon a Base Map in his Expert Rebuttal Report in order to identify the boundaries of Sites 3 and 6, to label the key remediation areas on Sites 3 and 6 and to locate the borings and tests pits discussed by the Board in its Interim Order ("IDOT Areas of Liability"). (Exh. 204-38; Oct. 26 Tr., pp. 217:12-223:23).[7] The materials used to generate this Base Map were created by AECOM, the firm that did the investigations and oversaw the removal work. (Oct. 26 Tr., pp. 222:21-223:11). These same materials, AutoCad drawings, were used to create maps that AECOM submitted to USEPA and that USEPA approved. (Oct. 26 Tr., pp. 41:9-42:7).[8]

1. Site 3

Mr. Dorgan identified the Site 3 Area of Liability as all of Parcel 0393 as well as sample grids within Site 3, namely B3-25, B3-15, B3-16, B3-50 and B3-45. (Ex. 203-12, 13; 204-16). As to the former, he stated that "the Board found IDOT liable for contamination within Parcel No. 0393 due to IDOT's interest in and control of this parcel." (Exh. 204-16). Furthermore, he underscored the Board's language:

> IDOT's interest in Parcel 0393 therefore gives it the right to control a portion of Site 3. Within that portion of Site 3, ACM waste is present in the soil. By continuing to

[7] A "Base Map" is the digital information stored in an AutoCAD file that identifies site boundaries, site features, roadways, utility locations and sample locations of a site. (Oct. 26 Tr. p. 36:8-11.)

[8] IDOT's expert, Mr. Steven Gobelman, did not use these maps, but rather created his own maps and figures ("Gobelman Maps") that conflict with the maps used by the Board, AECOM, USEPA and JM. Prior to Hearing, JM sought to exclude from evidence any testimony offered by IDOT about the Gobelman Maps, as well as the Gobelman Maps themselves. (*See Complainant's Motion to Exclude Base Maps and Related Figures and Testimony at Hearing*, filed September 13, 2019.) The Hearing Officer denied the Motion, but he found that his decision did not bind the Board in giving it the weight it seems appropriate or preclude JM from renewing its objections to specific issues at hearing. (Hearing Officer Order dated October 31, 2019, p. 7.) JM filed an interlocutory appeal to the Board. (*Complainant's Motion For Interlocutory Appeal and Interlocutory Appeal Of Hearing Officer's Order Denying Complainant's Motion to Exclude Base Maps and Related Figures and Testimony at Hearing*, filed November 14, 2019.) The Board affirmed the Hearing Officer's Order. (Order of the Board, dated June 18, 2020.) At Hearing, JM renewed its objections and thus did not waive them. (Oct. 26 Tr., p. 18:2-24; *id.* pp. 25:3-26:19; Oct. 28 Tr., p. 67:5-9.) (Hearing Officer deeming the objection to be a continuing objection). The objections still stand, and JM asks the Board to disregard Mr. Gobelman's testimony, which will be discussed at length in JM's Reply Brief.

> control the portion of Parcel 0393 falling within Site 3 (emphasis added), IDOT continues to allow ACM waste in that soil.
> (Exh. 206-10, 11).

Mr. Dorgan goes on to say that "the Board is clearly referencing the entirety of Parcel No. 0393 located within Site 3. As a result, it is my interpretation that the Board intended to attribute all work done by JM in, on and under Parcel No. 0393 (which IDOT controls given its easement interests) to IDOT, not work done in areas in close proximity to certain boring locations within Parcel 0393." (Exh. 206-11). At Hearing, Mr. Dorgan explained he understood "that IDOT had been determined to have been an owner of and in control of Parcel 0393. So all of the activities that took place within 0393 I found to be an area of liability for IDOT." (Oct. 26 Tr., p. 237:11-21).

According to the Board, "Section 21(a) creates liability for a person who causes or allows open dumping." (Exh. 203-12). The Board found that IDOT did both. As to the latter, the Board reasoned that "IDOT's interest in Parcel 0393 gave and continues to give it control over open dumping on that property" and provided examples of IDOT's control. (Exh. 203-12).[9] The perpetrator of the open dumping did not even matter to the Board, "the question here is whether IDOT, by controlling Parcel 0393 where ACM is not present, *allowed* open dumping." (*Id*). The Board answered this question in the affirmative and held IDOT liable for all contamination within Parcel 0393 that was identified at the first Hearing. (Exh. 203-12, 13). In fact, according to Mr. Gobelman, the Board was clear that if B3-45 fell within Parcel 0393 then IDOT was liable; but if it did not, IDOT was not liable. (Oct. 28 Tr., pp. 10:23-11:4).

[9] The Board also noted that "[o]wnership can result in sufficient control over the location of open dumping to result in responsibility even if the owner did not actually open dump,' Exh. 203-12, *citing Meadowlark Farms v. PCB*, 17 Ill. App. 3d 851, 861 (5th Dist. 1974) (current owner liable for pollution seeping from waste pile created by prior owner), including ownership in the form of holding an easement interest. *McDermott v. Metropolitan Sanitary District*, 240 Ill. App. 3d 1, 26 (1st Dist. 1992) (an easement interest rendered holder liable for failure to maintain a property).'" (Exh. 203-12.)

As to the soil borings, Mr. Dorgan explained that USEPA required JM, among other things, to treat a contaminated boring on Site 3 as representative of a contaminated 50-by-50 foot grid. (Exhs. 204-16, 120-3; Oct. 26 Tr., pp. 235:20-236:14). As a result, his Site 3 IDOT Area of Liability included the entire grid for each of the soil borings where the Board had found IDOT violated the law. (Oct. 26 Tr., pp. 236:15-237:4; *id.*, p. 239:15-23).

2. <u>Site 6</u>

The Board also found IDOT liable for contamination on the south side of Site 6 in the areas of 1S-4S because IDOT buried ACM waste in these locations while reconstructing Greenwood Avenue during the Amstutz Project in the early 1970s. (Exh. 203-9; *see also* 204-16). At Hearing, Mr. Dorgan explained that these soil borings could not be viewed in a vacuum. (Oct. 26 Tr., p. 221:15-22 (explaining that a boring is "representative of the larger area, not just the specific location where the sample was pulled.")). He opined that during remediation, the contractors found beneath 4S "asbestos-containing material in the layer with fill that had been placed during the IDOT road project … [that] extended at least as far as the western end of Site 6 and out past 08S." (Oct. 26 Tr., pp. 244:23-245:6). In other words, he opined that during the removal action, it became clear that the ACM beneath 4S was connected to the ACM from 5S-8S. That being said, Mr. Dorgan testified multiple times at Hearing that his IDOT attribution opinions would not change if the Board limited the IDOT Area of Liability to 1S-4S because of the way USEPA required the Sites to be remediated and how those requirements merged with his causation methodology. (*E.g.*, Oct. 26 Tr., p. 255:5-20; Oct. 27 Tr., pp. 78:15-79:24).

Mr. Dorgan's opinion on borings 5S-8S is based on several lines of evidence. (Oct. 26 Tr., pp. 242:2-243:5). These include his conversations with Mr. David Peterson, who personally witnessed, photographed, and oversaw the removal work, including the excavation work in the 1S-8S area. (Oct. 26 Tr., pp. 130:7-132:6; *id*., pp. 171:22-172:19; *id*. p. 188:3-15). Mr. Peterson told

Mr. Dorgan that it became apparent during the excavation (in approximately September 2016) that the ACM placed at areas 1S-4S had been placed at the same time as the ACM present at 5S-8S. (Exh. 204-16, 17). According to Mr. Dorgan, Mr. Peterson told him there was a "consistent seam of the same type of ACM materials (Transite, sludge, and roofing paper) along this entire transect of 1S-8S from the ground surface to a depth of approximately 3 to 5 feet below ground surface." (Exh. 204-17; Exh. 202; Oct. 26 Tr., pp. 242:12-243:5; Oct. 27 Tr. pp. 41:2-42:8 (explaining that materials identified in Exhibit 202 were the same identified by Mr. Peterson)).

At Hearing, Mr. Peterson explained to the Board what he witnessed this first-hand when participating in the excavation. (Oct. 26 Tr., pp. 174:9-175:10). Consistent with Mr. Dorgan's statement, Mr. Peterson described his photographs as showing a "consistent seam of industrial debris, including asbestos containing material present underneath the southern – the bank next to Greenwood Avenue approximately three to five feet below grade" from 1S to 8S. (Exh. 214-14, 19, 15, 17, 18; Oct. 26 Tr., pp. 174:9-178:13; *id*., p. 180:2-10; *id*., p.182:1-10). When pressed on cross about whether ACM was actually present in the photographs, Mr. Peterson explained that he witnessed it personally. "I mean, I was there. I was walking in that trench. I was up close to it." (Oct. 26 Tr., pp. 188:3-15). Moreover, he explained why he believed the ACM waste from 1S-8S was dumped contemporaneously:

> it would be difficult to do this at a different time because you would have to plan to excavate to a certain depth to lay down the same or similar material and so that would have required planning ahead of time and if it was -- if it was done at different times, I would -- there would be some changes I would think in the industrial debris and in some places like that layering wouldn't -- you know, would be discontinuous. So this looks like it was done at the same time.

(Oct. 26 Tr., pp. 180:11-181:8). In other words, one would have to know the depth and type of asbestos buried at 1S to 4S and plan to dump the same material at the same depth in order to explain the consistent seam found in the photographs. Neither he nor Mr. Dorgan believed this to be a

plausible scenario. (Oct. 26 Tr., pp. 180:11-181:8; *id*. p. 296:7-18; *id*. pp. 242:2-243:5). The more obvious conclusion was that IDOT dumped the ACM during the Amstutz Project. (*Id*).

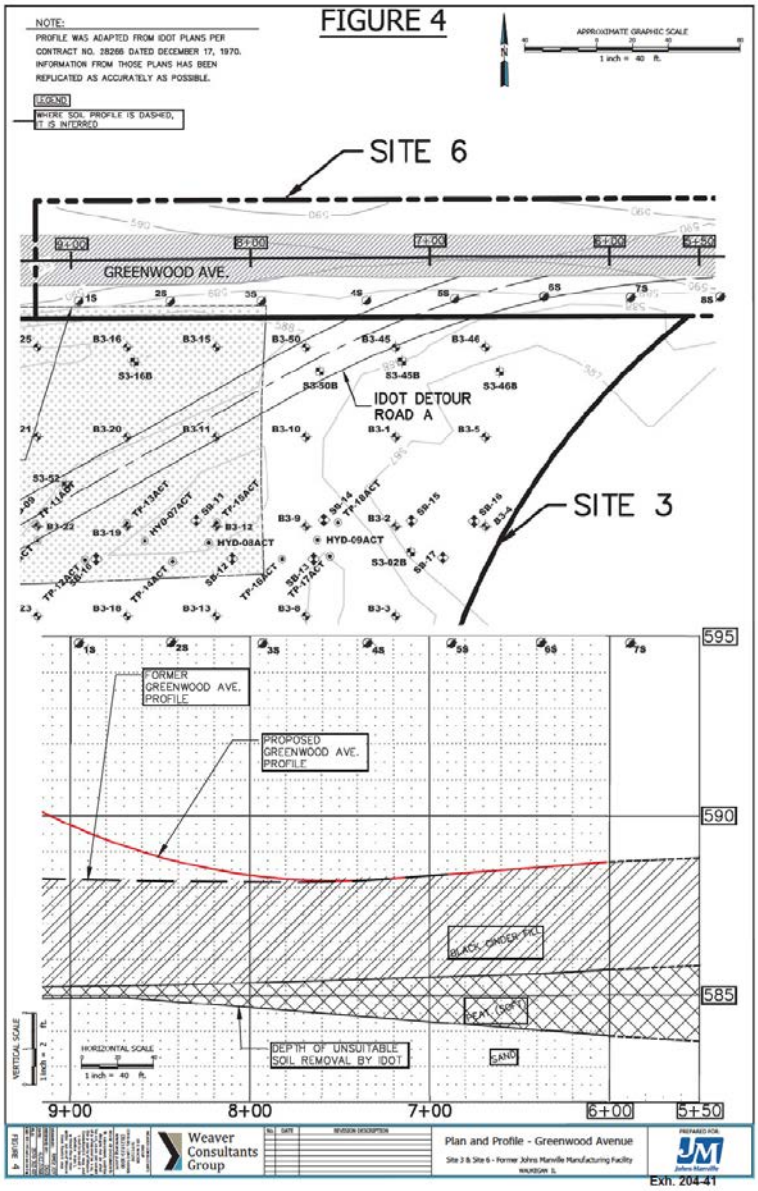
This conclusion is buttressed by the Amstutz Project geotechnical drawings. These pre-construction drawings[10] show that black cindery fill and peat existed in the soil beneath the stretch of Greenwood Avenue where test pitting at 5S-8S was subsequently done in 2008 during the investigation of Site 6. (Exhs. 204-41; 21-A-26).[11] If IDOT had not dumped ACM along this stretch of Greenwood during that Amstutz Project, then Mr. Peterson should have found black cindery fill and peat in the soil during his excavation. But he did not. Instead of black cindery fill, he found a consistent seam of ACM. (Oct. 26 Tr., p. 253:4-15).

Even more compelling is the fact that the pre-construction drawings show that this black cindery fill and peat needed to be removed and replaced with new fill in order to perform the anticipated work. As shown on Exhibit 204-41 (Figure 4 inserted below), there was a "zone of material, soft peat in this particular case, that had to be removed before suitable fill could be brought in to support the construction for the new Greenwood road"; this zone of unsuitable material encompassed borings 5S to 8S at elevations 583 to 590. (Oct. 26 Tr., pp. 251:6-253:3; Exh. 204-17, n. 14). Mr. Dorgan marked this zone on Exhibit 21A-26A at Hearing, and the Exhibit was left with the Board for its reference. (*See* Exh, 21A-26A; Oct. 26 Tr., pp. 253:16-255:4). Not surprisingly, the ACM found in 5S to 8S was located entirely within the zone where IDOT was required to remove material and replace it with fill. (Oct. 26 Tr., p. 253:4-15; Exh. 204-17, n. 14 (citing other exhibits for the fact that ACM was found at 5S between elevations 585.75 and 588.75;

[10] Exhibit 21A contains the as-built drawings, which were the pre-construction drawings as amended with marker to show any changes done during construction and Exh. 21B are the preconstruction drawings themselves. No changes are identified on the relevant as-built pages, 21A-26 to the pre-construction drawing on 21B-30. (Exhs. 21A-26, 21B-30; Oct. 29 Tr., pp. 115:6-116:9.)

[11] This black cindery fill and peat extend all the way out to Greenwood Avenue Construction Station 5+50, which is also at approximately 8S. (Exhs. 21A-26; 204-41.)

at 6S between elevations 585.63 and 588.63; at 7S elevations 584.94 and 587.94; and at 8S between elevations 587.60 and 588.60)).



Mr. Peterson's first-hand account and photographs of the excavation were unavailable to the Board when it decided its Interim Order and excluded Site 6 Test Pits 5S through 8S from IDOT's liability. Moreover, the Board apparently misinterpreted the Amstutz Project construction drawings, when it found that no construction work transpired along Greenwood Avenue east of Greenwood Avenue Station 7. (Exh. 203-8; Oct. 28 Tr., pp. 7:17-8:24) (Gobelman claiming that

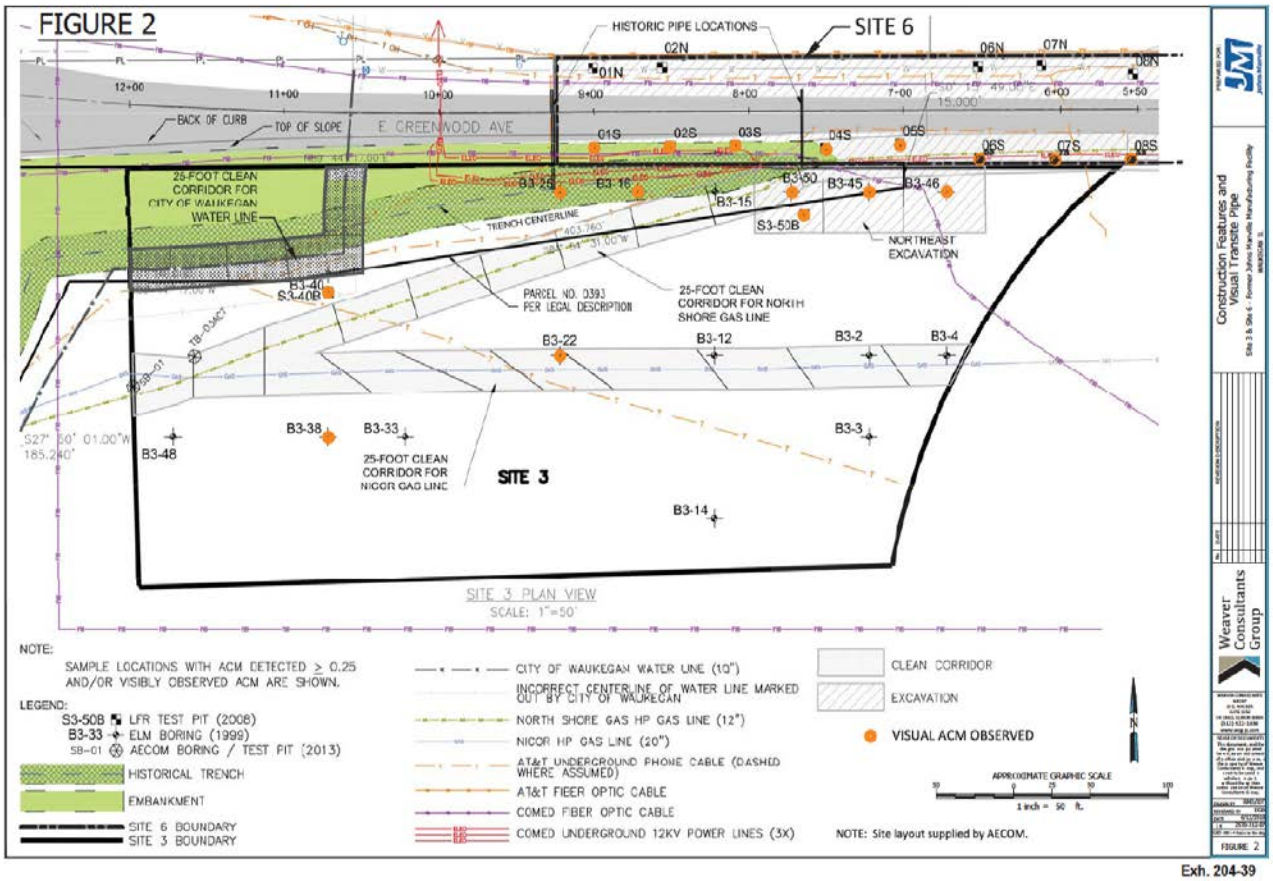
Greenwood Avenue Station 7 was the construction limit for *the embankment*, as opposed to the intersection between Greenwood and DTRA)). To explain this understandable error, it is important to understand that the substantial work that occurred at the intersection of Greenwood Avenue and Detour Road A ("DTRA" or "Detour Road A") is not contained in just one drawing. Rather, one must refer to multiple drawings to comprehend the extent of the work done at this intersection. (*E.g.*, Exh. 21A-26 and 21A-23). Mr. Gobelman and the Board did not do this. And to make matters more confusing, the Amstutz Project construction drawings treat the work for Greenwood Avenue and DTRA separately in that they both have different stationing numbers. (Oct. 26 Tr., p. 251:6-19). The Greenwood Avenue station numbers ("Greenwood Stations") descend from Greenwood Station 26 to 5+50 as you move from west to east along Greenwood Avenue and ascend as you move from southwest to northeast along DTRA from DTRA Station 1 to DTRA Station 15+50. (Oct. 26 Tr., p. 251:2-19; *id.*, p. 256:7-20; Exh. 21A-23; Exhs. 204-41, 21A-26, 21A-26A).

When these drawings are reviewed together with the stationing in mind, it becomes clear that significant construction work occurred east of Greenwood Station 7. (Exh. 204-40, 41). As Mr. Dorgan testified, the work along Detour Road A extended "nearly to [DTRA Station] 15." (Oct. 26 Tr., p. 247:9-21). More specifically, the black cindery fill and peat shown on Exhs. 21A-26 and 21A-26A needed to be excavated from Greenwood Avenue Stations 9 to 5+50 (which correspond to 1S-8S and include areas *east of Greenwood Station 7*), (Exh. 204-41; Oct. 26 Tr., pp. 251:6-255:4 (explaining Figure 4/Exh. 204-41),) and fill needed to be added in the same place to accommodate Detour Road A identified on 21A-23 from where it intersects with Greenwood Avenue at DTRA Station 13+50 to 15+50 (corresponding to borings 4S-8S). (Exh. 21A-23; 204-40; Oct. 26 Tr., pp. 246:10-249:9; *id.*, pp. 256:7-257:3 (explaining Figure 3/ Exh. 204-40)).

B. TASK BUCKET ATTRIBUTIONS

Visible ACM "drove the work mandated by the Enforcement Action Memorandum (EAM) and the work ultimately performed." (Exh. 206-4; Oct. 26 Tr., pp. 227:10-228:7). The majority of the visible ACM was found within the IDOT Areas of Liability. (Exh. 204-16, 39; Oct. 26 Tr., p. 220:13-20). In fact, eleven of the fourteen samples containing visible ACM fell within the IDOT Areas of Liability.

Most of the other boring locations contained only miniscule amounts of ACM. As shown on Exh. 204-39, inserted below, outside of the borings with visual ACM, only a few borings contained equal to or greater than 0.25% ACM, which is merely a "trace amount of asbestos fibers in a sample" or equivalent to "one or two individual asbestos fibers in a sample." (Exh. 204-39; Oct. 27 Tr., pp. 77:3-78:9).



Under CERCLA, a release of friable ACM is reportable only when it reaches one pound; one or two fibers is inconsequential. 40 C.F.R. §302.4. Given that visible ACM was "driving the remedy" and that most of the visual ACM (79% (11 out of 14)) was located in IDOT's Area of Liability, Mr. Dorgan opined that if IDOT had not violated the law leading to this visible ACM waste, USEPA probably would have required "no work" at all. (Oct. 26 Tr., p. 260:12-23).

Despite this conclusion, which lends further support to imposing joint and several liability, Mr. Dorgan entertained an alternative approach that separated the work into Task Buckets and examined the costs incurred by JM "as a result of [IDOT]'s violations" at a more granular level for the Board's consideration. (Oct. 26 Tr., p. 240:3-19). Each of the following attributions applies only to the alternative argument that IDOT is liable for the costs it caused JM to incur.

1. <u>Waukegan Water Line and Ramp Costs Attributed to IDOT - Site 3</u>

Mr. Dorgan opined that the Waukegan Water Line work and the Ramp work wholly fell within Parcel 0393; therefore, he attributed all of the costs associated with both Task Buckets to IDOT. (Oct. 27 Tr., p. 16:15-20; Exh. 204-19, 29). This is consistent with the Board's Order, which held IDOT responsible for all contamination identified within Parcel 0393 at the time of the first Hearing because IDOT "allowed" the ACM waste to be present. (Exh. 203-12, 13).

IDOT contends that it bears no responsibility for either the Waukegan Water Line or the Ramp because the Board did not specifically identify any borings in its Order that are located west of B3-26. (Oct. 28 Tr., p. 128:4-10; *id*., p. 44:18-24). But IDOT glosses over the fact that no borings were identified in the Board's Order because, at that time of the first Hearing, the actual location of the Waukegan Water Line was not known, and the Ramp work had not been performed.[12] (Exh.

[12] As Dr. Ebihara and Mr. Dorgan explained, the ramp work was necessitated by the fact that a cap could not be done for the sloped part of the embankment; thus, USEPA required them to do sampling. (Oct. 27 Tr., pp. 15:19-16:14.) After the first hearing, asbestos was identified in some of the samples and removed. (*Id*.) Mr. Dorgan identified the ramp as the "shaded green in the upper left corner of Site 3 . . . roughly to sample location 4S." (Exh. 204-38; Oct. 27, Tr., p. 15:13-18.)

204-18, n. 18, 29; Oct. 26 Tr., p. 164:4-165:21). During the second Hearing, the location of ACM contaminated areas along the Waukegan Water Line and within the Ramp area west of B3-26 were both identified. (Oct. 26 Tr., pp. 266:6-267:7 (identifying B3-40 as being located within the Waukegan Water Line remediation and Parcel 0393); *id*. pp. 83:14-87:3 (discussing ramp work); Exh. 213-1827). The Waukegan Water Line attribution amounted to $61,037 and the Ramp attribution totaled $20,880. (Exh. 204-19, 29).

2. **AT&T Lines Costs Attributed to IDOT**

i. Site 3

Three AT&T lines ran through Site 3 that JM had to address. (Exh. 204-19, 20). Since two of these three lines crossed through the IDOT Area of Liability (including Parcel 0393 and grids for B3-16, B3-25 and B3-15), Mr. Dorgan opined that 66% of JM's Site 3 AT&T Costs should be attributed to IDOT. (Exh. 204-19, 20, 39). This totaled $71,710. (Exh. 204-20).

ii. Site 6

Mr. Dorgan used a similar approach with respect to Site 6. Three AT&T lines were located on Site 6, two on the north side and one on the south side. (Exh. 204-19, 20). The one on the south side travelled through the IDOT Area of Liability, namely 4S and, to the extent the Board agrees to include 5S-8S, then through 5S-8S. (Exh. 204-20). Consequently, Mr. Dorgan attributed 33% of the JM AT&T Site 6 costs to IDOT, which totaled $88,858. (Exh. 204-21).

iii. Combined Site 3 and 6 Costs for the AT&T Lines Attributed to IDOT

As explained at the Hearing, there were certain costs that could not be segregated into Site 3 or Site 6 alone. (Exh. 204-21; Oct. 26 Tr., pp. 262:19-263:9). Based upon input from Dr. Ebihara or Mr. Peterson, these costs were segregated and then placed in combined Site 3/6 Task Buckets ($98,898). (Oct. 26 Tr., pp. 276:7-277:8). Mr. Dorgan then took several steps to determine IDOT's attribution for these combined Site 3/6 AT&T costs. The first step was to add the AT&T costs

attributable to IDOT for both Site 3 and for Site 6 ($160,568). (Exh. 204-21, 204-108; Oct. 26 Tr., pp. 277:9-278:5). The second step was to add the total AT&T costs spent by JM on Site 3 and Site 6 ($392,918). (Exh. 204-21, 204-108; Oct. 26 Tr., p. 278:6-10). The third step was to divide the AT&T costs attributable to IDOT by the AT&T total costs ($160,568/$392,918), which came to 40.9%. (Exh. 204-21, 204-108; Oct. 26 Tr., p. 280:11-13). The fourth step was to multiply this 40.9% by the combined Site 3/6 costs ($98,898), which came to an attribution of $40,449. (Exh. 204-21, 204-108; Oct. 26 Tr., p. 281:12-17).

3. Northshore Gas Line Costs Attributed to IDOT

i. Site 3

The Northshore Gas line on Site 3 runs through Parcel 0393 and two samples where the Board held IDOT liable – B3-15 and B3-50. (Exh. 204-14). In fact, there are no areas along the NSG line that were contaminated where the Board did *not* hold IDOT liable. (Exh. 204-38). Mr. Dorgan thus held IDOT liable for all Site 3 costs associated with the Northshore Gas Line. (*Id*). This decision is buttressed by USEPA's requirement that a clean corridor be created for an entire utility line if *any* part of the line was contaminated with ACM (the "Clean Corridor Rule"). (Exhs. 65-11, 65-16; 204-24 n. 18; Oct. 26 Tr., pp. 230:5-19; *id*., 231:20-232:20; *id*. 234:4-9).

ii. Site 6

The work done on the Northshore Gas line for Site 6 was a bit more complicated. Much of the work involved capping the line, which occurred at 4S. (Exh. 204-24). From 4S moving east (including 4S-8S), 560 lineal feet of the line was removed on the south side of Site 6. (Exh. 204-24). The remainder of the Northshore Gas line that was removed (1,445 lineal feet) occurred on the north side of Site 6 and outside the IDOT Area of Liability. Mr. Dorgan determined that the 560 feet removed on the south side was 27.9% of the total removed (2005 lineal feet). He therefore

multiplied 27.9% by the Site 6 Northshore Gas costs of ($234,861), arriving at an IDOT attribution of $65,597. (Exh. 204-24, 204-25).

Even if the Board elected not to count 5S-8S as an IDOT Area of Liability, Mr. Dorgan said his opinion would not change. (Oct. 27 Tr., pp. 78:15-79:24). As he explained, the Enforcement Action Memorandum set forth the Clean Corridor Rule, which required a clean corridor for the Northshore Gas line notwithstanding whether ACM was found directly above 5S-8S. (Exh. 204-24, n. 18; Exh. 65-16; Oct. 27 Tr., pp. 78:15-79:24). Stated differently, the fact that ACM was found at 4S required the work on the line on the south side of Site 6.

iii. Combined Site 3 and 6 Costs for the North Shore Gas Line Attributed to IDOT

Mr. Dorgan calculated the combined Site 3/6 costs for the Northshore Gas line using the same four-step method he utilized with the combined Site 3/6 costs for the AT&T Task Bucket. (*Supra*, Sec. III.B.2.iii). This calculation is detailed on pages 204-25 and 204-109 of his Expert Report. ($398,121/$567,385 = 70.2%. $58,155 x .702 = $40,826). In short, he concluded that the Northshore Gas combined Site 3/6 attribution to IDOT was $40,826. (Exh. 204-25).

4. Northeast Excavation Costs Attributed to IDOT - Site 3

The Northeast Excavation is represented by three 50-by-50 foot grids on Site 3. (Exh. 204-38). Two of the three grids were areas where the Board held IDOT liable – B3-50 and B3-45. (Exh. 204-22). The ComEd Fiber optic line ran through the third contaminated boring, as well as 1S-4S. (Exh. 241-3, 241-4; Oct. 26 Tr., pp. 288:23-289:3). Thus, because all three grids involved IDOT Areas of Liability, Mr. Dorgan attributed 100% of the Northeast Excavation costs to IDOT or $49,934. (Exh. 204-23; Oct. 26 Tr., pp. 289:4-290:2).

Mr. Dorgan's opinion was also based on what is referred to herein as USEPA's "Next Cleanest Boring Rule." As set forth on Exhibit 120-3, USEPA required all the contaminated soil

within a contaminated sample grid to be cleaned up as well as all contaminated soil within any surrounding sample grids extending outward until a clean sample grid was found. (Oct. 26 Tr., pp. 235:13-236:14). As a result, with respect to the Northeast Excavation, the contamination in the grid containing B3-45 necessitated the remediation of the grid immediately adjacent to its east, which contained B3-46. (Exhs. 120-3; 204-38, 22; Oct. 26 Tr., pp. 288:15-290:2). It is worth noting that Mr. Peterson testified that the most ACM, and thus the deepest excavation, occurred at B3-50, a grid identified by the Board as IDOT's responsibility. (Oct. 26 Tr., pp. 165:22-167:3).

5. Utility ACM Soils Costs Attributed to IDOT - Site 6

Utility/ACM Soils involved the removal of soils along the north and south side of Site 6 around utilities. (Exh. 204-22; Oct. 26 Tr., pp. 282:16-284:14). To determine the IDOT attribution, like he did with the AT&T lines, Mr. Dorgan looked at how many lines JM was required to address that fell within the IDOT Site 6 Area of Liability. (Exh. 204-22). He determined this to be eight utility lines, with four of them located on the north side of Site 6 and four of them located on the south side of Site 6. (Exh. 204-22; Oct. 26 Tr., pp. 284:23-285:16*).* All four on the south side of Site 6 traversed through the IDOT Site 6 Area of Liability (Northshore Gas line 4S); (AT&T line 3S); (ComEd Fiber Optic Line 1S-4S) and the (ComEd Electric line 1S-8S). (Exh. 204-22, 38; Oct. 26 Tr., pp. 285:17-286:14). Accordingly, Mr. Dorgan attributed 50% of the Utility ACM Soils costs to IDOT (4/8 lines), which totaled $77,659. (Exh. 204-22; Oct. 26 Tr., pp. 286:15-287:23). Again, Mr. Dorgan's opinion would not change if the IDOT Area of Liability was limited to 1S to 4S because of the Clean Corridor Rule; the work "would still have had to be done because of the asbestos present in 01S-08S." (Oct. 26 Tr., pp. 287:24-288:4).

6. Dewatering Costs Attributed to IDOT

i. Site 3

Dewatering was "undertaken to support various construction activities that occurred during implementation" of the Remedial Action Work Plan. (Exh. 204-25). Owing to the high water-table, dewatering was predominantly needed where JM conducted deep excavation work, such as when it needed to create clean corridors or remove the ACM from the Northeast Excavation. (*Id).* Mr. Peterson broke up the dewatering work into four different services: Base Bid dewatering work, T&M dewatering work, Construction Management dewatering work and Payment to Utilities dewatering work. (Exh. 204-25; Oct. 26 Tr., pp. 304:10-13). For the first two of these categories, Mr. Dorgan looked at what was driving, or causing, the need for the dewatering and concluded it was four primary construction tasks performed on Site 3 – the Nicor Gas line, the Northshore Gas line, the Waukegan Water Line, and the Northeast Excavation. (Exh. 204-26; Oct. 26 Tr., pp. 303:16-304:8). Of these, he had attributed 100% of the costs to IDOT for three of them (Northshore Gas, Waukegan Water Line and Northeast Excavation) and no costs to IDOT for one of them (Nicor). (Exh. 204-25, 204-26; Oct. 26 Tr., pp. 305:18-307:15). Thus, he attributed 75% of the Campanella Base Bid and T&M Dewatering Work to IDOT, which amounted to $105,600 for the Base Bid and $18,244 for the T&M work. (*Id*).

Mr. Dorgan attributed 100% of the Construction Management Work to IDOT because Mr. Peterson told him that all of these costs were associated with the installation of a valve related solely to the Northshore Gas Line, for which IDOT is entirely liable on Site 3. (Exh. 204-26; Oct. 26 Tr., pp. 307:16-308:13) Thus, the IDOT attributable costs therefore were $74,530.

Finally, Mr. Dorgan examined the payments made to the North Shore Water Reclamation District related to dewatering. (Exh. 204-26, 27). Of the total costs incurred, Mr. Dorgan concluded that $19,429 were for dewatering associated with Site 3. (Exh. 204-26, 27). Mr. Dorgan reached

this conclusion through a close examination of the costs presented on Table 5 of Exhibit C of Exhibit 204. (Exh. 204-27 n. 19, 204-90 (discussing North Shore Water Reclamation District payments); Oct. 26 Tr., p. 309:3-13).

ii. Site 6

Dewatering on Site 6 was included in the Campanella Base Bid and was driven by clean corridor work on both the north and south sides of Site 6. (Exh. 204-27). Mr. Dorgan concluded from conversations with Mr. Peterson that the level of work for this activity was relatively the same on both sides of Site 6. (*Id*.; Oct. 27 Tr., p. 5:1-11). The dewatering work for the south side of Site 6 was concentrated from 1S-9S, which there was significant excavation; dewatering was not needed east of 9S. (Exh. 204-27; Oct. 27 Tr., pp. 5:21-6:2). Mr. Dorgan opined that "because the Site 6 IDOT Area of Liability (1S to 4S or 1S to 8S) caused this work, I attributed these costs to IDOT." (Exh. 204-27). Accordingly, 50% of the costs (or 100% of the south side of Site 6 costs) were attributed to IDOT. (Exh. 204-27; Oct. 27 Tr., p. 6:3-10). This totals $79,625. (*Id*).

iii. Combined Site 3 and 6 Costs for Dewatering Attributed to IDOT

Mr. Dorgan calculated the Combined Site 3/6 costs for Dewatering using the same four-step method he utilized with the Combined Site 3/6 costs for AT&T Task Bucket. (*Supra*, Sec. III.B.2.iii; Oct. 27 Tr., p. 10:1-16). This calculation is detailed on Exhibit 204, pages 27, 28 and 109. ($297,428/$419,671 = 70.9%. $39,175 x .709 = $27,775). (Exh. 204-109; Oct. 27 Tr., pp. 11:15-12:11). In short, he concluded that the Dewatering Combined Site 3/6 attribution to IDOT was $27,775. (Exh. 204-27, 28).

7. Filling & Capping Costs Attributed to IDOT

i. Site 3

USEPA required a cap to cover all of Site 3. (Oct. 27 Tr., p. 12:12-20). Mr. Dorgan reached his IDOT attribution by considering "what drove the requirement for the cap to be constructed

across Site 3." (Exh. 204-28). He determined that the cap was required due to the extensive work done with respect to five Task Buckets, namely the Waukegan waterline, the Northshore Gas line, the AT&T lines, the Northeast Excavation/ComEd line and the Nicor Gas line. (Exh. 204-28, 29; Oct. 27 Tr., pp. 12:21-13:13). Since he had previously found that the ACM in the IDOT Site 3 Area of Liability caused the work in four out of these five Task Buckets (not Nicor), he attributed 80% of the costs to IDOT or $341,003. (Oct. 27 Tr., p. 13:11-16).

ii. Site 6

Filling occurred on both the north and south sides of Site 6 due to the work related to the utility lines. (Exh. 204-29). As set forth above, *supra* Sec. III.B.5., four utility lines were on the north side and four were on the south side of Site 6. (Exh. 204-29). Thus, like he did with his Utility ACM Task Bucket, Mr. Dorgan attributed 50% of the Site 6 filling costs to IDOT, which totaled $155,177. (Exh. 204-29; Oct. 27 Tr., pp. 14:9-15:1).

iii. Combined Site 3 and 6 Filling and Capping Costs Attributed to IDOT

Mr. Dorgan calculated the Combined Site 3 and 6 costs for Filling and Capping using the same four-step method described above. (*Supra*, Sec. III.B.2.iii). This calculation is detailed on Exhibit 204, pages 29 and 110. ($496,180/$736,607 = 67.4%. $352,012 x .674 = $237,256). (Exh. 204-29, 204-209). In short, he concluded that the Dewatering Combined Site 3 and 6 attribution to IDOT was $237,256. (Exh. 204-29, 110).

8. Construction Task Buckets Which JM's Expert Gave No IDOT Attribution

While JM contends that IDOT is jointly and severally liable for both Sites 3 and 6, if the Board were to consider only the areas that JM incurred costs due to IDOT's violations, then there are certain areas in which Mr. Dorgan attributed no money to IDOT. Those are: the Nicor Gas Line and the Site 6 Waukegan Water Line.

C. OVERSIGHT AND SUPPORT SERVICES TASK BUCKET ATTRIBUTIONS

Both experts employed the same methodology to determine Oversight and Support Services Task Bucket attributions. (Oct. 27 Tr., p. 19:10-12). In doing so, they relied upon their attributions for certain Construction Task Buckets. The Task Buckets relevant for each calculation is set forth on demonstrative Exhibit 245, entitled "Task Bucket Used As Inputs By Both Experts To Be Used To Determine Oversights And Support Services Task Bucket Attributions" and copied below (Exh. 245; Oct. 27 Tr., pp. 18:4-19:12).

Task Buckets Used as Inputs by Both Experts to Determine Oversight and Support Services Task Bucket Attributions

Construction Task Buckets	Oversight and Support Services Input Variables						
	Site 3 Prep	Site 6 Prep	Site 3/6 Prep	Health & Safety	Site 3 Oversight	Site 6 Oversight	Legal
Nicor	X				X		X
W. Water Line	X				X		X
ATT	X	X	X	X	X	X	X
North Shore Gas	X	X	X	X	X	X	X
Northeast Excavation	X				X		
ACM Utility		X				X	X
Dewatering	X	X	X	X	X	X	
Ramp	X				X		
Filling & Capping	X	X	X	X	X	X	

Gobelman Attribution Calculations

Site Prep 3: Nicor (0), WWL (0), ATT ($20,426), NSG ($130,682), NEE ($12,583), Dewater ($56,221), Ramp (0), F&C ($27,707) = $247,619
(Dorgan attribution total: $1,094,891)

Site Prep 6: NSG ($8,455), ACM Utility ($5,591), ATT ($4,548), Dewater ($37,738), F&C ($11,173) = $67,505
(Dorgan attribution total: $466,915)

Site Prep 3/6: ATT ($6,329), NSG ($14,248), Dewater ($8,775), F&C ($18,657) = $48,009
(Dorgan attribution total: $346,307)

H&S 3/6: ATT, NSG, Dewater, F&C (same as C) = $48,009
(Dorgan attribution total: $346,307)

Oversight 3: Nicor, WWL, ATT, NSG, NEE, Dewater, Ramp, F&C (same as A) = $247,619
(Dorgan attribution total: $1,094,891)

Oversight 6: NSG, ACM Utility, ATT, Dewater, F&C (same as B) = $67,505
(Dorgan attribution total: $466,915)

Legal: Nicor (0), WWL (0), ATT ($31,303), NSG (153,385), Utility ACM ($5,591) = $190,279
(Dorgan attribution total: $778,660)

As explained by Mr. Dorgan, the attributions for the Oversight and Support Services Task Buckets take into account the attributions for specific Construction Task Buckets. (Oct. 27 Tr., pp. 18:4-19:9). Thus, if a Construction Task Bucket is wrong, the corresponding Oversight and Support Services Task Buckets are equally wrong. (Oct. 27 Tr., pp. 18:20-19:19).

1. General Site Preparation Costs Attributed to IDOT

i. Site 3

The experts divided the General Site Preparation Services into seven categories. (Oct. 27 Tr., pp. 20:16-21:8). With respect to Site 3, costs were incurred with respect to five of these categories: Professional Engineering, Professional Engineering Completion Costs, Professional O&M, Construction Base Bid and Construction Miscellaneous. (Exh. 204-30, 204-31). To determine the IDOT attribution for four of these categories, Mr. Dorgan used a percentage (74.2%), which he derived by dividing the portion of the Site 3 costs for "construction services" he determined were attributable to IDOT by the overall Site 3 costs for "construction services." (Exh. 204-31; 204-110; Oct. 27 Tr., pp. 22:7-23:13; *id*., p. 24:18-24). As explained at Hearing, the various Task Buckets employed to determine the applicable "construction services" for Site 3 General Preparation are set forth on Demonstrative Exhibit 245 with an X. (Oct. 27 Tr., pp. 23:21-25:7).

With respect to each of the four categories, he applied the 74.2% to the costs incurred for that category. (Exh. 204-31). This amounted to $263,806 for Professional Engineering (Oct. 27 Tr., p. 25:4-7); $54,401 for Professional Engineering Completion Costs (Oct. 27 Tr., p. 25:8-15); $102,626 for Construction Base Bid and $42,563 for Construction Miscellaneous. (Exh. 204-31, 32; Oct. 27 Tr., pp. 25:16-26:9). The only category done differently was Operations and Maintenance (O&M); O&M was needed only for the cap itself. (Exh. 204-32). Thus, Mr. Dorgan applied the same percentage he applied to the capping work for Site 3, eighty percent, to Dr.

Ebihara's O&M cost projection for the Site 3 cap. (Oct. 27 Tr., pp. 26:19-27:12). This totaled $248,722. (Exh. 204-32).

ii. Site 6

Mr. Dorgan used a similar methodology for the General Site 6 Preparation Task Bucket as he did for the General Site 3 Preparation Task Bucket, except that the percentage he calculated (37.9%) was applied to all five General Site Preparation Site 6 categories. (Exh. 204-32, 204-33; Oct. 27 Tr., pp. 27:23-31:11). These were Professional Engineering, Professional Engineering Completion Costs, Construction Base Bid, Construction T&M[13] and Construction Miscellaneous. (Exh. 204-31). There was no anomaly such as the Site 3 cap regarding Site 6.

Mr. Dorgan arrived at his 37.9% quotient by dividing the portion of the Site 6 costs for "construction services" he determined were attributable to IDOT by the overall Site 6 costs for "construction services." (Exh. 204-32). Again, the Task Buckets that comprised these "construction services" are set forth on Exhibit 245 with an X under Site 6 General Site Preparation. The attributions for each category are as follows: $196,711 for Professional Engineering; $20,182 for Professional Engineering Completion Costs; $36,217 for Construction Base Bid, $14,178 for Construction T&M; and $38,689 for Construction Miscellaneous. (Exh. 204-32, 204-33; Oct. 27 Tr., pp. 30:2-31:11).

iii. Combined Site 3 and 6 General Site Preparation Costs Attributed to IDOT

Mr. Dorgan calculated the Combined Site 3/6 General Site Preparation employing the same four-step method described above. (*Supra*, Sec. III.B.2.iii). This calculation is detailed on pages 34 and 110 of his Expert Report, Exhibit 204. ($346,307/$548,602 = 63.1%. $74,300 x .631 =

[13] Site 6 had T&M Construction Services costs whereas Site 3 did not. (Exh. 204-31.)

$46,883). Thus, the General Site Combined Site 3/6 attribution to IDOT was $46,883. (Exh. 204-34, 204-110; Oct. 27 Tr., pp. 31:1-33:11).

2. Health & Safety Costs Attributed to IDOT - Combined Site 3 and 6

Site 3 and 6 Health and Safety costs were combined because the work related to both Sites, such as the need for a health and safety officer at the project. (Exh. 204-34). Using a similar methodology to the General Site Preparation Task Buckets (but relying only on combined Site 3/6 numbers), Mr. Dorgan calculated a percentage of 63.1 to be applied to all Health and Safety costs. (Exh. 204-34). He did this by dividing the portion of the Combined Site 3/6 costs for "construction services" he determined were attributable to IDOT ($346,307) by the overall Combined Site 3/6 "construction services" costs ($548,602). (Exh. 204-34). The applicable Task Buckets are set forth on Exhibit 245. He then applied this percentage to the overall Health and Safety costs of $77,000 to reach $48,587 as the amount attributable to IDOT. (Exh. 204-34; Oct. 27 Tr., pp. 33:12-34:12).

3. EPA Oversight Costs Attributed to IDOT

i. Site 3

To calculate the USEPA oversight costs attributable to IDOT on Site 3, Mr. Dorgan used the same 74.2% calculated for Site 3 General Site Preparation. (*Supra*, Sec. III.C.1.i). He then applied this to the overall Site 3 oversight costs of $233,805 to arrive at an IDOT attribution of $173,483. (Exh. 204-34; Oct. 27 Tr., pp. 34:2-36:12).

ii. Site 6

Similarly, to calculate the USEPA oversight costs attributable to IDOT on Site 6, Mr. Dorgan used the 37.9% calculated for Site 6 General Site Preparation. (*Supra*, Sec. III.C.1.ii). This percentage was then applied to the Site 6 USEPA oversight costs ($125,675) to reach the final attribution to IDOT was $47,631. (Exh. 204-35; Oct. 27 Tr., pp. 36:13-37:3).

4. Legal Costs Attributed to IDOT - Site 3 and 6

Donald Manikas performed non-litigation legal work for JM related to Site utility removal work. (Oct. 27 Tr., p. 37:4-24). Mr. Dorgan calculated the attribution for the Manikas legal work by focusing on the utility work done at the Sites. (Oct. 27 Tr., pp. 38:20-39:5). He took the total amount of utility work for Site 3, Site 6 and Combined Sites 3/6 and divided it by the total amount of utility work for Site 3, Site 6 and Combined Site 3/6 attributed to IDOT. (Exh. 204-35). This came to 47.5% (*see* Exh. 204-111 ($778,660/$1,638,837 = 47.5%)). He then multiplied this percentage by the total legal support services costs of $71,840, arriving at an attribution of $34,124. (Exh. 204-35, 204-111; Oct. 27 Tr., p. 39:3-17).

VI. CONCLUSION

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

A. Clarifies that the Interim Order held IDOT liable for all ACM waste found within Parcel 0393;

B. Finds that Mr. Gobelman's testimony lacked credibility and deserved no weight;

C. Awards JM a judgment for $5,579,794; or, in the alternative, awards JM a judgment for $3,274,917;

D. Amends its Interim Order, to the extent it deems necessary, to clarify certain findings and to rule that IDOT is liable for costs incurred as a result of IDOT's violations of the law at borings 5S to 8S.

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

Dated: July 22, 2021

Respectfully submitted,

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