IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

City of Evanston, Plaintiff, v. Northern Illinois Gas Company and Commonwealth Edison Company, Defendants.	)	Case No. 16-cv-5692 Judge John Z. Lee Magistrate Judge Maria Valdez

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS

Dated: August 31, 2016

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PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS

The City of Evanston (the "City"), by and through its undersigned counsel, responds as follows to the Motion to Dismiss ("Motion") and Memorandum of Law ("Memorandum") filed by Defendants Northern Illinois Gas Company ("Nicor") and Commonwealth Edison Company ("ComEd" and, together with Nicor, the "Utilities"):

INTRODUCTION

The City has an obligation to protect its citizens from the release and migration of hazardous substances that may endanger them in public schools, senior centers, public parks and their homes. In discharging that duty, the City sought critical information and data from the Utilities to determine whether three serious threats to the City and its constituents—the presence of manufactured gas waste oils ("MG Waste Oils"), an unsafe buildup of concentrated methane gas in and around James Park, and an accumulation of hazardous coal tar waste in and on the City's drinking water lines (the "Dodge Avenue Water Line")—may have been, or are being, contributed to by MG Waste Oils used at the Skokie Manufactured Gas Plant ("Skokie MGP") or the transportation infrastructure connected thereto (the "Infrastructure"). Rather than cooperate with the City in its effort to investigate the cause of these patently unsafe conditions, the Utilities stonewalled the City's requests and hampered, or even misled, the City's investigation. In doing so, the Utilities essentially forced the City to seek relief from this Court under the Resource Conservation and Recovery Act ("RCRA") and state law.

In their Motion, the Utilities rotely invoke *Twombly* to argue the City's claims are implausible. They submit the presence of MG Waste Oils, methane gas, and hazardous coal tar waste in and around James Park and the Dodge Avenue Water Line could not plausibly have been contributed to by the Skokie MGP or Infrastructure, and current conditions cannot plausibly present an imminent and substantial endangerment to health and the environment.

The only question before the Court is whether the City's claims are plausible in light of the City's well-pleaded allegations. In making this determination, the Court must consider, *inter alia*, the City's Complaint and its attached and referenced documents. Here, those resources amount to thousands of pages of facts and allegations, including engineering analyses and reports supporting the City's claims, and they more than plausibly establish, among other things:

(1) MG Waste Oils were in fact released from the Skokie MGP and/or Infrastructure, and migrated down to bedrock;

(2) the chemical fingerprint of the MG Waste Oils found in and around James Park and the Dodge Avenue Water Line matches that of the MG Waste Oils at the Skokie MGP;

(3) at virtually every location at which the City has encountered the Infrastructure, the City has also encountered the MG Waste Oils (and, conversely, the City has not found MG Waste Oils in the absence of the Infrastructure);

(4) MG Waste Oils are known to degrade into methane, and the City has found MG Waste Oils present in bedrock everywhere it has found high concentrations of methane gas;

(5) the hazardous coal tar waste in and on the Dodge Avenue Water Line is made up of MG Waste Oils; and

(6) City workers regularly encounter MG Waste Oils (in the form of a "black crust") in and on the Dodge Avenue Water Line when they repair it. *See infra* at 4-6.

Common sense tells us the MG Waste Oils, along with the methane and hazardous coal tar waste they create, may endanger the health of school children, senior citizens, visitors to James Park, construction workers, utility workers and residents, as well as the environment. In addition, the MG Waste Oils and their constituent contaminants are present in concentrations that exceed safety limits established in government standards intended to protect health and the environment and, as such, present an endangerment *per se*. This is not news to the Utilities, which are very familiar with the hazards associated with MG Waste Oils.

The Utilities ignore both the foregoing well-pleaded allegations in the Complaint and the factual allegations in the thousands of pages of referenced and attached documents, certain of

which are called out specifically below. *See infra* at 4-6. The Utilities can try to make their fact-based arguments later, but at this early pleading stage, their Motion should be denied.

RELEVANT FACTS AND FACTUAL ALLEGATIONS

In addition to the factual allegations in its Complaint, the City referenced and attached portions of its Amended RCRA Notice, including two reports prepared by a veteran environmental engineer (Attachments 3 and 4 to the Amended RCRA Notice). The City excerpted its Amended RCRA Notice for purposes of filing its Complaint using the Court's CM/ECF system, but the entire Amended RCRA Notice—totaling more than 3,000 pages—was served on the Utilities well before the City filed its Complaint. *See* 42 U.S.C. § 6972(b)(2).[1] In ruling on the Motion, the Court must consider (1) the factual allegations in the City's Complaint, (2) documents attached thereto, (3) documents critical thereto and referred to therein, (4) information subject to proper judicial notice, and (5) facts set forth in this brief and consistent with the City's pleadings. *See*, *e.g.*, *Geinosky v. City of Chicago*, 675 F.3d 743, 745 n.1 (7th Cir. 2012); *City of Evanston v. Texaco, Inc.*, 19 F. Supp. 3d 817, 820-21 (N.D. Ill. 2014); *Parus Holdings, Inc. v. Banner & Witcoff, Ltd.*, 585 F. Supp. 2d 995, 1000 (N.D. Ill. 2008); *City of North Chicago v. Hanovnikian*, 2006 WL 1519578, at *1 (N.D. Ill. May 30, 2006) (RCRA Notice "may be properly considered on a motion to dismiss").[2] While the City cannot restate all relevant factual allegations herein, the following are some of the salient factual allegations establishing the plausibility of the City's claims:

[1] The City's complete Amended RCRA Notice, including the Hendron Reports, is submitted herewith as **Exhibit 8**. For convenience, the City separately attaches excerpts from the 2015 and 2016 Hendron Reports as **Exhibits 3** and **4** hereto.

[2] The Utilities also concede that the Court may consider, *inter alia*, the Hendron Reports in ruling on their Motion. (Mem. at 2 n.2.)

The Utilities Generated and Released Hazardous Waste

- The Skokie MGP and Infrastructure created and transported manufactured gas waste oils ("MG Waste Oils"). (Compl. ¶¶ 36-45; 2015 Hendron Report § 7.3.)

- MG Waste Oils are presumptively dangerous hazardous wastes that may only be disposed of in permitted hazardous waste disposal sites. (415 ILCS 5/22.40a; Identification and Listing of Hazardous Waste, 57 FR 37284, 37289 (August 18, 1992).).

- The Skokie MGP and Infrastructure likely released MG Waste Oils into the ground. (Compl. ¶¶ 4(l), 12, 41, 43, 45-47, 53, Count I ¶¶ 71-72, 73(c), 75-76 & Appendices A-1 (Summary Table 1) and A-4; 2015 Hendron Report §§ 2.0, 7.3.3, 7.6.3, Figure 13.)

- The Utilities remediated the Skokie MGP site between December 2012 and October 2015, but did not address any contaminations more than 25 feet deep. (2015 Hendron Report § 7.3.2.)[3]

- The contaminated Skokie MGP site was nearly contiguous to the City, and the Infrastructure is located mere feet away from James Park and the Dodge Avenue Water Line. (Compl. Exhibit A-1 ("Dodge Avenue Pipes" and "Dodge Avenue Water Line (Abandoned)").)

- The Infrastructure may still be releasing MG Waste Oils today. (Compl. Exhibit A-1 (Dodge Avenue Pipes); 2016 Hendron Report, Figure 1, Table 4.)

These Hazardous Wastes Affect the City

- MG Waste Oils, due to low viscosity and high density, are known to travel quickly (between a few years and two decades) through soil and clay into bedrock and groundwater. (Compl ¶¶ 39-40; Amended RCRA Notice ¶ 35; 2015 Hendron Report § 7.3.3.)

- MG Waste Oils are known to degrade into methane, which becomes concentrated beneath the layers of clay through which the MG Waste Oils previously sank. (Compl. ¶¶ 46, Count I ¶¶ 73(c), 75; Amended RCRA Notice ¶ 45; 2015 Hendron Report § 7.6.3.)

- MG Waste Oils have been found in the vicinity of James Park and on and in the Dodge Avenue Water Line, and are chemically linked to MG Waste Oils in general and those found at the Skokie MGP in particular. (Compl. ¶¶ 11, 45, 46(b); RCRA Notice ¶ 24(b); 2015 Hendron Report, Table 2; 2016 Hendron Report, Table 4.)

- Highly-concentrated methane gas has been discovered in and around James Park, that methane gas is always found near MG Waste Oils, and MG Waste Oils are always found near the Infrastructure. (Compl. ¶¶ 2, 43, 45-47, 51, Count I ¶ 71; Amended RCRA Notice ¶¶ 6(c), 40, 43, 47, 54; 2015 Hendron Report, Table 1, Appendix A-4, Figures 13-16.)

[3] *See also* http://www.skokiesite.com/, the official site of the Skokie MGP remediation.

- There are other potential contributing sources of methane, but degradation of MG Waste Oils released from the Skokie MGP and Infrastructure are the most plausible cause. (Compl. ¶¶ 43, 47; 2015 Hendron Report §§ 7.3.3, 7.6.3.)

- City workers regularly encounter MG Waste Oils (in the form of a "black crust") when they repair the Dodge Avenue Water Line (Compl. Count I ¶ 72; Amended RCRA Notice ¶¶ 38-39, 41(a); 2015 Hendron Report, Bartus Memo, § 9, Reference 6.)

These Hazardous Wastes May Threaten Imminent and Substantial Harm

- The MG Waste Oil is, itself, a hazardous waste. (415 ILCS 5/22.40a & Identification and Listing of Hazardous Waste, 57 FR 37284, 37289, *supra*.)

- Methane resulting from the MG Waste Oils is becoming concentrated and pressurized at levels exceeding Illinois EPA safety limits, including less than 60 feet from the entrance of Dawes Elementary School. (Compl. ¶¶ 3, 4(l), 12 & Exhibit A; Amended RCRA Notice ¶ 14(a)-(d); **Exhibit 1**; 35 IAC § 811.311(a)(1).)[4]

- MG Waste Oils and hazardous coal tar waste in and around the Dodge Avenue Water Line, some of which are in direct contact with the City's drinking water, contain contaminants far in excess of Illinois EPA safety regulations. (2016 Hendron Report, Figure 1, Table 4; **Exhibit 1**.)

- The presence of coal tar in a public water distribution system "may contribute contaminants to the drinking water," thus "posing health implications." (40 C.F.R. § 141.42(d); Interim Primary Drinking Water Regulations; Amendments, 45 FR 57332, 57338 (August 27, 1980).)

- Contaminants have been identified in five additional public drinking water samples taken in July 2016, all in close proximity to the Dodge Avenue Water Line. (**Exhibit 2**.)[5]

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[4] The City attaches as **Exhibit 1** a table comparing levels of contaminants identified by the City's consultants against health-based regulations adopted by the Illinois Environmental Protection Agency ("IEPA") (35 IAC § 742, Appendix B, Tables A and B; 35 IAC § 811.311(a)(1)). Among other things, this comparison highlights contaminants in excess of IEPA regulations—in some cases, as much as 19,500% of what IEPA determined permissible. While certain of these guidelines apply to contaminants in soil that threaten groundwater, the contaminants at issue here have already come into contact with drinking water in the Dodge Avenue Water Line. These guidelines also make clear that concentrations of methane near the entrance to Dawes Elementary School far exceed what IEPA would allow to exist at a landfill. All of the data contained in **Exhibit 1** comes from documents properly before the Court. *See*, *e.g.*, *Driebel v. City of Milwaukee*, 298 F.3d 622, 630 n.2 (7th Cir.2002) (taking judicial notice of administrative regulations).

[5] The City attaches as **Exhibit 2** some additional, more recent data relating to drinking water tests. The Court may consider supplemental water sampling results in connection with the City's opposition to the Utilities' Motion. *See, e.g.*, *Geinosky*, 675 F.3d at 745 n.1.

- The Utilities have known since at least Fall 2015 that MG Waste Oils are coating and penetrating the Dodge Avenue Water Line, and that contaminants are leaching into the City's drinking water. (Compl. ¶¶ 4(x), 11, 65; Amended RCRA Notice ¶ 40.)

- Unable to fully remediate methane accumulations or coal tar waste without the Utilities' help, all the City can do is continuously monitor methane accumulations and drinking water. (Compl. ¶¶ 12, 53; Amended RCRA Notice ¶ 18; **Exhibit 2**.)

ARGUMENT

I. THE COMPLAINT ADEQUATELY STATES A PLAUSIBLE CLAIM UNDER RCRA.

"RCRA is a comprehensive statute governing the treatment, storage and disposal of hazardous waste." *Albany Bank & Trust Co. v. Exxon Mobil Corp*., 310 F.3d 969, 972 (7th Cir. 2002) (citing *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 331 (1994)). The Utilities do not dispute that the City may bring a RCRA claim against them, that the subject matter of this lawsuit (releases of hazardous waste, namely MG Waste Oils, from the Skokie MGP and/or Infrastructure, along with resulting methane and coal tar waste) falls within the scope of RCRA, or that they can potentially be held responsible for those releases. Instead, they rotely attack the adequacy of the City's allegations under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), while at the same time ignoring a crucial portion of its holding: "[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Id.* at 570; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."). So long as the City's Complaint fairly apprises the Utilities of the claims brought against them—as it plainly does, given that the Utilities recount those claims in their Memorandum (Mem. at 4)—the City has satisfied its obligations under Rule 8. *See* Fed. R. Civ. P. 8 (a) (requiring only that the City's "statement of the claim" provide "fair notice" to the Utilities "of what the ... claim is and the grounds upon which it

rests"); *Twombly*, 550 U.S. at 555; *Riverdale v. 138th St. Joint Venture*, 527 F. Supp. 2d 760, 766-67 (N.D. Ill. 2007) (cited by the Utilities) (denying motion to dismiss RCRA claim where facts alleged in the complaint "fairly apprise Defendants of the nature of the claim").[6]

In order to plead a claim under RCRA, "a plaintiff must allege (1) that the defendant has generated solid or hazardous waste, (2) that the defendant is contributing to or has contributed to the handling of this waste, and (3) that this waste may present an imminent and substantial danger to health or the environment." *Albany Bank*, 310 F.3d at 972; *see also City of North Chicago v. Hanovnikian*, 2006 WL 1519578, at *2 (N.D. Ill. May 30, 2006). The City adequately alleges each of these elements in its Complaint. (Compl. ¶¶ 2-3, 8, 46, Count I ¶¶ 77-78 (generated solid or hazardous waste); *id.* ¶¶ 9-10, 41-42, 44, 47, 71, 80, 82 (contributed or contributing to handling of such waste); *id.* ¶ 2, 11-12, 72-76, 81 (such waste may present imminent and substantial threat to health and environment).) *See also Riverdale*, 527 F. Supp. 2d at 767 (cited by the Utilities) ("[A]t the pleading stage, it is sufficient that [the plaintiff] has identified each of the Defendants as a possible contributor to ... the release of [solid waste] which may present an imminent and substantial endangerment to health of [the plaintiff's] inhabitants or the environment in general."). Beyond the factual allegations in the Complaint, the City referenced or attached thousands of pages of engineering analyses and reports forming the bases for the City's allegations. (Compl. ¶ 13, Ex. B, Amended RCRA Notice & Attachments 3 & 4 thereto; *see also supra* at 4-6.)

[6] The Utilities confusingly rely on product liability and pretrial detainee cases that had nothing to do with RCRA. (Mem. at 9-10.). In *Weddle v. Smith & Nephew, Inc.*, 2016 WL 1407634 (N.D. Ill. Apr. 11, 2016), a product liability case, the plaintiff alleged she was harmed by "nails" or "rods," neither of which the defendant manufactured. In *Saiger v. Dart*, 2016 WL 98573 (N.D. Ill. Jan. 8, 2016), a pretrial detainee case, the plaintiff failed to allege certain defendants were personally involved in the deprivation of his constitutional rights, as required. Here, the Utilities do not deny the Skokie MGP or Infrastructure transported, contained, and may continue to contain MG Waste Oils, nor do they try to deny those MG Waste Oils were released into the environment.

Here, the documents on which this Court may rely to deny the Utilities' Motion number into the thousands, and the Court must assume the truth of the City's factual allegations. *See*, *e.g.*, *Munson v. Gaetz*, 673 F.3d 630, 632 (7th Cir. 2012); *City of Evanston*, 19 F. Supp. 3d at 820; *Hanovnikian*, 2006 WL 1519578, at *1. Accepting as true the hundreds (if not thousands) of factual allegations before the Court, the City has adequately alleged a RCRA claim against the Utilities.

A. The Complaint Plausibly Alleges MG Waste Oils Released from the Skokie MGP and Infrastructure Are Present In and Around James Park.

For all their discussion of facts outside the scope of the City's Complaint, the Utilities cannot dispute that there is MG Waste Oil in the soil and bedrock in and around James Park, there are hazardous concentrations of methane gas accumulating under and around James Park, there is hazardous coal tar waste consistent with that MG Waste Oil in and on the Dodge Avenue Water Line, and these substances are linked to the MG Waste Oil from the Skokie MGP and Infrastructure. Instead, they lodge collateral and procedural attacks on the City's pleading. As explained below, the Utilities first argue the City impermissibly pleads key portions of its RCRA claim relating to methane gas "on information and belief," conveniently omitting that the City (1) has repeatedly requested (and the Utilities have just as often refused to provide) information uniquely within the Utilities' control that would allow the City to substantiate its claims, (Compl. ¶¶ 54-67), and (2) supports its allegations with thousands of pages of engineering analyses and reports. The Utilities then proceed to explain why they do not want to believe the MG Waste Oils are creating unsafe levels of methane and hazardous coal tar waste in the vicinity of James Park and on and inside the Dodge Avenue Water Line, but they (again) completely ignore the City's well-pleaded allegations, its Amended RCRA Notice, and the RCRA pleading standard after *Twombly*.

1. The Complaint appropriately pleads certain allegations on information and belief.

The Utilities criticize the City for pleading certain factual allegations "on information and belief." (Mem. at 7-8.) As an initial matter, this Court has expressly acknowledged "generally pleading facts 'on information and belief' is sufficient to meet the requirements of Rule 8." *Franklin Capital Corp. v. Baker & Taylor Entm't, Inc.*, 2000 WL 204227, at *3 (N.D. Ill. Feb. 10, 2000).[7] To the extent it was not clear to the Utilities in the first instance, the factual bases for the City's allegations appear in the City's Complaint and Amended RCRA Notice, including the voluminous engineering analyses and reports attached thereto. (*See*, *e.g.*, Compl. ¶ 10 (on information and belief, MG Waste Oils were released from the Skokie MGP and Infrastructure and came to be located in and around James Park, the property at issue in this litigation); 2015 Hendron Report, § 7.3; 2016 Hendron Report, Figure 1, Table 4; *supra* at 4-6. *See also* Compl. Count I ¶ 72 (on information and belief, leakage of MG Waste Oils has resulted in hazardous substances in the groundwater and soil in the property at issue in this litigation); 2015 Hendron Report, §§ 2.0, 7.3.3, 7.6.3; 2016 Hendron Report, Figure 1, Table 4; *supra* at 4-6.) As in many cases involving scientific evidence, these analyses and reports are, in large part, the "information" giving rise to the City's "belief."

Separately, pleading certain allegations on information and belief is appropriate "where pleadings concern matters peculiarly within the knowledge of the defendants." *See*, *e.g.*, *Lucas v. Ferrara Candy Co.*, 2014 WL 3611130, at *5 (N.D. Ill. July 22, 2014) (quoting *Brown v. Budz*,

[7] There are cases criticizing the use of "information and belief" allegations under Rule 9(b), but the Utilities (wisely) do not contend Rule 9(b) applies here. Even where Rule 9(b) applies, "information and belief" allegations are appropriate where the factual bases for those beliefs are provided. *See Grossman v. Waste Mgmt., Inc.*, 1983 WL 1370, at *6 (N.D. Ill. Sept. 9, 1983) ("Generally, an allegation of fraud based on information and belief is insufficient. The general rule may be avoided, however, when the complaint includes a factual basis for the assertions made on information and belief." (emphasis added)).

398 F.3d 904, 914 (7th Cir. 2005)). Here, the City's information and belief allegations relate to, *inter alia*, where the Infrastructure is located (Compl. ¶ 9), whether the Infrastructure was used to transport manufactured gas through the vicinity of James Park (*id.* ¶ 42), whether the manufactured gas contained MG Waste Oils (*id.* ¶ 47), and so on. If anyone has direct knowledge relevant to these facts, it is the Utilities. But, as alleged in the Complaint—and accepted as true for purposes of the Utilities' Motion, *City of Evanston*, 19 F. Supp. 3d at 820—the Utilities have repeatedly refused to disclose information relevant to these allegations. (Compl. ¶¶ 54-67 (identifying numerous instances in which the Utilities ignored or refused the City's requests).) The City, for its part, has done everything it feasibly can do to explain—through more than 3,000 pages of engineering analyses and reports—why it believes these allegations to be true.[8] Like the plaintiffs in *Lucas*, the City is "very unlikely to uncover facts" uniquely available to the Utilities "without discovery," making the City's information and belief allegations sufficient to survive the Utilities' motion to dismiss. 2014 WL 3611130, at *5.[9]

At its core, the questions before this Court are whether the City's Complaint (1) states a claim for relief that is plausible on its face, and (2) fairly notifies the Utilities of the claims made against them and the grounds upon which those claims rest. *Twombly*, 550 U.S. at 555. The answer

[8] "Feasibly," in this instance, does not include digging up the entire vicinity of James Park and unlawfully breaking into whatever unknown pipes, belonging to unknown parties and containing unknown potentially-hazardous substances, the City finds along the way.

[9] The Utilities' cases rejecting "information and belief" pleadings, (Mem. at 8), involved information that was plainly within the plaintiffs' control, such as whether the plaintiff in fact sent a notice of claim (*Mann Bracken, LLP v. Executive Risk Indem., Inc.*, 2015 WL 5721632 (D. Md. Sept. 28, 2015)), or whether and when the plaintiffs filed union grievances (*Yeftich v. Navistar, Inc.*, 722 F.3d 911, 916 (7th Cir. 2013)). This is not such a case. Absent any evidence that the City had reasonable means to locate and examine the Infrastructure, and in light of the extensive factual bases for its allegations in the Complaint and Amended RCRA Notice, the City's limited use of "information and belief" pleadings is appropriate here.

to both questions is clearly "yes." The Utilities describe the City's claims at length in their Memorandum, and the City's allegations describe in detail the City's plausible claim that the Skokie MGP and/or Infrastructure contributed to endangerments, including and resulting from MG Waste Oils. *See supra* at 4-6.[10] The Utilities can ignore the City's well-pleaded allegations, but they cannot will them away. Accepting these allegations as true for purposes of the Utilities' Motion, the City's Complaint states a plausible claim that the Skokie MGP and Infrastructure contributed to the presence of MG Waste Oils in and around James Park. *See City of Evanston*, 19 F. Supp. 3d at 820; *Hanovnikian*, 2006 WL 1519578, at *1.[11]

2. *The Complaint plausibly alleges the Skokie MGP and Infrastructure released hazardous materials causing hazardous coal tar waste to accumulate in and on the Dodge Avenue Water Line.*

The Utilities argue it is implausible that the MG Waste Oils from the Skokie MGP and/or Infrastructure could have caused hazardous coal tar waste to accumulate in and on the Dodge Avenue Water Line when only one of several water samples identified constituent chemicals of MG Waste Oils. (Mem. at 9.) In this plausibility fight, science is on the City's side.

The City's well-pleaded allegations—accepted as true for purposes of the Utilities' Motion, *City of Evanston*, 19 F. Supp. 3d at 820—state a plausible claim that the MG Waste Oils

[10] The Utilities make much of the facts that (1) there could be other causes of methane in and around James Park, and (2) that the City has investigated other potential causes for the concerns identified in its Complaint. (Mem. at 1-5.) It should come as no surprise that the City, in order to understand and remediate these issues, started by looking broadly at potential causes and narrowed its focus based on the evidence available to it. Meanwhile, other potential causes for these ongoing hazards can be investigated by the parties in discovery and advanced by the Utilities, as appropriate, as this matter proceeds, but they do not undo the facial plausibility of the City's allegations now.

[11] The Utilities' puzzling citation to *Messina v. Villa Park*, 2015 WL 4423579 (N.D. Ill. July 20, 2015), a case that had nothing to do with RCRA, is ultimately of no concern. (Mem. at 7.) The Utilities apparently cite *Messina* for the proposition that conclusory allegations as to causation need not be credited. (*Id.*) Of course this is true—but the City is not making conclusory allegations when it supports its allegations with thousands of pages of engineering analyses and reports.

contributed to the hazardous coal tar waste forming in and on the Dodge Avenue Water Line. *See supra* at 4-6. Furthermore, certain contaminants resulting from the presence of those MG Waste Oils are polluting the environment far in excess of IEPA guidelines, constituting endangerments *per se*, and those same contaminants threaten the City's drinking water supply. *See* **Exhibit 1**; *Forest Park Nat'l Bank & Trust v. Ditchfield*, 881 F. Supp. 2d 949, 966 (N.D. Ill. 2012) (RCRA complaint alleging contamination in excess of IEPA standards stands on "firmer ground"); *United States v. Apex Oil Co., Inc.*, 2008 WL 2945402, at *80 (S.D. Ill. July 28, 2008) (violation of IEPA health-based cleanup objectives is *per se* endangerment under RCRA).

Finally, the City has taken additional drinking water samples as part of its effort to identify and remediate threats to its constituents. Five additional samples contained elevated levels of the same contaminants found in MG Waste Oils in and around James Park and the Dodge Avenue Water Line. **Exhibit 2**; *Geinosky*, 675 F.3d at 745 n.1. Thus, it is entirely plausible that hazardous substances released by the Utilities have endangered, and continue to endanger, the City's residents who drink from the Dodge Avenue Water Line. *See Jaros v. IDOC*, 684 F.3d 667, 672 (7th Cir. 2012) ("Plausibility is not an exacting standard[.]"). The Utilities' mere disagreement with those allegations does not merit dismissal.[12]

B. The Complaint Plausibly Alleges the MG Waste Oils May Present an Imminent and Substantial Threat to Health and the Environment.

The Utilities next argue the City has not adequately pleaded the MG Waste Oils, and the methane and hazardous coal tar waste allegedly resulting therefrom, "may present an imminent

[12] The Utilities also challenge the plausibility of MG Waste Oils affecting the Dodge Avenue Water Line by noting that other water samples, taken between the Dodge Avenue Water Line and the Skokie MGP itself, did not indicate the presence of Oil on other lines. (Mem. at 9.) This straw-man argument is irrelevant in light of the City's allegations as to causation in the Complaint, including that the Infrastructure is contributing to this problem. (*See supra* at 4-6.)

and substantial endangerment" under RCRA § 6972(a)(1)(B) (emphasis added). But the Utilities, like the defendants in *LAJIM, LLC v. General Electric Co.*, focus "only on the threat to humans even though RCRA also addresses contaminants that 'may present an imminent and substantial endangerment to health or the environment.'" 2015 WL 9259918, at *13 (N.D. Ill. Dec. 18, 2015). "In this Circuit, an endangerment to the environment is established if contamination could leach into groundwater, even if the groundwater does not flow into any source of drinking water." *Apex Oil Co.*, 2008 WL 2945402, at *80 (collecting cases); *see also PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 618 (7th Cir. 1998) (even where groundwater did not flow into drinking water, "the buried wastes contain [a contaminant] that is a constant danger to the groundwater, so that some cleaning up is necessary in the interest of health, which is what the statute requires").

Turning to the Utilities' fallacious argument as to human health, the Utilities selectively cite prior decisions of this Court in a manner bordering on the deceptive. Specifically, the Utilities argue in their brief that "imminence generally requires a 'near-term' threat" and cite *Ditchfield* as if that was this Court's holding. (Mem. at 10.) In reality, *Ditchfield*—a summary judgment decision, entered with the benefit of discovery and a full factual record absent here—criticized the defendant's interpretation of "imminent" as "too narrow," sided with the RCRA plaintiff and, most troublingly in light of the Utilities' citation, finished the cited sentence as follows: "... but there is no corollary requirement that the harm necessarily will occur or that the actual damage will manifest immediately." 881 F. Supp. 2d at 979 (emphasis added). This Court then went on to explain numerous Courts of Appeals "have construed § 6279(a)(1)(B) broadly, in large part, because of the use of the word 'may.'" *Id.* (collecting cases). The Utilities also ignore clear precedent from this Court explaining it is "improper at the pleadings stage" to challenge the accuracy, as opposed to the sufficiency, of the City's allegations. *Tinaglia Family Ltd. P'ship v.*

North Shore Cleaners, Inc., 2010 WL 2178784, at *4-5 (N.D. Ill. May 27, 2010) (rejecting attempt to dispute allegations of imminent and substantial threat on factual grounds); *see also Ditchfield*, 881 F. Supp. 2d at 976 (imminence is an issue of fact where, as here, contaminants exist beneath the property and "a thorough assessment of the contamination" at issue "has yet to be conducted").

As this Court has recognized many times before, the bar for pleading that contaminants may present an imminent and substantial endangerment to health or the environment is exceedingly low. The Seventh Circuit has explained that "[i]mminence does not require an existing harm, only an ongoing threat of future harm." *Albany Bank*, 310 F.3d at 972.[13] To plead there may be an imminent and substantial harm, a plaintiff need only allege a defendant released contaminants into the ground and those contaminants are polluting, or threatening to pollute, the property at issue. *See*, *e.g.*, *T & B Ltd. Inc. v. City of Chicago*, 369 F. Supp. 2d 989, 993-94 (N.D. Ill. 2005); *LAJIM*, 2015 WL 9259918, at *9 ("[T]he operative word is 'may,' and ... its presence requires an expansive interpretation of the entire phrase."); *Hanovnikian*, 2006 WL 1519578, at *4-5 (N.D. Ill. May 30, 2006) ("While RCRA's limited scope is beyond dispute, it does not follow that at the pleading stage, a RCRA plaintiff is required to set forth specific facts to support an allegation of imminent endangerment."); *Apex Oil Co.*, 2008 WL 2945402, at *78 (RCRA plaintiff need only show "a potential for an imminent threat of serious harm") (emphasis added). Even the United States Supreme Court has acknowledged the breadth of this section of RCRA, holding "there must be a threat which is present now, although the impact of the threat may not be felt until

[13] In light of this authority, the Utilities' arguments—that there is no imminent or substantial threat because nobody has been injured yet—fall flat. (Mem. at 3, 12.) Regardless, and as another court acknowledged, where toxic chemicals have been released into the ground, this Court "need not—and should not—wait until the contaminated water is actually detected in [the] public water supply" before acting. *Fairway Shoppes Joint Venture v. Dryclean U.S.A. of Florida, Inc.*, 1996 WL 924705, at *8 (S.D. Fla. Mar. 7, 1996).

later." *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 486 (1996) (emphasis in original); *see also Spillane v. Commonwealth Edison Co.*, 291 F. Supp. 2d 728, 736 (N.D. Ill. 2003).[14]

The City's allegations of imminent and substantial threats are plainly sufficient under these standards, insofar as the City alleges the MG Waste Oils, along with concentrated methane and coal tar waste, may present an imminent and substantial threat to both health and the environment. To begin with, the Complaint states as much (Compl. Count I ¶¶ 72-74, 81), which is all the Seventh Circuit and this Court require. *See Albany Bank*, 310 F.3d at 971-72 (considering only the complaint and concluding its allegation of "a substantial and imminent endangerment to public health and the environment as a result of the releases of contaminants … which have migrated to Plaintiff's Property" was adequate);[15] *T & B Ltd. v. City of Chicago*, 369 F. Supp. 2d 989, 993-94 (N.D. Ill. 2005) (finding sufficient allegation that defendants' activities may gave rise to an "imminent and substantial endangerment to health and the environment by polluting or threatening to pollute the soil [and] surface water … around the property"); *Hanovnikian*, 2006 WL 1519578, at *3 (finding sufficient allegation that contamination is ongoing and "the release[] of solid wastes ... presents an imminent and substantial endangerment to health or the environment").

Furthermore, the City supplements its allegations with numerous well-pleaded facts, all accepted as true for purposes of the Motion, which support (if not require) the reasonable

[14] With the vast majority of writing on this issue standing against them, the Utilities are left to cite cases that are completely inapposite to the present case. For example, the Utilities cite *Sierra Club v. Gates*—yet another summary judgment decision, entered with the benefit of discovery and a full factual record that is absent here—in which the plaintiff offered "no evidence that anyone with scientific expertise" agreed with the central premise of the claim. 2008 WL 4368531, at *38 (S.D. Ind. Sept. 22, 2008). As the voluminous engineering analyses and reports referenced in and attached to the City's Complaint make abundantly clear, this is not that case. And even in *Sierra Club*, the court explained that only the threat need be current, with any potential harm to follow.

[15] *See also Albany Bank & Trust Co. v. Exxon Mobil Corp.*, No. 01-cv-6353, Dkt. #1, ¶ 16 (N.D. Ill. Aug. 16, 2001) (**Exhibit 5** hereto).

conclusion that the contaminants may present an imminent and substantial threat to the City and its residents. *See supra* at 4-6; *Ditchfield*, 881 F. Supp. 2d at 967; *Apex Oil*, 2008 WL 2945402, at *80; *City of Evanston*, 19 F. Supp. 3d at 821; *Hanovnikian*, 2006 WL 1519578, at *1.

Facing this mountain of well-pleaded allegations, the Utilities argue their prior remediation of the Skokie MGP site makes it implausible that that property or the Infrastructure could have contributed (or, indeed, still be contributing) to the issues raised by the City in its Complaint. (Mem. at 12-13.) The City's Amended RCRA Notice includes an engineering report that expressly rejected this argument. (*See* 2015 Hendron Report § 7.3.2 (Skokie MGP remediation went only to 25 feet below the ground, which allowed any MG Waste Oils below that depth to continue to sink toward bedrock and groundwater and travel to the vicinity of James Park).)[16]

Finally, the Utilities' argument that removal of a hazardous coal tar waste-coated water main removes any threat posed by the hazardous coal tar waste thereon (Mem. at 10-11) is misguided (at best) and has been rejected by this Court more than once. To begin with, and as explained in Paragraph 4(t) of the Complaint, the water main removed in 2015 (at the City's sole expense) was only part of the drinking water apparatus relevant to the Complaint. (Compl. ¶ 4(t) and Exhibit A-1 (the Dodge Avenue Water Line is larger than just the extracted water main).)

[16] The Utilities' reference to remediation of the Skokie MGP also calls to attention that the Utilities have already agreed to clean up thirty-eight manufactured gas plants in the State of Illinois due to environmental contamination, (Compl. ¶ 29 & Ex. C), which only makes it more plausible that the contamination in and around James Park and the Dodge Avenue Water Line was caused by the release of MG Waste Oils into the environment. Regardless, the Utilities have long known of the hazards associated with MG Waste Oils and their propensity to travel quickly through clay into bedrock in particular. (2015 Hendron Report, Reference 9 (citing learned paper on subject); Compl. ¶¶ 29-30 & Exhibits C and D (listing 38 sites Utilities are required to clean up).) Nonetheless, Nicor apparently decided not to investigate whether MG Waste Oils traveled down to bedrock at the Skokie MGP, instead looking only 25 feet below the ground. (2015 Hendron Report § 7.3.2 (investigation limited to 25 feet).) The Utilities then ignored the City's requests for information concerning the location of the Infrastructure, which they knew, or should have known, had the potential to leak hazardous MG Waste Oils in and around James Park. (Compl. ¶¶ 54-57.)

Moreover, this Court has rejected—at least twice—the argument that there is no imminent and substantial threat under RCRA where a defendant's contamination was so drastic as to cause a municipality to take certain drinking water apparatus out of commission, concluding—like the City alleges here—the releases attributable to the defendant were the reason the water at issue was tainted. *LAJIM*, 2015 WL 9259918, at *13; *see also Ditchfield*, 881 F. Supp. 2d at 976 (rejecting "twisted rationale" that there is no imminent and substantial threat when contamination is so serious as to make certain resources unusable—there a residence, here a water main). Even if the City's water is not unsafe to drink today, that does not mean it will be safe to drink tomorrow.[17] The City alleges there is an ongoing risk the hazardous coal tar waste will continue to penetrate the City's drinking water distribution system and further contaminate the City's drinking water (Compl. ¶ 2, Count I ¶ 71), presenting the risk of very real, substantial and serious harm.[18] Just as in *LAJIM*, the City alleges (and the Utilities cannot deny) the contamination at issue is "uncontrolled, unabated, undefined and unaddressed." 2015 WL 9259918, at *10. *See also Spillane*, 291 F. Supp. 2d at 736 (rejecting argument that other efforts at remediation mooted potential endangerment); *City of Evanston*, 19 F. Supp. 3d at 821-22 (rejecting argument that

[17] For example, there is evidence that contaminants are actively leaching into the City's drinking water. *See* **Exhibit 1** (concentration of contaminants in coal tar waste not exposed to running drinking water is higher than concentration in coal tar waste exposed to running water; those contaminants are going somewhere).

[18] The Utilities' citation to *Warren v. Matthey*, 2016 WL 215232 (E.D. Pa. Jan. 19, 2016) is unavailing for two reasons. First, the court read *Meghrig* only for the proposition that "[a]n endangerment can only be 'imminent' if it 'threatens to occur immediately,'" *id.* at *7, which is neither the Supreme Court's holding nor the way countless courts, including this Court, have subsequently interpreted the same. Second, the "specific factual circumstances" in *Warren* "prevent [the plaintiffs] from actually drinking contaminated water," *id.*, which is not the case here—the City's residents drink water from pipes affected by the Utilities' hazardous coal tar waste daily. Regardless, and as explained, the fact that the City's water meets USEPA standards today does not mean it will meet those standards tomorrow, and the Utilities' flippant and dismissive assertion that the City and its residents have nothing to fear is of little comfort.

alleged threat was not "imminent" where "it has existed for fifty years, an ordinance prohibits extracting groundwater from wells, 'most' of the [property] is covered by asphalt or concrete, and contaminated water has not reached the surface," because the case was "at the pleading stage" and "contaminated subsurface water could migrate to the surface through portions of the [property] or through adjacent properties to which the contamination has migrated and is migrating").[19] At minimum, the City's allegation of ongoing contamination in the vicinity of James Park, combined with the fact that this contamination has not yet been thoroughly assessed, merits further discovery into the factual question of whether the City and its residents (not to mention the environment itself) may face an imminent and substantial threat of harm. *See Ditchfield*, 881 F. Supp. 2d at 976; 2015 Hendron Report, Bartus Memo, § 9, Reference 6 (City continues to encounter coal tar waste).

C. The City Provided Adequate Notice of its Claims Under RCRA and its Claims are Limited to the Scope of its Amended RCRA Notice.

In another reflexive move, the Utilities again claim the City's Amended RCRA Notice is deficient. (Mem. at 13-15.) Importantly, the Utilities do not claim the City's notice was untimely, and in fact admit the City's Amended RCRA Notice "alleges that 'MG Waste Oils are present in soil and groundwater in and around James Park, and, specifically appearing as a crustaceous coating ("black crust") on a potable water line running along Dodge Avenue in Evanston (the "Dodge Avenue Water Line").'" (Mem. at 13 (quoting Amended RCRA Notice ¶ 6(c)).)

The Utilities apparently take issue with the City's use of the phrase "Impacted Area" as a shorthand description of where the MG Waste Oils came from and how the MG Waste Oils, unsafe

[19] The Utilities' apparent argument that their prior remediation of the Skokie MGP site contradicts the City's allegations is wrong. Unlike in *Northern California River Watch v. Fluor Corp.*, 2014 WL 3385287 (N.D. Cal. July 9, 2014), the Complaint explains in detail why remediation of the Skokie MGP plant does not contradict, and in fact is consistent with, the City's allegations. *See supra* at 4-6; *see also Spillane*, 291 F. Supp. 2d at 736 (other efforts at remediation do not automatically moot an alleged endangerment, particularly where it remains unclear whether such remediation in fact obviates present concerns).

concentrations of methane, and hazardous coal tar waste came to be located in and around James Park and the Dodge Avenue Water Line. To be clear, the City's claims are as the Utilities generally describe them (which confirms the Complaint satisfies *Twombly*): the City alleges (1) the Utilities are responsible for the release of hazardous substances (MG Waste Oils) from the Skokie MGP and/or Infrastructure, and those hazardous substances (2) have come to be located in and around James Park and the Dodge Avenue Water Line and (3) may present an imminent and substantial threat to health and the environment in the form of dangerous concentrations of methane gas in and around James Park and hazardous coal tar waste in and on the Dodge Avenue Water Line. *See supra* at 4-6. The "Impacted Area" referred to in the Complaint merely explains the likely pathway through which the hazardous MG Waste Oils traveled from the Skokie MGP and/or Infrastructure and came to be located in and around James Park and the Dodge Avenue Water Line. (*See* Compl. ¶ 2 ("Impacted Area" includes the Skokie MGP and areas in which the Infrastructure—facilities alleged to have released MG Waste Oils—likely run), ¶ 10 (MG Waste Oils are believed to have traveled through the Impacted Area), ¶¶ 42-43 (Skokie MGP and Infrastructure "consisted of multiple structures located in the vicinity of the Impacted Area" that transported MG Waste Oils), ¶ 47 (Infrastructure leaked MG Waste Oils "into the Impacted Area"), Count I ¶ 75 (Skokie MGP and Infrastructure are sources of the hazardous waste that has come to be located in and around James Park); Amended RCRA Notice ¶¶ 43-45, 49 (Skokie MGP and Infrastructure are sources of hazardous waste present in and around James Park).) There can be little doubt that, had the City not described this likely pathway, the Utilities would have filed a motion claiming the City alleges the MG Waste Oils were transported to the affected areas by sorcery.

While it apparently gives the Utilities great pause that the City has not been able to identify with certainty exactly where the MG Waste Oils were released, and exactly the pathway(s) they

took to where they now may present imminent and substantial threats to the City and its residents, this is not problematic for purposes of the Utilities' Motion. The City has alleged all it must in its Complaint, and then some. *See supra* at 4-18. However, and at least in part due to the Utilities' refusals to cooperate with the City's investigation, the City cannot identify precisely what the Utilities would need to do in order to remediate the ongoing contaminations at issue in this lawsuit. All the City can do is disclose, through its use of the shorthand phrase "Impacted Area," the property the City believes may be relevant to the investigation and remediation needed to address the Utilities' MG Waste Oils contaminations in and around James Park. Having repeatedly refused to provide information to the City, the Utilities cannot now be heard to complain of the City's voluntary effort to identify all potentially relevant property.[20]

D. The City Is Not Prohibited from Seeking Civil Penalties Under RCRA.

The Utilities claim civil penalties are not available to the City as the plaintiff in a RCRA citizen suit. (Mem. at 14-15 (citing *Riverdale v. 138th St. Joint Venture*, 527 F. Supp. 2d 760, 768 (N.D. Ill. 2007)).) *Riverdale* broke from this Court's prior precedent—*see Hanovnikian*, 2006 WL 1519578, at *4 ("Civil penalties may be imposed in RCRA citizen suits."), and *Clorox Co. v. Chromium Corp.*, 158 F.R.D. 120, 128 (N.D. Ill. 1994) (same)—and its analysis on this point has

[20] The City uses the phrase "Impacted Area" in its Complaint only to explain how MG Waste Oils may have come to be located in and around James Park and the Dodge Avenue Water Line. The City does not seek relief as to any property other than that identified in its Amended RCRA Notice. To the extent the City's Complaint could be read to seek relief not identified in the Amended RCRA Notice, (*e.g.*, Compl. ¶ 14, Count I ¶ 85(d) (using "Impacted Area")), the City acknowledges and agrees its requested relief should be (and is) limited to the scope of the Amended RCRA Notice. That being said, if further investigation confirms the City's well-founded allegations and belief that the MG Waste Oils originated from the Skokie MGP and/or Infrastructure, the Utilities necessarily must (1) determine how those hazardous substances are traveling through the ground and (2) take appropriate steps to remediate their contaminations. For now, however, the City's claims are limited to the property identified in its Amended RCRA Notice. *See*, *e.g.*, *Agric. Excess & Surplus Ins. Co. v. A.B.D. Tank & Pump Co.*, 878 F. Supp. 1091, 1100 (N.D. Ill. 1995) (RCRA claim must be limited to RCRA notice) (citing *Hallstrom v. Tillamook*, 493 U.S. 20, 24 (1989)).

never been cited with approval within the Seventh Circuit. *Riverdale* has, however, been expressly rejected by this Court. *See Evanston v. Texaco*, 19 F. Supp. 3d at 823 (acknowledging and rejecting *Riverdale*'s analysis and citing, *inter alia*, *Supporters to Oppose Pollution, Inc. v. Heritage Grp.*, 973 F.2d 1320, 1324 (7th Cir. 1992)). *Riverdale* (and the Utilities' argument relying on it) also appears to run afoul of an unpublished Seventh Circuit opinion holding civil penalties are available in RCRA citizen suits. *See Hassain v. EPA*, 41 F. App'x 888, 888 (7th Cir. 2002) (unpublished) (RCRA § 6972(a) "allow[s] injunctive relief and civil penalties in citizen suits"). The City respectfully submits the bulk of authority on this issue is correct.

II. THE COMPLAINT ADEQUATELY STATES A PLAUSIBLE CLAIM UNDER THE CITY'S HAZARDOUS SUBSTANCES ORDINANCE.

The Utilities next argue the City's claim under its Hazardous Substances Ordinance (the "Ordinance") fails because the City does not allege a "hazardous substance incident" and the Utilities cannot be held liable under the Ordinance. (Mem. at 15-20.) The parties briefed these arguments previously, and the City will restate its responses to the Utilities' arguments herein. But first, the City must correct the inaccurate assertion that the City's claim "focuses solely on the former Skokie MGP." (Mem. at 15.) The Complaint plainly states that MG Waste Oils released from the Infrastructure are also relevant. (Compl. ¶ 49; *see also supra* at 4-6.)

A. The City Adequately Alleges a Plausible "Hazardous Substance Incident."

In arguing against a "hazardous substance incident," the Utilities misrepresent the Ordinance, acting as if the Ordinance defines "hazardous substance incident" to include only a "sudden release" of a hazardous substance,[21] but they know the definition includes a "threatened

[21] The Utilities' argument that a "Hazardous Substance Incident" cannot exist without an "emergency circumstance" (Mem. at 15) also ignores that the City's Fire Chief, not the Utilities, determines whether the threatened release of methane, itself hazardous, "threatens immediate or irreparable harm." Ordinance § 9-12-1. The City's Fire Chief determined elevated methane levels pose such a threat when he issued the

release." The Utilities also contend no MG Waste Oils have escaped from the Skokie MGP or Infrastructure since enactment of the Ordinance in 1989, which is problematic for three reasons.

First, the Utilities' contention does not appear in the Complaint and cannot be credited for purposes of their Motion. *Second*, the Utilities refuse to investigate the City's concerns, making it difficult to understand how they could plausibly contest the City's well-pleaded allegations that MG Waste Oils have escaped or leaked (either a "release" under the Ordinance) since 1989. *Third*, it is entirely plausible that MG Waste Oils did escape or leak from the Skokie MGP or Infrastructure after 1989, and continue to escape or leak today. It can take as few as to two decades for MG Waste Oils to travel down, reach bedrock and degrade into the methane present in front of the Dawes School, and plausibly less to reach the Dodge Avenue Water Line. (Compl. ¶ 39; Amended RCRA Notice ¶ 35; 2015 Hendron Report, § 7.3.3 & Slide 31.) Remediation of the Skokie MGP did not even begin until late 2012. *See supra* at 4 n.3. The City continues to discover MG Waste Oils on and in the Dodge Avenue Water Line, as well as in bedrock, as the City investigates the scope of the harm resulting from MG Waste Oils. Thus, the City plausibly alleges it presently suffers an "emergency circumstance" caused by a "threatened release" of a hazardous substance. Ordinance § 9-12-1. (*See also* Compl. ¶¶ 9-10, 41, 43, 47, Count II ¶¶ 70-72.)

B. The City Adequately Alleges the Utilities are Liable Persons.

The Utilities first argue they cannot be held liable because they do not own, and never owned, any real property from which a hazardous substance is or may be released. (Mem. at 17.) Once again, the Utilities focus only on the Skokie MGP, and ignore the City's (1) claim relating

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Administrative Order the Utilities continue to ignore. (Compl. ¶¶ 53, 60, 62, 67 & Exhibit E; Amended RCRA Notice ¶ 18.). The City also alleged an emergency circumstance exists with respect to hazardous substances, such as benzo(a)anthracene, threatening to enter (and in fact entering) the Dodge Avenue Water Line. *See* **Exhibit 1**.

to the Ordinance includes the Infrastructure (specifically, the Infrastructure in and around James Park) and (2) allegations that the Utilities own(ed) and/or operate(d) both the Skokie MGP and the Infrastructure. (Compl. ¶¶ 9-10, Count II ¶¶ 73-74.) The Utilities (inappropriately, in a motion to dismiss) contest the veracity of these well-pleaded allegations as to their ownership or control today, (Mem. at 17-18), but they say nothing as to whether, for example, they owned or controlled relevant property during a release after 1989, or continue to own easements or rights-of-way associated with the Infrastructure to the present day.[22] *See*, *e.g.*, *Village of Round Lake v. Amann*, 311 Ill. App. 3d 705, 713, 725 N.E. 2d 35, 43 (2d Dist. 2000) ("An easement for a right-of-way is a substantial interest in real property."). If, as the City alleges, the Utilities own or control real property from which hazardous substances are being released today—or, more broadly, if the Utilities owned or controlled real property from which hazardous substances were released at any time after enactment of the Ordinance in 1989—the Utilities may be held liable under the Ordinance. *See also City of Evanston*, 19 F. Supp. 3d at 827-28 (Evanston ordinance is applicable to a continuing violation allegedly originating prior to enactment).[23] The Utilities, for their part, are welcome to try to disprove the City's well-pleaded allegations through discovery and at trial.

The Utilities next argue holding them liable for releases prior to enactment would be an impermissible retroactive application of the Ordinance. (Mem. at 18-20.) Importantly, the Court

[22] It is certainly plausible to infer, for example, that ownership and control over the Infrastructure—which the Skokie MGP conceptually could not have operated without—is addressed in the 1954 Separation Agreement that "transferred and assigned to Nicor all right, title and interest in certain gas and heating assets previously held by ComEd." (Compl. ¶ 26.)

[23] The Utilities repeatedly suggest that, because the Skokie MGP ceased operations years ago, it cannot be the case that MG Waste Oils were released after that time from the Skokie MGP or Infrastructure. This suggestion assumes—improbably, and without any apparent basis (much less a basis rooted in the Complaint)—that no MG Waste Oils remained under the Skokie MGP or in the Infrastructure after 1989 (even though they did not begin remediating the Skokie MGP site until 2012, *see supra* at 4 n.3), or currently threaten to escape or leak therefrom. Either scenario presents a "Hazardous Substance Incident."

need not engage in any retroactivity analysis in light of the City's plausible and well-pleaded allegations that the Utilities own(ed) or control(led) the Skokie MGP and Infrastructure at the time of the hazardous substance releases at issue here, certain of which post-date the enactment of the Ordinance in 1989. *See supra* at 4-6. However, should the Court need to engage in such analysis, the City reiterates that the Ordinance, like CERCLA, was enacted to address existing conditions that may present a threat to human health or the environment, and remedial environmental provisions are regularly given retroactive effect. *See Continental Title Co. v. Peoples Gas Light & Coke Co.*, 959 F. Supp. 893, 901 (N.D. Ill. 1997); *Davon, Inc. v. Shalala*, 75 F.3d 1114, 1126 (7th Cir.), *cert. denied*, 519 U.S. 808 (1996); *Raytheon Co. v. McGraw-Edison Co., Inc*., 979 F. Supp. 858, 863 (E.D. Wis. 1997) (*Landgraf* has not altered retroactive application of CERCLA); *see also McCarthy v. Kunicki*, 355 Ill. App. 3d 957, 966, 823 N.E.2d 1088, 1096 (1st Dist. 2005) (nuisance ordinance applied retroactively to "existing buildings" constructed prior to enactment); *People ex rel. Ryan v. Davies*, 313 Ill. App. 3d 238, 242, 729 N.E.2d 516, 519 (3d Dist. 2000), *appeal denied*, 189 Ill. 2d 701 (2000) (finding legislative intent to abate nuisance caused by pre-enactment disposal of tires); *People v. Jones*, 329 Ill. App. 503, 506, 69 N.E.2d 522, 524 (4th Dist. 1946) (law is not impermissibly retroactive when it "provides punishment or a penalty for the continued maintenance of certain conditions which prior to the enactment of the statute, were lawful"). *Landgraf v. USI Film Products*, cited and relied upon by the Utilities (Mem. at 18), held the retroactivity analysis includes the connection between the object of the legislation and pre-enactment conduct. 511 U.S. 244, 245 (1994). It is simply not reasonable to conclude the Evanston City Council was any less concerned in 1989 about harm to its residents caused by a hazardous substance release in 1988, than they were about harm resulting from a release in 1990—particularly when experience teaches, time and again, environmental contamination lingers.

III. THE COMPLAINT ADEQUATELY STATES PLAUSIBLE CLAIMS FOR TRESPASS AND NUISANCE.

The Utilities argue the City's claims for trespass and nuisance must be dismissed because the City does not adequately allege any underlying tortious conduct. (Mem. at 20-23.) They do not dispute that a trespass can consist of chemical substances moving from one property to another, nor do they dispute that the entry of such chemical substances onto one's property, invading the owner's interest in the use and enjoyment of the same, can constitute a nuisance. *See*, *e.g.*, *NutraSweet Co. v. X-L Eng'g Corp.*, 933 F. Supp. 1409, 1423-24 (N.D. Ill. 1996), *aff'd sub nom.*, *NutraSweet Co. v. X-L Eng'g Co.*, 227 F.3d 776 (7th Cir. 2000). The Utilities merely contend the City has not adequately alleged they or their predecessors were negligent in allowing MG Waste Oils to enter into the ground and ultimately travel into the City's property.

Every element of negligence either appears in the City's Complaint or is implied as a matter of Illinois law. In Illinois, negligence requires (1) a duty of care, (2) a breach of that duty, and (3) an injury proximately caused by that breach. *See*, *e.g.*, *NutraSweet Co.*, 933 F. Supp. at 1424-25; *City of Evanston*, 19 F. Supp. 3d at 826. The Utilities and their predecessors had a duty not to contaminate the environment. *NutraSweet Co.*, 933 F. Supp. at 1425 (citing *People v. Brockman*, 143 Ill. 2d 351, 372, 574 N.E.2d 626, 634 (1991)). The Complaint alleges the Utilities contributed to contamination of the environment, through releases of MG Waste Oils from the Skokie MGP and Infrastructure, breaching their duty. (Compl. ¶¶ 2, 10, 43, 44; 2015 Hendron Report, p. 17 (citing 1918 report that 8% of the gas produced at Skokie MGP was "lost").) The Complaint also alleges the City has incurred costs in investigating the contamination in the vicinity of James Park. (*Id.* ¶¶ 51, 53.) *See also NutraSweet*, 933 F. Supp. at 1425 (concluding such costs "certainly" constitute "an injury" for purposes of negligence). Finally, the Complaint alleges the Utilities violated RCRA and caused the MG Waste Oils and other contaminants to enter the City's property,

directly and proximately resulting in, *inter alia*, the investigation costs the City continues to incur. (Compl. ¶ 53; Amended RCRA Notice ¶ 18; 2015 and 2016 Hendron Reports; **Exhibit 2**.) *See also NutraSweet*, 933 F. Supp. at 1425 (similarly concluding a "violation of CERCLA 'caused' [the plaintiff] to incur such costs" and is *prima facie* evidence of negligence).

Separately, but of equal importance, *res ipsa loquitur* is alive and well in Illinois, and to plead negligence under that doctrine, the City need only allege it was injured "(1) in an occurrence that ordinarily does not happen in the absence of negligence, (2) by an agency or instrumentality within the defendant's exclusive control." *Heastie v. Roberts*, 226 Ill. 2d 515, 531-32, 877 N.E.2d 1064, 1076 (2007). The "control" standard is not rigid, and the City need not "eliminate all causes of [its] injuries other than the negligence of" the Utilities in order to proceed. *Id.* at 532-34, 877 N.E.2d at 1076-77. Thus, the City's Complaint plausibly alleges the Utilities' negligence by alleging the Utilities and/or their predecessors transported and handled MG Waste Oils in connection with their ownership and operation of the Skokie MGP and Infrastructure, and substantial volumes of the same hazardous MG Waste Oils found at the Skokie MGP appear in the vicinity of James Park. (Compl. ¶¶ 2, 10, 43-44, 54-57.) *See also Muniz v. Rexnord Corp.*, 2004 WL 2011393 (N.D. Ill. Sept. 3, 2004) (denying motion to dismiss *res ipsa loquitur* claim in RCRA lawsuit, but ultimately dismissing RCRA count in light of ongoing governmental involvement).

Finally, the Utilities' arguments against negligence directly contradict their prior representations in state court.[24] *See* **Exhibit 6** at 6-7 (1999 Cook County Circuit Court document in which Nicor admits, *inter alia*, "coal tar ... is considered a hazardous substance" and such

[24] While not a judicial admission in this matter, this prior statement is nonetheless relevant. *See*, *e.g.*, *Kohler v. Leslie Hindman, Inc.*, 80 F.3d 1181, 1185 (7th Cir. 1996) (statement may be used as evidence).

"substances have ... escaped" from "each of the [MGP] sites at issue" in that matter, "thereby subjecting [Nicor] to liability under the common law" for, *inter alia*, "trespass" and "nuisance").

Whether the Utilities and their predecessors intentionally dumped MG Waste Oils into the ground or negligently allowed them to enter the ground, MG Waste Oils entered the ground under the Skokie MGP (and, as the City alleges, around the Infrastructure) and the same MG Waste Oils now appear in the vicinity of James Park. Thus, whether or not the City alleged a separate, affirmative claim for negligence, the elements of negligence appear in the Complaint and the Utilities' arguments as to trespass and nuisance fail.[25]

IV. THE CITY'S COMPLAINT STATES A PLAUSIBLE CLAIM FOR PUNITIVE DAMAGES.

To argue against the City's punitive damages claims, the Utilities yet again pretend it is impossible for MG Waste Oils to have escaped from the Skokie MGP (below the 25 feet they actually remediated beginning in late 2012), or the Infrastructure in and around James Park (which they apparently did not remediate at all), after the facility closed. They also act is if they have not refused repeated requests for information and assistance in an effort to mitigate harms to the City from ongoing releases of MG Waste Oils that, as far as anyone knows, plausibly continue today. *See supra* at 4-6. Furthermore, the Utilities' arguments were roundly rejected in *City of Evanston*, 19 F. Supp. 3d at 827-28, and it is well-settled Illinois law that the City, as a unit of government asserting public rights, is not subject to the statute of limitations defense with respect to its

[25] The Utilities make much of *Village of DePue*, 632 F. Supp. 2d 854 (C.D. Ill. 2009), (Mem. at 20-23), but it, too, is distinguishable. As that court explained, the plaintiff alleged public and private nuisance based only on the "mere existence" of a contaminated property and did not provide allegations from which "some specific unreasonable conduct by Defendants" could be inferred. 632 F. Supp. 2d at 865. The plaintiff also alleged trespass based only on "run off and downhill migration of ... toxic metals" from the contaminated property, again failing to make allegations from which "tortious conduct by Defendants" could be inferred. *Id.* The Complaint's allegations and referenced documents distinguish this case from *DePue*.

Ordinance claims or common-law trespass and nuisance claims, *see*, *e.g.*, *Board of Education of City of Chicago v. A, C, & S, Inc.*, 131 Ill. 2d 428, 473-74, 546 N.E.2d 580, 602 (1989); *City of Chicago v. Latronica Asphalt and Grading*, *Inc*., 346 Ill. App. 3d 264, 269, 272-73, 805 N.E.2d 281, 286, 289 (1st Dist. 2004); *Village of Roxana v. Shell Oil Co.,* 2013 WL 4510164, at *6 (S.D. Ill. Aug. 26, 2013). The Utilities argue they have no duty to "cooperate" with the City's inquiries and requests in this matter, (Mem. at 25), but the City has alleged the Skokie MGP and Infrastructure are releasing MG Waste Oils into the ground, and—as alleged in the Complaint—the Utilities have done nothing to investigate or remediate those releases, evincing (as the Utilities frame it in their brief) "'wanton disregard of the rights of others,' as is required to support punitive damages under Illinois law," (Mem. at 26 (citing *David Mitzer Enters., Inc. v. Nexstar Broadcasting, Inc.*, 2015 WL 469423, at *3 (C.D. Ill. Feb. 3, 2015)). The Utilities intentionally and affirmatively ignored and refused the City's pleas—ignoring and refusing requests for information, or providing incomplete and misleading information (Compl. ¶¶ 54-67)—at their own peril. They intentionally ignored the possibility (indeed, likelihood) that they are contaminating the City's property. They cannot now be heard to complain about their lack of intentional conduct.

V. THE CITY'S COMPLAINT STATES A PLAUSIBLE CLAIM FOR BREACH OF THE FRANCHISE AGREEMENT.

The Utilities argue the City's claims under the franchise agreement are defective in two respects. First, the Utilities claim Section 2 of the franchise agreement is forward-looking only and does not address the issues raised by the City. Second, the Utilities claim Section 3 of the franchise agreement is also forward-looking only. These arguments fail, particularly at the pleading stage.

The Utilities make certain assumptions about both the franchise agreement and the City's claims thereunder, but in doing so, they ignore that (1) the City need only state a claim for relief that is plausible on its face and (2) there may be more than one plausible reading of a contract.

Here—and as the City argued in response to these very same arguments previously, which responses the Utilities make no effort to address in their Memorandum—the second sentence of Section 2 does not expressly limit itself to the "pipes" referred to in the first sentence (and, in fact, expressly applies to "[a]ll pipes," not just those pipes "hereafter laid"), and the Utilities' reading of Section 3 demands the conclusion that Nicor is not responsible under the franchise agreement for even those pipes they continue to use and operate today, provided those pipes were installed prior to 1982, which is overbroad and may or may not comport with Nicor's actions to date.[26] Thus, it is entirely plausible Nicor has a continuing obligation under the franchise agreement to "repair the damage" to the City's "water pipe[s]" that is "caused by" the "location" (plausibly meaning "existence") of Nicor's "pipes" and "other appliances" (Section 2), and to indemnify the City for expenses caused by or resulting from "the use and occupation" of "any" of a variety of types of property by Nicor in the "exercise by [Nicor] of its privileges" to use and operate pipes in and under the City (Section 3). In light of that continuing obligation, the City has stated a plausible claim for breach of the franchise agreement. *See Granville Nat'l Bank v. Alleman*, 237 Ill. App. 3d 890, 897, 605 N.E.2d 124, 128 (2nd Dist. 1992) (obligation may continue throughout the duration of a contract); *Teague v. Teague*, 847 F.Supp.2d 1120, 1123 (N.D. Ill. 2012) (contract requiring continuous performance is capable of being partially breached on numerous occasions).

Finally, the Utilities once again pretend the City does not allege an ongoing release of MG Waste Oils that post-dates the closing of the Skokie MGP, and try to knock down the straw-man of retroactivity. (Mem. at 26-28.) It is entirely plausible, and alleged by the City, that the Infrastructure, located in and under the City, continues to leak MG Waste Oils into the ground

[26] Discovery may reveal, *inter alia*, whether Nicor has repaired pipes laid prior to 1982. If it has, that would suggest that Nicor, too, interprets the franchise agreement to apply to pre-1982 pipes.

today. *See supra* at 4-6. Thus, this Court need not address retroactivity in order to conclude the Complaint adequately alleges a plausible claim for relief under the franchise agreement.

CONCLUSION

The City has adequately and plausibly alleged its claims against the Utilities. The Utilities' Motion should be denied.

Dated: August 31, 2016

Respectfully submitted,

The City of Evanston
By: /S/
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CERTIFICATE OF SERVICE

I, Jeffery D. Jeep, an attorney, hereby certify that on August 31, 2016, I caused a copy of the foregoing CITY OF EVANSTON'S MEMORANDUM IN RESPONSE TO MOTION TO DISMISS to be served upon all counsel of record via the Court's Electronic Filing system, in accordance with Local Rule 5.9.

By: /s/ Jeffery D. Jeep

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

City of Evanston, Plaintiff, v. Northern Illinois Gas Company and Commonwealth Edison Company, Defendants.	)	Case No. 16-cv-5692 Judge John Z. Lee Magistrate Judge Maria Valdez

TABLE OF EXHIBITS

Ex.	*Document*
1.	Comparison of Contaminant Levels In and Around James Park to IEPA Standards
2.	Summary of Coal Tar Semi-Volatile Organic Compound ("SVOC") Detection in City Drinking Water Samples
3.	January 30, 2015 Report of David M. Hendron, PE ("2015 Hendron Report") (*excerpt*)
4.	February 10, 2016 Report of David M. Hendron, PE ("2016 Hendron Report") (*excerpt*)
5.	Complaint in *Albany Bank & Trust Co. v. Exxon Mobil Corp.*, N.D. Ill. Case No. 01-cv-6353 (Dkt. #1, Aug. 16, 2001)
6.	Nicor's Supplemental Responses and Objections to Discovery Pursuant to Illinois Supreme Court Rule No. 213 in *Northern Illinois Gas Co. v. Home Ins. Co.*, Cook County No. 95-L-17549 (June 4, 1999)
7.	Copies of Unpublished Authority (Submitted Pursuant to Court's Standing Order)
8.	City's Amended Notice of Intent to Sue (Feb. 22, 2016) ("Amended RCRA Notice")

EXHIBIT 1

COMPARISON OF CONTAMINANT LEVELS IN AND AROUND JAMES PARK TO IEPA STANDARDS (EXAMPLES)
EXHIBIT 1

Table Key – Sample ID

Sample ID	Location	Reference
71+56/5'	Soil Between Pipes	*See* 2016 Hendron Report, references to sample identified as "71+56/5'" in Figure 1 (Sample Locations), Table 4 (Summary of Analytical Results) and Table 2 (Photographic Log), Photo 11 (attached).
Exterior Pipe Crust 71+50/7'	Outside Water Line	*See* 2016 Hendron Report, references to sample identified as "Exterior Pipe Crust 71+50/7'" in Figure 1 (Sample Locations), Table 4 (Summary of Analytical Results) and Table 2 (Photographic Log), Photo 60 (attached).
Exterior Pipe Crust 78+95+4E/4'	Outside "Dodge Avenue Pipe"	*See* 2016 Hendron Report, references to sample identified as "Exterior Pipe Crust 78+95+4E/4'" in Figure 1 (Sample Locations), Table 4 (Summary of Analytical Results), Table 2 (Photographic Log) and Photo 50 (attached).
Exterior Pipe Crust A 71+50/7'	Inside Valve Seal on Water Line	*See* 2016 Hendron Report, references to sample identified as "Exterior Pipe Crust A 71+50/7'" in Figure 1 (Sample Locations), Table 4 (Summary of Analytical Results) and Table 2 (Photographic Log), Photo 64 (attached).
Exterior Pipe Crust A 78+10/7'	Outside Water Line	*See* 2016 Hendron Report, references to sample identified as "Exterior Pipe Crust A 78+10/7'" in Figure 1 (Sample Locations), Table 4 (Summary of Analytical Results) and Table 2 (Photographic Log), Photo 56 (attached).
Inside Water Pipe D+O	Inside Water Line	*See* 2016 Hendron Report, references to sample identified as "Inside Water Pipe D+O" in Figure 1 (Sample Locations), Table 4 (Summary of Analytical Results) and Table 2 (Photographic Log), Photo 33.
Interior Pipe Crust 81+27/7'	Inside Water Line	*See* 2016 Hendron Report, references to sample identified as "Interior Pipe Crust 81+27/7'" in Figure 1 (Sample Locations) and Table 4 (Summary of Analytical Results).
Pipe Crust @ 79+55'	Outside Other Pipe	*See* 2016 Hendron Report, references to sample identified as "Pipe Crust @ 78+55'" in Figure 1 (Sample Locations) and Table 4 (Summary of Analytical Results).
Pipe Crust 81+75	Outside Other Pipe	*See* 2016 Hendron Report, references to sample identified as "Pipe Crust 81+75" in Figure 1 (Sample Locations), Table 4 (Summary of Analytical Results) and Table 2 (Photographic Log), Photo 9 (attached).
Soil @ 79+55' Below Pipe	Soil Between Pipes	*See* 2016 Hendron Report, references to sample identified as "Soil @ 79+55' Below Pipe" in Figure 1 (Sample Locations), Table 4 (Summary of Analytical Results) and Table 2 (Photographic Log), Photo 11 (attached).
James Park	Gas Probes	*See* 2015 Hendron Report, Appendix A-1, Summary Table 1

COMPARISON OF CONTAMINANT LEVELS IN AND AROUND JAMES PARK TO IEPA STANDARDS (EXAMPLES)
EXHIBIT 1

Table Key – IEPA Standards

IEPA Standard	Reference
Class I	35 IAC 742, Appendix B, Table A, Soil Component of Groundwater, Class I (potable water)
Class II	35 IAC 742, Appendix B, Table A, Soil Component of Groundwater, Class II (non-potable water)
Ingestion	35 IAC 742, Appendix B, Table B, Soil Remediation Objectives for Industrial/Commercial Properties, Construction Worker (Ingestion)
Inhalation	35 IAC 742, Appendix B, Table B, Soil Remediation Objectives for Industrial/Commercial Properties, Construction Worker (Inhalation).
Methane	35 IAC § 811.311(a)(1) (percent methane allowed in soil outside landfill)

COMPARISON OF CONTAMINANT LEVELS IN AND AROUND JAMES PARK TO IEPA STANDARDS (EXAMPLES)
EXHIBIT 1

Sorted by IEPA Standard and then % of Standard

Sample ID	Contaminant	IEPA Standard	IEPA Limit	Detected Level[1]	% of Standard
Exterior Pipe Crust A 71+50/7'	benzo(a)anthracene	Class I	2,000	390,000	19,500%
Exterior Pipe Crust A 71+50/7'	Benzo(b)fluoranthene	Class I	5,000	430,000	8,600%
Exterior Pipe Crust A 71+50/7'	Benzo(a)pyrene	Class I	8,000	350,000	4,375%
Soil @ 79+55' Below Pipe	benzo(a)anthracene	Class I	2,000	81,000	4,050%
Soil @ 79+55' Below Pipe	Carbazole	Class I	600	18,000	3,000%
Exterior Pipe Crust 78+95+4E/4'	benzo(a)anthracene	Class I	2,000	34,000	1,700%
Exterior Pipe Crust A 71+50/7'	Carbazole	Class I	600	9,000	1,500%
Soil @ 79+55' Below Pipe	Benzo(b)fluoranthene	Class I	5,000	66,000	1,320%
Exterior Pipe Crust A 71+50/7'	Indeno[1,2,3-c,d]pyrene	Class I	14,000	160,000	1,143%
Inside Water Pipe D+O	benzo(a)anthracene	Class I	2,000	15,000	750%
Exterior Pipe Crust A 71+50/7'	Dibenzo(a,h)anthracene	Class I	2,000	14,000	700%
Soil @ 79+55' Below Pipe	Benzo(a)pyrene	Class I	8,000	54,000	675%
Exterior Pipe Crust 78+95+4E/4'	Benzo(b)fluoranthene	Class I	5,000	31,000	620%
Exterior Pipe Crust A 78+10/7'	Carbazole	Class I	600	3,700	617%
Pipe Crust @ 79+55'	Carbazole	Class I	600	3,700	617%
Exterior Pipe Crust 71+50/7'	benzo(a)anthracene	Class I	2,000	12,000	600%
Soil @ 79+55' Below Pipe	2-Methylnaphthalene	Class I	1,900	11,000	579%
Soil @ 79+55' Below Pipe	Dibenzofuran	Class I	3,000	17,000	567%
Soil @ 79+55' Below Pipe	Dibenzo(a,h)anthracene	Class I	2,000	8,800	440%
Interior Pipe Crust 81+27/7'	Carbazole	Class I	600	2,300	383%
Inside Water Pipe D+O	Benzo(b)fluoranthene	Class I	5,000	17,000	340%
Exterior Pipe Crust 78+95+4E/4'	Benzo(a)pyrene	Class I	8,000	26,000	325%
Exterior Pipe Crust A 71+50/7'	Benzo(k)fluoranthene	Class I	49,000	150,000	306%
Exterior Pipe Crust 71+50/7'	Benzo(b)fluoranthene	Class I	5,000	14,000	280%
Soil @ 79+55' Below Pipe	Naphthalene	Class I	12,000	33,000	275%

[1] Unless indicated otherwise, all values are reported in micrograms per kilogram (parts per billion)

COMPARISON OF CONTAMINANT LEVELS IN AND AROUND JAMES PARK TO IEPA STANDARDS (EXAMPLES)
EXHIBIT 1

Sample ID	Contaminant	IEPA Standard	IEPA Limit	Detected Level[1]	% of Standard
Exterior Pipe Crust A 71+50/7'	Phenanthrene	Class I	210,000	560,000	267%
Exterior Pipe Crust A 71+50/7'	Chrysene	Class I	160,000	370,000	231%
Inside Water Pipe D+O	Benzo(a)pyrene	Class I	8,000	12,000	150%
Exterior Pipe Crust 78+95+4E/4'	2-Methylnaphthalene	Class I	1,900	2,800	147%
Pipe Crust 81+75	Dibenzo(a,h)anthracene	Class I	2,000	2,600	130%
Exterior Pipe Crust A 71+50/7'	Dibenzofuran	Class I	3,000	3,900	130%
Exterior Pipe Crust 71+50/7'	Benzo(a)pyrene	Class I	8,000	10,000	125%
Soil @ 79+55' Below Pipe	Indeno[1,2,3-c,d]pyrene	Class I	14,000	17,000	121%
Exterior Pipe Crust A 71+50/7'	benzo(a)anthracene	Class II	8,000	390,000	4,875%
Exterior Pipe Crust A 71+50/7'	Benzo(b)fluoranthene	Class II	25,000	430,000	1,720%
Soil @ 79+55' Below Pipe	benzo(a)anthracene	Class II	8,000	81,000	1,013%
Soil @ 79+55' Below Pipe	Carbazole	Class II	2,800	18,000	643%
Exterior Pipe Crust A 71+50/7'	Benzo(a)pyrene	Class II	82,000	350,000	427%
Exterior Pipe Crust 78+95+4E/4'	benzo(a)anthracene	Class II	8,000	34,000	425%
Exterior Pipe Crust A 71+50/7'	Carbazole	Class II	2,800	9,000	321%
Soil @ 79+55' Below Pipe	Benzo(b)fluoranthene	Class II	25,000	66,000	264%
Exterior Pipe Crust A 71+50/7'	Indeno[1,2,3-c,d]pyrene	Class II	69,000	160,000	232%
Inside Water Pipe D+O	benzo(a)anthracene	Class II	8,000	15,000	188%
Exterior Pipe Crust A 71+50/7'	Dibenzo(a,h)anthracene	Class II	7,600	14,000	184%
Soil @ 79+55' Below Pipe	Naphthalene	Class II	18,000	33,000	183%
Exterior Pipe Crust 71+50/7'	benzo(a)anthracene	Class II	8,000	12,000	150%
Exterior Pipe Crust A 78+10/7'	Carbazole	Class II	2,800	3,700	132%
Pipe Crust @ 79+55'	Carbazole	Class II	2,800	3,700	132%
Exterior Pipe Crust 78+95+4E/4'	Benzo(b)fluoranthene	Class II	25,000	31,000	124%
Soil @ 79+55' Below Pipe	2-Methylnaphthalene	Class II	9,500	11,000	116%
Soil @ 79+55' Below Pipe	Dibenzo(a,h)anthracene	Class II	7,600	8,800	116%

COMPARISON OF CONTAMINANT LEVELS IN AND AROUND JAMES PARK TO IEPA STANDARDS (EXAMPLES)
EXHIBIT 1

Sample ID	Contaminant	IEPA Standard	IEPA Limit	Detected Level[1]	% of Standard
Soil @ 79+55' Below Pipe	Dibenzofuran	Class II	15,000	17,000	113%
Exterior Pipe Crust A 71+50/7'	Benzo[a]pyrene	Ingestion	17,000	350,000	2,059%
Soil @ 79+55' Below Pipe	Benzo[a]pyrene	Ingestion	17,000	54,000	318%
Exterior Pipe Crust A 71+50/7'	Benzo[b]fluoranthene	Ingestion	170,000	430,000	253%
Exterior Pipe Crust A 71+50/7'	Benzo[a]anthracene	Ingestion	170,000	390,000	229%
Exterior Pipe Crust 78+95+4E/4'	Benzo[a]pyrene	Ingestion	17,000	26,000	153%
Soil @ 79+55' Below Pipe	Naphthalene	Inhalation	1,800	33,000	1,833%
71+56/5'	Naphthalene	Inhalation	1,800	7,400	411%
Exterior Pipe Crust 78+95+4E/4'	Naphthalene	Inhalation	1,800	6,800	378%
Exterior Pipe Crust A 71+50/7'	Naphthalene	Inhalation	1,800	4,200	233%
James Park GMP10	Methane	Methane	2.5%	99.3%	3,972%
James Park GMP11	Methane	Methane	2.5%	98.9%	3,956%
James Park GMP1	Methane	Methane	2.5%	95%	3,800%
James Park GMP8	Methane	Methane	2.5%	91%	3,640%
James Park GMP4	Methane	Methane	2.5%	90.1%	3,604%
James Park GMP19A (Dawes School)	Methane	Methane	2.5%	85.67%	3,427%
James Park GMP13	Methane	Methane	2.5%	42.1%	1,684%
James Park GMP9	Methane	Methane	2.5%	38%	1,520%
James Park GMP5	Methane	Methane	2.5%	25.1%	1,004%
James Park GMP16	Methane	Methane	2.5%	24.5%	980%
James Park GMP12	Methane	Methane	2.5%	20.7%	828%
James Park GMP19 (Dawes School)	Methane	Methane	2.5%	7.4%	296%
James Park GMP17 (James Park Landfill)	Methane	Methane	2.5%	5.3%	212%
James Park GMP14	Methane	Methane	2.5%	3.5%	140%
James Park GMP20	Methane	Methane	2.5%	2.8%	112%

Table 2. Photographic Log of Sample Locations
James Park, Dodge Avenue, Evanston, Illinois
SCS Engineers Project #25214107

Photo 9: The "Pipe Crust 81+75" sample was collected on 7/28/15 at 11:20 a.m. from a depth of 5 feet. This sample was associated with an unmarked, approx. Eight-inch-outer-diameter pipe heading E-W across the water main trench along the eastern side of Dodge Avenue. The sample consisted of black pipe crust scraped from the underside of the unmarked pipe. This photo shows the unmarked, roughly 8-in steel pipe. Crust was collected from the side and underside of this 8" pipe (see red arrow). Photo facing south. By Kollasch.

Table 2. Photographic Log of Sample Locations
James Park, Dodge Avenue, Evanston, Illinois
SCS Engineers Project #25214107

Photo 11: The "Pipe Crust @ 79+55'" sample was collected on 7/30/15 at 10:10 a.m. from a depth of 4 feet. This sample was associated with a 12-inch, cast iron, 1951, gas main abandoned in 2014 and heading W-NW across Dodge Avenue. The sample consisted of pipe crust adhering to the exterior of the unmarked pipe. This photo shows the 12-inch steel pipe with a ¾-inch "insulated" pipe protruding from it and angling toward the residences on the E side of Dodge (this pipe is spray-painted pink). Crust collected from underside of this 12-inch pipe (see red arrow). Photo facing west. By Grover.

Table 2. Photographic Log of Sample Locations
James Park, Dodge Avenue, Evanston, Illinois
SCS Engineers Project #25214107

Photo 33: Sample "Inside Water Pipe D+O" was collected on 8/6/15 at 13:54 at a depth of 7 feet. This sample was associated with a 10-inch-diameter N-S water main (now abandoned) running down the middle of Dodge Avenue. The pipe segment removed on 7/24/15 from Station 84+45 at Dodge and Oakton was re-sampled at the City of Evanston Water Department at 555 Lincoln Street on 8/6/15. Sample consisted of pipe crust scraped from inside the middle section of the stored pipe segment. This photo shows the pipe crust on 7/31/15. By Grover.

Table 2. Photographic Log of Sample Locations
James Park, Dodge Avenue, Evanston, Illinois
SCS Engineers Project #25214107

Photo 50: Sample "Exterior pipe crust 78+95+4E/4"" was collected at 8/12/15 at 13:00 from a depth of 4 feet. Sample was associated with an unidentified, 24-inch-diameter, metal, N-S pipe 4 feet E of W side of Dodge. Sample consisted of crust collected from the west side of the 24-inch pipe (see red arrow). Photo shows the 24-inch pipe, between the worker and excavator, traversing the E-W excavation for the Dawes School 2-inch supply lateral. Pipe surrounded by brown sand fill. Photo facing east. By Kramer.

Table 2. Photographic Log of Sample Locations
James Park, Dodge Avenue, Evanston, Illinois
SCS Engineers Project #25214107

Photo 56: Sample "Exterior Pipe Crust A 78+10/7"" was collected on 8/19/15 at 11:20 from a depth of 7 feet. Sample is associated with an 8-inch-diameter, E-W water main on Kirk Street near intersection with Dodge. Sample consists of dark, clayey crust scraped from the exterior of the main (see red arrow). Photo facing south-southeast. By Kramer.

Table 2. Photographic Log of Sample Locations
James Park, Dodge Avenue, Evanston, Illinois
SCS Engineers Project #25214107

Photo 60: Sample "Exterior Pipe Crust 71+50/7"' was collected on 8/20/15 at 9:30 from a depth of 7 feet. Sample is associated with a 10-inch diameter, N-S, water main down center of Dodge (now abandoned). Sample consists of crust scraped from the main (see red arrow). Photo shows encrusted pipe laying in angled trench at Mulford and Dodge. Photo facing south. By Kramer.

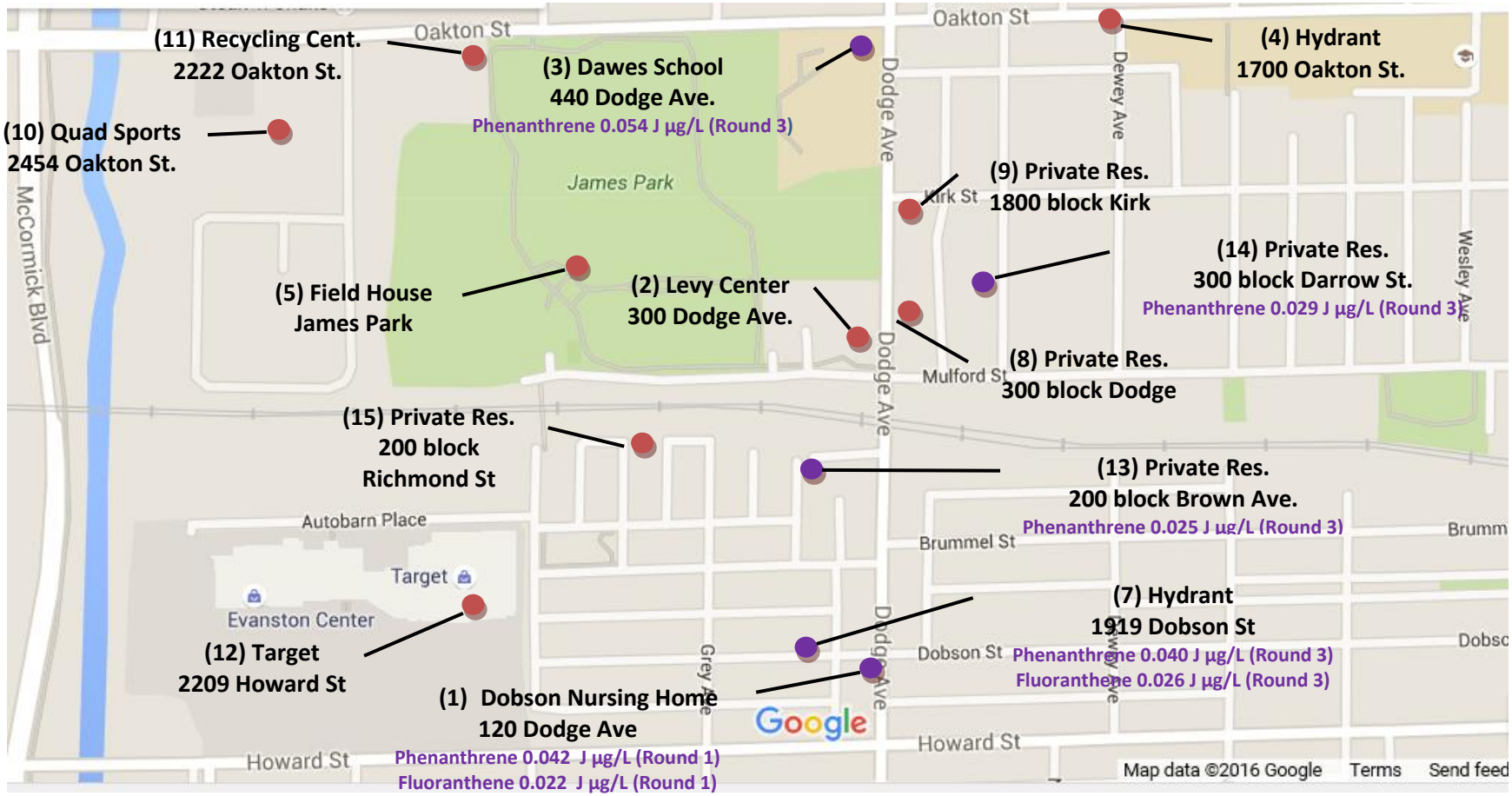
Table 2. Photographic Log of Sample Locations
James Park, Dodge Avenue, Evanston, Illinois
SCS Engineers Project #25214107

Photo 64: Sample "Exterior Pipe Crust A 71+50/7'" was collected on 8/20/15 at 12:40 from a depth of 7 feet. Sample is associated with a pipe joint on the 10-inch-diameter, N-S water main down center of Dodge (now abandoned). Sample consisted of a crust sample scraped from the male portion of a pipe joint. Photo shows a black crust right of the connecting flange and rubber gasket (red arrow). The black section of the pipe is the part that extended inside the adjoining pipe. Photo facing south. By Kramer.

EXHIBIT 2

SVOC DETECTIONS IN DRINKING WATER FROM THE JAMES PARK VICINITY

This maps shows semi-volatile organic compounds (SVOCs) associated with coal tar that were detected near James Park



Notes:

1) All of the concentrations are reported in micrograms per liter (µg/L), parts per billion (ppb)
2) There are Illinois EPA (IEPA) Class I Potable Water Standards 35 IAC 620.441 for Fluoranthrene (280 ppb) and Phenanthrene (210 ppb) that are used to compare results of the water testing results. The water testing results shown are significantly (99.9%) below the referenced standards.

TABLE 1: Coal Tar SVOC detections in Rounds 1, 2 and 3			
Sample Station	**Station Name**	**Station Address**	**Coal Tar SVOCs Detected**
1	Dobson Plaza Nursing Home	120 Dodge	Phenanthrene 0.042 µg/L J (Round 1) Fluoranthene 0.022 µg/L J (Round 1) Phenanthrene 0.042 µg/L J H (Round 2) Fluoranthene 0.029 µg/L J H (Round 2)
2	Levy Senior Center	300 Dodge	NONE DETECTED
3	Dawes School	440 Dodge	Phenanthrene 0.054 µg/L J (Round 3)
4	Hydrant at SW corner	Dewey & Oakton	NONE DETECTED
5	Hydrant N of Field House	James Park, Field House	NONE DETECTED
6	Background Location	2603 Sheridan	NONE DETECTED
7	Hydrant	1919 Dobson	Phenanthrene 0.040 µg/L J (Round 3) Fluoranthene 0.026 µg/L J (Round 3)
8	Private Residence	300 block Dodge	NONE DETECTED
9	Private Residence	1800 block Kirk	NONE DETECTED
10	Quad Indoor Sports	2454 Oakton	NONE DETECTED
11	Recycling Center	2222 Oakton	NONE DETECTED
12	Target Store	2209 Howard	NONE DETECTED
13	Private Residence	200 block Brown	Phenanthrene 0.025 µg/L J (Round 3)
14	Private Residence	300 block Darrow	Phenanthrene 0.029 µg/L J (Round 3)
15	Private Residence	200 block Richmond	NONE DETECTED

Methodology

The following notes explain Tables 1-4 containing the Round 1, 2 and 3 Sampling Data.

1. Sample Round 1 was conducted on 9/4/15 and included stations 1, 2, 3, 4, 5, and 6. Sample Round 2 was conducted on 10/6/15 and included stations 1 and 7. Sample Round 3 was conducted on July 12th and 13th and included stations 1 through 15.
2. All of the concentrations are reported in micrograms per liter (µg/L), parts per billion (ppb).
3. The Background Sampling Station (Station 6), located at 2603 Sheridan, is not located in the vicinity of James Park. Station 6 is 3.9 miles NNE of James Park.
4. The letter "J" following the concentration means that the result is less than the reporting limit but greater than or equal to the method detection limit. The method detection limit is the outer limit of the ability of laboratory instrument to detect a compound such as Fluoranthene and Phenanthrene. The report limit is level at which the compound is consistently detected by the laboratory equipment, reflecting a 95% level of confidence the compound is present, and that the concentration is therefore an approximate value.
5. The letter "H" following the concentration means the sample was prepared or analyzed beyond the specified holding time. For the semi-volatile organic compounds, such as Fluoranthene and Phenanthrene, this should not matter because these SVOC compounds are relatively resistant to bacterial degradation.
6. Two samples were collected at each station for each sample round; an early sample prior to flushing for 7 minutes, and a late sample after flushing. The VOC analyses shown in this table were taken from the late samples because they best represent the chemical conditions within the city's water distribution system. The SVOC detections, because there were so few of them, include both the early and late sample analyses. By way of example, sample "Round 3-7E"in Tab 3 of the TestAmerica Reports (Sample Summary) refers to the early sample collected at sample location 7 during Round 3.