

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

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

**PLAINTIFF'S MEMORANDUM IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION**

December 1, 2017

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INTRODUCTION

For decades, the Defendant Utilities manufactured gas at a plant on the border with Plaintiff, the City of Evanston, distributing that gas via pipelines buried, among other places, very near where the City's James Park now sits. While the Utilities obtained a "No Further Remediation" letter for the gas plant in Skokie (the "Skokie MGP") from the Illinois EPA, they left their defunct Evanston distribution pipelines (the "NIGC Pipelines") in the ground to decay. As a result, hazardous byproducts of the gas manufacturing process ("MG Waste Oils") that condensed within the pipelines have leaked from those pipelines, contaminated the soil, traveled down to the City's municipal water lines, and encrusted those water lines—both inside and out—with a black crust that potentially endangers human health. What is more, the hazardous MG Waste Oils that did not encrust the City's drinking water lines traveled farther down through the soil toward bedrock, where they decomposed and left a hazardous deposit of methane now trapped at high pressure, further potentially endangering human health, should the methane be unexpectedly released or make its way upward.

The City made the foregoing determinations after years of study and at significant expense, with the aid of independent experts. The City approached the Utilities on three separate occasions (most recently on November 9) and asked them to work with the City to investigate and remediate the contamination caused by their MG Waste Oils, but the Utilities rejected those entreaties. Thus, because the Utilities are unwilling to take responsibility for the contamination emanating from their pipelines, the City now seeks relief from this Court. The City asks the Court to enter a preliminary injunction requiring the Utilities to:

- 1) Investigate and identify the location of the NIGC Pipelines throughout the City;
- 2) Determine the extent of contamination caused by leakage of MG Waste Oils from the NIGC Pipelines, including identify the locations (a) where MG Waste Oils have

penetrated or threaten to penetrate the City's Dodge Avenue Water Line, (b) where MG Waste Oils have degraded, or threaten to degrade, into methane, and (c) where MG Waste Oils may endanger construction and utility workers who enter excavations in and along Oakton Street, Dodge Avenue and other locations in the City; and

- 3) Develop a remedial action plan to address the contamination.

The City's motion for preliminary injunction focuses on three ways the escape of MG Waste Oils from the Utilities' pipelines may endanger human health, not to mention the ways such waste may endanger the environment: (1) the MG Waste Oils around, on and inside the Dodge Avenue Water Line (in the form of a black crust) can release contaminants, including benzo(a)pyrene or BaP, into the City's drinking water at concentrations exceeding the Maximum Contaminant Level (MCL) established under the Safe Drinking Water Act; (2) methane, produced by the degradation of the fugitive MG Waste Oils, can cause death or serious bodily injury by explosion or asphyxiation; and (3) utility and construction workers, including employees of the Utilities and City who frequently work in excavations in Dodge Avenue and Oakton Street, may be exposed to dangerous concentrations of the hazardous MG Waste Oils.¹

As discussed below, the City is likely to succeed on the merits of its Resource Conservation and Recovery Act ("RCRA") claim, and the balance of harms weighs heavily in favor of protecting human health. For purposes of obtaining a preliminary injunction under RCRA, the evidence more than sufficiently demonstrates (1) that the Utilities are "past or present generator[s], past or present transporter[s], or past or present owner[s] or operator[s] of a treatment, storage, or disposal facility;" (2) that they have "contributed" to the handling of a solid or hazardous waste; and (3) that the waste "may present an imminent and substantial danger to health or the environment." *City of Evanston v. Northern Illinois Gas Co.*, 229 F. Supp.

¹ By focusing on these endangerments now, the City does not waive claims that the MG Waste Oils may present other endangerments, such as off-gases that may endanger indoor and outdoor air quality.

3d 714, 720-21 (N.D. Ill. 2017) (quoting 42 U.S.C. § 6972(a)(1)(B)). A preliminary injunction should accordingly issue.

FACTUAL BACKGROUND

Between 2013 and 2015, the City became aware that there were both oily residues and highly concentrated and pressurized methane accumulations at various places around James Park.² The City subsequently engaged SCS Engineers, and later Mark W. LeChevallier, Ph.D., to investigate, prepare reports on their investigations and findings, and assist in resolving technical issues regarding the MG Waste Oils found in and around James Park and the threat to human health presented by the leaked MG Waste Oils and resulting black crust and methane. As further detailed below and in their reports, SCS and LeChevallier have determined:

- The NIGC Pipelines were connected to, and distributed the gas manufactured at, the Skokie MGP;
- Condensate that formed from MG Waste Oils entrained in the manufactured gas leaked from NIGC Pipelines in and around the City's James Park, a community space that includes recreation facilities, a senior center, and an elementary school;
- Leakage of MG Waste Oils from the NIGC Pipelines also extends along Oakton Street (adjacent to James Park) and along Dodge Avenue from Howard Street north to Lee Street, and, because the exact location of the NIGC Pipelines throughout the City is unknown, very likely at other unknown locations;
- Leakage of MG Waste Oils from the NIGC Pipelines caused a black crust to form around, on and inside the Dodge Avenue Water Line, which is a portion of the City's drinking water infrastructure; and
- The presence of methane at high concentration and pressure in and around James Park is the result of degradation of MG Waste Oils that leaked from the NIGC Pipelines.

The City's consultants investigated the contaminations at the Park via, among other things, borings, gas monitoring probes, and laboratory analyses, as well as a review of literature

² 2015 SCS Report, App. Ex. 3, at 2; *see also* Executive Summary to the 2017 SCS Engineers Report, 2017 SCS Report, App. Ex. 5, at vii-ix. Citations to "App. Ex. ___" are to the Appendix of Exhibits filed in support of the City's Motion for Preliminary Injunction.

relating to naturally-occurring petroleum and methane, and by considering prior investigations of nearby properties by the Metropolitan Water Reclamation District of Greater Chicago and the Utilities. (2015 SCS Report, App. Ex. 3, at 2-4.) Part of the investigation included sampling and testing an “encrusted material” (the “Black Crust”) found on the City’s drinking water infrastructure “at the corner of Dodge and Mulford Street.” (*Id.* at 3.) In January 2015, the City’s consultants identified the Skokie MGP and its associated pipelines as a potential source of the contaminants found in James Park. (*Id.* at 12-18.) The City’s consultants also ruled out a number of other potential sources. (*Id.* at 9-12, 18-19, 21-29.)

After issuing the 2015 SCS Report, the City’s consultants continued to investigate the contaminants found in James Park, including the Black Crust found around, on and inside the City’s drinking water infrastructure. They determined the City’s Dodge Avenue Water Line was “encrusted with several inches of a hard, black material which exhibited a hydrocarbon-like odor.” (2016 SCS Report, App. Ex. 4, at 2.) In February 2016, as part of their ongoing work, the City’s consultants provided another report on their field and laboratory investigations in James Park. Among other things, they noted that “hard, black pipe crusts are reportedly common on water mains” around James Park, a sample of the black crust had “a variety of polynuclear aromatic hydrocarbons (PAHs),” and those PAHs “are similar to those found in the coal tar wastes generated by manufactured gas plants.” (*Id.*) The City’s consultants noted in their report the presence of two, then-unidentified pipelines in the vicinity—each suspected of being associated with the Skokie MGP, and one of which exhibited “a hydrocarbon odor” and “photoionization detector (PID) readings indicat[ing] the presence of [volatile organic compounds, or] VOCs,” along with “an oily liquid form[ing] a small puddle” in the vicinity of the pipe. (*Id.* at 8-9.) Documents later confirmed these pipelines were “connected to, and a

principal element of, the Gas Distribution Infrastructure connected to the Skokie MGP” (hereinafter “NIGC Pipelines”). (2017 SCS Report, App. Ex. 5, at 2, Figures 2-3, Appendix A.)

The City directed its consultants to investigate whether the NIGC Pipelines were the source of the MG Waste Oils and methane gas detected in James Park. The City’s consultants performed additional field, laboratory and literature investigations, leading to several factual findings as to the NIGC Pipelines observed to date, and five key conclusions:

- *First*, the NIGC Pipelines were “an original, integral, and important part of the Distribution Infrastructure for the Skokie MGP.” This conclusion is in part based on historical drawings tracing the locations of the NIGC Pipelines from the Skokie MGP to where they were located in the field. (2017 SCS Report, App. Ex. 5, at 13-14, Figure 3 & Appendix A.)
- *Second*, the NIGC Pipelines “contain remnant materials consistent with two phases of MG Waste Oils in the pipelines that existed throughout the operation of the pipeline.” (*Id.* at 14-15.)
 - The first phase is “condensate that formed primarily on the top and sides of the pipeline” as manufactured gas cooled while traveling through the pipeline and away from the Skokie MGP. (2017 SCS Report at 14.) This conclusion is based on the presence of “elongated, rounded, spherical-shaped droplets” that are known to be found in distribution infrastructure attached to manufactured gas plants, and that exhibited “significant concentrations of all the chemicals normally associated with MG Waste Oils.” (*Id.* at 15-16, Figures 4 & 10 & Tables 1-2.)
 - The second phase is “sediment on the bottom of the pipeline that resulted as the condensate ... dropped from gravity forces during operation of the pipeline.” (*Id.* at 14.) This conclusion is based on the presence of “dark brown or black” sediment that “appeared to have a high gloss appearance” and exhibited “significant concentrations of all of the chemicals normally associated with MG Waste Oils.” (*Id.* at 17, Figure 11, Tables 1-2.)
- *Third*, the NIGC Pipelines leaked MG Waste Oils “into the underlying geologic media,” *i.e.*, onto and into the soils underlying the NIGC Pipelines. (*Id.* at 17.)
 - This conclusion is based on the fact that “joints throughout the length of the pipelines ... had experienced some degree of separation, degradation and failure,” which resulted in “leaked fluids from the interior of the pipe onto soils beneath the pipes[.]” (*Id.* at 17-18, Figures 5, 6 & 12, Appendix C.)

- The conclusion that MG Waste Oils were released into the soils underlying the NIGC Pipelines is further based on the presence of “discolored areas” beneath the pipelines, exhibiting “chemicals similar to those found in the sediment samples taken from the interior of” the NIGC Pipelines and “similar to those chemicals typically occurring in MG Waste Oils.” These releases occurred not only where the NIGC Pipelines were excavated, but likely also “at numerous other joints in” the NIGC Pipelines where video evidence “showed separation of joints in the pipelines.” (*Id.* at 18-19, Figures 4 & 7, Tables 1-2 & 5.)
- *Fourth*, “[t]he crust on the inside and outside of the Dodge Avenue Water Lines” beneath the NIGC Pipelines “represents MG Waste Oils that migrated to the Water Lines as a result of leakage from” the NIGC Pipelines. (*Id.* at 19.) This conclusion is based on, *inter alia*, “comparisons of the chemistry of the MG Waste Oils found during the 2015, 2016, and 2017” investigations, including in “the crust material found on the Water Line at th[at] location,” with “the typical chemistry of MG Waste Oils found at the Skokie MGP and with constituents of coal tar typical of other MGP sites.” (*Id.* at 19, Figure 4, Tables 1-2 and 5, Appendix B.)
- *Fifth*, “the contamination found in the deeper soils and bedrock” in at least two locations within James Park is “a result of leakage of MG Waste Oils from” the NIGC Pipelines “close to [those] locations.” (*Id.* at 21.) This conclusion is based on a comparison of gas chromatography-mass spectrometry (“GC-MS”) testing of “visually contaminated water and bedrock samples” against the same testing on “a sample of sediment containing the MG Waste Oils obtained from” the NIGC Pipelines, which showed “essentially the same” range of molecular weights. (*Id.* at 20-21, Figures 8, 13-14, Appendix E.) Similar testing showed that “samples collected from investigations at the intersection of Oakton Street and Dodge Avenue” were “completely consistent with the raw fuel product used at the Skokie MGP.” (*Id.* at 21 & Figure 15.) The conclusion is further bolstered by the fact that the MG Waste Oils were encountered “within a distance the MG Waste Oils could be expected to travel during the time of operation of” the NIGC Pipelines. (*Id.* at 20 & n.7.)

The City’s consultants concluded that “the source of MG Waste Oils and methane in the area in and around the intersection of Dodge Avenue and Oakton Street is the long term leakage and release of MG Waste Oils from” the NIGC Pipelines. (2017 SCS Report, App. Ex. 5, at 25.)³

³ The City’s consultants also addressed why the James Park Landfill is not a source of the contaminations at issue: (i) drilling samples through the landfill itself demonstrated that the landfill does not contain the “chemical constituents of waste oil materials” found closest to the landfill, (ii) methane discovered in the landfill itself was concentrated at five percent or less, whereas methane discovered elsewhere in the park was at substantially greater concentrations (80.5 to 88.8 percent), and (iii) available documents “confirm that non-putrescible waste,” as opposed to waste that would generate the contaminations at issue here, “was disposed in the James Park Landfill.” (2017 SCS Report, App. Ex. 5, at 22-23, Figure 2, Appendices G-H.)

In follow-up to the 2017 SCS Report, SCS prepared a Preliminary Assessment of Risk of the Manufactured Gas Waste Oils and Methane in the James Park Area (the “2017 SCS PAR,” App. Ex. 6). The purpose of the Preliminary Assessment of Risk is to, first, “[i]dentify and preliminarily assess primary human health risks associated with the presence of MG Waste Oils, Black Crust and methane in the James Park Area” and, second, “recommend additional efforts needed to perform a Risk Assessment ... and propose a [corrective action] plan to mitigate the risks as necessary.” (2017 SCS PAR, App. Ex. 6, Section 1.2, Purpose.)

SCS identified three primary health risks (2017 SCS PAR, Section 3.1):

- *First*, benzo(a)pyrene (BaP) “was detected in the Black Crust inside of the Water Lines at concentrations from 130 ppb to 12,000 ppb,” concentrations which exceed the maximum contaminant limit (MCL) established under the federal Safe Drinking Water Act MCL “by 1,000 to 60,000 times.” (*Id.* Section 4.1.1, Comparison to MCLs.)
 - The Black Crust inside the Water lines is friable, *i.e.*, subject to crumbling and washing away. *See, e.g., Id.* Figure 4, Photograph 33, showing the friable Black Crust inside the Dodge Avenue Water Line (also attached as Exhibit A to this Memorandum).
 - “At these elevated concentrations, and considering the friable form, quantity and distribution of the Black Crust found in the Water Lines, it is reasonably foreseeable that BaP constituents will be released into the potable water in the Water Lines at concentrations exceeding the MCL for benzo(a)pyrene (0.2 ppb) and other hazardous constituents of MG Waste Oils.” (*Id.* Section 4.1.1.)
 - The exceedance of the MCL “could occur under normal Water Line operating conditions and the likelihood would increase” during such foreseeable conditions as vibrations (such as from vehicle or railway traffic), opening and closing of valves, increases in water demand, and water main breaks. (*Id.*)
 - “The presence of MG Waste Oils, in the form of friable Black Crust, inside a public water supply line is unprecedented.” (*Id.* Section 4.1.2.) “The closest standard that could be found to make a relatively conservative Preliminary Assessment of Risk for this situation is the standard established by [the Illinois Environmental Protection Agency] under [its Tiered Approach to Corrective Action regulation] for contaminants in soil that may migrate and reach groundwater used as a potable water supply.” (*Id.* (emphasis added).) The concentration of BaP in Black Crust inside the Water Line and in contact with potable water (12,000 ppb) exceeds this standard by a factor of 1.5. (*Id.*)

- *Second*, “[m]ethane has been documented at high pressure ... and high concentration ... in the upper zones of bedrock and granular soils on top of the bedrock” in and around James Park. (*Id.* Section 2.3.) Methane is produced by the decomposition of the MG Waste Oils that leaked from the NIGC Pipelines. (*Id.*)
 - As a result, Dawes Elementary School and Levy Senior Center at the Park, and other “buildings and structures throughout the City where the NIGC Pipeline is present” are susceptible to methane migration and penetration. (*Id.* Section 4.2 & Figure 2.)
 - Just such an accidental encounter of methane at high pressure and concentration has already occurred at the Metropolitan Water Reclamation District of Greater Chicago plant near James Park. (*Id.* Section 4.2.)
- *Third*, “[t]he presence of MG Waste Oil in the soil and bedrock, methane in soil and Black Crust on the Water Lines presents a risk to construction and utility workers and others that may be performing work that exposes them to MG Waste Oil constituents and methane.” (*Id.* Section 4.3, Worker Safety.)

The City also engaged Dr. LeChevallier to consider two topics: (a) intrusion of contaminants, such as MG Waste Oils, into pressurized water pipelines, and (b) the risk MG Waste Oils, once inside the Dodge Avenue Water Line, presents to water quality. LeChevallier explains that not-uncommon pressure transients in water lines (resulting from rapid change in flow velocity due to, *e.g.*, valve closures or water main breaks) suck in contaminants near the surface of a water pipe, such as the Black Crust coating the Dodge Avenue Water Line. (LeChevallier Report, App. Ex. 7, at 1-3.) LeChevallier concurs that the conditions discussed in Section 4.1.1 of the 2017 SCS PAR will likely cause the hazardous Black Crust inside the Dodge Avenue Water Line to “scour” and “scale” off into the City’s water supply, as depicted in Exhibit B hereto,⁴ and thus “pose a public health threat to water customers.” (*Id.* at 6.)

Given the endangerment the MG Waste Oils, Black Crust and methane may present to human health, SCS recommends the Utilities (a) identify the locations of the NIGC Pipelines

⁴ Exhibit B, prepared by the City’s experts, shows how scouring and scaling can cause release of the Black Crust and the contaminants contained therein, including BaP, at concentrations exceeding the MCL.

throughout the City, (b) investigate the extent of contamination caused by leakage of MG Waste Oils from the NIGC Pipelines, (c) assess the risk such contamination presents to human health (a Risk Assessment), and (d) prepare a plan to remediate such contamination (a Remedial Action Plan). (2017 SCS PAR, App. Ex. 6, Section 5.2, Recommendations.) Dr. LeChevallier concurs a Risk Assessment is necessary with respect to the threat the MG Wastes and Black Crust pose to human health. (LeChevallier Report, App. Ex. 7, Recommendations for the Future.)

The City shared its environmental investigation reports with the Utilities after each was prepared and, on November 9, informed them of SCS's conclusions regarding the risk posed to human health by the MG Waste Oils, Black Crust and methane. In each instance, the City asked the Utilities to cooperate in investigating the nature and extent of the Utilities' contaminations. The Utilities refused and, offering no response to the 2015, 2016 and 2017 SCS Reports, deny the source of the contamination is leakage of MG Waste Oils from their pipelines. As a result, the City has no choice but to seek this Court's intervention now.

APPLICABLE STANDARD

RCRA expressly authorizes the Court to both "'restrain' a responsible party from further violating RCRA," and "order[] a responsible party to 'take action' by attending to the cleanup and proper disposal of toxic waste." *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 484 (1996) (citing 42 U.S.C. § 6972(a)(1)(B)). The City asks the Court to order the Utilities to take action by investigating the full nature and extent of their contamination, and designing a remedial action plan to address such contamination.

To establish its entitlement to this relief, the City herein demonstrates "(1) that its case has 'some likelihood of success on the merits,' and (2) that it has 'no adequate remedy at law and will suffer irreparable harm if a preliminary injunction is denied.'" *Deckers Outdoor Corp. v.*

Does I-100, 2013 WL 169998, *1 (N.D. Ill. Jan. 16, 2013) (quoting *Ezell v. City of Chicago*, 651 F.3d 684, 694 (7th Cir. 2011)); *see also Tuf-Tite, Inc. v. Fed. Package Networks, Inc.*, 2014 WL 6613116, *2 (N.D. Ill. Nov. 21, 2014) (citing *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the USA, Inc.*, 549 F.3d 1079, 1085-86 (7th Cir. 2008)). The City then proceeds to “demonstrate that its harm in the absence of [an injunction] outweighs any harm that may be suffered by the [Utilities] if the injunction is granted.” *Tuf-Tite*, 2014 WL 6613116, at *2-3 (citing *Girl Scouts of Manitou*, 549 F.3d at 1086). Where, as here, the plaintiff is a unit of government “and is seeking to protect the public interest . . . the Court’s equitable powers are even broader and more flexible than if only private parties were seeking relief.” *US v. Cinergy Corp.*, 582 F. Supp. 2d 1055, 1060 (S.D. Ind. 2008) (citing *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946)); *see also U.S. v. Bethlehem Steel*, 38 F.3d 862, 868 (7th Cir. 1994) (there is “a lesser need” to balance equities where “the activity in question is the underground disposal of a characteristic hazardous waste”).

The decision whether to grant the City’s request for preliminary injunction falls within this Court’s discretion. *Tuf-Tite*, 2014 WL 6613116, at *2-3 (quoting *Girl Scouts of Manitou*, 549 F.3d at 1086). In exercising its discretionary power, the Court should bear in mind that “[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment.” *Amoco Prod. Co. v. Village of Gambell, Inc.*, 480 U.S. 531, 545 (1987); *see also EPA v. Environmental Waste Control*, 917 F.2d 327, 332 (7th Cir. 1990).

ARGUMENT

A. The City is likely to succeed on the merits of its RCRA claim.

As this Court has explained, the City must ultimately demonstrate that (1) the Utilities are “past or present generator[s], past or present transporter[s], or past or present owner[s] or operator[s] of a treatment, storage, or disposal facility”; (2) they have “contributed” to the handling of a solid or hazardous waste; and (3) the waste “may present an imminent and substantial danger to health or the environment.” *City of Evanston*, 229 F. Supp. 3d at 720-21 (quoting RCRA § 6972(a)(1)(B) and collecting cases). For present purposes, the City can certainly show “that it has some likelihood of succeeding on the merits of its claim.” *Tuf-Tite*, 2014 WL 6613116, at *3.

1. The Utilities are past generators, transporters, owners and operators of a treatment, storage or disposal facility.

The Utilities either have admitted, or must concede, that they owned and operated the Skokie MGP and NIGC Pipelines from which the MG Waste Oils leaked. ComEd admits that it owned the Skokie MGP in its Answer. (ComEd Answer, Dkt. #46, ¶ 9.) Both Utilities admit the veracity of a Final Allocation Agreement (“FAA”) establishing that both Utilities owned and operated the Skokie MGP. (*See* ComEd Answer, Dkt. #46, ¶ 10 & Nicor Answer, Dkt. #45, ¶ 10 (admitting certain MGP sites were transferred from ComEd to Nicor through the General Conveyance); ComEd Answer, Dkt. #46, ¶ 30 & Nicor Answer, Dkt. #45, ¶ 30 (admitting the authenticity of the Final Allocation Agreement, attached to the City’s Complaint as Exhibit D).)⁵

⁵ Because Nicor refused to admit the basic fact that it owned and operated the Skokie MGP, the City explains for convenience: Attachment A to the Final Allocation Agreement (PageID #72-73) lists 24 sites, including the Skokie MGP, for which the Utilities agreed to split remediation expenses 51.73% (ComEd) / 48.27% (Nicor), as set forth in Section 2.1 of the FAA (PageID #65). As set forth in Paragraph 10 of the ICC Petition jointly submitted by the Utilities, that division of responsibility applies to “sites that had been transferred to Nicor Gas pursuant to the 1954 General Conveyance” referred to in Paragraph 9 of ComEd’s Answer. (PageID #59.)

The City also obtained documents tracing the NIGC Pipelines back to the Skokie MGP. (2017 SCS Report, App. Ex. 5, at 13-14, Figure 3, § 5.1, Conclusion No. 1 & Appendix A.)

2. *The Utilities contributed to the handling, storage, transportation, and disposal of hazardous and solid wastes.*

The Utilities also “contributed or [are] contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste[.]” *City of Evanston*, 229 F. Supp. 3d at 720 (quoting 42 U.S.C. § 6972(a)(1)(B)). RCRA defines many of these terms. *See* 42 U.S.C. §§ 6903(5) (defining “hazardous waste”), 6903(27) (defining “solid waste”), 6903(3) (defining “disposal”), 6903(33) (defining “storage”). The others—terms like “handling” and “transportation”—are easily understood.

MG Waste Oils are solid and hazardous wastes. As discussed above in the Factual Background, MG Waste Oils are a condensate from the gas manufactured at the Skokie MGP and distributed through the NIGC Pipelines, making them solid wastes when the Oils leak from the NIGC Pipelines into the environment. *See* 42 U.S.C. § 6903(3) (disposal includes leakage); *City of Evanston*, 229 F. Supp. 3d at 718 (same); 2017 SCS Report, App. Ex. 5, § 5.1, Conclusion Nos. 2 and 3 (MG Waste Oils leaked from NIGC Pipelines). Moreover, the MG Waste Oils inside the NIGC Pipelines are solid wastes because the Pipelines have been abandoned by the Utilities. *See* 42 U.S.C. § 6903(27) (solid waste includes discarded material); 2017 SCS Report, App. Ex. 5, Appendix A-1, 1969 Drawing, Sheet 4 of 4 (Notation “Used Concrete to Block Cap and Seal Old C. I. Pipe” in Oakton Street); *id.* § 3.1.1, ¶ 3 (Nicor staff tapped the abandoned NIGC Pipelines). Indeed, not only have the NIGC Pipelines been abandoned, the Utilities apparently lost the NIGC Pipelines in Oakton Street and Dodge Avenue until they were found by the City. Other sections of the abandoned NIGC Pipelines likewise remain lost. MG Waste Oils are also hazardous wastes because (1) they are presumptively

hazardous under Illinois law as “manufactured gas plant waste” (415 ILCS 5/22.40a),⁶ and, as demonstrated by the SCS and LeChevallier reports, (2) they may pose an imminent and substantial threat to human health and the environment.

3. *MG Waste Oils may present an imminent and substantial endangerment to health or the environment.*

While the threat posed by the Utilities’ MG Waste Oils is well documented and substantiated, RCRA’s endangerment section “is ‘intended to confer upon the courts the authority to eliminate any risks posed by toxic wastes,’” and courts should “‘recogniz[e] that risk may be assessed from suspected, but not completely substantiated, relationships between imperfect data, or from probative preliminary data not yet certifiable as fact.’” *Interfaith Community Organization v. Honeywell Int’l, Inc.*, 399 F.3d 248, 260 (3d Cir. 2005) (quoting legislative history). Accordingly, “‘if an error is to be made in applying the endangerment standard, the error must be made in favor of protecting public health, welfare and the environment.’” *Id.* at 259 (citation omitted). Thus, “[p]roof of contamination in excess of state standards may support a finding of liability, and may alone suffice for liability in some cases,” but the fact that a particular contamination has not exceeded state standards yet is not fatal to a RCRA claim. *Id.* at 261.

The year after the Third Circuit decided *Interfaith*, the First Circuit joined it in *Maine People’s Alliance v. Mallinckrodt, Inc.*, stating:

Correctly interpreted, [RCRA § 6972(a)(1)(B)] allows citizen suits when there is a reasonable prospect that a serious, near-term threat to human health or the environment exists.... It is the threat that must be close at hand, even if the

⁶ The constituents in MG Wastes Oils listed in the 2016 and 2017 SCS Reports and PAR, including BaP, are hazardous substances. 40 C.F.R. § 302.4. The EPA has established an MCL of 0.2 ppb for BaP under the Safe Drinking Water Act. *See* 40 C.F.R. § 141.61 (MCL for BaP 0.2 ppb); *see also* 35 Ill. Admin. Code § 611.311 (MCL for BaP 0.2 ppb); Toxicological Review of Benzo[a]pyrene, United States Environmental Protection Agency, Pub. No. CASRN 50-32-8 (Jan. 2017), available at https://cfpub.epa.gov/ncea/iris/iris_documents/documents/toxreviews/0136tr.pdf (visited Nov. 30, 2017).

perceived harm is not. For example, if there is a reasonable prospect that a carcinogen released into the environment today may cause cancer twenty years hence, the threat is near-term even though the perceived harm will only occur in the distant future.... To sum up, the combination of the word ‘may’ with the word ‘endanger,’ both of which are probabilistic, leads us to conclude that a reasonable prospect of future harm is adequate to engage the gears of RCRA....

471 F.3d 277, 279 & n.1, 296 (1st Cir. 2006).

Precedent from the Seventh Circuit—and the law of this case—holds the same. As this Court explained in denying the Utilities’ motion to dismiss, “a plaintiff bringing a RCRA endangerment claim need not allege an already existing harm, a harm that is certain to occur, or a harm that will manifest immediately.” *City of Evanston*, 229 F. Supp. 3d at 722 (citing *Albany Bank & Trust Co. v. Exxon Mobil Corp.*, 310 F.3d 969, 972 (7th Cir. 2002)). Instead, “any substantial ongoing threat of future harm” is sufficient. *Id.* (citing *Albany Bank*, 310 F.3d at 972 and *Forest Park Nat’l Bank & Trust v. Ditchfield*, 881 F. Supp. 2d 949, 976 (N.D. Ill. 2012)). Using this Court’s examples, “present and future contamination of drinking water” with MG Waste Oils, and “degradation” of MG Waste Oils “into potentially dangerous levels of methane,” are endangerments that are sufficiently imminent and substantial to give rise to RCRA liability. *Id.*; see also 2017 SCS PAR, App. Ex. 6, §§ 4.1.1 (MC Waste Oils in Water Line), 4.2 (methane in soil) and 4.3 (MG Waste Oils in soil). The 2017 SCS PAR establishes MG Waste Oils and methane are present in concentrations that exceed, or are likely to exceed, standards intended to protect human health.

As discussed above, the Utilities’ releases of hazardous substances present at least four imminent and substantial endangerments to human health and the environment. Any of these endangerments, by itself, warrants this Court’s intervention; taken together, they require it.

- a. The Utilities' wastes are contaminating and threatening to further contaminate the City's drinking water.

The Utilities' MG Waste Oils have been found in the form of a Black Crust inside the City's drinking water infrastructure, and samples of that crust have been found to contain many problematic compounds, including benzo[a]anthracene, benzo[a]pyrene and benzo[a]fluoranthene. There are no "safe" levels of these compounds in drinking water, presumably because they should never be in contact with drinking water. There are, however, IEPA standards for such contaminants in soil that may migrate to groundwater—and the concentrations found inside the City's drinking water infrastructure exceed even these limits. (See 2017 SCS PAR, App. Ex. 6, §§ 4.1.1, 4.1.2, 4.1.3.) Such contaminants present two concerns. First, they are leeching into the City's drinking water, such that the drinking water solution contains trace elements of problematic chemicals today. (See LeChevallier Report, App. Ex. 7, at 3.) More importantly, in the opinion of SCS and LeChevallier, the Black Crust is likely, through scaling and scouring, to release sediment containing contaminants, including BaP in concentrations of up to 12,000 ppb, into drinking water in excess of the MCL, which, in the case of BaP, is only 0.2 ppb. (*Id.* at 3; Ex. B hereto) This condition presents a near-term risk of harm to the health of residents who drink the water, whether that harm becomes manifest in the near future or twenty years from now, per the standard in *Maine People's Alliance, supra*. (2017 SCS PAR, App. Ex. 6, § 4.1.1; LeChevallier Report, App. Ex. 7, at 3.)

- b. The Utilities' wastes are creating unsafe accumulations of methane gas.

The Utilities' MG Waste Oils have sunk into the ground and degraded into methane gas at high pressures and concentrations. As encountered in James Park, the methane gas resulting from the Utilities' contaminations presents two distinct endangerments, each sufficient to warrant this Court's intervention. (See 2017 SCS PAR, App. Ex. 6, § 4.2.)

First, the City cannot conduct any substantial construction operations within James Park because it does not know each location where the methane will be found. As a practical matter, the City cannot dig any substantial hole or trench in James Park for fear of hitting a methane pocket that could asphyxiate workers, cause a deadly explosion, or both. The City could try to mitigate that risk by working only in areas where the methane has not accumulated, if only the City knew where those areas were. Instead, as a practical matter, the Utilities have prevented the City from enjoying and exercising all of its rights with respect to its own property. As noted by SCS in its 2015 report, just such an accidental encounter of methane at high pressure and concentration occurred at the MWRDGC plant near James Park, where methane was encountered in bedrock at a concentration of between 82 and 87 percent. (2015 SCS Report, App. Ex. 3, at 27.)

Second, the methane accumulated underground could find a pathway through the Soil Layer (depicted in Figure 2 to the 2017 SCS PAR, App. Ex. 6) to the surface, including into structures within James Park, such as Dawes Elementary School and the Levy Senior Center. The City has installed methane detection equipment that continuously monitors methane levels, but children, seniors, and their families and loved ones should not have to worry about whether tomorrow will be the day an emergency evacuation is required.

These risks are compounded by the fact the Utilities have apparently lost the NIGC Pipelines, so the City does not know all the locations where MG Waste Oil has leaked into soil and degraded to form methane at high concentration and pressure. (2017 SCS PAR, App. Ex. 6, § 4.4.)

c. The Utilities' wastes are coming into contact with humans.

The Utilities' MG Waste Oils have been found in the soils surrounding the NIGC Pipelines, including soils surrounding the City's drinking water infrastructure. These wastes have also coated the City's drinking water infrastructure. As a result, the City is unable to perform work on certain drinking water infrastructure, or work in the vicinity of the NIGC Pipelines, without exposing its personnel to MG Waste Oils. (*See* 2017 SCS PAR, App. Ex. 6, § 4.3.)

These MG Waste Oils exceed IEPA standards for short-term construction worker exposure: eleven separate samples have been identified with concentrations of contaminants in excess of IEPA limits, including benzo[a]anthracene, benzo[a]pyrene, benzo[b]fluoranthene, naphthalene, 1,2,4-trimethyl-benzene, and 1,3,5-trimethyl-benzene, and these contaminants are accumulated at as much as 2,059% of the ingestion standard and 1,833% of the inhalation standard. (*See id.* § 4.3.) Put simply, the conditions created by the Utilities are definitionally unsafe. *Interfaith*, 399 F.3d at 261 (“Proof of contamination in excess of state standards ... may alone suffice for liability in some cases.”).

The City has done what it can to mitigate the risk to its personnel, by acquiring and issuing protective equipment to City personnel who may come into contact with MG Waste Oils. But the City and its personnel should not have to worry about exposure to hazardous wastes while conducting routine public works and infrastructure projects.

d. The Utilities' wastes are endangering the environment.

The Utilities' MG Waste Oils are also endangering the environment itself. MG Waste Oils are in regular and repeated contact with groundwater at James Park. Specifically, groundwater has infiltrated the NIGC Pipelines, likely for several decades. (2017 SCS Report,

App. Ex. 5, at 11-12, 18.) Those pipelines contain MG Waste Oils, so the groundwater that enters and exits the NIGC Pipelines is in contact with MG Waste Oils. (*Id.* at 20-21 & Figs. 13-14 (groundwater beneath James Park is visually contaminated and contains the same contaminants as sediment inside the NIGC Pipelines).) “[A]n 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.” *U.S. v. Apex Oil Co.*, 2008 WL 2945402, at *80 (S.D. Ill. July 28, 2008), *aff’d* 579 F.3d 734 (7th Cir. 2009) (citing *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 618 (7th Cir. 1998)); *see also Environmental Waste Control*, 917 F.2d at 331-32 (affirming grant of injunction based on disposal of contaminants that contaminated groundwater and consequently caused “potential danger to the environment and to public health”); *U.S. v. Seymour Recycling Corp.*, 554 F. Supp. 1334, 1340 (S.D. Ind. 1982) (finding “toxic chemicals” and “contaminated soil” threatened “immediate, substantial endangerment to public health and the environment” through potential “fire, explosion and groundwater contamination”). Since the MG Waste Oils have contaminated groundwater and decomposed into potentially explosive methane gas underground, the environment has unquestionably been endangered.

B. The City will suffer irreparable harm absent an injunction.

Without injunctive relief, the City will suffer irreparable harm, because the health of its residents is at risk. As discussed above, the MG Waste Oils likely endanger human health because they are contaminating and threatening to further contaminate the City’s drinking water, creating unsafe accumulations of methane gas, and otherwise coming into contact with humans. Such threats have been recognized as the type of injury that calls for injunctive relief. In *Maine People’s Alliance*, for example, the First Circuit affirmed issuance of a preliminary injunction such as that sought by the City here, noting, based on expert analysis such as that proffered by

the City here, that defendant's mercury contamination in a river posed a possible "serious endangerment to both human health and the environment" since the mercury was "inimical to human health" and could "endanger reproduction, development, and overall health of the public." 471 F.3d at 281, 282, 285. Similarly, in *Apex Oil*, the court granted a RCRA injunction in light of risks associated with "actual or potential contamination of drinking water supplies' ... based on groundwater sampling showing benzene concentrations that were thousands of times higher than relevant drinking water standards at locations near the recharge zone for the Village of Hartford's drinking water supply well...." 2008 WL 2945402, ¶ 251. Citing *PMC, supra*, the court in *Apex* issued an injunction since the contamination was "close to" the village's well recharge area and "could" migrate or affect the village's source of drinking water. *Id.* ¶ 451. Here, the situation is even more concerning. While in *Apex* there was a potential for the contaminants to migrate into the source of potable water for the village, here the Black Crust is already in direct contact with potable water. And, as in *Apex*, experts here also conclude the contamination could endanger the water supply.

Moreover, as discussed above, the Utilities have caused an environmental injury, and "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable." *Amoco*, 480 U.S. at 545 (1987); *see also Environmental Waste Control*, 917 F.2d at 332. Similarly, the City is being deprived of the full enjoyment and possession of its land, and interference with the enjoyment or possession of land causes "irreparable" harm because land is a "unique commodity for which monetary compensation is an inadequate substitute." *Pelfresne v. Village of Williams Bay*, 865 F.2d 877, 883 (7th Cir. 1989).

C. The City cannot be compensated through traditional legal remedies.

By definition, the City—as a RCRA plaintiff—cannot “seek pecuniary relief” under RCRA, and consequently has “no other adequate remedy available at law.” *Apex Oil*, 2008 WL 2945402, at *84; *see also Cent. States, S.E. & S.W. Areas Health & Welfare Fund v. Lewis*, 871 F. Supp. 2d 771, 779-80 (N.D. Ill. 2012) (fact that federal statute does not allow recovery of damages indicates no adequate remedy at law and “favor[s] imposing” injunctive relief); *Milwaukee Inner-City Congregations Allied for Hope v. Gottlieb*, 944 F. Supp. 2d 656, 664 n.1 (W.D. Wisc. 2013) (“traditional legal remedies” necessarily are “inadequate” when “only equitable remedies are available” under a federal statute); *United States v. Apex Oil Co.*, 438 F. Supp. 2d 948, 953 (S.D. Ill. 2006) (plain language of RCRA prohibits courts from awarding monetary damages). The City cannot simply “do nothing,” because the risks to the health of its residents are too great. But if the City further investigates the full extent of the Utilities’ contaminations and develops a remediation plan at the City’s own expense, it cannot recoup that expense from the Utilities. *See, e.g., Meghrig*, 516 U.S. at 487. Thus, traditional legal remedies are not adequate here. The only way the Utilities can be held responsible at this point for their releases of hazardous wastes is “to order [the Utilities] to take such ... action as may be necessary,” including determining the full extent of their contaminations and developing a remediation plan—all as expressly contemplated by RCRA. 42 U.S.C. § 6972(a).⁷

D. The balance of equities favors enjoining the Utilities.

Before addressing the balance of the equities in this case, the City notes that the Court need not engage in this analysis if it determines that the Utilities’ conduct “has been willful.”

⁷ Even under a traditional injunction analysis it is readily apparent that legal remedies are inadequate here because of the nature of the injuries the City is suffering. Legal remedies are inadequate “when the nature of the loss incurred by the plaintiff makes it difficult to calculate damages,” such as when “loss of real property” and “damage to goodwill” are at issue. *Girl Scouts of Manitou*, 549 F.3d at 1095. The City is suffering both types of losses here.

Environmental Waste Control, 917 F.2d at 332. In this case the Utilities left the NIGC Pipelines in the ground when they dismantled the Skokie MGP, they did nothing to remediate the NIGC Pipelines when they undertook to remediate the Skokie MGP site, and they refused to work with the City to investigate and mitigate their environmental contaminations in the James Park area despite the increasingly overwhelming factual and scientific evidence that the Utilities are responsible for the contaminations at issue in this case.

Moreover, where, as here, the plaintiff is a unit of government “and is seeking to protect the public interest . . . the Court’s equitable powers are even broader and more flexible than if only private parties were seeking relief.” *Cinergy*, 582 F. Supp. 2d at 1060 (citing *Porter*, 328 U.S. at 398). There can be no doubt that the wellbeing of the City’s residents and environment are public interests, which the City is seeking to protect here.

In balancing the equities, “the court weighs the irreparable harm that the [City] would endure without the protection of the preliminary injunction against any irreparable harm the [Utilities] would suffer if the court were to grant the requested relief.” *Tuf-Tite*, 2014 WL 6613116, at *9 (quoting *Girl Scouts*, 549 F.3d at 1086). “The more likely it is that [the City] will win its case on the merits, the less the balance of harms need weigh in its favor.” *Id.* (citing *Girl Scouts*, 549 F.3d at 1100). The Court also should consider “the potential impact of the injunction on the public interest” as part of its analysis, *id.* (citing *Girl Scouts*, 549 F.3d at 1100), bearing in mind that “the public interest would be disserved by ... delay in corrective action” regarding an environmental contamination under RCRA, *Matter of Environmental Waste Control, Inc.*, 125 B.R. 546, 551 (N.D. Ind. 1991). Where granting an injunction “would benefit the citizens” in the area at issue “and promote the Congressionally-expressed public interest in ‘minimiz[ing] the present and future threat to human health and the environment’ posed by solid and hazardous

wastes”—while a defendant “would suffer [no] particular hardship (other than its obvious need to bear the cost of complying with the order)” —the balance of equities favors the plaintiff. *Apex Oil*, 2008 WL 2945402, at *84 (balancing of the equities in a RCRA case “is heavily influenced by ‘a congressional thumb on the scale in favor of remediation’”).

Regarding the relief sought here, the First Circuit’s opinion in *Maine People’s Alliance v. Mallinckrodt, Inc.* is instructive. There, as here, the plaintiff brought suit under 42 U.S.C. § 6972(a)(1)(B) and asked the court to enter an injunction requiring the alleged contaminator “to fund an ‘independent, comprehensive, scientific study to determine the precise nature and extent of the endangerment’” at issue. 471 F.3d at 281. The trial court considered the plaintiff’s evidence—including the opinion and testimony of the plaintiff’s expert—as well as the parties’ arguments. *Id.* at 281-82. Acknowledging that the requested study likely would require the defendant to spend \$4 million on laboratory analyses alone, the trial court granted the requested relief—at least in part because (1) the problems caused by the contamination could not be fully understood without such a study, and (2) it was “highly likely” that remediation of the contamination would be both necessary and desirable. *Id.*

On appeal, the First Circuit explained that, in environmental cases, the balancing of equities “is inevitably colored by the nature of the case and the purposes of the underlying environmental statute (here, RCRA).” *Maine People’s Alliance*, 471 F.3d at 296. With that standard in mind, the First Circuit affirmed the district court’s entry of an injunction requiring the defendant to investigate the precise nature and extent of the endangerment caused by its contaminations, noting that (1) there was evidence that the defendant’s contaminants were present in the area alleged to have been affected, (2) the applicable standard under RCRA requires only “a reasonable prospect of a near-term threat of serious potential harm,” (3) the

plaintiff presented evidence that the defendant's contamination included toxic contaminants that were capable of impacting health and the environment for decades, and (4) requiring an environmental contaminator to spend at least \$4 million to investigate the potential harms flowing from its contamination is not "so vastly disproportionate to the threatened harm" flowing from environmental contaminations as to render the injunction inappropriate. *Id.* at 280, 296-98; *see also Francisco Sanchez v. Esso Standard Oil Co.*, 572 F.3d 1, 21 (1st Cir. 2009) ("We applaud the [district] court for taking th[e] sensible step" of ordering a defendant to investigate the extent of its contaminations under RCRA).

So, too, here. There is no dispute that the Skokie MGP generated, and deposited into the ground, MG Waste Oils, a hazardous waste. The City has found the same contaminants in its property, and has identified the pathway through which those contaminants traveled from the source (the Skokie MGP and NIGC Pipelines) to where they are found today (in and around James Park, including Oakton Street and Dodge Avenue from Howard Street north to Lee Street). This Court has agreed with the First Circuit (as well as the Seventh Circuit, and many others) that "any substantial ongoing threat of future harm" is sufficient to constitute an endangerment, regardless of whether the harm "already exist[s]," "is certain to occur," or "will manifest immediately." *City of Evanston*, 229 F. Supp. 3d at 722. The MG Waste Oils that the Utilities have allowed to leak into the City's property are toxic contaminants, and they are capable of causing harm well into the future. Requiring the Utilities to investigate the potential harms flowing from the contaminations they have allowed to continue for years is no more burdensome here than it was for the defendants in *Maine People's Alliance* and *Francisco Sanchez*.

CONCLUSION

For the foregoing reasons, the City respectfully requests that this Court enter a preliminary injunction ordering the Defendant Utilities to (1) investigate and identify the location of the NIGC Pipelines throughout the City; (2) determine the extent of contamination caused by leakage of MG Waste Oils from the NIGC Pipelines; and (3) develop a remedial action plan to address their contamination. The City additionally requests such other and further relief as this Court deems appropriate under the circumstances.

Dated: December 1, 2017

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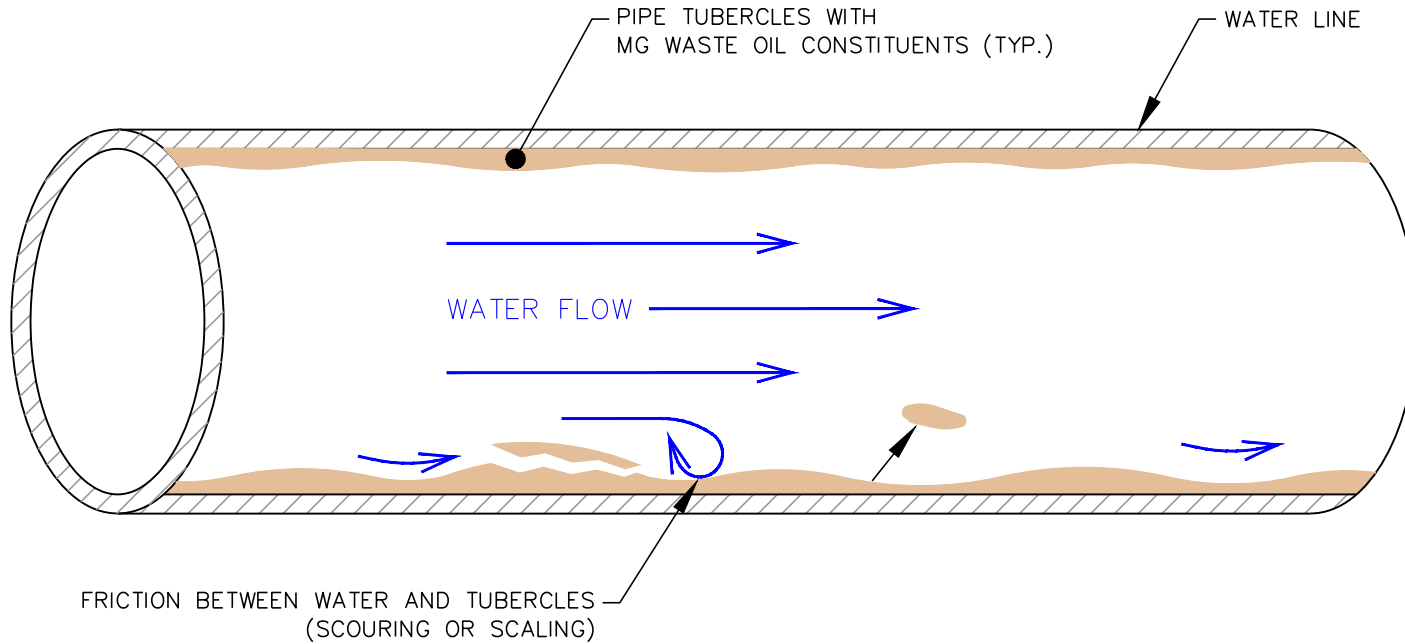
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EXHIBIT A



Figure 4 of the 2017 SCS PAR, Photograph 33,
showing the friable Black Crust inside the Dodge Avenue Water Line

EXHIBIT B

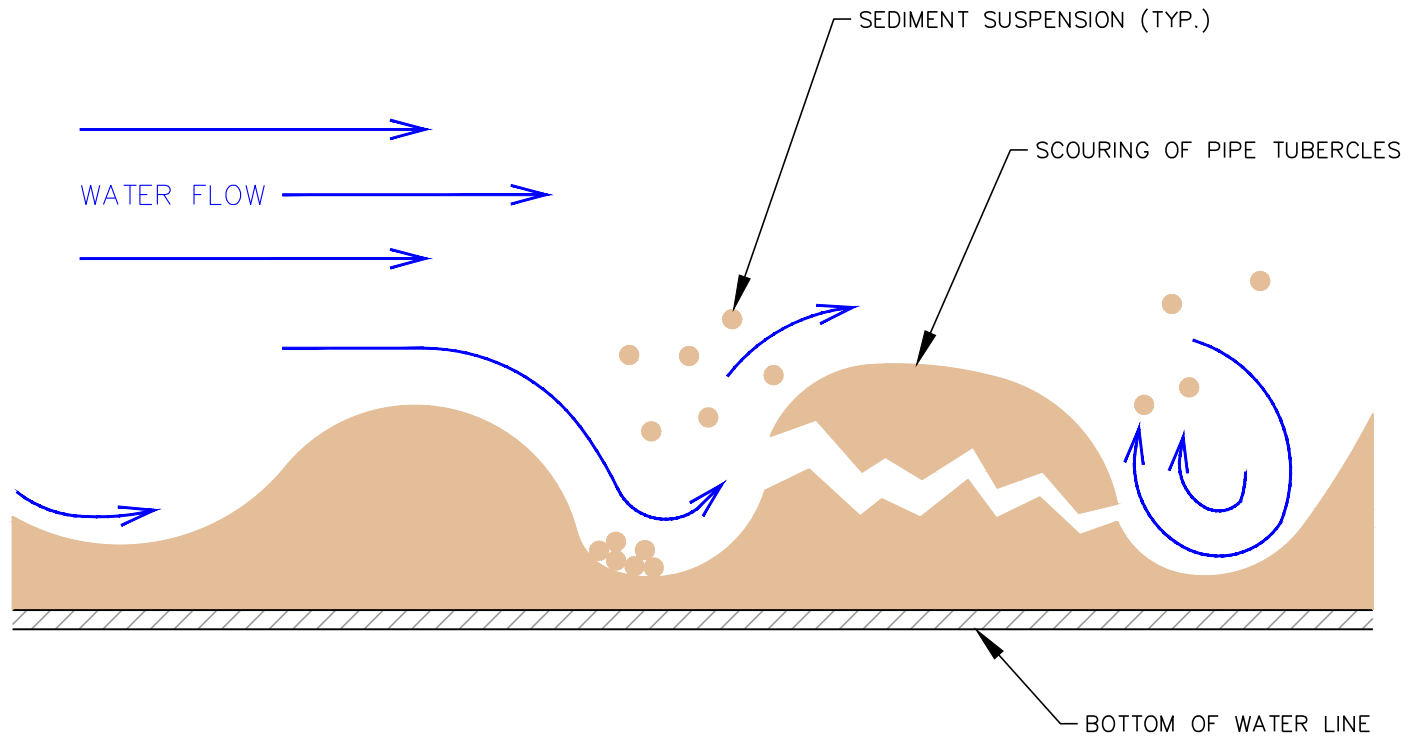


NOTES:

1. SEE DETAIL OF SCOURING/SCALING OF TUBERCLES.

OVERVIEW OF WATER FLOW AND SCOUR/SCALING PROCESSES

CHANGE IN WATER PRESSURE AND VELOCITY INCREASES FRICTION BETWEEN WATER AND MG WASTE OIL IN PIPE TUBERCLES, RESULTING IN SCOURING (OR SCALING) THAT RELEASES TUBERCLES INTO WATER AS SEDIMENT. CHANGE IN WATER PRESSURE AND VELOCITY CAN BE CAUSED BY VARIOUS TYPES OF DISTURBANCES, INCLUDING SYSTEM FLUSHING AND REPAIRS. OTHER FACTORS CAN ALSO CAUSE SCALING, SUCH AS; VIBRATIONS, INCREASED WATER FLOW (INCLUDING FIRE FLOWS), WATER FLOW REVERSALS, AND MAIN BREAKS.



NOTES:

1. MCL FOR BENZO(A)PYRENE IS 0.2 PPB.
2. THE CONCENTRATION OF BENZO(A)PYRENE FROM TUBERCLES IN PIPE IS 12,000 PPB (2016 SCS REPORT, TABLE 4 [SVOC DATA], SAMPLE LOCATION "INSIDE WATER PIPE D+0").

DETAIL OF WATER FLOW AND SCOUR/SCALING PROCESSES