ILLINOIS POLLUTION CONTROL BOARD
November 7, 2013

JOHNS MANVILLE, a Delaware Corporation	)	
Petitioner,	)	
v.	)	PCB 14-3 (Enforcement)
ILLINOIS DEPARTMENT OF TRANSPORTATION,	)	
Respondent.	)	

ORDER OF THE BOARD (by J.A. Burke):

Johns Manville (JM) brought this complaint against the Illinois Department of Transportation (IDOT) pursuant to Section 31(d) of the Illinois Environmental Protection Act (Act). The one-count complaint alleges IDOT caused violations of Sections 21(a) and 21(e) of the Act by improper disposal of asbestos pipe and other waste at a site in Waukegan, Lake County. IDOT moved to dismiss the complaint. For the reasons below, the Board denies the motion to dismiss, finds the complaint neither duplicative nor frivolous, and accepts the complaint for hearing.

PROCEDURAL HISTORY

On July 8, 2013, JM filed its complaint (Compl.) against IDOT. IDOT filed a motion for extension of time to respond on August 29, 2013. On September 16, 2013, the Board's hearing officer granted the motion for extension of time to respond and directed IDOT to file any motions to strike or dismiss the complaint by September 27, 2013. On September 27, 2013, IDOT filed its motion to dismiss (Mot.) the complaint along with a memorandum of law in support of IDOT's motion to dismiss (Memo.). JM filed a response (Resp.) to the motion to dismiss on October 11, 2013.

SUMMARY OF COMPLAINT

Background

JM owned and operated a manufacturing facility in Waukegan (facility) that manufactured construction and other materials, some of which contained asbestos. Compl. at 2. On September 8, 1983, the United States Environmental Protection Agency (USEPA) added a portion of the facility to the National Priorities List under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), due to the presence of asbestos-containing material (ACM). *Id.* JM conducted and completed certain remediation activities at the facility under the direction and oversight of the USEPA. *Id.*

JM ceased operations at the facility in approximately 1998. Compl. at 2. ACM was thereafter discovered beyond the boundaries of the facility, on adjacent property owned by Commonwealth Edison (ComEd) and the City of Waukegan. *Id.*

On June 11, 2007, JM entered into an Administrative Order on Consent (AOC) with USEPA whereby JM agreed to perform removal action at four specific off-property areas. Compl. at 2. These four areas were designated as site 3, site 4/5 and site 6 (collectively, the "Southwestern site areas"). *Id.* ComEd, the current owner of site 3 and site 4/5, is also a party to the AOC. *Id.* at 3. ComEd has agreed to undertake certain response activities at these sites pursuant to the terms of the AOC. *Id.*

Site 3 is the focus of the complaint. Compl. at 3. Site 3 is located south of the Greenwood Avenue right-of-way and east of North Pershing Road in Waukegan, near the southwestern corner of the JM facility. *Id.* In December 1998, ACM was discovered at the surface of site 3. *Id.* Subsequent sub-surface investigations revealed ACM primarily at the north end and in at least two other areas of site 3. *Id.* The predominant ACM found at site 3 is a non-friable form of ACM called Transite pipe. *Id.* The northwest portion of site 3 also contains miscellaneous fill material, some of which has been found to contain asbestos. *Id.*

JM used site 3 as a parking lot in approximately the 1950s and 1960s pursuant to a license agreement with ComEd. Compl. at 3. Transite pipes were used for curb bumpers on the parking lot surface. *Id.* In approximately 1971, IDOT began construction of a ramp to the Amstutz Expressway as part of its reconstruction of the Pershing Road/Greenwood Avenue intersection. *Id.* During this construction, IDOT built a detour road through the former parking lot pursuant to a temporary easement with ComEd. *Id.* at 4. This construction destroyed the parking lot. *Id.* The detour road was used as an expressway bypass until the completion of the ramp construction in 1976. *Id.* A contractor was paid a "special excavation fee" to "remove and obliterate" the detour after the construction was complete. *Id.* The detour road and parking lot are no longer intact at site 3. *Id.*

JM states that IDOT acknowledged to USEPA in a CERCLA Section 104(a) response that it dealt with asbestos pipe during the construction project. Compl. at 4. IDOT is not a party to the 2007 AOC with USEPA because, at the time of signing, USEPA "took the position that there was insufficient evidence to name IDOT because IDOT did not admit to burying any ACM on or near" site 3. *Id.* JM states that subsequent investigations have revealed buried Transite pipe in the area, including in the south side shoulder of Greenwood Avenue at a depth approximately one foot higher than the adjacent surface of site 3. *Id.*

On June 13, 2008, pursuant to the terms of the AOC, JM and ComEd submitted to USEPA for its review and approval an initial "Engineering Evaluation and Cost Analysis" (EE/CA) for proposed response action at the southwestern sites. Compl. at 5. JM and ComEd submitted their final EE/CA on April 4, 2011 (EE/CA Revision 4). *Id.* EE/CA Revision 4 evaluated four potential response action options for site 3. *Id.* On February 1, 2012, USEPA approved EE/CA Revision 4 with modifications. *Id.* In its EE/CA approval letter, USEPA

proposed a new alternative (modified alternative 2) for site 3, and estimated cost for construction of this modified alternative to be $2,196,000. *Id.*

On November 30, 2012, USEPA issued an Action Memorandum selecting a remedy for the southwestern sites, including modified alternative 2. Compl. at 5. This Action Memorandum included further modifications to modified alternative 2. *Id.* at 6. The Action Memorandum

> states that a response action at the Southwestern Sites is necessary "to abate or mitigate releases of hazardous substances that may present an imminent and substantial endangerment to public health and the environment posed by the presence of soils that are contaminated with hazardous substances." It further states that a response action is necessary to "reduce the actual and potential exposure to the nearby human population and the food chain to hazardous substances" and that the action is "expected to result in the removal and capping of contaminated materials at or near the surface which present a threat to trespassers or workers at the Site." *Id.*

USEPA estimates costs of the selected remedy for site 3 at between $1,705,696 and $2,107,622. *Id.* at 8. JM has disputed portions of USEPA's selected remedy for the southwestern sites, including parts of USEPA's cost analysis. *Id.*

On May 6, 2013, USEPA issued a Notice to Proceed with the selected remedy for all of the southwestern sites. Compl. at 8. This notice triggers a 120-day period within which JM and ComEd must submit to USEPA a Removal Action Work Plan for performing the response actions at the southwestern sites. *Id.* No response action has commenced at site 3 except for removal of surficial ACM. *Id.*

Count I – Violations of Section 21 of the Act

JM states

> IDOT's actions in breaking up, obliterating, spreading, burying, placing, dumping, disposing of and abandoning ACM, including Transite pipe, throughout [s]ite 3 and in using ACM as fill during construction of the Greenwood Avenue ramp and expressway bypass from 1971 to 1976 constitute violations of Section 21 of the [Act]. Compl. at 9.

Section 21 of the Act states in relevant part

> No person shall:
>
> (a) Cause or allow the open dumping of any waste; [or]
>
> (e) Dispose, treat, store, or abandon any waste, or transport any waste into this State for disposal, treatment, storage or abandonment, except at a site or

> facility which meets the requirements of this Act and of regulations and standards thereunder. Compl. at 9, citing 415 ILCS 5/21 (2012).

JM contends that the discarded ACM at site 3 is a "waste" within the meaning of 415 ILCS 5/3.535 (2012). Compl. at 9. JM further contends that site 3 is neither "a disposal site that fulfills the requirements of a sanitary landfill" nor "a permitted waste disposal site or facility" which meets the requirements of the Act. *Id.*, citing 415 ILCS 5/3.445, 5/3.540 (2012).

JM argues IDOT

> engaged in the open dumping of waste and disposed of ACM waste between 1971 and 1976 when it broke up and obliterated Transite pipe that had previously been used as bumpers for a parking lot and spread, buried, dumped, placed, disposed of and abandoned the obliterated pipe on and under [site] 3. Compl. at 11.

JM states that this ACM was abandoned by IDOT around 1976 and currently remains in situ. *Id.*

JM argues that IDOT "caused the open dumping of waste" in violation of section 21(a) of the Act and "disposed of and abandoned ACM waste in an area that does not meet the requirements of the Act or its regulations" in violation of Section 21(e) of the Act. Compl. at 11, citing 415 ILCS 21(a), 21(e) (2012). JM states that the alleged violations are continuing in nature. *Id.* Further, JM contends that IDOT exacerbated any existing contamination at site 3 and directly contributed to USEPA's selected remedy for site 3 by "moving ACM materials both horizontally and vertically within and outside the boundaries of [site 3]." *Id.* JM argues that "IDOT should be required to participate in the response action for [site] 3" because IDOT's alleged violations "have directly impacted the scope of the proposed remedy" for site 3. *Id.*

JM states that "it stands to suffer immediate and irreparable injuries for which there is no adequate remedy at law" because JM must complete a work plan for the selected response action within 120 days (approximately November 2013) of receiving the notice to proceed.

JM requests that the Board (a) authorize a hearing in this matter, (b) find that IDOT has violated Sections 21(a) and (e) of the Act, (c) require IDOT to participate in the future response action on site 3 to the extent attributable to IDOT's violations of the Act, pursuant to the Board's authority to award equitable relief under Section 33 of the Act (415 ILCS 5/33 (2012)), and (d) grant other relief that the Board deems appropriate. Compl. at 12.

IDOT MOTION TO DISMISS

IDOT contends the complaint should be dismissed for two reasons: (1) JM is barred because this action is duplicative pursuant to the provisions of Section 31(d) of the Act (415 ILCS 5/31(d) (2012)) and Section 2-619(a)(9) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(9) (2012)), and (2) the complaint consists of conclusions not supported by specific pleaded facts and is substantially insufficient as a matter of law, and should be dismissed pursuant to Section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (2012)). Memo. at 1.

Duplicative Action

IDOT states that a first amended consent decree was entered by the US District Court for the Northern District of Illinois involving three parties: the US, Illinois, and Manville Sales Corporation now known as Johns Manville. Memo. at 6; US and People of State of Illinois ex rel. Madigan v. Manville Sales Corporation, Civil Action No. 88 C 630. IDOT claims that Illinois intervened in that proceeding. Memo. at 5, citing 69 Fed. Reg. 34 (Feb. 20, 2004). The amended consent decree "acknowledges and contemplates the likelihood of contribution claims on the part of Johns Manville." *Id.* IDOT contends that JM's position, that JM is unaware of any identical or substantially similar action pending before the Board or in another forum, ignores the current federal action. *Id.* at 6-7. IDOT notes that JM is a defendant and Illinois is a party to the federal lawsuit. *Id.* at 7.

IDOT states that, because it is a department in the executive branch of state government, it "does not have a legal identity separate and apart from the State of Illinois." Memo. at 7. IDOT argues that a state agency may not be a defendant in a circuit court action because state agencies are arms of the state. *Id.*, citing Rockford Mem'l Hosp. v. Dep't of Human Rights, 272 Ill. App. 3d 751, 756 (1995). IDOT states that JM is involved in a federal action with Illinois over JM's manufacturing plant, and that JM has made the same claims in that case as it has here. *Id.*

IDOT argues that the current action is duplicative of the CERCLA enforcement action being conducted by the USEPA and Illinois. Memo. at 7. IDOT states that the administrative order on consent is currently dealing with remediation of site 3, which is the same subject matter of this action. IDOT argues that nothing in the first amended consent decree prevents JM from seeking contributions from others regarding matters involving alleged environmental violations. *Id.* IDOT further states that the federal court has retained jurisdiction over the subject matter of the first amended consent decree. *Id.* at 8. IDOT notes that, at the same time, this matter is also still before the USEPA in the form of the administrative order on consent between JM, ComEd and USEPA. *Id.*

IDOT argues that there are three federal actions that have a direct bearing on site 3: (1) US and People of State of Illinois ex rel. Madigan v. Manville Sales Corporation, Civil Action No. 88 C 630; (2) the Stipulation and Order of Dismissal and Settlement entered by the Court for the Southern District of New York (91 Civ. 6683) (Global Settlement Order); and (3) the administrative order on consent with USEPA. Memo. at 8.

IDOT argues that, "[w]hat ultimately will happen in the remediation of Site 3 will take place and should take place in a federal forum." Memo. at 9. IDOT argues that CERCLA is the law that should apply. *Id.* IDOT contends that, if JM has a claim for contribution against Illinois, it should be presented in a federal forum where matters involving site 3 are located. *Id.* Further, if JM has a claim for contribution, it should be governed under CERCLA. *Id.*

IDOT contends that the USEPA already determined that IDOT should not be made a party to the federal action, and that JM's recourse is to file a contribution claim in the district

court in US and People of State of Illinois ex rel. Madigan v. Manville Sales Corporation, Civil Action No. 88 C 630. Memo. at 9. IDOT states that JM

> has the option of filing a claim in federal district court under Section 107 of CERCLA, 42 U.S.C.A. 9607, or JM can file a claim for contribution against the State of Illinois under Section 113 of the Superfund Amendments and Reauthorization Act (SARA), 42 U.S.C.A. 9613. *Id.*

Insufficient in Law

IDOT argues that the complaint contains conclusions unsupported with specific facts that are substantially insufficient as a matter of law. Memo. at 10. IDOT has not admitted to burying any Transite pipe. *Id.* USEPA has taken the position to not name IDOT as a potentially responsible party because IDOT did not admit to burying any ACM on or near site 3. *Id.* IDOT further contends that site 3 "is not the only off-site location where ACM has been discovered," noting that IDOT "did not build a temporary road" over the other locations. *Id.* at 11. IDOT believes "[it] would be more likely to conclude that the transite pipe that has been buried at Site 3 was buried when the utility companies did digging and backfilling." *Id.* at 12. IDOT argues that, taking the complaint as a whole, the conclusion that IDOT is responsible for buried ACM is a conclusion unsupported with specific facts and insufficient in law. *Id.*

IDOT further argues that JM has not alleged that IDOT "possessed transite pipe, brought it from off-site, or deposited transite pipe at Site 3." Memo. at 12. IDOT states that evidence of Transite pipe parking bumpers in a 1950s aerial photograph "does not mean [the parking bumpers] were intact and visibly identifiable on the surface of Site 3 in the early 1970s" when the road construction occurred. *Id.* IDOT describes the allegations against it as "[IDOT] caused a temporary road to be built in the area of Site 3 in the early to mid-1970s and then removed the temporary road." *Id.* at 13. IDOT concludes that "building a temporary road in the vicinity of Site 3 does not constitute open dumping" and that the complaint should be dismissed "because it is substantially insufficient as a matter of law." *Id.*

JOHNS MANVILLE RESPONSE TO IDOT MOTION TO DISMISS

JM contends that "IDOT's Motion fails to apply the proper legal standards, misconstrues the scope of the 'federal proceedings' it references, and neglects to cite any Pollution Control Board case law in support of its arguments." Resp. at 2. JM states that it

> is seeking a finding that IDOT violated the Act and equitable relief in the form of an Order requiring IDOT to participate in future response actions at Site 3, to the extent the asbestos contamination at or near Site 3 is attributable to IDOT's actions. *Id.* at 4.

The Action Is Not Duplicative

JM argues that IDOT "mischaracterizes the scope and application" of prior proceedings on the case at hand. Resp. at 6. JM states that the Board, in determining whether a case is the

same or substantially similar as one pending before the Board or another forum, looks at four factors: (1) whether the parties to the two matters are the same; (2) whether the proceedings are based on the same legal theories; (3) whether the violations alleged in the two matters occurred over the same time period; and (4) whether the same relief is sought. *Id.* at 5, citing Sierra Club v. Midwest Generation, LLC, PCB 13-15, slip op. at 22 (Oct. 3, 2013).

JM notes that IDOT cites three federal matters that IDOT claims have a direct bearing on this case: (1) the 1988 Northern District of Illinois case that led to the 2004 amended consent decree; (2) the Global Settlement Order; and (3) the 2007 AOC between JM, ComEd and USEPA. Resp. at 9-10. JM argues that "none of these actions involves . . . IDOT, and none of them addresses violations of the Act." *Id.* at 10.

JM first contends that IDOT "misrepresents the scope and application of the 2004 Consent Decree." Resp. at 11. JM states that the amended consent decree only covers response actions at the facility and that the "facility" does not include off-site areas, including site 3. *Id.* JM argues that the amended consent decree "expressly provides that it does not include response actions for [sites including site 3]," noting that these sites "will be addressed by separate actions." *Id.*, citing 2004 Consent Decree, Preamble, ¶N. The amended consent decree further provides that USEPA "may select and require implementation of any response action for any area outside the [f]acility boundaries and such decisions are not subject to this Consent Decree." *Id.*, citing 2004 Consent Decree, ¶18. JM therefore contends that the two actions are not duplicative because the amended consent decree neither covers site 3 nor seeks the same remedy at issue here. *Id.* at 12. JM further argues that, even if the amended consent decree had covered site 3, IDOT has not shown that it is "identical or substantially similar" to this case. *Id.* JM states that the amended consent decree "has nothing to do with IDOT's conduct beginning in the early 1970s . . . which forms the basis for the violations of the Act alleged [in the complaint]." *Id.* Further, the amended consent decree "has nothing to do with alleged violations of Sections 21(a) and 21(e) of the Act by anyone, let alone IDOT." *Id.* JM argues that the amended consent decree "involves different property, different alleged violations, different time periods and different requested relief." *Id.* at 13. JM also argues that the Northern District of Illinois court only retained jurisdiction over the "subject matter of the First Amended Consent Decree" which does not include off-site areas such as site 3. *Id.*

JM states that it "is unclear what relevance, if any," the Global Settlement Order has on this case. Resp. at 13. JM argues that the Global Settlement Order "was intended to address certain respects of JM's liability to [USEPA] under CERCLA, after JM's emergence from bankruptcy in 1988." *Id.* at 14. JM states that neither Illinois nor IDOT were parties to the Global Settlement Order, and that the order "has nothing to do with IDOT's historical violations of the Act." *Id.*

JM states that, while the 2007 AOC does address response actions at site 3, it does not bar JM's current action because it is not a matter before another forum, Illinois and IDOT are not parties to the AOC, and the AOC does not address IDOT's conduct or alleged violations. Resp. at 14. JM argues that the AOC "is not the product of an adjudicatory proceeding but rather is an administrative settlement." *Id.* at 15. JM states that the AOC "has not been approved or entered by a court or any other tribunal" and that the AOC "is not currently under review by any court of

administrative law judge." *Id.* Further, IDOT's actions are not a focus of the AOC. *Id.* JM also states that, because the AOC does not involve alleged violations of the Act, it is not duplicative under the law. *Id.* JM notes USEPA's decision to not include IDOT as a party to the AOC as further evidence of this point. *Id.* at 16. Further, USEPA "was exercising discretion in assessing liability under CERCLA when it elected not to add IDOT to the AOC; it was not considering violations of Section 21 of the Act." *Id.* JM states that the 2007 AOC "is not before an adjudicative forum and involves different parties, unique timeframes and disparate laws." *Id.*

JM disagrees with IDOT's position that the correct recourse for JM would be to file a contribution claim in federal district court under Section 107 or Section 113 of CERCLA. Resp. at 16. JM states that Section 31(d) of the Act "specifically authorizes citizen claims against state agencies for violations of the Act" and that the Board "has broad authority under Section 33 of the Act to award equitable relief." *Id.*

The Complaint Pleads Sufficient Facts

JM notes IDOT's position that the complaint should be dismissed because it is insufficient in law pursuant to Section 2-615 of the Illinois Code of Civil Procedure. Resp. at 17. JM argues, however, that IDOT "never claims JM's Complaint is frivolous and never attempts to equate the frivolous standard to a Section 2-615 standard." *Id.* JM contends that IDOT "is using the wrong procedural tool." *Id.* JM states that it is only required to "plead facts which, if established, would entitle it to relief" and that it "is not required to amass all possible facts and tie them together in a neat bow for IDOT." *Id.* at 17-18. JM states that, here, "IDOT does not argue that it does not understand the allegations," but rather IDOT "alleges they are wrong, based solely on conjecture and theorizing." *Id.* at 19. JM contends that it "has alleged facts sufficient to advise IDOT of the nature of the violations alleged." *Id.*

Sufficient Facts Are Alleged to State a Claim for Open Dumping

JM states that IDOT "mangles the definition of 'open dumping'" in arguing that JM cannot prove that IDOT engaged in open dumping. Resp. at 20. JM argues that the definition of open dumping does not require that waste be brought from one site to another. *Id.* at 20-21. Further, JM argues that a violation of Section 21 does not require intent and notes that the Illinois Supreme Court has established that one may "cause or allow" a violation of the Act without knowledge or intent. *Id.* at 21, citing People v. Fiorini, 143 Ill.2d 318 (1991). JM states that, even if intent were a prerequisite, IDOT's former engineer "appears to have demonstrated intentional conduct" by admitting to burying asbestos pipe during the road construction project. *Id.* JM also notes that IDOT does not raise a "lack of specificity" argument with respect to the alleged Section 21(e) violation for disposing of ACM waste. *Id.* at 20.

JM concludes that the motion to dismiss must be denied because IDOT has not shown that the complaint is frivolous or that the complaint fails to state a cause of action for a violation of Section 21(a) or 21(e) of the Act. Resp. at 21.

BOARD DISCUSSION

The Board looks to Illinois civil practice law for guidance when considering motions to strike or dismiss pleadings. 35 Ill. Adm. Code 101.100(b); s*ee also* United City of Yorkville v. Hamman Farms, PCB 08-96, slip. op. at 14-15 (Oct. 16, 2008). In ruling on a motion to dismiss, the Board takes all well-pled allegations as true and draws all reasonable inferences from them in favor of the non-movant. *See e.g.*, Beers v. Calhoun, PCB 04-204, slip op. at 2 (July 22, 2004); *see also* In re Chicago Flood Litigation, 176 Ill. 2d 179, 184, 680 N.E.2d 265, 268 (1997); Board of Education v. A, C & S, Inc., 131 Ill. 2d 428, 438, 546 N.E.2d 580, 584 (1989). "[I]t is well established that a cause of action should not be dismissed with prejudice unless it is clear that no set of facts could be proved which would entitle the plaintiff to relief." Smith v. Central Illinois Regional Airport, 207 Ill. 2d 578, 584-85, 802 N.E.2d 250, 254 (2003).

"Illinois is a fact-pleading state which requires the pleader to set out the ultimate facts which support his cause of action." Loschen v. Grist Mill Confections, Inc., PCB 97-174, slip op. at 4 (June 5, 1997), citing LaSalle National Trust, N.A. v. Village of Mettawa, 249 Ill. App. 3d 550, 557, 616 N.E.2d 1297, 1303 (2d Dist. 1993). "[L]egal conclusions unsupported by allegations of specific facts are insufficient." Village of Mettawa, 249 Ill. App. 3d at 557, 616 N.E.2d at 1303, citing Estate of Johnson v. Condell Memorial Hospital, 119 Ill. 2d 496, 509-10, 520 N.E.2d 37 (1988). A complaint's allegations are "sufficiently specific if they reasonably inform the defendants by factually setting forth the elements necessary to state a cause of action." People *ex rel.* William J. Scott v. College Hills Corp., 91 Ill. 2d 138, 145, 435 N.E.2d 463, 467 (1982).

Section 31(d)(1) of the Act provides "[u]nless the Board determines that [the] complaint is duplicative or frivolous, it shall schedule a hearing." 415 ILCS 5/31(d)(1) (2012); *see also* 35 Ill. Adm. Code 103.212(a). A complaint is duplicative if it is "identical or substantially similar to one brought before the Board or another forum." 35 Ill. Adm. Code 101.202. A complaint is frivolous if it requests "relief that the Board does not have the authority to grant" or "fails to state a cause of action upon which the Board can grant relief." *Id.*

The Complaint Is Not Duplicative

IDOT contends that this action is duplicative pursuant to the provisions of Section 31(d) of the Act (415 ILCS 5/31(d) (2012)) and Section 2-619(a)(9) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(9) (2012)).[1] Memo. at 1. IDOT notes three federal actions that it contends have a direct bearing on site 3: (1) the Northern District of Illinois action which resulted in the amended consent decree; (2) the Global Settlement Order; and (3) the 2007 Administrative Order on Consent. Memo. at 8. IDOT argues that JM's recourse is to file a contribution claim in the district court in US and People of State of Illinois ex rel. Madigan v. Manville Sales Corporation, Civil Action No. 88 C 630. However, JM is not barred from bringing this action before the Board.

[1] 735 ILCS 5/2-619(a)(9) (2012) states that a defendant may file a motion for dismissal of an action if "the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim."

In determining whether a matter before the Board is the same or substantially similar to one pending before another forum, the Board looks to whether (1) the parties to the two matters are the same; (2) the proceedings are based on the same legal theories; (3) the violations alleged in the two matters occurred over the same time period; and (4) the same relief is sought in the two proceedings. United City of Yorkville v. Hamman Farms, PCB 08-96, slip op. at 5-6 (Apr. 2, 2009).

"[W]here two actions between the same parties on the same subject are brought in different courts with concurrent jurisdiction, the first court which acquires jurisdiction retains its jurisdiction." Janson v. PCB, 387 N.E.2d 404, 751 (3rd Dist. 1979). The Northern District of Illinois does not retain jurisdiction over the claims at issue in this case. The Northern District action pertains only to the facility and not site 3, which is the subject of this proceeding. The amended consent decree states that "[n]othing contained herein is intended to or shall be interpreted as waiving any rights that the parties may have under the Global Settlement Order with respect to areas outside of the boundaries of the Facility." Memo. Exh. C at 2. The amended consent decree defines "facility" as "only the area within the boundaries depicted on the facility map attached hereto as Exhibit 3. . . . The facility does not include any areas adjacent to and/or outside of the boundaries set forth in Exhibit 3." *Id.* at 10. The amended consent decree further states that it "will be the governing document defining responsibilities for work by Johns Manville at its facility, as defined in Exhibit 3, in Lake County, Illinois." Resp. Exh. 2 at 4. With respect to the surrounding area, the amended consent decree states that

> [s]ince 1998, the parties have discovered further asbestos contamination in several areas on and/or adjacent to the Johns Manville Waukegan Disposal Area, including Sites 1, 2, 3, 4, 5, 6 and 7 as approximately depicted in Exhibit 4. This First Amended Consent Decree does not include response actions for these areas; however these Sites will be addressed by separate actions. Resp. Exh. 2 at 7.

A comparison of Exhibits 3 and 4 to the amended consent decree makes clear that site 3 is not interpreted by the Northern District of Illinois as part of the defined "facility" that is the subject of the amended consent decree. The two actions therefore do not pertain to the same subject.

The amended consent decree also states that "JM hereby covenants not to sue and agrees not to assert any claims or causes of action against the United States or the State with respect to the Facility or this First Amended Consent Decree . . . ." Memo. Exh. C at 1. Finally, the amended consent decree states that "[t]he proper completion of the Work under this First Amended Consent Decree is solely the responsibility of JM." *Id*. The issue of site 3 remediation by IDOT has not been raised in the amended consent decree.

"The intent behind the prohibition against 'duplicitous' complaints is to avoid the situation where private citizens' complaints raise the same issue and unduly harass a [respondent]." Northern Illinois Anglers' Association v. City of Kankakee, PCB 88-183, slip op. at 5 (Jan. 5, 1989). It is clear that this action and the amended consent decree are neither the same nor substantially similar. The amended consent decree specifically states that it relates only to remediation work performed at the JM facility. The original action brought before the

Northern District of Illinois was filed under Sections 106 and 107 of CERCLA (42 U.S.C. §§ 9606 and 9607), whereas this case was brought pursuant to Section 31(d) of the Act (415 ILCS 5/31(d) (2012) and pertains to violations of Sections 21(a) and 21(e) of the Act. The two actions are therefore not duplicative of one another.

With regards to the Global Settlement Order and the 2007 AOC, neither IDOT nor the State is a party to either action. None of the three federal proceedings are duplicative of the instant action. IDOT is therefore not "unduly harass[ed]" by this case.

The Complaint Is Not Frivolous

IDOT contends that the complaint should be dismissed pursuant to Section 2-615 of the Illinois Code of Civil Procedure because "it is substantially insufficient as a matter of law."[2] Memo. at 13. While IDOT does not directly equate this position to the Board's frivolity standard, the two arguments are similar and the Board addresses IDOT's position as it would apply under the Act and the Board's regulations together with its argument as to Section 2-615.

A complaint is frivolous if it requests relief that the Board does not have the authority to grant, or fails to state a cause of action upon which the Board can grant relief. 35 Ill. Adm. Code 101.202. JM requests that the Board find that IDOT violated Sections 21(a) and 21(e) of the Act, and order IDOT to participate in the future response action at site 3. Comp. at 12. Section 33(a) of the Act grants the Board the authority to "issue and enter such final order, or make such final determination, as it shall deem appropriate under the circumstances." 415 ILCS 5/33(a) (2012). Further, Section 33(b) of the Act states in part that Board orders "may include a direction to cease and desist from violations of this Act." 415 ILCS 5/33(b) (2012). IDOT does not dispute that the Board has the authority to grant the requested relief. The Board is authorized to find violations of the Act, and the complaint is therefore not frivolous in this regard.

IDOT does, however, dispute that the complaint adequately states a cause of action upon which the Board can grant relief. IDOT argues that, taking the complaint as a whole, the conclusion that IDOT is responsible for buried ACM is a conclusion unsupported with specific facts and insufficient in law. Memo. at 12. IDOT states "[it] would be more likely to conclude that the transite pipe that has been buried at Site 3 was buried when the utility companies did digging and backfilling." *Id.* JM argues in response that "IDOT does not argue that it does not understand the allegations," but rather IDOT "alleges they are wrong, based solely on conjecture and theorizing." Resp. at 19. JM contends that it is only required to "plead facts which, if established, would entitle it to relief" and that it "has alleged facts sufficient to advise IDOT of the nature of the violations alleged." *Id.* at 17-18, 19.

The Board finds that the complaint is sufficiently specific as it reasonably informs IDOT of the alleged violations. To "cause or allow" open dumping, the alleged polluter must have the

[2] 735 ILCS 5/2-615 allows, in part, a party to move that an action be dismissed after pointing out "specifically the defects complained of." 735 ILCS 5/2-615(a) (2012). A court may "terminate the litigation in whole or in part" after ruling on the motion. 735 ILCS 5/2-615(d) (2012).

"capability of control over the pollution" or "control of the premises where the pollution occurred." People v. A.J. Davinroy Contractors, 249 Ill. App. 3d 788, 793-96, 618 N.E.2d 1282, 1286-88 (5th Dist. 1993). JM contends that IDOT has violated Sections 21(a) and 21(e) of the Act through IDOT's actions

> in breaking up, obliterating, spreading, burying, placing, dumping, disposing of and abandoning ACM, including Transite pipe, throughout Site 3 and in using ACM as fill during construction of the Greenwood Avenue ramp and expressway bypass from 1971 to 1976. Resp. at 9.

The Board finds the allegations sufficient to reasonably inform IDOT of the claims being brought against it. Further, IDOT's argument that the more likely conclusion for why the Transite pipe is at site 3 is that it "was buried when the utility companies did digging and backfilling" is not adequate grounds for dismissal. Memo. at 12. When ruling on a motion to dismiss, the Board takes all well-pled allegations in the complaint as true and draws all reasonable inferences from them in favor of the complainant. JM has provided sufficient facts to set forth a scenario which, if proven, may establish a violation of the Act. The complaint is therefore not frivolous.

Accept for Hearing

Section 31(d) of the Environmental Protection Act allows any person to file a complaint with the Board. 415 ILCS 5/31(d) (2012). Section 31(d) further provides that "[u]nless the Board determines that such complaint is duplicitous or frivolous, it shall schedule a hearing." *Id.*; *see also* 35 Ill. Adm. Code 103.212(a).

Having found that the complaint is neither duplicitous nor frivolous, the Board accepts the complaint for hearing. *See* 415 ILCS 5/31(d) (2012); 35 Ill. Adm. Code 103.212(a). A respondent's failure to file an answer to a complaint within 60 days after receiving the complaint may have severe consequences. Generally, if IDOT fails within that timeframe to file an answer specifically denying, or asserting insufficient knowledge to form a belief of, a material allegation in the complaint, the Board will consider IDOT to have admitted the allegation. 35 Ill. Adm. Code 103.204(d). The Board grants IDOT until Monday, December 9, 2013, which is the first business day following the 30th day of this order, to file an answer, if it so chooses.

The Board directs the hearing officer to proceed expeditiously to hearing. Among the hearing officer's responsibilities is the "duty . . . to ensure development of a clear, complete, and concise record for timely transmission to the Board." 35 Ill. Adm. Code 101.610. A complete record in an enforcement case thoroughly addresses, among other things, the appropriate remedy, if any, for the alleged violations, including any civil penalty.

If a complainant proves an alleged violation, the Board considers the factors set forth in Sections 33(c) and 42(h) of the Act to fashion an appropriate remedy for the violation. *See* 415 ILCS 5/33(c), 42(h) (2012). Specifically, the Board considers the Section 33(c) factors in determining, first, what to order the respondent to do to correct an on-going violation, if any, and, second, whether to order the respondent to pay a civil penalty. The factors provided in

Section 33(c) bear on the reasonableness of the circumstances surrounding the violation, such as the character and degree of any resulting interference with protecting public health, the technical practicability and economic reasonableness of compliance, and whether the respondent has subsequently eliminated the violation.

If, after considering the Section 33(c) factors, the Board decides to impose a civil penalty on the respondent, only then does the Board consider the Act's Section 42(h) factors in determining the appropriate amount of the civil penalty. Section 42(h) sets forth factors that may mitigate or aggravate the civil penalty amount. These factors include the following: the duration and gravity of the violation; whether the respondent showed due diligence in attempting to comply; any economic benefits that the respondent accrued from delaying compliance based upon the "lowest cost alternative for achieving compliance"; the need to deter further violations by the respondent and others similarly situated; and whether the respondent "voluntarily self-disclosed" the violation. 415 ILCS 5/42(h) (2012). Section 42(h) requires the Board to ensure that the penalty is "at least as great as the economic benefits, if any, accrued by the respondent as a result of the violation, unless the Board finds that imposition of such penalty would result in an arbitrary or unreasonable financial hardship." *Id*. Such penalty, however, "may be off-set in whole or in part pursuant to a supplemental environmental project agreed to by the complainant and the respondent." *Id*.

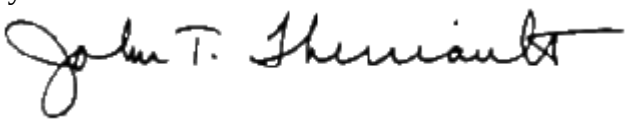
Accordingly, the Board further directs the hearing officer to advise the parties that in summary judgment motions and responses, at hearing, and in briefs, each party should consider: (1) proposing a remedy for a violation, if any, and supporting its position with facts and arguments that address any or all of the Section 33(c) factors; and (2) proposing a civil penalty, if any (including a specific total dollar amount and the portion of that amount attributable to the respondent's economic benefit, if any, from delayed compliance), and supporting its position with facts and arguments that address any or all of the Section 42(h) factors. The Board also directs the hearing officer to advise the parties to address these issues in any stipulation and proposed settlement that may be filed with the Board.

CONCLUSION

The Board finds that the complaint is neither duplicative nor frivolous. Accordingly, the Board denies IDOT's motion to dismiss the complaint, and the Board accepts the complaint for hearing. IDOT has until Monday, December 9, 2013, to file an answer to the complaint, if it so chooses.

IT IS SO ORDERED.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on November 7, 2013, by a vote of 4-0.



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John T. Therriault, Clerk
Illinois Pollution Control Board