BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

To: See Attached Service List

PLEASE TAKE NOTICE that on July 29, 2014, I caused to be filed with the Clerk of the Pollution Control Board of the State of Illinois, Complainant's Response to Respondent's Motion to Dismiss Amended Complaint and to Strike Portions of Amended Complaint, copies of which are attached hereto and herewith served upon you via e-mail. Paper hardcopies of this filing will be made available upon request.

Dated: July 29, 2014

Respectfully submitted,

BRYAN CAVE LLP

Attorneys for Complainant Johns Manville

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CERTIFICATE OF SERVICE

I, the undersigned, certify that on July 29, 2014, I caused to be served a true and correct copy of Complainant's Response to Respondent's Motion to Dismiss Amended Complaint and to Strike Portions of Amended Complaint upon all parties listed on the Service List by sending the documents via e-mail to all persons listed on the Service List, addressed to each person's e-mail address. Paper hardcopies of this filing will be made available upon request.

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Respondent.	)	

COMPLAINANT'S RESPONSE TO RESPONDENT'S MOTION TO DISMISS AMENDED COMPLAINT AND TO STRIKE PORTIONS OF AMENDED COMPLAINT

Complainant JOHNS MANVILLE ("JM") hereby responds to Respondent ILLINOIS DEPARTMENT OF TRANSPORTATION'S ("IDOT") Motion to Dismiss Amended Complaint and to Strike Portions of Amended Complaint as follows:

INTRODUCTION

Despite the fact that Complainant has already survived one Motion to Dismiss in this matter, Respondent IDOT now moves to dismiss this case for a second time, based on arguments that it could easily have made, but did not make, in its prior motion. Respondent is improperly using Complainant's Amended Complaint—which raises no new legal claims but only adds new facts—as an opportunity to take a second bite at the apple.

Respondent argues that JM's Amended Complaint should be dismissed on three grounds: (1) that the Board does not have authority to grant equitable relief; (2) that the statute of limitations on JM's claim has expired; and (3) that, even if the statute of limitation has not expired, JM's claim should be barred by the doctrine of laches because JM's delay in bringing this action has prejudiced IDOT's interests. Even assuming it were proper for Respondent to make these arguments now, each of these arguments fails on the merits.

As a threshold matter, the Board may only dismiss a complaint if it is "duplicative or frivolous." 415 ILCS 5/31(d)(1). The Board has already ruled that JM's Complaint is neither frivolous nor duplicative, which is the only standard the Board must apply in determining whether this case may be accepted for hearing. Respondent fails to demonstrate that the new facts introduced by JM in its Amended Complaint have somehow rendered JM's case frivolous or duplicative. Applying the law of the case doctrine, therefore, IDOT's second Motion to Dismiss must fail and should be denied for this reason alone.

IDOT's arguments fail on the merits as well. First, the Board already expressly held in its November 7, 2013 opinion denying IDOT's prior Motion to Dismiss that it has the authority to grant the relief requested. As the Board noted in that opinion, the Illinois Environmental Protection Act grants the Board broad authority to issue any order it deems appropriate under the circumstances. IDOT's argument wholly ignores long-standing Board precedent in which the Board has ordered exactly the type of relief that JM has requested in this case.

Second, IDOT argues that JM's claim is barred by a five-year statute of limitations which, it contends, began to toll in 2007 at the latest, when JM entered into an Administrative Order on Consent ("AOC") with the United States Environmental Protection Agency ("EPA") for the Waukegan site. IDOT's argument is wrong on several fronts. The Act itself does not impose any statute of limitation on citizen enforcement actions seeking prospective injunctive relief under Section 31(d).

But even if it did, the Amended Complaint here alleges that the violations—which include disposing of and abandoning ACM waste—are "continuing in nature," thereby continually tolling the statute of limitations.

Finally, assuming the five-year statute of limitations advocated by IDOT were to apply here, the Board would adhere to the "discovery rule," by which the statute of limitations would begin to run on "the date that the injured person knew or reasonably should have known of the

injury and that the injury was wrongfully caused." *Indian Creek Dev. Co. v. Burlington N. Santa Fe Rwy.*, PCB 07-44, at 5-6 (June 18, 2009). Here, JM did not know that it was injured by IDOT's violations until November 30, 2012 when EPA issued an Action Memorandum selecting a remedy for the Southwestern Sites, which included the removal of ACM that had been buried by IDOT. Am. Compl., ¶ 42. It was not until then that JM was aware of the scope of work EPA would require at the Southwestern Sites. Accordingly, this action, which was filed well within five years of November 30, 2012 does not run afoul of IDOT's proposed statute of limitations.

Finally, just as JM's claim is not barred by a statute of limitations, it likewise is not subject to dismissal on grounds of laches. The Board has repeatedly held that laches is not an appropriate grounds for dismissal and, further, that the affirmative defense of laches does not apply to enforcement actions under the Illinois Environmental Protection Act. Even if laches could apply to this action, JM is not guilty of laches because it has diligently pursued its claim against IDOT and, indeed, filed this action within the five-year statute of limitations that IDOT claims governs this case.

In the alternative, IDOT moves to strike certain portions of JM's Amended Complaint as "irrelevant and immaterial" to JM's causes of action, pursuant to Section 2-615 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-615 (2012). Specifically, IDOT requests that the Board strike certain allegations that describe the scope of the remedy that EPA has required JM to conduct under the AOC. The reasoning behind IDOT's motion to strike these allegations is unclear. These allegations are a necessary element of the Amended Complaint because they go to the remedy in this case: JM has requested relief in the form of an order requiring IDOT to participate in the remedy required by EPA for portions of the Waukegan site. Accordingly, the scope of that remedy is directly relevant to these proceedings.

Although IDOT complains throughout its motion that its ability to defend this case has been prejudiced due to delay, the continued delays in this case since it was originally brought

over a year ago have in fact been prejudicial to JM. JM has requested relief in the form of an order requiring IDOT to participate in a remedy that is expected to commence in the next several months. Although JM has accommodated reasonable delays due to unforeseen circumstances, including the unexpected death of IDOT's prior counsel, JM notes that it took nearly three months for IDOT to identify suitable replacement counsel and an additional forty-five days before IDOT was prepared to file a responsive pleading to JM's Amended Complaint. The fact that IDOT has now further delayed the progress of this case by filing a second Motion to Dismiss, after the Board has already rejected one such motion, borders on bad faith.

For the reasons set forth herein, Respondent's Motion to Dismiss Amended Complaint and to Strike Portions of Amended Complaint must be denied. The Board plainly has the authority to grant the requested relief, the Complaint states a cause of action upon which the Board can grant relief, and IDOT fails to prove otherwise.

BACKGROUND AND STATEMENT OF FACTS

On July 8, 2013, Complainant JM filed a Complaint before the Illinois Pollution Control Board (the "Board") pursuant to Section 31(d) of the Illinois Environmental Protection Act (the "Act"), 415 ILCS 5/31(d), which authorizes "any person" to file a complaint before the Board against "any person allegedly violating this Act." 415 ILCS 5/31(d). In its original Complaint, JM contended that IDOT violated certain provisions of Section 21 of the Act when it broke up, obliterated, spread, buried, placed, dumped, disposed of and abandoned ACM including asbestos-containing Transite® pipe and used it as fill during an expressway project at and near a site in Waukegan, Illinois currently owned by Commonwealth Edison ("ComEd"), which is referred to herein as Site 3. Site 3 neighbors the former JM manufacturing facility located in Waukegan, Illinois (the "Facility").

On September 27, 2013, Respondent IDOT filed a Motion to Dismiss JM's Complaint pursuant to Section 2-619.1 of the Illinois Code of Civil Procedure. Following briefing on the

Motion, the Board issued an opinion on November 7, 2013 denying IDOT's Motion to Dismiss. The Board expressly held that "the complaint is neither duplicative nor frivolous" and accepted the complaint for hearing. *Johns Manville v. Illinois Dep't of Transp.*, PCB 14-03, at 13 (Nov. 7, 2013).

On March 12, 2014, based on newly-discovered information, JM moved to amend its Complaint to add allegations that IDOT similarly violated the Act when it disposed of and abandoned ACM waste and caused the open dumping of ACM waste at and near Site 6, another area immediately adjacent to the Facility that is subject to the 2007 AOC. *See generally* Complainant's Amended Complaint ("Am. Compl."). Site 6 is located on the north and south edges of Greenwood Avenue east of North Pershing Road and to the north of Site 3. Am. Compl., ¶ 14. As stated in the Amended Complaint, engineering drawings produced by IDOT coupled with subsurface testing done near Site 6 and other information suggests that ACM was used as fill in portions of the Amstutz Expressway project that impacted Site 6 as well as Site 3. Am. Compl., ¶¶ 33, 34. JM did not add any new legal claims to its Amended Complaint.

To the extent that IDOT's Statement of Facts in its Motion to Dismiss and Motion to Strike largely excerpts from JM's Amended Complaint, JM deems those facts admitted and does not repeat them here. Further, JM hereby incorporates by reference the facts set forth by the Board in its November 7, 2013 opinion denying IDOT's first Motion to Dismiss.

LEGAL STANDARD

Section 31(d) of the Act provides that "any person may file with the Board a complaint . . . against any person allegedly violating this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit, or any Board order." 415 ILCS 5/31(d)(1) (2012). "Unless the Board determines that such complaint is duplicative or frivolous, it shall schedule a hearing and serve written notice thereof upon the person or persons named therein." 415 ILCS 5/31(d)(1) (2012). Per the Board's rules, a complaint is considered "duplicative" if the matter is

"identical or substantially similar to one brought before the Board or another forum." 35 Ill. Adm. Code § 101.202. An action before the Board is "frivolous" if the Board does not have the authority to grant the requested relief, or if the complaint fails to state a cause of action upon which the Board can grant relief. 35 Ill. Adm. Code § 101.202.

When ruling on a motion to dismiss, the Board takes all well-pled allegations as true and draws all inferences from them in favor of the non-movant. *People v. Peabody Coal Co.*, PCB 99-134, at 1-2 (June 20, 2002). Dismissal is proper only if it is clear that no set of facts could be proven that would entitle a complainant to relief. *People v. Stein Steel Mills Co.,* PCB 02-1, at 1 (Nov. 15, 2001).

ARGUMENT

I. RESPONDENT'S MOTION TO DISMISS MUST BE DENIED BASED ON THE LAW OF THE CASE DOCTRINE.

IDOT's Motion to Dismiss must be denied for the simple reason that the Board has already denied one motion to dismiss in this case, and nothing has changed since that motion was denied that would warrant a different outcome. Since the Board issued its opinion on November 7, 2013, JM amended its Complaint only to add new allegations relating to IDOT's activities at Site 6. These new allegations are largely identical to JM's allegations in its original Complaint relating to IDOT's activities at Site 3. IDOT does not argue that these new facts require the Board to modify its prior decision. IDOT does not even attempt to limit the scope of its motion to only these new allegations. Rather, IDOT takes this opportunity to rehash old arguments previously rejected by the Board and to raise new arguments that it neglected to raise in its first Motion to Dismiss and which it easily could have raised at that time. Indeed, IDOT raised its statute of limitations and laches arguments as affirmative defenses in its Answer to JM's Original Complaint, which was filed after the Board denied IDOT's first Motion to Dismiss. IDOT does

not get a second bite at the apple, and its Motion to Dismiss should be denied for this reason alone.

Under the law of the case doctrine, generally, a rule established as controlling in a particular case will continue to be the law of the case, as long as the facts remain the same. *People v. Patterson*, 154 Ill.2d 414, 468 (Ill. 1992); *Elmhurst Mem'l Healthcare and Elmhurst Mem'l Hosp. v. Chevron U.S.A. Inc. and Texaco Inc.*, PCB 09-66, at 27 (July 7, 2011). This doctrine is binding on a court where the prior decision was final. *Elmhurst* at 27.

The Board's November 7, 2013 opinion was a final resolution of the sufficiency of JM's original Complaint, and the Board expressly held that that Complaint was neither frivolous nor duplicative and could proceed to hearing. JM's Complaint has not substantially changed except to add new allegations that are largely identical to the allegations in the original Complaint. In particular, no facts have changed that would impact the three arguments IDOT has now raised in its second Motion to Dismiss (*e.g.,* the Board's authority to grant the relief requested, the applicable statute of limitations, and laches). IDOT has not argued that the Board erred in reaching its prior decision. Accordingly, the law of this case dictates that JM's Amended Complaint is neither frivolous nor duplicative and can proceed to hearing. IDOT has failed to prove otherwise, and its second Motion to Dismiss should be denied.

II. RESPONDENT HAS FAILED TO DEMONSTRATE THAT JM'S AMENDED COMPLAINT IS DUPLICATIVE OR FRIVOLOUS.

The Board is required to schedule JM's Complaint for a hearing "unless the Board determines that such complaint is duplicative or frivolous." 415 ILCS 5/31(d)(1) (2012). IDOT does not argue that JM's Amended Complaint is duplicative or frivolous. Indeed, the Board confirmed in its November 7, 2013 opinion that this case is not duplicative of any other action and that the case is not frivolous. *Johns Manville*, at 10-11.

However, notwithstanding IDOT's argument, the Board has already made a final determination that it has the authority to grant the relief requested in this case. As the Board observed in its November 7, 2013 opinion, 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" and to "include a direction to cease and desist from violations of the Act." *Johns Manville,* at 11 (*citing* 415 ILCS 5/33(b)(2012)). JM requests the same relief in its Amended Complaint as it requested in its original Complaint. Accordingly, as discussed above, the Board is bound to follow its prior legal determination that it has the authority to grant the relief requested, pursuant to the law of the case doctrine. *People v. Patterson*, 154 Ill.2d 414, 468 (Ill. 1992); *Elmhurst Mem'l Healthcare and Elmhurst Mem'l Hosp. v. Chevron U.S.A. Inc. and Texaco Inc.*, PCB 09-66, at 27 (July 7, 2011)

Even if this issue had not been previously decided, IDOT's argument has no merit. IDOT contends that the Board has no authority to order "equitable relief," which it claims is within the exclusive province of the circuit courts, and that any request for equitable or injunctive relief must be brought in circuit court and not before the Board. Respondent's Motion to Dismiss Amended Complaint ("Resp. Mot.") at 7. Even assuming that JM's request is equitable in nature, IDOT's narrow interpretation of the Board's authority is quite simply not supported by Board precedent or the Board's prior decision in this case.

As the Board has previously observed in this case, the Act grants the Board broad authority to issue orders "as it shall deem appropriate under the circumstances." 415 ILCS 5/33(b). For example, in its opinion denying IDOT's first Motion to Dismiss, the Board acknowledged that it has the authority to issue cease and desist orders and to find violations of the Act. *Johns Manville*, at 11. It also directed the Hearing Officer to advise the parties to consider proposing a remedy for the violation as well as a civil penalty. *Id.* at 13. The Board has previously recognized that its authority is "broader than the circuit court's authority to hear

enforcement cases," insofar as the Board is empowered to hear citizen suits under Section 31(b) of the Act. *Lake Cty. Forest Preserve Dist. v. Ostro*, PCB 92-80, at 13 (March 31, 1994). The scope of the Board's authority to grant relief is generally commensurate with the circuit court's authority to grant relief under the Act because, as the Board noted in that case, "[i]f we were to find that the circuit court had a remedy . . . which was not available before the Board, we would be finding that citizens have fewer remedies for violations of the Act [than the State has in similar enforcement actions]." *Id.* Indeed, in numerous enforcement cases, the Board has granted relief of the type JM requests here, including orders requiring a party to conduct remediation and investigation. *See, e.g., Lake Cty. Forest Pres. Dist.*, at 12-13 (citing broad grant of authority under Section 33(a) of the Act and ordering respondents to conduct investigation and remediation and to pay cleanup costs for violations that occurred more than ten years prior); *Mather Inv. Prop., L.L.C. v. Ill. State Trapshooters Ass'n, Inc.*, PCB 05-29, at 4 (July 21, 2005) (holding that the Board has authority to grant order directing Trapshooters Association to remediate any contamination remaining on the property and noting that "[t]he Board has similarly found that Section 33 considers and provides for remediation of property"). The unrelated dicta cited by IDOT in its Motion to Dismiss does not outweigh this long-standing precedent.[1]

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[1] JM would also note that Respondent misinterprets the language of the Act and of the Illinois appellate court's opinion in *People v. Fiorini* when it argues that any citizen suit seeking injunctive relief must be brought in circuit court and not before the Board. Mot. Dismiss at 7 (citing 415 ILCS 5/45, which provides that "[a]ny person adversely affected in fact by a violation of this Act or of regulations adopted thereunder may sue for injunctive relief against such violation" but that "no action shall be brought under this Section until 30 days after plaintiff has been denied relief by the Board under paragraph (b) of Section 31 of this Act"). As reaffirmed by the appellate court in *People v. Fiorini*, Section 45 of the Act simply requires that any citizen filing a suit under Section 31(b) must first exhaust his or her administrative remedies by filing a complaint before the Board before he or she may file a lawsuit in circuit court. *See People v. Fiorini*, 192 Ill.App.3d 396, 401 (3d Dist. 1989). Contrary to IDOT's assertions, the Act does not prohibit the Board from granting equitable or injunctive-type relief.

Having failed to demonstrate that the Board does not have authority to grant the relief requested by JM, IDOT therefore fails to prove that JM's Amended Complaint is frivolous. For this reason as well, Respondent's Motion to Dismiss must be denied.

III. JM'S AMENDED COMPLAINT IS NOT BARRED BY A STATUTE OF LIMITATIONS OR LACHES.

As previously noted, the Act requires that "[u]nless the Board determines that such complaint is duplicative or frivolous, it shall schedule a hearing and serve written notice thereof upon the person or persons named therein." 415 ILCS 5/31(d)(1)(2012). Accordingly, the only standard the Board must apply at this stage is whether JM's Amended Complaint is duplicative or frivolous. In its second Motion to Dismiss, IDOT improperly expands upon this standard by introducing arguments that are more appropriately presented as affirmative defenses or, at most, a Motion for Summary Judgment—specifically, that JM's claims are barred by statute of limitations and/or laches. To the extent the Board chooses to consider these arguments at this stage, IDOT has failed to prove that JM's Amended Complaint must be dismissed on these grounds. JM will address each of these arguments in turn below.

a. JM's Amended Complaint Is Not Barred by Statute of Limitations.

IDOT argues, first, that JM's Amended Complaint must be dismissed because a five-year statute of limitations applies to JM's claims, pursuant to Section 13-205 of the Illinois Code of Civil Procedure and that statute of limitations started running either in 1976 (when construction began on the Amstutz Expressway) or alternatively in 1998 (when JM learned that ACM was present at and beneath Site 3) or, at the latest, in 2007 (when JM signed the AOC with EPA and ComEd). Resp. Mot. at 7-11. IDOT's argument fails.

The Act itself does not impose any statute of limitation on citizen enforcement actions under Section 31(d). Indeed, the Board in *Lake County Forest Preserve District v. Ostro*

expressly rejected an argument that a citizen enforcement action claiming violations of Section 21 of the Act was barred by the five-year statute of limitations, holding that the complainant was acting in the capacity of a "private attorney general" in asserting the public's right to a clean environment on behalf of all people of the State and, therefore, the five-year statute of limitations did not apply. PCB 92-80, at 2 (July 30, 1992) (citing *Pielet Bros. Trading, Inc. v. Pollution Control Bd.*, 110 Ill.App.3d 752 (5th Dist. 1982)).

This is a citizen enforcement action under Section 31(d). Here, JM has requested that the Board (1) find that IDOT violated the Act and (2) issue an order requiring IDOT to participate in ongoing remediation at Site 3 and Site 6. JM is acting in the capacity of a private attorney general to enforce that Act and to ensure that ACM contamination at Site 3 and Site 6 is fully and properly remediated in accordance with the public's right to a clean environment. Accordingly, per the Board's prior holdings, no statute of limitations applies to JM's request for relief.

While the Board has recognized that a five-year statute of limitations may apply to private *cost recovery* actions under the Act, this is not a private cost recovery action. JM is not seeking to recover money it has spent cleaning up the Southwestern Sites. JM is seeking an order requiring IDOT to participate in a remediation action. By its terms, the statute of limitations at Section 13-205 of the Code of Civil Procedure applies only to actions seeking to "recover damages" for an injury done to property or for "civil actions." *See also Meyers v. Kissner*, 149 Ill.2d 1, 12 (1992) (holding that "statutes of limitations, applicable in legal actions, are not directly controlling in suits seeking equitable relief"). JM has requested relief in the context of an administrative proceeding and, indeed, would not have any claim for property damages against IDOT since JM does not own the property at issue.

But even if the Board were to construe JM's claim as a cost recovery action, that claim would still not be barred by any statute of limitations for at least two reasons. First, JM has

alleged in its Amended Complaint that, although IDOT conducted work on the Amstutz Expressway between approximately 1971 and 1976 and violated the Act by dumping and disposing of ACM in and around Site 3 and Site 6 during that time, IDOT also abandoned those materials when it completed construction in 1976 and the ACM remains *in situ* at both Site 3 and Site 6. Am. Compl., ¶ 67. Accordingly, as stated in the Amended Complaint, because this material remains on site, IDOT's violations are continuing in nature. Am. Compl., ¶ 70. Under the Illinois "continuing violation rule," where a tort involves a continuing or repeated injury, the statute of limitations does not begin to run until the date of the last injury or the date the tortious acts cease." *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A.*, 199 Ill.2d 325, 345 (2002). The Board has recognized that the "dispose, store, and abandon" language from Section 21(e) of the Act may be read to encompass continuing violations. *See Casanave v. Amoco Oil*, PCB 97-84, at 4 (Nov. 20, 1997). Here, IDOT disposed of and abandoned ACM at Site 3 and Site 6 in or around 1976 and has since continued to abandon those materials insofar as they remain on-site and have not been remediated. Because the statute of limitations will not begin to run with respect to this decades-long continuing violation unless and until those materials are removed or otherwise remediated, JM's claim against IDOT is not barred by that statute of limitations.

Second, JM filed this action within five years of the applicable "discovery" date. As IDOT rightly points out, the date that any statute of limitations would begin to run in this case is determined based on the "discovery rule," which provides that a statute of limitations begins to run on "the date that the injured person knew or reasonably should have known of the injury and that the injury was wrongfully caused." *Indian Creek Dev. Co. v. Burlington N. Santa Fe Rwy.*, PCB 07-44, at 5-6 (June 18, 2009). Here, the applicable date of discovery is November 30, 2012, when JM learned it was obligated to clean up ACM waste abandoned by IDOT. The geographic scope of any work JM was required to perform on Site 3 and Site 6 was not determined until that date. Consequently, the statute did not begin to run until that time. *See,*

e.g., Khan v. BDO Seidman, 408 Ill.App.3d 564, 603 (4th Dist. 2011) (holding that the statute of limitations did not begin to run until a cause of action arose—specifically, a settlement or assessment with the IRS—even though the plaintiffs clearly knew that they had received bad tax advice several years prior because "negligence without harm does not make a cause of action").

In the alternative, the statute did not begin to run here until July 8, 2008. On that date, JM received notice from its environmental consultant of the actual presence of Transite® materials in the Greenwood Avenue ramp area at a location at least one foot higher than the adjacent ground surface where ACM was known to exist on the Facility property. Am. Compl. ¶ 32. The discovery of this above-grade material in the Greenwood Avenue ramp was the first concrete evidence that IDOT likely used ACM from the Waukegan site as fill during construction of the roadway and therefore increased the footprint of ACM at the Southwestern Sites. Prior to that time, as stated in the Amended Complaint, EPA took the position that there was insufficient evidence that IDOT contributed ACM to the Southwestern Sites. Am. Compl., ¶ 31.

This action was filed on July 8, 2013, which falls within the proffered five year statute of limitations, even if the July 8, 2008 date is used as the date of discovery. Accordingly, JM's claim is not barred by any five-year statute of limitations and should not be dismissed on these grounds.

b. JM's Amended Complaint Is Not Barred by Laches

IDOT next argues that JM's delay in bringing the current action is prejudicial to IDOT's interests primarily because the IDOT engineer who oversaw the Amstutz Expressway project died over ten years ago and the general contractor for the project reportedly went out of business thirteen years ago. By IDOT's logic, JM's claim would have been barred by laches as early as 2001, which is even before any statute of limitations would have begun to run in this case. This

result is nonsensical. The fact that certain witnesses may be unavailable does not prevent IDOT from mounting a defense in this case. *See Elmhurst Mem'l Healthcare and Elmhurst Mem'l Hosp. v. Chevron U.S.A. Inc. and Texaco Inc.*, PCB 09-66, at 9, 33-34 (July 7, 2011) (granting motion to strike affirmative defense of laches even where it had been more than 30 years since respondents last had any contact with the property at issue and documents, witnesses and other evidence "cannot be located or are no longer in existence"). Environmental cases routinely involve conduct that occurred decades ago. Moreover, the fact that the Bolander Company is out of business, assuming that is true, does not mean that they have no records and that all of their employees are dead. There is absolutely no reason to believe that the prior owners and employees of the now defunct Bolander Company cannot testify in this matter. It is the Board's job to determine, based on all the evidence presented, whether JM can support its claim. IDOT cannot make that determination prospectively on the Board's behalf before any evidence is presented.

Notwithstanding IDOT's argument, however, the Board has repeatedly held that laches is not a proper grounds for dismissal and, moreover, that laches does not apply to enforcement actions under the Act. *People of the State of Illinois v. Big O, Inc.*, PCB 97-130, at 1 (April 17, 1997) ("[T]he Board has previously held that the equitable doctrine of laches generally does not apply to enforcement actions brought under the Illinois Environmental Protection Act." (citing cases)); *People of the State of Illinois v. Cmty. Landfill Co., Inc., et al.*, PCB 97-193 and 04-207, at 6 (April 20, 2006) (noting that "the Board has consistently found that . . . a defense of laches does not warrant dismissal").

In the same vein, the Board has previously acknowledged that if the right to bring a lawsuit is not barred by statute of limitations, then the equitable doctrine of laches also will not bar the lawsuit. *People of the State of Illinois v. Big O, Inc.*, PCB 97-130, at 1 (April 17, 1997) ("In assessing the period in which claims will be barred by laches, equity follows the law, and

generally courts of equity will adopt the period of limitations established by statute."). Here, as discussed above, the statute of limitations does not bar JM's claim. Accordingly, IDOT's Motion to Dismiss must be denied for this reason as well.

IV. ALLEGATIONS IN THE AMENDED COMPLAINT ARE MATERIAL AND SHOULD NOT BE STRICKEN.

Finally, and in the alternative, if the Board does not grant its Motion to Dismiss, IDOT requests that the Board strike certain portions of the Amended Complaint, namely those allegations that discuss the scope of the remediation that EPA has required JM to perform on Site 3 and Site 6 under the 2007 AOC. Resp. Mot. at 13-15. IDOT asserts that these allegations must be stricken as "immaterial," pursuant to Section 2-615(a) of the Illinois Code of Civil Procedure. Resp. Mot. at 14. IDOT argues that the Amended Complaint is "encumbered" with this supposedly unnecessary material and that "it is most certainly not necessarily to allege, as Complainant does, the nature, extent, and scope of the removal actions which it must undertake pursuant to the AOC." Resp. Mot. at 14. JM strenuously disagrees.

JM has requested relief in the form of an order requiring IDOT to participate in the remedies required under the Action Memorandum for Site 3 and Site 6. The allegations IDOT seeks to strike go directly to the scope of the remedy JM has requested from the Board. As the Board noted in its November 7, 2013 opinion on IDOT's first Motion to Dismiss, the Board expressly directed the parties to consider "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." *Johns Manville*, at 13. The factors set forth in Section 33(c) of the Act 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." *Id.* (emphasis added). The allegations set forth in JM's Amended

Complaint are key to understanding the scope and cost of the remedy JM is required to perform, which is necessary in order for the Board to fashion an order that appropriately reflects IDOT's relative contribution to the performance of that remedy.

JM also emphasizes that these allegations are by no means new to IDOT; indeed, JM made these allegations in its original Complaint and IDOT answered the allegations after its first Motion to Dismiss failed. There is no reason why these allegations should now be stricken. Accordingly, the Board should deny JM's Motion to Strike, as well as its Motion to Dismiss.

CONCLUSION

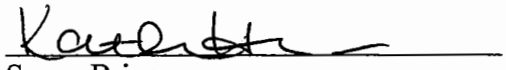
For the reasons set forth above, JM requests that the Board deny Respondent IDOT's Motion to Dismiss Amended Complaint and Motion to Strike Portions of Amended Complaint, schedule this matter for a hearing in accordance with Section 31(d)(1), and order appropriate pre-hearing discovery pursuant to the Board's rules. In the alternative, to the extent the Board deems JM's Complaint to be legally deficient, JM hereby requests leave to amend its Complaint to allege additional facts.

Dated: July 29, 2014

Respectfully submitted,

BRYAN CAVE LLP

Attorneys for Complainant Johns Manville

By: 

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