

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

<b>In the Matter Of:</b>	)	
	)	
<b>JOHNS MANVILLE, a Delaware corporation,</b>	)	
	)	
	)	
<b>JM,</b>	)	<b>PCB No. 14-3</b>
	)	
<b>v.</b>	)	
	)	
<b>ILLINOIS DEPARTMENT OF TRANSPORTATION,</b>	)	
	)	
	)	
<b>Respondent.</b>	)	

**NOTICE OF FILING**

To: See Attached Service List

PLEASE TAKE NOTICE that on May 4, 2016, I caused to be filed with the Clerk of the Pollution Control Board of the State of Illinois, Complainant's Reply to Respondent's Affirmative Defenses, 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: May 4, 2016

Respectfully submitted,

BRYAN CAVE LLP

Attorneys for JM Johns Manville

By: /s/ Lauren J. Caisman  
Susan Brice, ARDC No. 6228903  
Lauren J. Caisman, ARDC No. 6312465  
161 North Clark Street, Suite 4300  
Chicago, Illinois 60601  
(312) 602-5079  
Email: lauren.caisman@bryancave.com

**CERTIFICATE OF SERVICE**

I, the undersigned, certify that on May 4, 2016, I caused to be served a true and correct copy of the attached *Notice of Filing of Complainant's Reply to Respondent's Affirmative Defenses* 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.

/s/ Lauren J. Caisman

Lauren J. Caisman

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

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

**COMPLAINANT’S REPLY TO RESPONDENT’S AFFIRMATIVE DEFENSES**

Complainant JOHNS MANVILLE (“JM”) hereby submits its Reply to Respondent ILLINOIS DEPARTMENT OF TRANSPORTATION’S (“IDOT”) Affirmative Defenses as follows:

**IDOT’s First Affirmative Defense (Unclean Hands)**

1. All of the asbestos-containing materials (“ACM”) located at Sites 3 and 6 were placed on those Sites by Johns Manville (“JM”) and the Illinois Department of Transportation (“IDOT”) had no role in bringing the ACM to Sites 3 and 6.

**ANSWER:** JM admits only that it placed concrete Transite pipe on top of a parking lot area that it used in the late 1950s and 1960s that later became part of Site 3. Except as specifically admitted, JM denies the allegations contained in this paragraph.

2. USEPA initially identified JM and Commonwealth Edison as the potentially responsible parties (“PRP”) for the ACM contamination at Site 3 and, subsequently, at Site 6. No additional PRPs have ever been identified for Sites 3 and 6, and USEPA has never determined that IDOT was a PRP for the ACM contamination at Site 3 or, subsequently, Site 6.

**ANSWER:** JM admits only that JM and Commonwealth Edison (“ComEd”) have been identified as potentially responsible parties under CERCLA with respect to Sites 3 and 6 and that

USEPA did not order the Illinois Department of Transportation (“IDOT”) to enter into an Administrative Order on Consent under CERCLA. JM lacks sufficient knowledge or information to know whether USEPA ever identified other potentially responsible parties, whether USEPA ever determined that IDOT was a potentially responsible party for Sites 3 or 6 or whether USEPA was aware that IDOT has held an interest in parts of Sites 3 and 6 since 1971. Except as specifically admitted, JM denies the allegations contained in this paragraph.

3. The USEPA only required JM and Commonwealth Edison, and not IDOT, to enter into an Administrative Order on Consent (“AOC”) for the investigation and removal of the ACM at Sites 3 and 6.

**ANSWER:** JM admits only that USEPA required only JM and ComEd to enter into an Administrative Order on Consent (“AOC”) under CERCLA, which is a different law from the Illinois Environmental Protection Act, and further states that the AOC speaks for itself. Except as specifically admitted, JM denies the allegations contained in this paragraph.

4. JM and Commonwealth Edison, and not IDOT, are currently under a legal obligation to remove the ACM at Sites 3 and 6, because USEPA has determined that they are responsible for the ACM at those sites.

**ANSWER:** Paragraph 4 states a legal conclusion, for which no response is required. To the extent any response is required, JM states that the nature and extent of obligations imposed on JM are set forth in the Administrative Order on Consent, the Administrative Record and documents produced by JM in this case. Further, JM denies that IDOT is not currently under a legal obligation to remove the ACM at Sites 3 and 6. Except as specifically admitted, JM denies the allegations contained in this paragraph.

5. ACM waste materials were discovered at Site 3 at various depths and consisted of asbestos-containing felt paper, tar paper, roofing materials, flash paper and insulation, as well as Transite.

**ANSWER:** JM admits only that ACM waste materials were found on the surface and buried on Site 3 at various depths; according to the environmental reports, the buried ACM was predominantly in the 0-2 foot range and not deeper than three feet. The buried ACM is predominantly Transite but also includes two instances of both insulation and tar paper and one instance of fibrous material. Most of the ACM is located at or adjacent to the location of the former Detour Road constructed by IDOT. Except as specifically admitted, JM denies the allegations contained in this paragraph.

6. ACM waste materials were discovered at Site 6 at various depths and consisted of asbestos-containing fibrous sludge, roofing materials, brake materials, shingles and Transite.

**ANSWER:** JM admits only that ACM waste materials were found in the top three feet of Site 6 (as it relates to this case) within the zone of fill material placed by IDOT during the Amstutz Project. According to the environmental reports, the ACM waste found in this area was predominantly Transite, but included roofing sludge in two locations, brake shoe in one location and limited roofing materials, including shingles in one location. Except as specifically admitted, JM denies the allegations contained in this paragraph.

7. In addition to the ACM discovered at Sites 3 and 6, ACM waste materials was discovered at Sites 4/5 (the western edge of the former JM facility) at various depths and consisted of Transite, roofing materials, brake shoe materials and other forms of ACM. Sampling field work undertaken in the early months of 2008, showed that ACM waste materials were pervasive in the subsurface at Sites 4/5.

**ANSWER:** JM states that this matter does not involve Site 4/5 and thus the allegations in this paragraph are irrelevant. JM admits only that ACM waste materials were discovered at Site 4/5 and that the exact location of Site 4/5 and the type and location of any ACM waste materials are contained in the Administrative Record and numerous documents produced in this case. JM further states that the ACM waste on the south portion of Site 4/5 was, on information

and belief, placed there by IDOT as fill when it built the Amstutz Expressway in the early 1970s. Except as specifically admitted, JM denies the allegations contained in this paragraph.

8. Given the prevalence of various forms of ACM material at the JM Site, Sites 3, 4/5, and 6, and JM's existing obligations under the AOC for removing this ACM, JM's efforts to name IDOT as a respondent in this present action should be barred, as Johns Manville has unclean hands.

**ANSWER:** JM denies the allegations contained in paragraph 8.

**IDOT's Second Affirmative Defense (Waiver)**

1. JM was aware at the time that IDOT began construction work on Greenwood Avenue and in the former Parking Lot that ACM Transite pipe was located on and at the Parking Lot.

**ANSWER:** JM lacks knowledge or information to determine exactly what JM was aware of in 1970, but admits that JM was aware that it had placed concrete Transite pipes for a specific, useful purpose as wheel stops on top of the parking lot it had used in the late 1950s and 1960s that later became part of Site 3. Except as specifically admitted, JM denies the allegations contained in this paragraph.

2. At least as early as 2000, JM asserted to USEPA that IDOT was responsible for the ACM at Site 3.

**ANSWER:** JM admits only that it communicated with USEPA Region V regarding whether the USEPA Region V would be bringing in the State as a potentially responsible party under CERCLA at Additional Site No. 3, that those communications speak for themselves, that JM was told by USEPA that they were not going to name IDOT as a party to the AOC. Except as specifically admitted, JM denies the allegations contained in this paragraph.

3. In a July 6, 2000 email from JM's counsel to an attorney with USEPA Region V, JM's counsel urged USEPA to name IDOT as a PRP at Site 3.

**ANSWER:** The allegations contained in paragraph 3 purport to characterize a document which speaks for itself and is the best evidence of its content. To the extent that Respondent's characterization of that document is inaccurate or incomplete, JM denies it. JM admits only that it communicated with USEPA Region V regarding whether the USEPA Region V would be bringing in the State as a potentially responsible party under CERCLA at Additional Site No. 3. Except as specifically admitted, JM denies the allegations contained in this paragraph.

4. In an August 7, 2000 email from JM's counsel to the Illinois Attorney General, JM's counsel raised the same allegations concerning IDOT's potential liability for ACM contamination at Site 3 that it now makes in its Second Amended Complaint.

**ANSWER:** JM denies the allegations contained in Paragraph 4.

5. On information and belief, JM continued to urge USEPA to name IDOT as a PRP for Site 3 at least up through the entry of the AOC in June 2007.

**ANSWER:** JM denies the allegations contained in paragraph 5.

6. JM was aware even before the AOC was entered in June 2007 that it would be required under the terms of the AOC to undertake a substantial amount of work at Sites 3 and 6, including "determining the extent of asbestos contamination at or near the Southwestern Site Area (AOC, § VIII.15.a), the development of an "Extent of Contamination Work Plan" (AOC, § VIII.15.b), and the implementation of the scope of work identified under that plan.

**ANSWER:** JM denies the allegations contained in paragraph 6.

7. By failing to commence its action before the Pollution Control Board ("Board") for approximately 13 years after JM first raised issues about IDOT's potential liability for ACM contamination at Site 3, as well as six years after the signing of the AOC by all parties, including JM, and long after it was aware of the nature and extent of IDOT's construction project, JM waived its rights to bring this action when it initially filed it with the Board on July 9, 2013.

**ANSWER:** JM denies the allegations contained in paragraph 7.

### **IDOT's Third Affirmative Defense (Laches)**

1-6. IDOT realleges and incorporates by reference Paragraphs 1 through 6 of its Second Affirmative Defense as Paragraphs 1-6 of its Third Affirmative Defense.

**ANSWER:** JM incorporates its responses to paragraphs 1 through 6 to IDOT's Second Affirmative Defense as if set forth fully herein.

7. By failing to commence its action before the Board for approximately 13 years after JM first raised issues about IDOT's potential liability for ACM contamination at Site 3, as well as some six years after it entered into the AOC with USEPA, and long after it was aware of the nature and extent of IDOT's construction project, JM's claims against IDOT are now barred under the doctrine of laches.

**ANSWER:** JM notes that the Board already found that laches does not apply in this case and JM further denies the allegations contained in paragraph 7.

**IDOT's Fourth Affirmative Defense (Statute of Limitations)**

1-6. IDOT realleges and incorporates by reference Paragraphs 1 through 6 of its Second Affirmative Defense as Paragraphs 1-6 of its Fourth Affirmative Defense.

**ANSWER:** JM incorporates its responses to paragraphs 1 through 6 to IDOT's Second Affirmative Defense as if set forth fully herein.

7. Section 13-205 of the Illinois Code of Civil Procedure, 735 ILCS 5/13-205 provides for a five year statute of limitations for the causes of actions that JM which JM has brought under its Second Amended Complaint.

**ANSWER:** JM denies the allegations contained in paragraph 7.

8. JM's causes of action under the Act began accruing no later than June 2007, when it entered into the AOC with USEPA, if not earlier, back in 2000, when it first sought to have IDOT named as a potentially responsible party for the site.

**ANSWER:** JM denies the allegations contained in paragraph 8.

9. Accordingly, JM's causes of action are barred by the five year statute of limitations found at 735 ILCS 5/13-205.

**ANSWER:** JM denies the allegation contained in paragraph 9.

**IDOT's Fifth Affirmative Defense (Lack of Jurisdiction)**

1. JM, through its Prayer for Relief, requests the Board grant it relief that the Board does not have the statutory authority to grant.

**ANSWER:** JM has previously filed its Partial Motion to Strike with respect to this Affirmative Defense.

2. Paragraph C of the Prayer for Relief in JM's Second Amended Complaint asks that the Board enter an order:

Requiring Respondent to participate in the response actions on Sites 3 and 6 - implementing the remedy approved or ultimately approved by EPA - to the extent attributable to IDOT's violations of the Act, pursuant to the Board's broad authority to award equitable relief under Section 33 of the Act, 415 ILCS 5/33[.]

**ANSWER:** JM has previously filed its Partial Motion to Strike with respect to this Affirmative Defense.

3. The Board does not have the statutory authority to require IDOT to participate in the implementation of a remedy that the USEPA has ordered JM and Commonwealth Edison to perform.

**ANSWER:** JM has previously filed its Partial Motion to Strike with respect to this Affirmative Defense.

4. The Board cannot grant JM's requested relief without the approval and consent of USEPA, as the AOC is an agreement negotiated between and entered into by JM, Commonwealth Edison and USEPA.

**ANSWER:** JM has previously filed its Partial Motion to Strike with respect to this Affirmative Defense.

**IDOT's Sixth Affirmative Defense (Failure to Join Necessary Parties)**

1-2. IDOT realleges and incorporates by reference Paragraphs 1 through 2 of its Fifth Affirmative Defense as Paragraphs 1-2 of its Sixth Affirmative Defense.

**ANSWER:** JM has previously filed its Partial Motion to Strike with respect to this Affirmative Defense.

3. At all times relevant to JM's Second Amended Complaint, Commonwealth Edison has been the fee simple owner of the property on which Site 3 is located.

**ANSWER:** JM has previously filed its Partial Motion to Strike with respect to this Affirmative Defense.

4. At all times relevant to JM's Second Amended Complaint, JM has been required, pursuant to the AOC, the terms of which JM and Commonwealth Edison negotiated with USEPA, to investigate and remove ACM from Sites 3, 4/5 and 6.

**ANSWER:** JM has previously filed its Partial Motion to Strike with respect to this Affirmative Defense.

5. Pursuant to Paragraph 74 of the AOC, JM and Commonwealth Edison must seek prior approval from USEPA before it can deviate from its obligations under the AOC.

**ANSWER:** JM has previously filed its Partial Motion to Strike with respect to this Affirmative Defense.

6. JM, through the Prayer for Relief in its Second Amended Complaint, seeks to require IDOT to participate in the removal action which JM and Commonwealth Edison are obliged to perform under the terms of the AOC that they negotiated with USEPA.

**ANSWER:** JM has previously filed its Partial Motion to Strike with respect to this Affirmative Defense.

7. JM's requested relief would constitute a deviation from its obligations under the AOC.

**ANSWER:** JM has previously filed its Partial Motion to Strike with respect to this Affirmative Defense.

8. Because the Board does not have the statutory authority to modify the terms of the AOC to require IDOT to participate in the removal action, and because the inclusion of IDOT as a participant in the removal action would constitute a deviation from the terms which JM has agreed to under the AOC, USEPA is a necessary party to this action.

**ANSWER:** JM has previously filed its Partial Motion to Strike with respect to this Affirmative Defense.

9. Commonwealth Edison, as the party owning Site 3 is a necessary party to this action.

**ANSWER:** JM has previously filed its Partial Motion to Strike with respect to this Affirmative Defense.

10. As alleged above in Paragraphs 1-9 of this Sixth Affirmative Defense, JM has failed to name all necessary parties that are required to participate in this action, such that the Board can grant full and complete relief.

**ANSWER:** JM has previously filed its Partial Motion to Strike with respect to this Affirmative Defense.

**IDOT's Seventh Affirmative Defense (IDOT's Alleged Actions Were Not a Violation of the Environmental Protection Act at the Time That They Occurred)**

1. Johns Manville's claims against IDOT are based on alleged actions that purportedly constitute violations of the Environmental Protection Act ("Act"), as currently drafted.

**ANSWER:** JM has previously filed its Partial Motion to Strike with respect to this Affirmative Defense.

2. At the time that IDOT caused the Project to be constructed, the Act was more limited in scope than is currently the case.

**ANSWER:** JM has previously filed its Partial Motion to Strike with respect to this Affirmative Defense.

3. At the time that IDOT caused the Project to be constructed, Section 21(a) of the Act provides that: “No person shall cause or allow the open dumping of garbage.”

**ANSWER:** JM has previously filed its Partial Motion to Strike with respect to this Affirmative Defense.

4. At the time that IDOT caused the Project to be constructed, Section 21(d) of the Act provided that: “No person shall abandon any vehicle in violation of the “Abandoned Vehicles Amendment to the Illinois Vehicle Code”, as enacted by the 76th General Assembly.”

**ANSWER:** JM has previously filed its Partial Motion to Strike with respect to this Affirmative Defense.

5. At the time that IDOT caused the Project to be constructed, Section 21(e) of the Act provided, in relevant part, that: “No person shall conduct any refuse-collection or refuse-disposal operations, except for refuse generated by the operator’s own activities, without a permit granted by the Agency . . .”

**ANSWER:** JM has previously filed its Partial Motion to Strike with respect to this Affirmative Defense.

6. Any control, ownership, or authority which IDOT may have ever held over Sites 3 and 6 ended once IDOT completed all work on Greenwood Avenue extension to the Amstutz Expressway.

**ANSWER:** JM has previously filed its Partial Motion to Strike with respect to this Affirmative Defense.

7. The actions which JM alleges IDOT undertook in the course of conducting the Project were not violations of the Act at the time those actions were undertaken.

**ANSWER:** JM has previously filed its Partial Motion to Strike with respect to this Affirmative Defense.

**IDOT’s Eighth Affirmative Defense**

1. The land that JM constructed the Parking Lot on the north end of Site 3 and adjacent to the south side of Site 6, was historically a low-lying, wet area.

**ANSWER:** JM admits only that historical records indicate that, in 1939, there were some lineal low lying features that appeared to be wet on at least part of Site 3 and that, by 1946, these features were no longer present, suggesting the filling of the interdunal areas between 1939 and 1946. Additionally, JM admits that soil borings indicate that parts of Site 3 were filled with cinders, which IDOT's own expert indicates could have come from the owner of Site 3, ComEd. Except as specifically admitted, JM denies the allegations contained in this paragraph.

2. On information and belief, JM constructed the Parking Lot using ACM, including asbestos-containing Transite pipe, as well as other ACM that was used for the sub-base of the Parking Lot.

**ANSWER:** JM admits only that it placed concrete Transite pipe on top of a parking lot area that it used in the late 1950s and 1960s that later became part of Site 3. Except as specifically admitted, JM denies the allegations contained in this paragraph.

3. On information and belief, at a time better known to JM, JM ceased using the Parking Lot.

**ANSWER:** JM admits only that it ceased using the parking lot around the time IDOT began work on the Amstutz Project. Except as specifically admitted, JM denies the allegations contained in this paragraph.

4. At the time that JM ceased its use of the Parking Lot, it abandoned thereon the ACM materials that had been used to construct at the Parking Lot and took no steps to remove any of the aforementioned ACM.

**ANSWER:** Paragraph 4 states a legal conclusion, for which no response is required. To the extent any response is required, JM admits only that an aerial photograph dated on or about June 11, 1970 shows concrete Transite pipes on top of the parking lot area. Except as specifically admitted, JM denies the allegations contained in this paragraph.

5. The ACM materials which JM abandoned at the Parking Lot are the very same ACM materials which the United States Protection Agency is now requiring JM and Commonwealth Edison to remove, pursuant to the terms of the AOC.

**ANSWER:** Paragraph 5 states a legal conclusion, for which no response is required. To the extent any response is required, admits only that it placed concrete Transite pipes on top of a parking lot area that it used in the late 1950s and 1960s, which later became part of Site 3 and that USEPA has asserted that JM is a potentially responsible party because JM had placed concrete Transite pipes on top of the parking lot area in the 1950s. Except as specifically admitted, JM denies the allegations contained in this paragraph.

May 4, 2016

Respectfully submitted,

BRYAN CAVE LLP

Attorneys for Complainant Johns Manville

By: /s/ Lauren J. Caisman  
Susan Brice, ARDC No. 6228903  
Lauren J. Caisman, ARDC No. 6312465  
161 North Clark Street, Suite 4300  
Chicago, Illinois 60601  
(312) 602-5079  
Email: [lauren.caisman@bryancave.com](mailto:lauren.caisman@bryancave.com)

**CERTIFICATE OF SERVICE**

I, the undersigned, certify that on May 4, 2016, I caused to be served a true and correct copy of *Complainant's Reply to Respondent's Affirmative Defenses* 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.

          /s/ Lauren J. Caisman            
Lauren J. Caisman

**SERVICE LIST**

Evan J. McGinley  
Office of the Illinois Attorney General  
69 West Washington Street, Suite 1800  
Chicago, IL 60602  
E-mail: [emcginley@atg.state.il.us](mailto:emcginley@atg.state.il.us)

Matthew D. Dougherty  
Assistant Chief Counsel  
Illinois Department of Transportation  
Office of the Chief Counsel, Room 313  
2300 South Dirksen Parkway  
Springfield, IL 62764  
E-mail: [Matthew.Dougherty@illinois.gov](mailto:Matthew.Dougherty@illinois.gov)

Ellen O'Laughlin  
Office of Illinois Attorney General  
69 West Washington Street, Suite 1800  
Chicago, IL 60602  
E-mail: [elaughlin@atg.state.il.us](mailto:elaughlin@atg.state.il.us)

Illinois Pollution Control Board  
Brad Halloran, Hearing Officer  
James R. Thompson Center  
100 W. Randolph, Suite 11-500  
Chicago, IL 60601  
E-mail: [Brad.Halloran@illinois.gov](mailto:Brad.Halloran@illinois.gov)

Illinois Pollution Control Board  
John Therriault, Clerk of the Board  
James R. Thompson Center  
100 W. Randolph, Suite 11-500  
Chicago, IL 60601  
E-mail: [John.Therriault@illinois.gov](mailto:John.Therriault@illinois.gov)