

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
 JOHNS MANVILLE, a Delaware)
 Corporation,)
)
 Complainant,)
)
 v.)
)
 ILLINOIS DEPARTMENT OF)
 TRANSPORTATION,)
)
 Respondent.)

No. 14-3

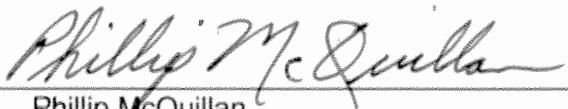
NOTICE OF FILING

To: See Attached Service List

PLEASE TAKE NOTICE that on December 23, 2013, I caused to be filed with the Clerk of the Pollution Control Board of the State of Illinois, ANSWER TO COMPLAINT and AFFIRMATIVE DEFENSES, copies of which are attached hereto and herewith served upon you.

Respectfully submitted,

ILLINOIS DEPARTMENT OF TRANSPORTATION,
Respondent,

By: 
 Phillip McQuillan
 Special Assistant Attorney General

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Illinois Pollution Control Board, No. 14-3

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ANSWER: Respondent admits that the allegation in paragraph 2 accurately recites a portion of Section 31(d) of the Act, but the law speaks for itself and it is the best evidence of its content.

3. "Persons" is defined under the Act as "any individual, partnership, co-partnership, firm, company, limited liability company, corporation, association, joint stock company, trust, estate, political subdivision, state agency, or any other legal entity, or their legal representative, agent or assigns." 415 ILCS 5/3.315.

ANSWER: Respondent admits the allegation in paragraph 3.

4. Complainant JM is a Delaware corporation authorized to do business in Illinois.

ANSWER: Respondent admits the allegation in paragraph 4.

5. Respondent IDOT is an agency of the State of Illinois and was formerly known as the Division of Highways (a division of the Department of Public Works and Buildings).

ANSWER: Respondent admits the allegation in paragraph 5.

Factual Background

6. Complainant JM owned and operated a manufacturing facility on property consisting of approximately 300 acres in Waukegan, Illinois, which manufactured construction and other materials, some of which contained asbestos (the "JM Site").

ANSWER: Respondent admits the allegation in paragraph 6.

7. On September 8, 1983, the United States Environmental Protection Agency ("EPA") added a portion of the JM Site to the National Priorities List ("NPL") under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), due to asbestos materials.

ANSWER: Respondent admits that a 120 acre portion of the JM site was published in the Federal Register on September 8, 1983, 48 Fed. Reg. 40658, as being on the National Priorities List ("NPL"), although the EPA Superfund Record of Decision states that the Site was listed on the NPL in December of 1982.

8. JM has conducted and completed certain remediation activities at the JM Site under the direction and oversight of the EPA.

ANSWER: Because the term "certain remediation activities" is vague and ambiguous, Respondent lacks knowledge thereof as to the specific activities JM references or the specific location of said activities, and Respondent cannot form a belief as to the truth or falsity of said allegations in paragraph 8.

9. JM ceased operations onsite in approximately 1998. Thereafter, asbestos-containing material ("ACM") was discovered beyond the boundaries of the JM Site, on adjacent property owned by Commonwealth Edison ("ComEd") and by the City of Waukegan.

ANSWER: Respondent has insufficient information to either admit or deny the time at which JM ceased manufacturing operations at its Waukegan plant; Respondent has insufficient information to either admit or deny the time at which asbestos-containing material ("ACM") has been "discovered" beyond the boundaries of the JM Site on adjacent property in that JM has always had knowledge that ACM was located at these off-site locations in that JM is the party that placed ACM at these off-site locations.

10. On June 11, 2007, Complainant JM entered into an Administrative Order on Consent ("AOC") with EPA whereby JM agreed to conduct a "removal" action at four specific off-site areas. These sites are individually designated as Site 3, Site 4/5 and Site 6 and are collectively referred to as the "Southwestern Site Areas."

ANSWER: Respondent denies that JM entered into an Administrative Order on Consent on June 11, 2007, in that the effective date of the Administrative Order on Consent is June 14, 2007. The remaining allegations purport to characterize the AOC which speaks for itself and is the best evidence of its content.

11. ComEd is also a party to the AOC, as the current owner of Site 3 and Site 4/5, and pursuant to the terms of the AOC has agreed to undertake certain response activities at these sites.

ANSWER: Because the term "certain response activities" is vague and ambiguous, Respondent lacks knowledge thereof as to the specific activities JM references or the specific location of said activities; in further responding, Respondent lacks knowledge as to the ownership interests in Site 3 and Site 4/5 and because of this Respondent cannot form a belief as to the truth or falsity of said allegations in paragraph 11. Further, the remaining allegations purport to characterize the AOC which speaks for itself and is the best evidence of its content.

12. Site 3, the focus of the instant action, is located south of the Greenwood Avenue right-of-way and east of North Pershing Road in Waukegan, Illinois, near the southwestern corner of the former JM manufacturing facility.

ANSWER: Respondent admits the allegation in paragraph 12.

13. In December 1998, ACM was discovered at the surface of the area currently designated as Site 3.

ANSWER: Respondent denies the allegation in paragraph 13 in that JM has always had knowledge that ACM was located at Site 3 in that JM is the party that placed ACM at Site 3.

14. Subsequent sub-surface investigations of Site 3 have revealed ACM at a depth of one to three feet below ground surface (bgs), primarily at the north end of the site, and at a depth of up to four feet bgs in at least two areas of the site.

ANSWER: Respondent lacks sufficient knowledge thereof to form a belief as to the truth or falsity of the allegations in paragraph 14.

15. Transite® pipe, a non-friable form of ACM, is the predominant ACM found at Site 3.

ANSWER: Respondent lacks sufficient knowledge thereof to form a belief as to the truth or falsity of the allegation in paragraph 15.

16. The northwest portion of Site 3 also contains miscellaneous fill material, some of which has been found to contain asbestos.

ANSWER: Respondent lacks sufficient knowledge thereof to form a belief as to the truth or falsity of the allegation in paragraph 16.

17. Six utility lines run through Site 3.

ANSWER: Respondent lacks sufficient knowledge thereof to form a belief as to the truth or falsity of the allegation in paragraph 17.

18. In approximately the 1950s and 1960s, JM used Site 3 as a parking lot for its employees and invitees, pursuant to a license agreement with ComEd.

ANSWER: Respondent lacks sufficient knowledge thereof to form a belief as to the truth or falsity of the allegation in paragraph 18.

19. Asbestos-containing Transite® pipes were used for curb bumpers on the parking lot surface. Aerial photographs show that these bumpers were in place in the 1950s.

ANSWER: Respondent lacks sufficient knowledge thereof to form a belief as to the truth or falsity of the allegation in paragraph 19.

20. Records show that in approximately 1971 Respondent IDOT began construction of a ramp to the Amstutz Expressway as part of its reconstruction of the Pershing Road/Greenwood Avenue intersection.

ANSWER: Respondent lacks sufficient knowledge thereof to form a belief as to the truth or falsity of the allegation in paragraph 20.

21. During this construction, pursuant to a temporary easement agreement with ComEd, IDOT built a detour road cutting a large, curved swath through the former parking lot in the area currently designated as Site 3 and destroyed the parking lot during this construction.

ANSWER: Respondent lacks sufficient knowledge thereof to form a belief as to the truth or falsity of the allegation in paragraph 21.

22. This detour road was used as an expressway bypass until the ramp construction was completed in 1976.

ANSWER: Respondent lacks sufficient knowledge thereof to form a belief as to the truth or falsity of the allegation in paragraph 22.

23. Records show that a contractor was paid a "special excavation" fee to "remove and obliterate" the detour after construction was complete. The detour road and the former parking lot are no longer intact at Site 3.

ANSWER: Respondent lacks sufficient knowledge thereof to form a belief as to the truth or falsity of the allegation in paragraph 23.

24. IDOT has admitted to EPA that it dealt with asbestos pipe during the construction project. IDOT stated in a CERCLA Section 104(e) Response that a retired engineer, Mr. Duane Mapes, recalled "dealing with asbestos pipe during the project and burying some of it. As the Department does not have information about where ACM was located at the start of the project and where it is alleged to have been disposed, he was unable to ask Mr. Mapes to provide more information."

ANSWER: Respondent denies that a retired engineer has authority to make any admissions against the interests of Respondent; Respondent denies that it did anything with "asbestos pipe" at Site 3; Respondent lacks sufficient knowledge thereof to form a belief as to the truth or falsity of the allegation concerning the CERCLA Section 104(e) matter in paragraph 24.

25. IDOT was not ultimately made a party to the 2007 AOC with EPA. At the time the AOC was signed, EPA 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.

ANSWER: Respondent admits that it is not a party to the 2007 AOC with EPA; Respondent lacks sufficient knowledge thereof to form a belief as to the truth or falsity of the balance of the allegations in paragraph 25.

26. Subsequent investigations have revealed buried Transite® pipe in the area. Portions of Transite® pipe have been found in the south side shoulder of Greenwood Avenue at a depth of approximately 2.5 feet below the ground surface. The elevation of this Transite® pipe is roughly one foot higher than the adjacent surface of Site 3.

ANSWER: Respondent lacks sufficient knowledge thereof to form a belief as to the truth or falsity of the allegation in paragraph 26.

27. Pursuant to the terms of the AOC, on June 13, 2008, JM and ComEd submitted to EPA for its review and approval an initial "Engineering Evaluation and Cost Analysis" ("EE/CA") for a proposed response action at the Southwestern Sites.

ANSWER: Respondent lacks sufficient knowledge thereof to form a belief as to the truth or falsity of the allegation in paragraph 27.

28. After several rounds of revisions in consultation with EPA, JM and ComEd submitted their final EE/CA to EPA on April 4, 2011 ("EE/CA Revision 4"). EE/CA Revision 4 evaluated four potential response action options for Site 3, based on discussions with EPA.

ANSWER: Respondent lacks sufficient knowledge thereof to form a belief as to the truth or falsity of the allegation in paragraph 28. Further, the allegations purport to characterize a document which speaks for itself and is the best evidence of its content.

29. EE/CA Revision 4 identified "Alternative 2" as the preferred remedy for Site 3. This alternative included limited soil excavation (approximately 660 cubic yards) in the northeast corner of Site 3 to a depth of approximately three (3) feet below the ground

surface and installation of a vegetated soil barrier over the entire site, at an estimated cost of between \$595,000 and \$630,000.

ANSWER: Respondent lacks sufficient knowledge thereof to form a belief as to the truth or falsity of the allegation in paragraph 29. Further, the allegations purport to characterize a document which speaks for itself and is the best evidence of its content.

30. EE/CA Revision 4 was approved by EPA with modifications on February 1, 2012. In its EE/CA approval letter, EPA proposed a new alternative for Site 3—"Modified Alternative 2"—which was a markedly different remedy from those previously proposed by JM and ComEd. This modified alternative not only included a requirement to remove all asbestos-impacted soils to a depth of four (4) feet below the ground surface in the northeast portion of Site 3, but also required JM and ComEd to create a clean corridor for all utilities running through Site 3 by excavating all soil to a depth of two (2) feet below each utility line and a minimum width of twenty-five (25) feet centered on each utility line. EPA's estimated cost for construction of this Modified Alternative 2 was \$2,196,000.

ANSWER: Respondent lacks sufficient knowledge thereof to form a belief as to the truth or falsity of the allegation in paragraph 30. Further, the allegations purport to characterize a document which speaks for itself and is the best evidence of its content.

31. On November 30, 2012, EPA issued an Action Memorandum selecting a remedy for the Southwestern Sites, including the Modified Alternative 2 that it had proposed for Site 3. However, the Action Memorandum included further modifications to EPA's Modified Alternative 2 that were not previously included in the February 1, 2012 EE/CA approval letter.

ANSWER: Respondent lacks sufficient knowledge thereof to form a belief as to the truth or falsity of the allegation in paragraph 31. Further, the allegations purport to characterize a document which speaks for itself and is the best evidence of its content.

32. Specifically, the Modified Alternative 2 set forth in the Action Memorandum requires JM and ComEd to create a clean corridor for each utility line "extending to a depth requested by the owner of the utility line with placement of a continuous barrier at the base and sides

of the excavation to inhibit further excavation and/or exposure beyond the clean fill." It also includes a new "compliance alternative" of abandoning and relocating utility lines in lieu of creating clean utility corridors, pending written approval from EPA and provided that each utility owner signs a voluntary subrogation agreement to abandon its line(s). Any new utility lines would be required to bypass the ACM-contaminated areas of the site or to be fully enclosed within utility vaults so as to eliminate the need for excavation during repair or maintenance activities.

ANSWER: Respondent lacks sufficient knowledge thereof to form a belief as to the truth or falsity of the allegation in paragraph 32. Further, the allegations purport to characterize a document which speaks for itself and is the best evidence of its content.

33. 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."

ANSWER: Respondent lacks sufficient knowledge thereof to form a belief as to the truth or falsity of the allegation in paragraph 33. Further, the allegations purport to characterize a document which speaks for itself and is the best evidence of its content.

34. According to the Action Memorandum, the potential health risks associated with ACM contamination at the Southwestern Sites include "exposure to asbestos fibers via inhalation [which] results in significant health effects including mesothelioma, lung cancer, asbestosis, thickening of pleural lining around the lungs and pulmonary deficits. Exposures to soils containing asbestos fibers have been associated with all of these health effects including cancer." Due to the presence of asbestos in soils, the Action Memorandum indicates that "adverse health risks are reasonably anticipated in the event that exposure occurs."

ANSWER: Respondent lacks sufficient knowledge thereof to form a belief as to the truth or falsity of the allegation in paragraph 34. Further, the allegations purport to characterize a document which speaks for itself and is the best evidence of its content.

35. The Action Memorandum directs JM and ComEd to conduct the following response actions as the selection remedy for Site 3:
- a. Excavate soil in the northeast portion of the Site 3 (approximately 0.14 acres) identified as the "limited excavation area," to remove all ACM and asbestos fibers (estimated to a depth of 4 feet);
 - b. Excavate soil and sediments contaminated with ACM and/or asbestos fibers to a minimum depth of 2 feet below each utility line and extending to a depth requested by the owner of each utility line with placement of a continuous barrier at the base and sides of the excavation to inhibit further excavation and/or exposure beyond the clean fill and a minimum width of 25 feet centered on each utility line and clean backfill provide a clean corridor for utility maintenance on Site 3 or, alternatively, abandon and relocate utility lines, conditioned on signed voluntary subrogation agreements from the utility owners;
 - c. Conduct post-excavation sampling and analysis to confirm there are no remaining ACM or asbestos fibers in soil or sediment within either the limited excavation area or within each utility corridor;
 - d. Dispose of all excavated materials in an off-site landfill;
 - e. Place and maintain a vegetated soil cover in any areas of Site 3 where ACM or asbestos fibers remain in place;
 - f. Implement certain institutional controls in the form of an environmental covenant, pursuant to the Illinois Environmental Covenants Act, 765 ILCS Ch. 122;
 - g. Reroute, pipe, or remove surface water as needed to perform the required excavation;

- h. Install and maintain security fencing with warning signs every 100 feet and at all gates completely surrounding all areas where ACM or asbestos fibers remain in place;
- i. Conduct long-term operation and maintenance (O&M) of the vegetated soil cover for a minimum of 30 years beginning when construction is completed.

ANSWER: Respondent lacks sufficient knowledge thereof to form a belief as to the truth or falsity of the allegation in paragraph 35, subparagraphs (a) through (i). Further, the allegations purport to characterize a document which speaks for itself and is the best evidence of its content.

- 36. EPA has estimated the cost of construction of the selected remedy for Site 3 at between \$1,705,696 and \$2,107,622. JM disputed portions of EPA's remedy selected for the Southwestern Sites on December 13, 2012 and May 16, 2013, including certain of EPA's cost analyses.

ANSWER: Respondent lacks sufficient knowledge thereof to form a belief as to the truth or falsity of the allegation in paragraph 36. Further, the allegations purport to characterize a document which speaks for itself and is the best evidence of its content.

- 37. EPA issued a Notice to Proceed with the selected remedy for all of the Southwestern Sites on May 6, 2013. Under the terms and conditions of the AOC, this Notice to Proceed triggers a 120-day period within which JM and ComEd must submit to EPA a Removal Action Work Plan for performing the response actions at the Southwestern Site Area¹. With the exception of removing surficial ACM, no response action has commenced at Site 3.

ANSWER: Respondent lacks sufficient knowledge thereof to form a belief as to the truth or falsity of the allegation in paragraph 37.

¹ JM and ComEd have disputed the selected remedy, pursuant to the dispute resolution provisions of the AOC, on grounds that the EPA substantially modified the selected remedy between its final approval of the EE/CA and the issuance of the Action Memorandum. However, despite this ongoing dispute, EPA has not agreed to toll the 120-day period for preparing the Removal Action Work Plan.

COUNT I

Violation of Section 21 of the Illinois-Environmental Protection Act

38. Complainant realleges and incorporates herein the allegations contained in paragraphs 1-37 of this Complaint as if set forth herein in full.

ANSWER: Respondent restates and reaffirms its responses to paragraphs 1 through 37 herein and incorporates herein the responses to paragraphs 1 through 37 as if fully set forth herein.

39. Respondent 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 constitute violations of Section 21 of the Illinois Environmental Protection Act ("Act").

ANSWER: Respondent denies the allegations in paragraph 39.

40. Section 21 of the Act, 415 ILCS 5/21, provides, in pertinent 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.

ANSWER: Respondent admits that the allegation in paragraph 40 accurately recites a portion of Section 21 of the Act, but the Act speaks for itself and is the best evidence of its content.

41. Section 3.535 of the Act, 415 ILCS 5/3.535, defines "waste" as "any garbage, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility or other discarded material, including solid, liquid, semi-solid, or contained gaseous material resulting from industrial, commercial, mining and agricultural operations, and from

community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows, or coal-combustion products ... or industrial discharges which are point sources subject to permits under Section 402 of the Federal Water Pollution Control Act, as now or hereafter amended, or source, special nuclear, or by-product materials as defined by the Atomic Energy Act of 1954 ... or any solid or dissolved material from any facility subject to the Federal Surface Mining Control and Reclamation Act of 1977 or the rules and regulations thereunder or any law or rule or regulation adopted by the State of Illinois pursuant thereto.”

ANSWER: Respondent admits that the allegation in paragraph 41 accurately recites a portion of Section 3.535 of the Act, but the Act speaks for itself and is the best evidence of its content.

42. Discarded ACM at Site 3 is a “waste” within the meaning of the Act.

ANSWER: Respondent admits the allegation in paragraph 42.

43. Section 3.305 of the Act, 415 ILCS 5/3.305, defines “open dumping” as “the consolidation of refuse from one or more sources at a disposal site that does not fulfill the requirements of a sanitary landfill.”

ANSWER: Respondent admits that the allegation in paragraph 43 accurately recites a portion of Section 3.305 of the Act, but the Act speaks for itself and is the best evidence of its content.

44. Section 3.185 of the Act, 415 ILCS 5/3.185, defines “disposal” as “the discharge, deposit, injection, dumping, spilling, leaking or placing of any waste or hazardous waste into or on any land or water or into any well so that such waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.”

ANSWER: Respondent admits that the allegation in paragraph 44 accurately recites a portion of Section 3.185 of the Act, but the Act speaks for itself and is the best evidence of its content.

45. Section 3.445 of the Act, 415 ILCS 5/3.445, defines "sanitary landfill" as "a facility permitted by the Agency for the disposal of waste on land meeting the requirements of the Resource Conservation and Recovery Act, P.L. 94-580, and regulations thereunder, and without creating nuisances or hazards to public health or safety, by confining the refuse to the smallest practical volume and covering it with a layer of earth at the conclusion of each day's operation, or by such other methods and intervals as the Board may provide by regulation."

ANSWER: Respondent admits that the allegation in paragraph 45 accurately recites a portion of Section 3.445 of the Act, but the Act speaks for itself and is the best evidence of its content.

46. Section 3.540 of the Act, 415 ILCS 5/3.540, defines "waste disposal site" as "a site on which solid waste is disposed."

ANSWER: Respondent admits that the allegation in paragraph 41 accurately recites a portion of Section 3.540 of the Act, but the Act speaks for itself and is the best evidence of its content.

47. Site 3 is not a disposal site that fulfills the requirements of a sanitary landfill.

ANSWER: Respondent admits that the allegation in paragraph 47.

48. Site 3 is not a permitted waste disposal site or facility which meets the requirements of the Act or its regulations as they relate to the disposal or abandonment of waste.

ANSWER: Respondent admits that the allegation in paragraph 48.

49. 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.

ANSWER: Respondent denies the allegations in paragraph 49.

50. The ACM waste dumped and disposed of on and under Site 3 was abandoned by IDOT around 1976 and currently remains in situ.

ANSWER: Respondent denies the allegations in paragraph 50.

51. IDOT caused the open dumping of ACM waste in violation of Section 21(a) of the Act, 415 ILCS 5/21(a).

ANSWER: Respondent denies the allegations in paragraph 51.

52. IDOT 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, 415 ILCS 5/21(e).

ANSWER: Respondent denies the allegations in paragraph 52.

53. IDOT's violations are continuing in nature.

ANSWER: Respondent denies the allegations in paragraph 53.

54. By moving ACM materials both horizontally and vertically within and outside the boundaries of the area currently designated as Site 3, IDOT exacerbated any existing contamination at the Site and directly contributed to the scope of the EPA's selected remedy for Site 3, which requires Complainant JM and ComEd to conduct extensive sub-surface excavation, including by creating clean corridors for each of six utilities running through the site.

ANSWER: Respondent denies the allegations in paragraph 54.

55. JM contends that because IDOT's violations of the Act have directly impacted the scope of the proposed remedy for Site 3, including the need to excavate buried portions of Transite® pipe and to create clean corridors around the six utilizes (portions of the remedy

not proposed by JM and ComEd but ordered by EPA in 2012), IDOT should be required to participate in the response action for Site 3.

ANSWER: Respondent denies the allegations in paragraph 55.

56. As JM must complete a Work Plan for the selected response action within 120 days of receiving the Notice to Proceed (approximately November 2013) and must begin implementation of EPA's proposed remedy shortly thereafter, it stands to suffer immediate and irreparable injuries for which there is no adequate remedy at law.

ANSWER: Respondent lacks sufficient knowledge thereof to form a belief as to the truth or falsity of the allegation regarding the Work Plan and timelines for action; Respondent denies the balance of the allegations in paragraph 56.

57. Complainant JM is not aware of any identical or substantially similar action pending before the Board or in any other forum against Respondent IDOT based on the same conduct or alleging the same violations of the Act.

ANSWER: Respondent lacks sufficient knowledge thereof to form a belief as to the truth or falsity of JM's awareness.

Wherefore, the Department respectfully requests that an order be entered in favor of the Department and against JM in this matter and that JM's complaint before the Pollution Control Board be dismissed with prejudice.

Respectfully submitted,

ILLINOIS DEPARTMENT OF TRANSPORTATION,
Respondent,

By: _____
Phillip McQuillan
Special Assistant Attorney General

AFFIRMATIVE DEFENSES

Respondent, the Illinois Department of Transportation (the "Department"), by Lance T. Jones, Special Assistant Attorney General, and by Phillip McQuillan, Special Assistant Attorney General, submits the following Affirmative Defenses to this matter:

First Affirmative Defense

1. The Illinois State Geographical Survey topography map for the land area encompassing Site 3 indicates in 1908 that Site 3 is in a low-lying marshy area.
2. The Illinois State Geographical Survey topography map for the land area encompassing Site 3 indicates in 1914 that Site 3 is in a low-lying marshy area.
3. The Illinois State Geographical Survey topography map for the land area encompassing Site 3 indicates in 1929 that Site 3 is in a low-lying marshy area.
4. The Illinois State Geographical Survey topography map for the land area encompassing Site 3 indicates in 1939 that Site 3 is in a low-lying marshy area.
5. The Illinois State Geographical Survey topography map for the land area encompassing Site 3 indicates that from some time before 1960 that the land upon which Site 3 is located is no longer classified as being a low-lying marshy area.
6. Sometime before 1960 "fill material" was placed upon Site 3.
7. Johns Manville placed an assortment of Asbestos Containing Material ("ACM") upon Site 3 to form a base for its parking lot on Site 3.

Wherefore, the Department respectfully requests that an order be entered in favor of the Department and against JM based upon the First Affirmative Defense in that JM is responsible for the ACM contamination on Site 3.

Second Affirmative Defense

8. When JM ceased using Site 3 as a parking lot, it abandoned all of the ACM on Site 3, including but not limited to Transite pipe, it had deposited at Site 3.
9. The ACM fill material that JM abandoned at Site 3 constitutes the ACM waste that the US EPA is requiring JM to remediate in the Administrative Order on Consent.

Wherefore, the Department respectfully requests that an order be entered in favor of the Department and against JM based upon the Second Affirmative Defense in that JM is responsible for the ACM contamination on Site 3.

Third Affirmative Defense

10. Site 3 is located on the South side of East Greenwood Street.
11. East Greenwood Street was the main access road to JM's main facility located North of East Greenwood Street, all during the time period of the operation of JM's manufacturing facility in Waukegan.
12. In the early 1970s when the Amstutz Expressway was constructed, JM's executives, management personnel, and other agents of JM drove by Site 3 on a daily basis and witnessed the road construction work being performed in the area.
13. JM was aware of the presence of the ACM it had placed at Site 3.
14. JM was aware of the health risks posed by inhalation of asbestos fibers all during the time period when the road work was done in the 1970s.
15. Despite the knowledge of the presence of ACM at Site 3 and the awareness of the health risks of asbestos fibers, JM failed to warn the Illinois Department of Transportation of the presence of ACM at Site 3 or the risks posed by the ACM at Site 3.

16. If any ACM were to be inadvertently disturbed during road construction work it, was done with the tacit knowledge, acquiescence, and culpability of JM.

Wherefore, the Department respectfully requests that an order be entered in favor of the Department and against JM based upon the Third Affirmative Defense in that JM is responsible for the ACM contamination on Site 3.

Fourth Affirmative Defense

17. JM placed all of the ACM at Site 3.
18. JM was aware of the presence and danger of the ACM at Site 3 from the time JM first placed it there and continually since then to the present.
19. As to JM, the "discovery" of the ACM at Site 3 relates back to the time JM placed the ACM on Site 3.
20. If the nature and extent of the ACM contamination at Site 3 was not discovered by "others" until after 1998, as JM asserts in its pleading, then that discovery date is of no legal significance or benefit to JM because JM knew all along that the ACM was at Site 3.
21. JM has been aware of the road work done in the vicinity of Site 3 since the early 1970s.
22. JM has been aware of the presence of ACM at Site 3 since before the 1970s.
23. If the Department performed a tortious act by inadvertently burying some ACM, as alleged by JM, then the last tortious act would have occurred when the temporary road in the vicinity of Site 3 was removed.
24. The temporary road in the vicinity of Site 3 was removed prior to 1977.
25. JM's cause of action, if any, accrued prior to 1977.
26. In July of 2013, JM filed the present action before the Pollution Control Board.

27. JM has been guilty of laches for over 36 years.
28. The Department is prejudiced by JM's laches in that the vast number of Department employees that were involved in the Amstutz Expressway and the work in the vicinity of Site 3 are deceased or otherwise unavailable to aid the Department in defense of this matter.

Wherefore, the Department respectfully requests that an order be entered in favor of the Department and against JM based upon the Fourth Affirmative Defense in that JM is guilty of laches that has prejudiced the Department's ability to defend this matter.

Fifth Affirmative Defense

29. JM place all of the ACM at Site 3.
30. JM was aware of the presence and danger of the ACM at Site 3 from the time JM first placed it there and continually since then to the present.
31. As to JM, the "discovery" of the ACM at Site 3 relates back to the time JM placed the ACM on Site 3.
32. If the nature and extent of the ACM contamination at Site 3 was not discovered by "others" until after 1998, as JM asserts in its pleading, then that discovery date is of no legal significance or benefit to JM because JM knew all along that the ACM was at Site 3.
33. JM has been aware of the road work done in the vicinity of Site 3 since the early 1970s.
34. JM has been aware of the presence of ACM at Site 3 since before the 1970s.
35. If the Department performed a tortious act by inadvertently burying some ACM, as alleged by JM, then the last tortious act would have occurred when the temporary road in the vicinity of Site 3 was removed.

36. The temporary road in the vicinity of Site 3 was removed prior to 1977.
37. JM's cause of action, if any, accrued prior to 1977.
38. JM's cause of action herein is barred by the five year statute of limitations found at 735 ILCS 5/13-205.

Wherefore, the Department respectfully requests that an order be entered in favor of the Department and against JM based upon the Fifth Affirmative Defense in that JM has brought this action 36 years after the Department's last alleged tortious act and is barred by the five year limitations period found at 735 ILCS 5/13-205.

Sixth Affirmative Defense

39. JM placed all of the ACM at Site 3.
40. JM was aware of the presence and danger of the ACM at Site 3 from the time JM first placed it there and continually since then to the present.
41. JM failed to warn the Department that JM had placed large amounts of ACM at Site 3.
42. If the Department performed a tortious act by inadvertently burying some ACM at Site 3, as alleged by JM, then that action would have a *de minimis* effect upon the already thoroughly contaminated site.
43. If all of the allegations of actions purportedly performed by the Department were found to be true, then the Department's actions have still not contributed to the condition of Site 3 which was already thoroughly contaminated by ACM.

Wherefore, the Department respectfully requests that an order be entered in favor of the Department and against JM based upon the Sixth Affirmative Defense in that JM is responsible

for the ACM contamination on Site 3 and the Department's road construction activities in the vicinity of Site 3 are *de minimis* and insufficient to attach any liability to the Department.

Seventh Affirmative Defense

44. Six utility lines run through Site 3.
45. Paragraph 30 of JM's Complaint before the Pollution Control Board indicates that the US EPA, as part of the remediation to Site 3 pursuant to the AOC, requires JM to remove all asbestos impacted soils to a depth of four (4) feet below the ground surface in the northeast portion of Site 3, and requires JM and ComEd to create a clean corridor for all utilities running through Site 3 by excavating all soil to a depth of two (2) feet below each utility line and a minimum width of twenty-five (25) feet centered on each utility line.
46. Maintenance and construction of the utility lines requires excavation work on Site 3 within the parameters stated in the above paragraph 45.
47. The Department's alleged activities in the vicinity of Site 3 ceased sometime prior to the year 1977.
48. Since 1977 maintenance and construction work has been performed on the utility lines that run through Site.
49. The work performed on the utility lines that run through Site 3 from 1977 to the present has included excavation work that disturbed the plentiful supply of ACM that is present on Site 3 and which was placed on Site 3 by JM.
50. The contractors that performed utility line construction and/or maintenance within Site 3 are necessary parties in this action in that JM is alleging that excavation work performed at Site 3 has exacerbated the condition of Site 3 in that the contractors allegedly disturbed the ACM that JM placed in the parking lot at Site 3.
51. JM has failed to join these contractors as necessary parties.

Wherefore, the Department respectfully requests that an order be entered in favor of the Department and against JM based upon the Seventh Affirmative Defense in that JM has failed to join all necessary parties.

Eighth Affirmative Defense

52. JM alleges in paragraph 23 of the complaint: "Records show that a contractor was paid a "special excavation" fee to "remove and obliterate" the detour after construction was complete. The detour road and the former parking lot are no longer intact at Site 3."
53. The physical construction work in the vicinity of Site 3 was performed by independent contractors rather than by employees of the Department.
54. JM's allegations in paragraph 23 of the complaint recognize that independent contractors performed the work in the vicinity of Site 3.
55. The independent contractors who performed the construction work in the vicinity of the parking lot at Site 3 would be the entities that allegedly disturbed the ACM that JM placed in the parking lot at Site 3.
56. JM has failed to join these contractors as necessary parties.

Wherefore, the Department respectfully requests that an order be entered in favor of the Department and against JM based upon the Eighth Affirmative Defense in that JM has failed to join all necessary parties.

Ninth Affirmative Defense

57. JM placed all of the ACM at Site 3.
58. JM was aware of the presence and danger of the ACM at Site 3 from the time JM first placed it there and continually since then to the present.

59. As to JM, the "discovery" of the ACM at Site 3 relates back to the time JM placed the ACM on Site 3.
60. If the nature and extent of the ACM contamination at Site 3 was not discovered by "others" until after 1998, as JM asserts in its pleading, then that discovery date is of no legal significance or benefit to JM because JM knew all along that the ACM was at Site 3.
61. Under Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. Section 9607(a), only an innocent party may bring an action for cost recovery against another potentially responsible party.
62. JM is not an innocent party under Section 107 of CERCLA.
63. If there are two parties who both injured the property, then a contribution action by one responsible party against another responsible party must be undertaken pursuant to Section 113(f) of the Superfund Amendments and Reauthorization Act ("SARA"), 42 U.S.C. Section 9613(f).
64. Section 31(d) of the Illinois Environmental Protection Act (the "Act"), 415 ILCS 5/31(d) is analogous to Section 107 of CERCLA.
65. Because JM is not an "innocent party", JM should not be allowed to recover anything against the Department under Section 31(d).

Wherefore, the Department respectfully requests that an order be entered in favor of the Department and against JM based upon the Ninth Affirmative Defense in that JM is not an innocent party and should not be allowed to proceed against the Department under Section 31(d) of the Act.

Respectfully submitted,

ILLINOIS DEPARTMENT OF TRANSPORTATION,
Respondent,

By: 
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Illinois Pollution Control Board, No. 14-3

CERTIFICATE OF SERVICE

I, Phillip McQuillan, herein certify that I have served a copy of the foregoing, ANSWER TO COMPLAINT and AFFIRMATIVE DEFENSES, upon :

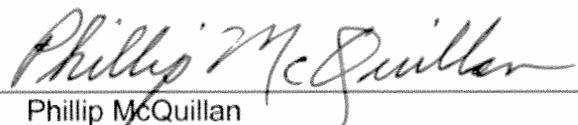
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by causing to be mailed a true copy thereof at the address referred to above in an envelope, properly addressed, bearing proper first class postage and deposited in the United States mail at Springfield, Illinois on December 23, 2013. In addition, true copies thereof, were sent via E-mail.

By: 
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