BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

To: See Attached Service List

PLEASE TAKE NOTICE that on November 14, 2016, I caused to be filed with the Clerk of the Pollution Control Board of the State of Illinois, *Complainant's Post-Hearing Brief Reply*, a copy of which is attached hereto and herewith served upon you via e-mail. Paper hardcopies of this filing will be made available upon request.

Dated: November 14, 2016

Respectfully submitted,

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COMPLAINANT JOHNS MANVILLE'S POST-HEARING BRIEF REPLY

The Illinois Department of Transportation's ("IDOT") Post-Hearing Brief ("Resp.") is just another example of IDOT's refusal to take responsibility for any of its wrongful conduct. Instead of actually rebutting any arguments, allegations, or evidence in JM's Post-Hearing Brief ("PHB"), IDOT ignores the Illinois Environmental Protection Act (the "Act") and case law, spending many pages regurgitating its erroneous understanding of the facts of this case. In doing so, IDOT asserts facts that do not exist in the record, mischaracterizes facts that *do* exist and ignores facts that overwhelmingly support JM's case. Indeed, IDOT's Response fails to cite to the record for an assertion of "fact" on multiple occasions.

In this same vein, IDOT repeatedly debates non-issues, as if IDOT participated in a different hearing altogether. No matter how much IDOT tries, it cannot escape the reality that JM clearly met its burden of proof in establishing that IDOT violated the Act in numerous ways and that the Board should grant JM its requested relief. JM demonstrated that IDOT violated the current and historical versions of Section 21 of the Act (collectively, "Section 21") by: (1) engaging in open dumping and disposing of ACM waste during the Amstutz Project (the

"Project") and storing or abandoning said waste at Sites 3 and 6 (the "Sites"); (2) holding ownership interests in the contaminated rights of way when the illegal acts transpired and still holding those interests; (3) having the ability to control and controlling the contaminated rights of way when the violations occurred, and/or continuing to control the contaminated rights of way; and (4) conducting a waste disposal operation without a permit.

IDOT's Response boils down to a few points that cannot withstand even marginal scrutiny: (1) IDOT's unwavering and erroneous assertion that its work on the Project "had nothing, whatsoever, to do with" the ACM contamination on the Sites (Resp., p. 2); (2) IDOT's conviction that the City of Waukegan (the "City") has "jurisdiction" over Greenwood Avenue (*id*., pp. 20-21), an issue irrelevant to this case; (3) IDOT's assertion that it does not "own" Parcel No. 0393 in fee simple (*id*., p. 23), while the real issue is whether it has held "an interest in" the rights of way per the Act; (4) IDOT's absurd claim that Mr. Gobelman is a more qualified and a more convincing expert than Mr. Dorgan, who IDOT says happens to be biased and "cherry picked" data merely because he is being paid all the while conveniently ignoring that its own expert was a paid employee and consultant (*id*., pp. 4, 31, 33, 38); (5) IDOT's backwards argument that the Section 33(c) factors do not weigh in JM's favor because it did not cause the contamination (*id*., pp. 41-47); and (6) IDOT's unsupported contention the Board cannot award JM the relief requested (*id*., pp. 53-55). IDOT further vaguely contends that JM's claims are barred by other affirmative defenses, but the Board has found that many of them are improper or do not apply in this case. (*See* Nov. 7, 2013 Board Order; Sept. 4, 2014 Board Order; May 19, 2016 Board Order.) Additionally, IDOT erroneously argues that because JM did not file suit against IDOT in 2000, unclean hands, waiver, laches and the statute of limitations bar JM's claim. But JM had no claim to bring against IDOT at that time. (*Id*., pp. 47-53.)

Moreover, as detailed below, IDOT's arguments are misguided. Three fundamental facts stand out. First, ACM is found within the fill material placed by IDOT on the Sites during the Project, including within the Embankment that *did not exist* before the Project. Second, IDOT's Resident Engineer on the Project admitted to burying ACM on Site 3 during the Project. And, finally, IDOT has owned and operated portions of these illegal waste disposal facilities since 1971. Based on these facts alone, JM should prevail in this case. While JM has admitted that it bears some responsibility for the ACM, IDOT should do the same and stop sticking its head in the sand. As the Illinois Supreme Court has stated, "adverse effects upon the environment" should be "borne by those who cause them." (PHB, p. 1.) IDOT violated the Act and should be held responsible.

ARGUMENT

I. JM Did Not Use Fill To Erect The Parking Lot

IDOT asserts that JM used ACM to build the parking lot it installed on Site 3 in the late 1950s pursuant to a license agreement with Commonwealth Edison ("ComEd") ("Parking Lot"). (Resp., pp. 7-9.) But as pointed out in JM's PHB, Mr. Gobelman "only relied upon one piece of evidence for this opinion, a statement contained in a 1999 environmental report [drafted by ELM] that said, '[a]ccording to JM, the parking lot was constructed with materials containing ACM.'" (PHB, p. 8.) This one sentence in the 1999 "ELM Report" does not support Mr. Gobelman's conclusion that the Parking Lot must have been built with ACM fill. (Ex. 8-10; Tr. June 23, pp. 62:16-64:7; Ex. 4C-173, lines 7-16; Ex. 16-9.)

In fact, the JM employee who made the statement to ELM (*i.e.*, the JM in the "according to JM") testified at trial. He testified that Mr. Gobelman was wrong and that the only ACM he ever told ELM about was the concrete Transite pipe on top of the Parking Lot. (Tr. May 23, pp. 54:4-

55:12.) IDOT has no evidence establishing otherwise. In an ill-fated attempt to discredit Mr. Clinton, IDOT falsely argues that Mr. Clinton was asked by JM's counsel at hearing about an entirely different statement in the ELM Report. (Resp., p. 9.) The portion of the transcript cited by IDOT (*see id*. (citing Tr. May 23, pp. 54:15-55:12)), is clear that JM's counsel *did not* ask Mr. Clinton about this specific statement. Regardless, Mr. Clinton's testimony was unequivocal:

> Q. Did you ever tell ELM that Site 3 area had been filled with ACM prior to being used by Johns Manville as a parking lot?
> A. No, I did not.
> Q. Did you ever tell ELM that the Site 3 area had been filled at all by anyone prior to being used by JM as a parking lot?
> A. No, I did not.
> Q. Why is that?
> A. I had no evidence or knowledge of that.

(Tr. May 23, p. 55:2-12). IDOT then egregiously misrepresents the record by saying that Mr. Clinton testified that "he had never made any statement to Johns Manville's consultant." (Resp., p. 9 (again citing Tr. May 23, pp. 54:15-55:12).) Mr. Clinton testified to the opposite; he discussed the "history of the Site 3 Parking Lot" with ELM and told ELM that the only ACM used in the Parking Lot construction was "asbestos-containing Transite as wheel bumpers . . . on the surface." (Tr. May 23, pp. 54:8-55:12.)

Even worse, IDOT then misleadingly claims that Mr. Clinton's testimony cannot be squared with another statement in the same ELM Report regarding photographs identifying potential ACM. (Resp., p. 9 (citing Ex. 57-16).) IDOT seems to suggest that the statement that "other potential ACM was identified on the Site according to the Site photographs" somehow supports its view that JM built the Parking Lot with ACM. The following sentence (not quoted by IDOT) then references "Photographs of Site 3 [] taken" during the Site investigation in 1998. (Ex. 57-16 (omitted in IDOT's Response).) The fact that Site photographs taken in 1998 show

non-Transite "potential ACM" has no bearing on whether JM built the Parking Lot with ACM in the 1950s—over thirty years earlier.

Moreover, IDOT offers no credible rationale for why JM would have needed fill material to install the Parking Lot. According to IDOT, based upon comparing 1939 and 1960 topographic maps covering Site 3, it is clear that fill was required to "raise the ground to bring the parking area to a similar elevation as Greenwood Avenue and to keep the parking lot dry during wet times of the year." (Resp., p. 10.) But Mr. Gobelman did not review any topographic maps *between* 1939 and 1960, which IDOT claims evidence the "need for fill" (*id.*; Tr. May 25, p. 136:21-24) and did not know when the alleged change in hydrology took place. (*Id.*, pp. 139:1-140:3.) It is possible, he conceded, that ComEd could have filled the area between 1939 and the late 1950s, when the Parking Lot was installed. (*Id.*, pp. 139:5-13; 141:14-142:21: Ex. 8-14.) Indeed, this is exactly what happened. According to Mr. Dorgan, the area around Site 3 had been "relatively level ground" at the time the Parking Lot was installed in the late 1950s and was "relatively level ground" when IDOT began its work in 1969 or 1970. (Tr. May 23, p. 134:8-16; Exs. 21A-23, 53N.) The fact the ground level did not change in the interim shows it is "more likely than not that between 1939 and 1960 ComEd" filled the "lower lying portions" of the property. (Ex. 16-9, 16-10.)

IDOT's construction drawings, approved in 1970, further bolster Mr. Dorgan's view of the facts. (*See* Ex. 21A-1; Tr. June 23, pp. 77:17-78:10; Ex. 4C-96, line 16- 4C-97, line 6.) The profile for Detour Road A shown at Exhibit 21A-23 indicates that the elevation of the land across the entire stretch of Detour Road A is *consistently* at or near 590 feet in elevation, the same height as Greenwood Avenue. This consistency is important. If Mr. Gobelman was correct that JM filled the Parking Lot area in the late 1950s, then it would follow that the Parking Lot would be noticeably higher than the rest of the surrounding land. But, as Exhibit 21A-23 shows, that is simply not the

case. Therefore, instead of JM filling in one spot of the Parking Lot in the late 1950s, it is more likely than not that ComEd filled in the entire area between 1939 and the late 1950s. (*See* Ex. 16-9 (discussing 1946 aerial photograph indicating filling between 1939 and 1946).)

IDOT's theory—that JM used ACM fill to build the Parking Lot—is also contradicted by Mr. Gobelman, who stated that test pit soil boring logs for Site 3 show the area "was filled with cinders and slag," which "most likely came from the waste products from a coal fired power plant, Midwest Generation facility" (located on the ComEd property). (Ex. 8-14; Ex. 16-10.) This admission wholly undermines the allegation that JM filled the area with ACM. If the Parking Lot had been constructed out of ACM, "the soil borings would have shown ACM throughout the parking lot area as well as at depths. Here, the depths of ACM are consistent with the work performed by IDOT." (*Id.; see also* Tr. May 23, p. 95:15-20.)

IDOT's theory also assumes that ComEd allowed JM to fill its Property with ACM. But the license agreement between JM and ComEd provides only that JM can "grade and level said area and improve the surface thereof;" it *does not* say JM can excavate and import fill onto ComEd's property. (Ex. 50-2.) IDOT lacks any credible evidence that JM built the Parking Lot out of ACM. Rather, the evidence shows that, consistent with JM's witnesses and USEPA representations, JM placed concrete Transite pipe on top of the ground to outline a perimeter and to be used as wheel stops and then IDOT crushed and buried them as part of the Project. (Tr. May 23, pp. 45:21-46:6; 50:3-51:9; 134:8-16; PHB, pp. 13-17.)

II. IDOT Buried And Disposed Of ACM During The Amstutz Project

IDOT's Response lays out a number of arguments that it claims show "IDOT could not have" contaminated the Sites through its work on the Project. (Resp., pp. 11-19.) None of them find support in the record.

A. The Transite Pipes Were On Site 3 When IDOT Began Work

IDOT argument that there is "no proof or evidence" that Transite pipes were actually present on the Parking Lot when IDOT began work on the Project is wrong. (Resp., p. 13.) To the contrary, the evidence is laid out in detail in JM's PHB. (PHB, pp. 12-13; *see also* Ex. 16-4.) To buttress its assertion, IDOT argues that the June 1970 aerial shows "no cars." (Resp., p. 13.) Like many of IDOT's points, this is a red herring. The key here is not whether cars are present, but whether the pipes are present. IDOT cannot escape the fact that the concrete Transite pipes *are present* on Site 3 in June 1970, as depicted in the June 1970 aerial photograph. (PHB, pp. 12-13; Ex. 53B.) Given this concession, it is illogical for IDOT to argue that JM "could have removed" the pipes from Site 3 prior to June 1970. (Resp., p. 13.) Further, Mr. Gobelman, testified that IDOT did work on Site 3 prior to the June 1970 photograph while the pipes were present. (*See* Resp., p. 13; Ex. 16-4; Tr. May 23, pp. 145:24-151:22; 154:17-156:16; Exs. 21A-8, 21A-23 (showing Parking Lot on plans); PHB, pp. 12-13.) IDOT was there in 1970, on the Sites, doing work when the pipes were present.

B. IDOT Used Concrete Transite Pipe And Other ACM On Site 3

IDOT incorrectly argues that JM is wrong that IDOT buried ACM during the Project on Site 3. (Resp., p. 14.) Yet the evidence presented at hearing plainly demonstrates that IDOT buried ACM when building Detour Road A; that IDOT buried ACM when constructing the intersection of Detour Road A and Site 6; and that IDOT buried ACM when doing restoration work on these Sites at the end of the Project. (*See* PHB, pp. 14-17.)

IDOT claims that "[s]ince there was more cut available than fill needed [for Detour Road A], the contractor would have used the readily available cut for the fill" where it was called for on Detour Road A. (Resp., p. 15; Ex. 16-6.) In making this argument, IDOT forgets that it also

advanced the argument that JM built the Parking Lot out of ACM. (Resp., pp. 8-10.) If both arguments are correct, then IDOT is undermining its own argument and conceding that it utilized cut containing ACM as fill on Site 3. (Ex-16-6 ("The area of Detour Road A construction that transected Site 3 . . . required fill to raise the existing site grades to the design elevation."); Ex. 21A-23 (indicating cut down to elevation 587 along special ditch for Detour Road A on Site 3).)

Without citing to the record, IDOT asserts that its contractor would not have used the Transite pipe on Site 3 for various reasons. (*See* Resp., pp. 15, 17-18.) IDOT argues that the pipes needed to be crushed first and that the contractor "could not have crushed any pipe" on the northeast corner of Site 3. (*Id*.) IDOT likely omits any citation to the record because, once again, Mr. Gobelman conceded (and Mr. Dorgan agrees) that "there was room in the parking lot area to do the breaking up of these pipes." (Tr. June 23, pp. 147:2-11; Ex. 16-4, 16-13.)

Further, IDOT speculates that any crushing of the pipes would have occurred outside the construction limits, where it alleged it did no work. (Resp., p. 15; Tr. June 23, pp. 126:11-127:5.) Yet, when pressed, Mr. Gobelman agreed that IDOT *did* do work outside the construction limits when it removed the Parking Lot. (Tr. June 23, pp. 127:6-129:7.) Further, IDOT concedes that the 1972 aerial photograph shows a "disturbed area of ground" that "show[s] piles, evidencing digging" in a triangle area, which is also outside of the limits of construction. (Resp., pp. 15-16; *compare* Exs. 53B, 54Q *with* Ex. 16-18 (showing construction limits); Tr. May 23, pp. 157:1-160:22; Tr. May 25 pp. 195:7-14; Tr. June 23, pp. 218:6-219:14.) Thus, the record belies the claim that IDOT could not have crushed pipe outside those limits. (*See also* PHB, pp. 17-18.)

IDOT claims that Site 3 needed little to no fill (Resp., p. 15), but this makes no sense. The record is replete with evidence, and Mr. Gobelman admitted, that fill was needed at the intersection of Detour Road A and Site 6. (*See* PHB, pp. 14-15; Tr. June 24, pp. 198:6-199:7.)

Fill was also needed to restore Site 3 after IDOT "obliterated" Detour Road A (Ex. 35; Tr. June 23, pp. 156:4-12), including material to fill in the ditches running through Site 3 (PHB, pp. 16-17), to restore the area around Detour Road A (*id*., p. 17) and to fill in the area where IDOT installed a culvert under Detour Road A. (*Id*.) The evidence not only demonstrates that fill was needed in these areas, but also that concrete Transite pipe and other ACM happen to be found buried in these exact locations. (*See id*., pp. 14-17 (identifying evidence showing ACM located where IDOT placed fill on Site 3).) IDOT makes no effort to rebut this compelling proof.

C. IDOT Used Concrete Transite Pipe And Other ACM In The Embankments And On Site 6

IDOT claims that the contractor would not have used the pipes "in the embankment area for Greenwood Avenue." (Resp., p. 16.) But Mr. Gobelman disagrees—he testified that IDOT's contractor used the concrete Transite pipes on the Project, which "*went into the embankments, which w[ere] associated with [Sites] 3 and 6*" (the "Embankments"). (Tr. June 24, p. 10:10-16 (emphasis added); *see also* Tr. June 23, p. 28:4-9 (stating contractor could have used pipes "in the larger embankment areas").) IDOT cannot now backpedal from this unvarnished admission.

IDOT's arguments are similarly weak as to the Embankments on the ROWs (which are part of both Sites 3 and 6). IDOT built these Embankments and has no reasonable explanation for how the ACM became buried in their fill material. (PHB, pp. 9, 26.) The evidence shows that IDOT's contractor was actually encouraged to, and did, bury ACM in the Embankment. (PHB, pp. 14-15; Exs. 6-28, 84, 202.) After all, the pipes had "value" and "reduce[d] the amount of material that [the contractor] is going to have to try to find from a borrow source." (Tr. May 25, pp. 164:21-165:13; *see also* PHB, pp 19-21.) Thus, the contractor surely would have used them on the Project. (Tr. May 25, pp. 162:5-16.) This is particularly so where the contractor was

responsible for the cost of disposing of "obstructions," such as concrete Transite pipe, if not buried on the Sites. (Tr. May 23, pp. 225:14-226:22; Ex. 19-5, 19-6.)

IDOT makes the unsupported argument that the contractor would have removed any pipes "well before the construction of the embankment" and would not have wanted to drag them back to Site 3 to bury them in the Embankment. (Resp., p. 16.) But IDOT's theory conflicts with Mr. Gobelman's view on construction practices. Mr. Gobelman opined that contractors do not like to move things twice. (Tr. June 23, pp. 139:20-140:2; 147:12-15.) Consequently, it is more likely than not that IDOT's contractor crushed the pipe and left it in place on top of Site 3. Then, when the Embankment was built, the crushed concrete Transite pipe was sitting just a few feet away. (*See* PHB, pp. 22-23.) IDOT has utterly failed to offer any rational rebuttal to this point.

IDOT tries to prop up its contention (and its "expert") by claiming that, similar to its argument concerning Site 3, the amount of fill needed for the Embankment "at the areas relevant to this lawsuit would have been minimal." (Resp., p. 17.) To support this argument, IDOT asserts two inaccurate statements of fact. First, IDOT claims that the contract plan cross-sections only show about a foot of fill material required at Station 9+00, the location where Mr. Gobelman says the Embankment begins to rise. (*Id*. (citing Tr. May 25, pp. 169:6-170:24).) But this statement is exceedingly misleading. The issue is not where the Embankment begins "to rise," but is where fill was needed, whether above-grade fill or backfill from excavated areas. (*See* Ex. 16-8.) Thus, the Mr. Gobelman's argument only takes into account the fill required above the grade, failing to consider the backfill required. As a result, the argument grossly underestimates the fill used "at the areas relevant to this lawsuit." (Resp., p. 17.) JM examined this point extensively on cross examination with Mr. Gobelman at hearing. Using the cross sections in the construction drawings, JM established through Mr. Gobelman that several feet of

fill were required at Stations 7+60, 8 and 9; Station 7+60 required 3.49 feet of material for backfill; Station 8 mandated 5.85 feet of material for backfill; and Station 9 necessitated 4.97 feet of material for backfill. (Tr. June 23, pp. 193:11-199:11; Exs. 21A-72, 21A-73.) ACM is located within the Embankment at and between these Greenwood stations. (Ex. 202 (borings 1S, 2S, 3S, 4S, 5S, 1N, 2N, B3-25, B3-16, B3-15, B3-50, B3-45); Tr. June 24, pp. 210:5-211:20 (explaining that Embankment extends between 25 and 44 feet into Site 3 at Stations 8-10).)

Second, IDOT states that "the contractor's work ended at Station 7." (Resp., p. 17.) It did not. The plans for Detour Road A clearly show that IDOT's work along Greenwood extended east to Station 5+90, where Greenwood intersects with Detour Road A. (Ex. 21A-23; Tr. June 23, pp. 187:16-191:2.) At that juncture (Stations 15, 16, 17 along Detour Road A which correspond with Greenwood Stations 7 and 6), the plans call for approximately 1 to 2.5 feet of fill to elevate the ground at that location to meet Greenwood. (PHB, pp. 15-16; Exs. 21A-23 (showing fill needed on profile and Detour Road A stationing); 164/202 (showing ACM at Stations 7 and 6 along Greenwood and *within* Site 6).)

In a last ditch effort, IDOT asserts that the evidence showed that fly ash was "likely used as borrow material" fill in the Embankment. (Resp., p. 17 (citing Ex. 29 and Mr. Gobelman's discussion of Exhibit 29).) Once again, IDOT mischaracterizes the record. Mr. Gobelman was asked specifically about this testimony and denied that he ever made such a suggestion:

> Q. You seem to suggest, as least to me that IDOT was using fly ash embankment for the embankments on the north and south side of Greenwood that involved Sites 3 and 6, is that correct, or am I overreaching?
> A. I've never stated anything like that.

(Tr. June 23, pp. 214:1-16.) Mr. Gobelman then conceded that Exhibit 29 referred to an unrelated embankment "further west." (*Id.*, pp. 214:17-215:1.) There is nothing in the record indicating that soil borings taken along the Embankments contained fly ash.

D. There Is No Evidence That ACM Was Buried With Utility Lines Except For The Water Line That IDOT Moved

JM rebutted IDOT's trial theory that waste might have been buried or re-buried when utilities were installed or maintained. (PHB, p. 19.) But instead of addressing JM's points, IDOT simply restates its theory with no citations to the record. (Resp., p. 18.) IDOT then posits a brand new theory that "any utility e installation or maintenance could have encountered and handled ACM that was on the surface . . ." (*Id.*, p. 19 (typos in original).) There is no testimony on this point in the record and absolutely no evidence in the record concerning when most utilities were installed at the Sites or whether any maintenance has ever been done on them. (PHB, p. 19.) IDOT's argument amounts to no more than sheer speculation.

IDOT points to soil samples taken by JM that "show a close alignment" between ACM contamination and utility lines at the Sites, suggesting that utility work might have impacted the ACM (*id.*), but neglects to consider testimony from Dr. Ebihara and Mr. Dorgan. Dr. Ebihara testified that, during his involvement in the sampling done on Sites 3 and 6 from 2008-2016, he and his team purposely picked sample locations that would avoid utilities and that they never encountered a utility during sampling work, save one telephone line that was not located where depicted on the maps. (Tr. May 23, pp. 69:4-70:13; 71:21-23; 87:20-89:1.)

Mr. Dorgan opined that the utilities were not responsible for the ACM on the Sites in part because the occurrence "of Transite pipe and ACM in the subsurface generally aligns with the location of Detour Road A and the Greenwood Avenue right of way. From my review of the utilities onsite, the overall occurrence of ACM, including Transite pipe, does not align with any

specific utility." (Ex. 16-8.) He also testified that it would make no sense for a utility company to backfill a utility excavation with pieces of concrete Transite pipe:

> Q. Would it make sense to backfill a utility excavation with pieces of concrete Transite pipe?
> A. That wouldn't normally be done.
> Q. Why is that?
> A. The potential that the fragment of concrete could in some way damage or injure the pipe and create future problems.
> Q. So it wouldn't be a standard practice?
> A. No.

(Tr. May 24, pp. 54:22-55:7.) But even if IDOT were correct and this imagined utility work moved around ACM in the subsurface, it still does not change that fact that IDOT buried ACM in the first place and that, to the extent the movement occurred on one of the ROWs, IDOT is ultimately responsible. (*See* Ex. 16-8.)

E. IDOT's Speculation About Vandals Is A Shot In The Dark And Contradicted By Evidence That ComEd Closely Monitors Site 3

IDOT suggests that vandals could have possibly caused the ACM contamination. (Resp., p. 19.) This argument lacks any evidentiary support. IDOT incorrectly argues that the Sites are "open and accessible to the public." (*Id*.) But as Mr. Dorgan explained, shortly after he accessed the Sites for a visit, "a security guard from Commonwealth Edison approached us to inquire as to why we were there and what was the purpose for our presence." (Ex. 4A-177, lines 13-19.) The idea that vandals accessed and buried ACM on the Sites is simply absurd.[1]

III. IDOT Has Held And Continues To Hold An Interest In Parcels Nos. 0393 And 0392

IDOT splits hairs in arguing that JM's assertion that IDOT had an "ownership interest" in Parcel No. 0393 is unsupported because, according to IDOT, Illinois property law "views the holding of an easement over a parcel as a distinctly different interest than would exist if owning

[1] IDOT also claims "it is possible" that something happened at the Sites after construction. (Resp., p. 19.) But Mr. Dorgan testified that the record showed no development at the Sites post-1977. (Tr. May 23, pp. 164:22-165:1.)

the property." (Resp., p. 23.) This is a distinction without any meaning. The Act and its regulations define ownership more broadly than does Illinois property common law. While IDOT does not own Parcel 0393 in fee simple, IDOT "owns" Parcel 0393, *within the meaning of the Act*, because it has an "interest, directly or indirectly, in land" because of its permanent easement interests. *See* 35 Ill. Admin. Code 807.104; 35 Ill. Admin. Code 810.103.[2]

Because it has no reasonable response to JM's ownership argument, IDOT attempts to distract the Board with a number of immaterial and unpersuasive points. For example, IDOT contends that Greenwood and Sand Street are owned by the City and subject to its jurisdiction. (Resp., pp. 20-21.)[3] The ownership and jurisdiction over the streets themselves are irrelevant. The ROWs and their abutting streets—Greenwood Avenue and Sand Street—are not one in the same or synonymous. IDOT's witness, James Stumpner, agrees and testified it was "correct" that "having a right of way over a particular piece of property is different than having jurisdiction over the roadways abutting that right of way." (Tr. May 25, pp. 53:21-54:12; *see also* Tr. June 24, pp. 156:22-158:6 (testimony of Keith Stoddard); Ex. 18-14, § V.D.3 (Mr. Fortunato's opinion that under "IDOT's own Highway Jurisdiction Guidelines, property rights are distinct from jurisdiction" and that "[e]ven if the City of Waukegan had jurisdiction over Parcel No. 0393 . . . the law of easements would control and IDOT would still owe the duties under the common law and Grant.").) What matters is the "ownership" of the ROWs under the Act. Notably, IDOT does not argue that the City "owns" the ROWs.

[2] Under property law, an easement holder *owns* the easement right. That easement right is more than just a right of possession, in contrast to the right incident to a lease; a tenant is not an owner, but a holder of an easement owns a non-exclusive property right.

[3] IDOT has presented no evidence that the City has jurisdiction over Parcel 0393. IDOT's 104(e) Response does not discuss jurisdiction over Site 3 (or Parcel No. 0393) or attach the "map" to which IDOT refers. (Ex. 60-3.) Instead, the response merely refers to the highways adjoining the site. (*Id.*)

IDOT also strings together a somewhat incoherent argument concerning the "highway" to which the Grant for Public Highway ("Grant") refers. (Resp., p. 23.) Citing no testimony, IDOT seems to contend that the "highway purpose" for which the Grant is to be used was the "City of Waukegan's streets." (*Id*.) While the relevance of this point remains unexplained, the argument is belied by the record. The "highway purposes" in question were obviously related to the highway that was being built, the Amstutz. (*See* Exs. 41-43.) IDOT's witnesses and JM's witnesses concurred during hearing—testifying that the "highway purpose" for which Parcel No. 0393 has been and is used relates to the Amstutz in part because the Embankments built on the ROWs connect traffic to the state highway. (*See* Tr. May 23, pp. 165:15-166:5; Tr. May 24, pp. 143:23-144:22; 155:21-156:18; Tr. May 25, pp. 51:21-52:3; 52:9-53:16; 69:14-18; Tr. June 24, pp. 121:13-122:6; Ex. 4H-51, lines 2-16.) As set forth by IDOT itself, "highway" includes "rights of way" and "and all other structures and appurtenances necessary or convenient for vehicular traffic." (*See* Resp., p. 24 (quoting 605 ILCS 5/2-202 and 605 ILCS 5/2-217).) This is precisely what Parcel No. 0393 is—a right of way/permanent easement necessary for vehicular traffic to the Amstutz. IDOT does not dispute that it obtained a direct interest in Parcel E393, 0393 and 0392 in 1971 and held these interests during the Project. (Exs. 41-43.) Nor does IDOT dispute that it still retains those interests in Parcels Nos. 0392 and 0393. As a result, IDOT was an "owner" of Parcel Nos. E393, 0393 and 0392 during the Project and is still an "owner" of the latter two, and therefore should be held liable for violations of Section 21 as an owner.

IV. IDOT Controls Parcels Nos. 0393 And 0392

A. IDOT's Maintenance Argument Is Immaterial To JM's Claim

IDOT employs the same tactics in responding to JM's argument that IDOT is liable for violations of Section 21 due to IDOT's exertion of control over portions of the Sites. Rather than

citing rebuttal evidence, IDOT addresses an entirely irrelevant point, namely who has responsibility for maintaining the Embankment. (Resp., pp. 20-21.) But what the law targets is whether IDOT possesses the ability to control, has controlled, and/or currently controls the ROWs by virtue of IDOT's permanent easements (and temporary easement over Parcel No. E393). *See e.g.*, *McDermott v. Metro. Sanitary Dist.*, 240 Ill. App. 3d 1, 25-26 (1st Dist. 1992) (focusing on easement holder's control over the easement property); *People v. Intra-Plant Maint. Corp.*, PCB 12-21, 2013 WL 3970883, **6-7 (July 25, 2013). Put simply, "maintenance" and "control" are two different things. The one in control is not necessarily doing the maintenance.

In addition to misdirecting its focus, IDOT's assertion that the City has maintenance responsibility over the Embankment lacks credible evidentiary support. IDOT failed to produce a single piece of evidence showing that the City has jurisdiction or exercised any sort of maintenance responsibility over Parcel No. 0393. (Tr. May 24, pp. 156:19-157:5; Tr. May 25, p. 69:8-13.) Rather, this haphazard maintenance argument hinges upon the conflicting testimony of Mr. Stumpner. At one point, Mr. Stumpner testified that did not think anyone had jurisdictional responsibility over Parcel No. 0393. (Tr. May 25, p. 56:14-17.) IDOT, however, relies on different testimony from Mr. Stumpner when claiming that the City is responsible for maintaining the Embankment. (Resp., pp. 20-21.) But Mr. Stumpner backed off the testimony IDOT relies upon on cross examination, stating that he never said the City had maintenance responsibility over Parcel No. 0393 and that he had only been referring to the highway itself: "I didn't make any reference to parcel – to the parcel [when discussing maintenance responsibility over Parcel No. 0393]. We were talking about the highway." (Tr. May 25, p. 47:3-15.)

Moreover, Mr. Stumpner's "evidence" fails to support his testimony. His testimony was based solely on a 1966 Resolution between the State of Illinois, the County of Lake, and the

City. (*See* Resp., p. 20; Ex. 40;[4] Tr. May 25, pp. 33:1-5; 40:11-19; 69:2-13.) Despite the fact he has no legal background or relevant experience, Mr. Stumpner claims to be able to interpret the legal meaning of this decades-old and difficult-to-read document, apparently concluding that it delegates to the City perpetual maintenance responsibility over IDOT's ROWs. (*See e.g.*, Tr. May 25, pp. 68:9-69:13.) The 1966 Resolution, however, says nothing of the sort. In fact, it says nothing about "jurisdiction" or maintenance of the ROWs. (Ex. 40; Tr. May 25, pp. 67:16-68:7.) The maintenance language in the 1996 Resolution addresses only the streets themselves, not the abutting parcels: "[t]he CITY will maintain the improvement along Greenwood Avenue in its entirety as indicated on the attached exhibit" (Ex. 40-3); the attached exhibit only identifies the streets and not the abutting ROWs. (Tr. May 25, p. 46:10-17 (admitting that the "land abutting those roadways isn't colored at all"); Ex. 18-14, 18-15, § V.D.5.)

The only trial witness who had expertise in reviewing grant documents and assessing their impact on common law property rights was Mr. Fortunato. (*Compare* Tr. May 25, pp. 68:8-69:1 (discussing Mr. Stumpner's lack of experience or personal knowledge) *with* Ex. 18, § II; Tr. May 24, pp. 104:8-113:8 (discussing Mr. Fortunato's expertise); 117:19-119:13.) Mr. Fortunato and JM unequivocally refuted IDOT's maintenance argument:

> Even if the Resolution had delegated maintenance duties over Parcel No. 0393 to the City of Waukegan, which it did not, the law of easements would control and IDOT would still owe the duties under the common law and the Grant set forth above . . . Even under the current Illinois Highway Code, if IDOT has statutory maintenance duties (which are distinct from common law property duties), it can enter into written contracts with any municipal corporation to perform those statutory duties, but still under IDOT's supervision and at the expense of the State. *See* 605 ILCS 5/4-406. Based upon this language, IDOT would remain ultimately liable for failing to discharge its statutory maintenance duties.

(Ex. 18-15, 18-16) Thus, IDOT cannot escape this liability. (Tr. May 24, pp. 148:12-149:9.)

[4] IDOT's reliance on and citation to Exhibit 38 (Resp., p. 20) is highly improper given that this exhibit was excluded from evidence as illegible and taken only as an offer of proof. (*See* Tr. June 29, p. 245:10-15.).

Since IDOT elected not to have its expert witness testify at trial, IDOT takes unwarranted shots at Mr. Fortunato in the hopes that the Board will forget about his uncontroverted testimony. But in doing so, IDOT oversimplifies Mr. Fortunato's opinion. Mr. Fortunato opined that IDOT has the ability to operate and control areas on Parcel No. 0393, including the Embankment, *because the easement still exists and is still being used for highway purposes*. (*See* PHB, pp. 9-11, 25-28, 38-46.) The facts that IDOT conducted wetlands surveys using its permanent easement in Parcel No. 0393[5] and that the Embankment still exists on Parcel No. 0393 (*see* Resp., p. 25) are just two examples of IDOT's continued operation relied upon by Mr. Fortunato.

As Mr. Fortunato testified, JM's control rights and duties over Parcel No. 0393 are numerous and broad. (*See e.g.*, PHB, pp. 9-11, 25-28.) These include the rights "to operate on," "to construct improvements in, on and under," "to maintain," "to access," "to prevent third parties from interfering with," "to control," and to "repair" the permanent easement areas and the duties "to maintain and repair," "to not to damage or cause diminution in value to," "to prevent waste," and "to maintain public safety" over the permanent easement areas. (*Id*.; *see also* Tr. June 24, pp. 118:17-119:13.) This includes the authority to prevent other entities, including the City, from removing the embankment on Parcel No. 0393. (*Id.*) Even IDOT's witnesses affirmed that it was IDOT's easement interests that entitled IDOT to access, enter onto, survey, and conduct subsurface investigations on the ROWs. (Tr. May 24, pp. 101:4-102:7.) While IDOT claims that "what is ultimately most important is that it is the City, and not IDOT, which has the authority to tear down the embankment, although IDOT would object" (Resp., p. 21),

[5] IDOT's attempt to claim that that it used "statutory authority" to conduct this work lacks credibility. While the statute does allow its employees "to enter private-property for the purpose of conducting highway-related work" advance written notice is required. *See* 605 ILCS 5/4-503. IDOT could not furnish any such notice given with respect to the ROWs. (*See* Tr. May 24, pp. 100:14-101:3.)

IDOT conveniently ignores its own witnesses' testimony that not only would IDOT object, any such action by the City *would require IDOT's approval*. (PHB, p. 27.)

B. Parcel 0393 And 0392 Are Contaminated And Part Of The Sites

In an attempt to evade liability for Site 6, IDOT offers a new expert opinion in its Response regarding the specific boundaries of Parcel No. 0393, Site 6, and the Embankment, but without offering an expert. (Resp., pp. 22, 25.) Relying on a 1970 plat of survey (Ex. 15),[6] IDOT provides an unintelligible description of these boundaries and concludes, "[n]o part of Parcel 0393 lies on Site 6" and that the "embankment that is part of Site 6 sits within the ROW for Greenwood Avenue." (Resp., pp. 22, 25.) But Parcel No. 0393 and the ROW are one in the same. So if "Site 6 sits within the ROW for Greenwood," then Site 6 (and its Embankment) sits within Parcel No. 0393. IDOT does not dispute that it built the Embankments or that Parcel 0393 falls within Site 3. (PHB, p. 26.) Thus, IDOT's liability for these areas *cannot be foisted off on JM*.

IDOT should not be allowed to advance this new "opinion." At IDOT's request and over JM's objection, the parties employed experts to testify regarding the ROW issues. IDOT's expert, who ultimately did not testify at hearing, offered no opinion that Parcel 0393 did not fall within Site 6. No *IDOT* expert said this. "If an opinion is important to a case, it and the basis for it must be disclosed prior to trial." *Boehm v. Ramey*, 329 Ill. App. 3d 357, 363 (4th Dist. 2002). It is an abuse of discretion "to allow parties to present opinions at trial without having disclosed those opinions." *Id.* (remanding for new trial where expert opined on subjects not disclosed); *Warrender v. Millsop*, 304 Ill. App. 3d 260 (2d Dist. 1999). IDOT should not be permitted to

[6] IDOT's citation to Exhibit 15, dated 1970, as establishing the boundaries of Parcel No. 0393 today is inherently unreliable given that Greenwood Avenue was to be widened during the Amstutz Project. (*See* Ex. 21A.)

opine regarding the boundaries of Site 6, the ROW and the Embankment at this late juncture without any prior disclosure.

Nor should IDOT be permitted to make arguments regarding Exhibit 15, about which IDOT did not elicit accompanying witness testimony at trial. Mid-hearing, this very issue was briefed. In ruling that IDOT could not do exactly what it is trying to do now, offer a new opinion in its post-hearing brief based upon a document without any accompanying testimony, the Hearing Officer agreed with JM that "JM ha[d] a right to an opportunity to examine witnesses offering exhibits to be offered into evidence." (June 21, 2016 Hearing Officer Order, p. 6.) As such, IDOT's argument should be disregarded by the Board. This is particularly so because IDOT's contention is contradicted by evidence actually contained in the record, (Tr. May 23, pp. 35:3-5; 106:13-20), including admissions by IDOT that Parcel No. 0393 was located within Site 6. (*See* Ex. 3I-3, RFA Responses 1, 2; Tr. May 25, pp. 149:21-152:10; 268:11-15; June 23, pp. 170:13-24; 217:9-20; Tr. June 24, pp. 9:19-10:16; 197:13-199:7; 200:1-203:24; 207:16-208:4; Exs. 164/202 (Gobelman drawings depicting Parcel No. 0393 as lying, in part, on both Sites 3 and 6).) In fact, IDOT's Exhibit 202 depicts the Embankments to be within Parcels Nos. 0393 and 0392 and containing ACM. (*Id.*; Ex. 202 (borings 1S, 3S, 4S, 5S, 6S, 7S, 8S and 6N falling within dashed ROW); Tr. May 24, pp. 149:21-152:1 (Mr. Gobelman pointing out IDOT's ROWs and Site 6 on his Exhibit); Tr. May 25, pp. 152:23-155:21; 177:7-179:3; 264:23-268:15.)

Finally, IDOT's argument makes no sense. IDOT could not have built the Embankments on Sites 3 and 6 if it did not have an easement. The only easements IDOT produced in this case are those contained in the Grant, which encompass Parcel No. 0393. (Tr. May 25, pp. 51:21-52:3; 53:13-16; Tr. June 24, pp. 120:22-121:1.)

V. Mr. Gobelman Lacked Credibility And His Opinion Should Have Been Barred

IDOT tries to buoy its expert's dubious testimony, but does not attempt to reconcile or defend any of Mr. Gobelman's inconsistent opinions or apparent bias. (PHB, Ex. A: Resp., p. 28.) Rather, IDOT tries to deflect from Mr. Gobelman's shortcomings by attacking JM as "desperate" and "loosely using terms, misrepresenting testimony and trying to assume that any ACM in areas where IDOT worked was put there by IDOT." (Resp., p. 30.) If JM had actually done any of these things, IDOT's Response would have cited to such instances in the record. IDOT did not and cannot because no such misrepresentations or citations exist.

But evidence *doe*s exist directly highlighting Mr. Gobelman's lack of credibility. The record illustrates that Mr. Gobelman knew that IDOT held a right of way interest in Parcel No. 0393, but instead testified that it did not. He said that the City held that interest, attempting to mislead JM into thinking that IDOT could not possibly be held liable as an owner or operator in this case. (PHB, pp. 31-32, 54-57.) IDOT's *only* response to this proof is to assert that JM's argument is "ridiculous" because Mr. Gobelman has reviewed hundreds of Preliminary Environmental Site Assessments ("PESAs"). (Resp., p. 30.) But whether Mr. Gobelman has reviewed lots of PESAs is irrelevant to JM's argument. The key point is that the evidence shows that Mr. Gobelman reviewed PESA 2308 (which identified Parcel Nos. 0392 and 0393 as IDOT right of ways) *just days before he submitted his Expert Rebuttal Report*. (PHB, pp. 31-32, 55-57.) He therefore knew when he submitted his Expert Rebuttal Report that portions of the Sites fell within the ROWs. (*Id*.) But his Expert Rebuttal Report implied the converse—that the City owned the ROWs. (PHB, p. 54.)

VI. Mr. Dorgan Is Qualified To Opine In This Case And His Opinions Were Based Upon A Thorough Review And Consideration Of The Record

In an apparent effort to disguise its faults, IDOT spends eight pages of its Response assaulting Mr. Dorgan's expertise and credibility. (Resp., pp. 31-39.) In order to do so, IDOT

narrowly frames the experience needed by an expert in this case as "background in highway design and/or construction." (*Id.*, p. 31.) Yet, this is not a case about the standard of care to be applied to the design of a highway in the 1970s. It is a case about how concrete Transite pipe and other ACM came to be buried in the soils on the Sites.

Ironically, IDOT claims that Mr. Dorgan is not an expert because he has never testified in a case involving construction of a highway. (*Id.*, p. 32.) Under this test, IDOT would disqualify its own expert. Mr. Gobelman testified that he has never served as an expert in any case, let alone one involving highway construction. (Tr. May 25, p. 210:6-8.) Undoubtedly an individual can qualify as an "expert" without ever having testified before as an expert. "A person will be allowed to testify as an expert if his experience and qualifications afford him knowledge that is not common to laypersons, and where his testimony will aid the trier of fact in reaching its decision." (April 26, 2016 Hearing Officer Order, p. 2.)

The Hearing Officer found that Mr. Dorgan possesses such knowledge and experience and "could consequently assist the Board in its determinations." (*Id.*, p. 3.) In fact, Mr. Dorgan possesses knowledge and experience not only in the fields of environmental consulting and geology, but also in the fields of engineering and construction. (Exs. 6, 7; Tr. May 23, pp. 110:18-119:1.) Mr. Dorgan has worked for engineering firms for 25 years. (Ex. 7, ¶ 3; Tr. May 23, pp. 110:18-112:16; 113:4-114:1.) In arguing that Mr. Dorgan has no background or experience in "highway design and/or construction," IDOT ignores several facts. (Resp., 31.) From 1986 to the early 1990s, Mr. Dorgan supported projects involving the design and construction of on-site roadways. (Tr. May 23, pp. 110:18-112:16; 113:4-115:10; Ex. 7, ¶¶ 4-5, 8.) In this work, he drafted technical specifications, cross sections, bid specifications and other documents relating to the roadway project at hand. (*Id.*) In his current position, Mr. Dorgan supervises a team that

designs and builds, among other things, roads and highways. (Ex. 7, ¶¶ 7-8.) In fact, this team "concentrates on civil engineering projects" (Tr. May 23, p. 112:9-16) and recently completed a preliminary access road design, including layout plans and details; drainage feature plans and details; pavement subgrade preparation details; and pavement width and construction specifications. (Ex. 7, ¶ 8.) Mr. Dorgan's team will ultimately provide construction oversight on this project. (*Id*.) As Mr. Dorgan testified, he has designed roadway embankments and there is no relevant difference between designing a roadway embankment and a "highway" roadway embankment, as IDOT suggests. (Tr. May 24, pp. 21:9-22:7.) In short, IDOT's argument that Mr. Dorgan lacks the expertise to offer opinions in the case cannot withstand Board scrutiny.

IDOT erroneously argues that Mr. Dorgan "cherry-picked" data and facts to reach his opinion. (Resp., pp. 31, 33, 38.) However, IDOT cannot provide one legitimate example of Mr. Dorgan employing such a practice. (Tr. May 23, pp. 121:20-123:19 (describing how Mr. Dorgan reached his opinions).) IDOT oddly argues that Mr. Dorgan failed to explain how non-Transite ACM came to be located on the Sites. (Resp., p. 31.) This is wrong. Mr. Dorgan testified that the non-Transite ACM was part of the fill material used by IDOT. (Tr. May 23, pp. 216:23-221:20 (explaining Ex. 84 and how different types of asbestos shown on cross-sections A to A' and C to C' would have been brought in as part of the Project and used within the IDOT fill material); 198:14-201:10 (describing Ex. 6-27 as showing all types of visual ACM along Detour Road A within the IDOT fill material); 205:15-206:19 (describing Ex. 6-28 as showing all types of ACM near south side of Greenwood within the fill material placed by IDOT).)

IDOT attacks Mr. Dorgan for claiming ACM is located "throughout" Site 3. (Resp., p. 33.) Nitpicking word choice is a needless distraction. Exhibits 6-26 through 6-28, 16-18, 84, and 202 all depict where ACM was detected on the Sites, which happens to be where IDOT did

work and used fill. (PHB, pp. 14-17.) It is expected that there would be locations were ACM is not found given that IDOT used bulldozers to crush and disperse Transite pipe and only needed fill material at certain locations. (Tr. May 24, pp. 58:19-59:5; Tr. June 23, pp. 168:9-169:21.)

IDOT faults Mr. Dorgan for not focusing on Site 4/5 and the eastern portion of Site 6. (Resp., pp. 33-34.) But that would have been pointless since the lawsuit does not involve these areas. (Tr. May 23, p. 313:2-13.) If IDOT thought these areas were relevant, it should have sought discovery about them, developed opinions about them or offered testimony about them, but it did not. Interestingly, IDOT admits that it did work on Sites 4/5 during the Project, which is perhaps why IDOT elected not to press the issue at hearing. (Resp., p. 34.)

IDOT attempts to argue that Mr. Dorgan's opinions about the origin of the ACM conflicts with Dr. Ebihara's "opinions." (Resp., pp. 34-35.) Again, this is simply not the case. Dr. Ebihara has offered no opinions in this case. He was merely a fact witness. As Dr. Ebihara explained, "the focus of my work is to investigate what's present and rely upon that data to determine what the remediation plan ought to be. So I don't delve into origins and sources if I don't have detailed evidence or documents." (Tr. May 23, p. 104:11-22.) IDOT plucks two sentences from Exhibit 66 to highlight as evidence that Dr. Ebihara has reached an opinion different from Mr. Dorgan. (Resp., p. 35.) IDOT claims that Dr. Ebihara reached the following conclusions about the origin of ACM at the Sites: the ACM on Site 3 "typically coincide with the location of utilities or other structures installed after the mid-1950s" and that "the origin of the ACM in Site 6 is not known but presumed to be debris that fell from trucks while driving on Greenwood Avenue." (*Id.*) But when asked about these statements, Dr. Ebihara said these statements in Exhibit 66 were "merely conjecture" and that he did not know the "actual process of origin." (Tr. May 23, pp. 94:10-97:7.) Furthermore, Dr. Ebihara explained that when the

sentences were written, he had not studied the distribution of ACM on the Sites in relation to IDOT's work in the 1970s. (*Id*., p. 98:1-8.) In fact, he stated that he was unaware of the exact location of IDOT's work when the report was written. (*Id*., pp. 100:4-21; 103:2-15.) But after reviewing Mr. Dorgan's report, he had reached a different conclusion:

> Q. Okay. And so can you explain -- because after reading Mr. Dorgan's report, is that your view that the ACM is located near the utility lines in all instances?
> A. No.
> Q. What is your view of it at this point?
> A. That there appears to be another disturbance activity for the path of the access road and construction for the IDOT activities . . . (*Id*., pp. 98:22-99:6; Tr. May 24, pp. 40:2-41:5.)

Finally, IDOT asserts that Mr. Dorgan never considered whether JM could have buried the ACM at the Sites. (Resp., p. 37.) In addition to Mr. Dorgan's testimony that he considered and, based upon the record, determined that JM did not bury the ACM, Mr. Dorgan repeatedly offered testimony indicating that JM could not have been responsible for the subsurface ACM contamination at depth. For example, as to Site 3, Mr. Dorgan examined the evidence relating to the construction of the Parking Lot and expressly rebutted IDOT's testimony that JM used ACM to build the Parking Lot. (Tr. May 23, pp. 226:23-227:14; Tr. May 24, pp. 27:22-35:13; Tr. June 24, pp. 239:18-240:17; Ex. 16-9-16-12.) Site 6, which contains the shoulders of Greenwood Avenue (as they currently exist) and the Embankment, was built by IDOT and thus could not have been part of the JM Parking Lot. (PHB, pp. 9, 11; Ex. 6-21.) In short, IDOT's attempt to cast Mr. Dorgan as an ill-experienced expert who ignored the factual record finds no support.

VII. It Is Appropriate To Consider Duane Mapes's Statements

Because his statements are so damaging to IDOT's case, IDOT wants the Board to revisit the Hearing Officer's ruling on IDOT's Motion *in Limine* to exclude the statements of Duane Mapes, the resident engineer on the Project. (Resp., pp. 38-39.) The Board should not; doing so

would be futile. Mr. Mapes stated in response to a question about Site 3 that he "recalled dealing with asbestos pipe during the project and burying some of it." (Ex. 60-4, 60-5.) The Hearing Officer denied IDOT's Motion *in Limine*, agreeing with JM that the evidence was not hearsay. (April 26, 2016 Hearing Officer Order, p. 4 (finding "Mr. Mapes' statements admissible for a number of reasons cited by JM," as they were party-opponent admissions, public records, and trustworthy).) But even if Mr. Mapes's statements were hearsay, Mr. Dorgan should be allowed to rely upon it pursuant to Illinois Rules of Evidence 703 and 705. It is axiomatic that experts are permitted to rely on hearsay evidence so long as it is the type of evidence they would reasonably rely upon. (*See* JM's Response to IDOT's Motion *in Limine*, filed Feb. 15, 2016, pp. 7-9.) Mr. Dorgan expressly testified that the documents he reviewed in this case, including IDOT's 104(e) Response with Mr. Mapes's statements, which IDOT adopted by swearing to its truth and accuracy, are documents that experts in his fields reasonably rely upon in reaching their conclusions. (May 23, p. 123:15-19.)

VIII. IDOT Violated Section 21 of the Act

JM put forth several theories under which IDOT should be found liable under Section 21. (PHB, pp. 34-45.) In Response, IDOT never cites to the Act, 415 ILCS 5/21 (in its current or historical form), or to any cases supporting IDOT's legal arguments. In fact, the Response does not dispute any of JM's fundamental legal points regarding the scope of IDOT's liability under Section 21 and its applicability to owners and operators of polluted sites, such as IDOT. (*Compare id. with* Resp. generally.) Instead, in seeking to avoid liability for its wrongful actions, IDOT again futilely slings mud at Mr. Dorgan and argues facts that *do not exist* in the record. (Resp., pp. 39-40.) Because IDOT is wrong on these points and essentially concedes

JM's legal points, IDOT should be held liable for violation Section 21. IDOT's conclusory assertions regarding what "JM has not proved" provide no reason for holding otherwise.

A. IDOT Violated The Current And Historical Versions Of Section 21[7] By Engaging In Open Dumping And Disposing Of ACM Waste During The Project

Sections 21(a)/1021(b) prohibit the "open dumping" of waste. The Act 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." 415 ILCS 5/3.305; IL ST CH 111 ½ ¶ 1003(h). Sections 21(e)/1021(f) generally prohibit any person from disposing, storing or abandoning any waste at a site or facility that fails to meet the requirements of the Act or regulations. IDOT fails to advance any reasonable argument that it has not engaged in open dumping and/or the storage/abandonment/disposal of ACM waste on the Sites and has not disputed any of the legal prerequisites set forth in JM's PHB. (PHB, pp. 34-37; Resp., pp. 39-41; Ex. 2C-26, ¶ 66.) IDOT only contends that it was not the entity that disposed of this waste/refuse. (*See* Resp., pp. 39-41.) But this contention does not measure up to the established facts of this case.

B. IDOT Violated Section 21 Because Of Its Ownership Interests In The ROWs And Parcel E393

An entity like IDOT also violates Section 21(a)/1021(b) and Section 21(e)/2012(f) when it "owns" (again, within the meaning of the Act) the disposal or storage site in question when violations of the Act occur, irrespective of whether it actually did the dumping. (*See* PHB, pp. 38-40.) IDOT does not dispute this point. (*See* Resp., pp. 39-41.)[8] IDOT also fails to contest that a right of way or easement is an "interest" in land or that IDOT held such an "interest" in E393 and the ROWs during the Project. (*Id*.; Exs. 41-43.) IDOT, then, was undoubtedly an

[7] IDOT does not dispute that it is a "person" under the Act, that the Act can apply retroactively, or that the current and historical versions of Section 21 differ in any material way. (*See generally* Resp.)
[8] IDOT does not claim that there are any "operators" on the Sites other than IDOT. (*See* Resp., pp. 39-41.)

"owner" of E393 and the ROWs under the Act and its regulations at the time the dumping occurred. (*See* PHB, pp. 10, 39-40.)

Nor can IDOT reasonably contest that ACM was found buried in these areas IDOT "owned." Exhibit 202, prepared by IDOT, clearly shows the locations of ACM on these Sites and plainly depicted ACM buried on and within Parcel No. 0393 and 0392. (PHB, pp. 15, 17, 26, 39.) ACM has been also been found within IDOT's easement over Parcel E393. (*Id*., p. 39.) Thus, IDOT cannot deny its liability for open dumping and illegal disposal/storage/abandonment of ACM waste that occurred on E393 and the ROWs during the Project.

Similarly, IDOT does not dispute that it still owns the ROWs (within the meaning of the Act) or that an owner of a pollution source is also liable for ongoing violations of the Act. (*Compare* PHB, pp. 39-40 *with* Resp., pp. 39-41.) Notably, IDOT does not dispute that the Embankments and the intersection of Greenwood and Detour Road A are appropriately considered pollution sources or that the release of pollution at these locations is ongoing. (*Id*.) Thus, because IDOT still holds a direct ownership interest in the ROWs, which cover the Embankments and the intersection, IDOT is liable for violating Sections 21(a) and (e) regardless when the ACM was first buried or who buried it. In fact, IDOT should be held liable for each re-burial/dispersion of ACM or fibers that have occurred since IDOT's first violation. (PHB, p. 40.)

C. IDOT Violated Section 21 Because Of Its Ability To Control And Control Over The Sites, Including The ROWs And Parcel E393

IDOT does not quarrel with JM's conclusion that an entity with "capability of control over the pollution" *or* with "control of the premises where the pollution occurred" can be held liable under Section 21 of the Act or that IDOT qualifies as such an entity. (*Compare* PHB, pp. 40-41 *with* Resp., pp. 39-41.) This is because easement law plainly permits the easement holder to use and *control* the property, and requires the easement holder to maintain the property, over

which the easement has been granted. (*See* PHB, pp. 40-42.) Because IDOT still has the capability to control the pollution or the ROWs, it should be held liable for violating Section 21(a)/1021(b) and Section 21(e)/1021(f) of the Act.

D. IDOT Violated Section 21 By Conducting A Waste Disposal Operation Without A Permit

Section 21(d)/1021(e) requires those conducting a waste/refuse disposal or storage/collection operation to obtain a permit and to comply with the applicable regulations. 415 ILCS 5/21(d). (PHB, pp. 42-43.) The Sites, indisputably, have never complied with applicable regulations or been permitted. (*Id*.) IDOT, who owned and had control over the ROWs during the wrongful dumping and who still exercises ownership and control over the ROWs, should be held liable for these failures.

IX. IDOT Has Failed To Show That The Section 33 Factors Weigh Against A Penalty

IDOT's analysis of Section 33(c) is backwards. IDOT makes the tautological argument that because there is also no proof that IDOT was responsible for having caused the placement or disposal of that waste" (Resp., p. 42), the Section 33 factors do not weigh against it. Such an argument has no relevance in a Section 33(c) analysis, which centers on determining the appropriate remedy *after* a violation has been established. *Ill. v. Cmty. Landfill Co., Inc*., PCB 97-193, *People v. Edward Pruim and Robert Pruim*, PCB 4-207, 2009 WL 6512347, *46 (Aug. 20, 2009) (the six factors of Section 33(c) are used by the Board "when determining the appropriate remedy before the Board" and it is upon *having already found* violations of the Act or Board regulations, that the Board turns to the Section 33(c) factors).

Even then, rather than actually addressing the Section 33(c) factors, IDOT impermissibly attempts to shift the burden of proof. (*See e.g.*, Resp., p. 42 ("JM has failed to meet its burden of proof.").) It is IDOT's burden, not JM's, to show that compliance with the Act would be

unreasonable under Section 33(c). *See e.g., Processing & Books, Inc. v. Pollution Control Bd.*, 64 Ill. 2d 68 (Ill. 1976); *Envt'l Prot. Agency v. Janson*, PCB 76-292, 1977 WL 9730, *2 (Mar. 12, 1977). IDOT has not met this burden. The Section 33(c) factors weigh in favor of awarding a significant remedy to JM, and holding IDOT fully accountable. (*See* PHB, pp. 47-57.) IDOT's Response does nothing to rebut these arguments.

With respect to the first factor, IDOT does not meaningfully contest that the mishandling or improper disposal of hazardous materials endangers the "health, general welfare, and physical property of the people." (*See* Resp., p. 41.) This is because IDOT cannot contest this fact. (*See* PHB, pp. 47-48.) Instead, IDOT ignores the risk to the protection of the public altogether and takes issue with JM's cite to *People v. Champion Envt'l Servs., Inc.*, PCB 5-199, 2014 WL 340171, (Jan. 23, 2014), without any explanation as to why IDOT believes that case to be "either inapplicable or factually distinguishable." (Resp., p. 41.) However, IDOT's actions here are equally as "egregious and improper" (*id*.) as those of the *Champion* respondent. In *Champion*, the People alleged, like JM does, that the respondent had violated Sections 21(a) and (e) of the Act when it removed Transite panels and allowed ACM waste to be dumped on the ground at its site. 2014 WL 340171, at *3. The Board held that the respondent "mishandled ACM and RACM, including improper disposal of the materials. Such actions endanger the health, general welfare, and physical property of the people. Therefore, The Board finds that this factor weighs against Champion." *Id*. at *11. This case also involves the dumping of ACM. As plainly seen here, the *Champion* case is applicable and factually similar to this case. IDOT's ill-advised and half-hearted attempt to distinguish *Champion* fails.

While IDOT argues that the Amstutz Expressway has social and economic value, IDOT cannot argue that there was social or economic value in using and burying waste to construct the

Amstutz Expressway, as opposed to non-hazardous materials. In fact, IDOT concedes that there is no value in the waste buried at Sites 3 and 6 and that such waste is "unquestionably unsuitable to the area in which [it] is located." (Resp., pp. 41-42.) "A properly run landfill is definitely of social and economic value; however, not much can be said for a poorly operated site." *Janson*, 1977 WL 9730, at *3. In this case, IDOT's burial of ACM and poor operation of unpermitted landfills on the Sites dictates that the Sites be viewed as lacking any inherent social or economic value. (*See* PHB, pp. 48-50.) IDOT has not established that the second and third factors of Section 33(c) weigh in its favor.

As to the fourth factor, while IDOT does not contest the USEPA's findings concerning the feasibility of the removal actions on the Sites, it suggests that those findings cannot be part of this Section 33 analysis. (Resp., p. 42.) IDOT, however, refuses to explain why USEPA's findings are inapplicable to it. Such a failure is particularly notable in light of the fact that "compliance with the law" should always be considered both technically practicable and economically feasible. (*See* PHB, pp. 50-51.) IDOT has not introduced any evidence to rebut USEPA's findings, despite that it was its burden to do so. (*See id.*; Resp., p. 42.)

Lastly, as to the final factor, IDOT cannot seriously contend it has complied with the Act. Rather than demonstrating the steps IDOT has taken to remedy its violations on the Sites (because there have been none) (Tr. May 23, p. 77:6-11), IDOT attempts to distinguish the cases cited by JM for the proposition that inaction, non-achievement of compliance, and the lack of a sincere desire to cooperate with the Board or achieve the statutory objectives of the Act are considerations that weigh against IDOT. But in doing so, IDOT either mischaracterizes the cases cited or ignores their plain holdings.

For instance, though IDOT argues that *People v. Patrick Roberts Land Trust* is discernible from this case (Resp., p. 43), IDOT fails to grasp that the prevailing reasoning behind the Board's determination that Section 33(c)(iv) did not weigh in favor of the respondent was that compliance was not achieved until *after* the initiation of the *proceedings*. *See* PCB 1-135, 2002 WL 31132884, *5 (Sept. 19, 2002). While IDOT seeks to fault JM for what it allegedly left unsaid—"that the Board made this pronouncement due to the respondent's failure to take timely action to address the compliance situation on his property" (*see* Resp., p. 43 n. 9)—what IDOT leaves unsaid is that IDOT has also failed to take timely action to address the compliance situation on the ROWs. Yet, unlike IDOT, the respondent in *Patrick Roberts* at least remediated the site at some point, albeit after extensive intervention by the IEPA and after proceedings were initiated before the Board. 2002 WL 31132884, at *5. In both instances (*Patrick Roberts* and here), neither respondents remedied the open dumping prior to hearing. Accordingly, the circumstances are the same. The "subsequent compliance" factor should weigh against IDOT.

IDOT also takes issue with *Bresler Ice Cream Company v. Illinois Pollution Control Board*. IDOT characterizes the issue in *Bresler* as "whether a penalty was warranted in a case where the company had begun taking corrective measures even before the Illinois EPA instituted a formal enforcement action." (Resp., pp. 43-44.) In that case, no fine was warranted. 21 Ill. App. 3d 560, 564 (1st Dist. 1974). The converse logically follows. Here, a sufficient award against IDOT *is* warranted since IDOT did not begin taking corrective measures before (or since) the initiation of a formal enforcement action. (Tr. May 24, p. 192:9-24.)[9] This stands in stark contrast to *Bresler*, the holding of which IDOT cannot contest—"a sincere desire on the part of

[9] This includes IDOT failure to respond to JM's July 11, 2013 letter, which inquired as to whether IDOT "would be amenable to settlement discussions in the matter," but "did not make any offer of compromise." (Tr. May 24, pp. 189:24-190:14; Ex. 5-2.) IDOT's evidentiary argument regarding the admissibility of Exhibit 5 (Resp., p. 44) was overruled by the Hearing Officer on two occasions. (Tr. May 24, pp. 189:14-15; 190:15-16.)

[respondent] to cooperate with the Board in achieving the statutory objectives expressed in the Environmental Protection Act should have been noted and encouraged by the Board." 21 Ill. App. 3d at 563. Conversely, the Board should discourage IDOT's lack of cooperation with the Board in achieving the statutory objectives expressed in the Act.

IDOT seems to claim that the fact it responded to the USEPA's 104(e) Request in 2000 qualifies as "subsequent compliance." (Resp., p. 43.) But responding to a 104(e) Response mandated by federal law is quite different from rectifying violations of Section 21. Moreover, as pointed out in JM's PHB, IDOT's 104(e) Response omitted the salient fact that IDOT had acquired and still held *permanent* easements over the ROWs associated with Site 3. Tellingly, IDOT's Response *never denies* misleading the USEPA. Rather, IDOT argues only that "Ai also made reference to the temporary easements." (Resp., p. 45 (typo in original); Ex. 60-4.) This is exactly JM's point. By hiding the fact that it held permanent easements, IDOT supplied USEPA with the misimpression that it did not hold ownership interests with respect Site 3 and thus no CERCLA "owner" liability attached.

IDOT has exhibited the same bad faith and failure to cooperate that was perpetrated by the respondent in *Standard Scrap Metal Company v. Poll. Control Bd.*, 142 Ill. App. 3d 655, 662 (1st Dist. 1986), who "demonstrated a blatant disregard for the requirements and procedures designed to protect the environment." IDOT knew that it retained permanent easement rights in the Sites, and failed to admit so until hearing.[10] IDOT's production of the Grant (Exs. 41, 42), does not excuse IDOT's knowing concealment of its permanent easement interests or its past

[10] Because of IDOT's knowing concealment and misrepresentation of its permanent easement interest in Parcel No. 0393 (*see also* PHB, pp. 51-57), IDOT should be equitably estopped from asserting any affirmative defenses against JM's claims that IDOT owned or controlled the Sites. *See Fleissner v. Fitzgerald*, 403 Ill. App. 3d 355, 358 (2d Dist. 2010) (citing *Vaughn v. Speaker*, 126 Ill. 2d 150, 162-163 (Ill. 1988)); *Payne v. Mill Race Inn*, 152 Ill. App. 2d 269, 277 (2d Dist. 1987). Such a result is necessary to prevent fraud and injustice as the doctrine of equitable estoppel requires.

misrepresentations that it held only temporary interests. (Resp., p. 45.) The issue is not whether IDOT obtained the Grant in the first place, which is what the Grants show, but is whether IDOT lied about later transferring the Grant to the City, which JM had understood and Mr. Gobelman had claimed. (PHB, pp. 52-56.) This fact cannot be answered from the Grant's mere production.

IDOT claims that if there were evidence of IDOT actively seeking to misinform JM about Parcel No. 0393, "JM would have cited it to it in its brief, *ad nauseum.*" (Resp., p. 46.) Indeed, JM's PHB devotes at least five pages, replete with record cites, to IDOT's bad faith conduct, including, but not limited to, inaccurate and incomplete, sworn discovery responses; changed, sworn testimony; the frivolous reopening of fact and expert discovery; and the unnecessary prolonging of this matter. (PHB, pp. 52-57.)[11] In short, IDOT has failed to establish that any of the Section 33(c) factors militate against a significant remedy in favor of JM.

X. IDOT's Affirmative Defenses Are Meritless[12]

IDOT asserts six affirmative defenses against each of JM's claims, impermissibly lumping them all together. But JM's claims against IDOT are distinct and IDOT's affirmative defenses should be considered distinct as well. JM seeks an order mandating that IDOT cease and desist from violating the Act and to come into compliance with the Act, a request equitable in nature. JM also seeks cost recovery, a claim at law. (*See* PHB, p. 58.) Equity and law afford different remedies, and entertain different affirmative defenses. For example, unclean hands and laches only apply to equitable claims, whereas a statute of limitations only applies to claims at law. (*Infra* §§ X.A, C, D.) Thus, the Board must only apply IDOT's equitable affirmative defenses to JM's equitable claim and any legal affirmative defenses to JM's claim at law.

[11] IDOT misunderstands the import of Exhibit 77 as it relates to Section 33(c)(v). (Resp., p. 46.) The key point is that PESA 2308 clearly identifies Parcel No. 0393 as "existing" IDOT right-of-way, despite that Steven Gobelman, who oversaw work related to the PESA testified under oath otherwise. (*See* PHB, pp. 31-32.)

[12] *See supra* n. 10.

IDOT is also sloppy with the facts. With respect to IDOT's laches, waiver and statute of limitation defenses, IDOT inaccurately contends that JM learned of certain facts related to Site 3 and Site 6 at the same time. (Resp., pp. 50-51.) Site 6, however, was not even discovered until 2002 and therefore JM could not possibly have imagined a claim against IDOT regarding Site 6 in 2000, as IDOT contends. (Ex. 66-14.) IDOT has presented no specific evidence regarding JM's knowledge concerning when it allegedly had a claim against IDOT regarding Site 6 and thus JM cannot be barred by timing from asserting its Site 6 claims. In the same vein, the evidence presented at trial firmly demonstrates that JM knew nothing about IDOT's permanent interests in the ROWs until well into litigation. (*Infra* §§ X.B-D.) Thus, any of JM's claims arising solely out of IDOT's ownership or operation of the Sites cannot be barred by waiver, laches or the statute of the affirmative defenses. (Tr. May 24, p. 193:1-17).)

A. Unclean Hands Does Not Apply to JM's Claims

The doctrine of unclean hands provides that a party seeking equitable relief cannot take advantage of his own wrong. *See People v. Douglas Furniture of Cal.*, PCB 97-133, 1997 WL 235230, *4 (May 1, 1997) (striking affirmative defense). In asserting an affirmative defense, the respondent bears the burden of establishing the defense by a preponderance of the evidence. *Kay v. Prolix Packaging, Inc.*, 2013 IL App (1st) 112455, ¶ 77 (2013). The defense of unclean hands requires the consideration of the party's intent of fraud or bad faith. *Id.* "In determining whether a party acted with unclean hands, the court will look to the intent of the party, not the effect of its actions, and will only find unclean hands present if there has been fraud or bad faith." *See Schivarelli v. Chi. Transit Auth.*, 355 Ill. App. 3d 93, 103 (1st Dist. 2005) (finding unclean hands defense was unsupported). "Courts do not favor the doctrine and apply it solely as a matter of discretion." *Cole v. Guy*, 183 Ill. App. 3d 768, 776 (1st Dist. 1989). Here, IDOT has made no

allegation, and cannot make an allegation, that JM acted fraudulently or in bad faith, dooming its affirmative defense. (Resp., pp. 47-49.) In fact, IDOT merely makes a conclusory statement in their affirmative defense, without alleging fraud or bad faith, because there is no evidence that JM has acted fraudulently or in bad faith against IDOT.

The doctrine of unclean hands only applies when: (1) the person against whom the defense is asserted directs the allegedly fraudulent or bad faith conduct toward the party asserting the defense and (2) when such conduct involves the same transaction or issues before the Court. *Cole*, 183 Ill. App. 3d at 776 (unclean hands held inapplicable where plaintiff's admitted error was wrong, but not directed toward the defendant and did not involve the transaction at issue); *Sax v. Exch. Nat'l Bank of Chi.*, 48 Ill App. 3d 431, 491 (1st Dist. 1977) ("For the doctrine of 'unclean hands' to be applicable, the misconduct, fraud or bad faith complained of must have been toward the defendant raising the claim of 'unclean hands."). To prevail on its defense, therefore, IDOT must show that JM committed fraudulent or bad faith actions toward it that relate to the ACM on the Sites. IDOT has not proved that either requirement has been met.

IDOT argues that JM has unclean hands because of JM historically manufactured ACM and engaged in "apparent waste disposal practices" on its property and other areas not at issue here. (Resp., p. 47.) This alleged "misconduct" is not directed at IDOT. Moreover, the alleged contamination of properties not at issue in this case is, by definition, not "the very transaction at issue" before the Board. Since the alleged unclean conduct is not germane to these proceedings, IDOT's attempt to invoke the doctrine of unclean hands is misplaced. Indeed, under IDOT's theory, a person engages in unclean hands if they contribute to contamination and seek to recover from others jointly responsible for that contamination. (Resp., pp. 47-48.) IDOT's logic contravenes Illinois law. *See* 40 ILCS 100/2(a); *People v. Brockman*, 143 Ill. 2d 351 (Ill. 1991)

(holding that a violation of the Illinois Joint Tortfeasors Contribution Act can serve as a "predicate for a contribution claim"). Further, the Board has found that Section 31(d) allows for private cost recovery. (Sept. 14, 2015 Order, p. 5.) IDOT's theory simply cannot be squared with Illinois jurisprudence.

B. JM Has Not Waived Its Claims

IDOT has not satisfied its burden of proof on its waiver defense. "Waiver consists of either an express or implied voluntary and *intentional relinquishment* of a known right." *Wang v. Marcus Brush Co*., 354 Ill. App. 3d 968, 970 (1st Dist. 2005) (emphasis added). "Waiver can arise either expressly or by conduct inconsistent with an intent to enforce that right." *Phillips v. Elrod,* 135 Ill. App. 3d 70, 74 (1st Dist. 1985). "The party claiming implied waiver has the burden of proving a clear, unequivocal and decisive act of the opponent manifesting his intention to waive his rights." *Greene v. Helis*, 252 Ill. App. 3d 957, 962 (1st Dist. 1993).

IDOT has not alleged, and has presented no facts, that JM expressly waived a known right. Rather, its argument seems to be premised upon an assertion of implied waiver. IDOT argues that by 2000 JM was "claiming that IDOT was responsible for creating the then existing conditions on Site 3" and that by waiting thirteen years to bring its claims, JM "evidenced its intention to relinquish its claims against IDOT." (Resp., pp. 50-52.) IDOT's argument is flawed for multiple reasons.

IDOT fails to cite any case law supporting the idea that mere passage of time amounts to intent to waive a right, let alone "a clear, unequivocal and decisive act" manifesting an intentional waiver. This is because such argument contradicts the requisite elements of waiver. *See e.g., Lee v. Heights Bank*, 112 Ill. App. 3d 987, 995 (3d Dist. 1983) (noting that "mere

passage of time or delay in bringing suit, without more, does not result in waiver of right to sue"); *Palm v. 2800 Lake Shore Drive Condo. Ass'n*, 2013 IL 110505, ¶ 26.

Further, IDOT has neglected to show that JM possessed a "known right" against IDOT in 2000 and that JM subsequently and *intentionally* relinquished it. IDOT argues that Exhibit 58-1 demonstrates that JM knew in 2000 that IDOT was responsible for causing the contamination on Site 3. (Resp., pp. 50-51.) Again, this is not the test for waiver. To show waiver in this context, IDOT must demonstrate that JM knew in 2000 that it possessed *a claim* against IDOT in 2000; Exhibit 58-1 does not do this. Exhibit 58-1 is part of letter sent to IDOT by USEPA as part of its investigation into Site 3. The paragraphs at issue state:

> The U.S. Environmental Protection Agency (U.S. EPA or Agency) is investigating the Johns Manville Superfund Site in Waukegan, Illinois (Site) and surrounding locations. U.S. EPA believes that the Illinois Department of Transportation may have information that is relevant to the investigation of contamination at the Site and surrounding areas.
>
> ***
>
> Johns Manville has alleged that, during the construction of the Amstutz Highway during the late 1960s, the Illinois Department of Transportation constructed a bypass that was located, in part, on the area that is identified as Parcel 3. During the Highway construction period the Department of Transportation stored equipment in the same area. It is alleged that this construction activity may have affected the conditions of Parcel 3.

These paragraphs say nothing about JM, or even USEPA,[13] possessing a claim against IDOT.[14] At most, the paragraphs indicate that USEPA communicated to IDOT that JM had notified USEPA that IDOT constructed a road during the Project and therefore USEPA thought that IDOT "*may have* information that is relevant" to its CERCLA investigation. The letter also states "it is alleged that this construction activity *may have* affected the conditions on Site 3" (it does not mention Site 6). (Ex. 58-1 (emphasis added).) Of particular relevance here, USEPA

[13] JM did not have to be injured in order for USEPA to name IDOT as a PRP. (Tr. May 24., p. 231:11-15.)

[14] Even with what JM knows today, it could not bring a CERCLA claim against IDOT. *See Seminole Tribe v. Fla.*, 517 U.S. 44 (1996) (overruling the holding in *Pennsylvania v. Union Gas Co*., 491 U.S. 1 (1989), that CERCLA permitted suits for monetary damages against states without violating sovereign immunity).

never named IDOT as a PRP. (Tr. May 23, pp. 283:15-184:3; Tr. May 24, p. 231:16-24.) Despite having employed civil investigators to study Site 3 history, USEPA told JM in 2007 that it "did not have enough evidence to bring them [IDOT] in [as a PRP under CERCLA]." (Tr. June 24, pp. 103:22-104:6; 105:9-15; 107:6-108:2.) If USEPA lacked sufficient evidence in 2007 to name IDOT as CERCLA PRP, JM cannot have possessed a cognizable claim under Section 21 of the Act against IDOT seven years earlier.

IDOT's waiver defense falls short for the additional reason that IDOT has not identified any "clear, unequivocal and decisive act" manifesting JM's intent to waive any claim against IDOT. In fact, IDOT's own words undercut its theory. IDOT argues that "JM has known of and sought to vindicate its purported claims against IDOT for years." (Resp., p. 49.) If true, JM has not engaged in conduct "inconsistent with an intent to enforce that right" and IDOT's waiver claim collapses.

C. IDOT's Laches Argument Fails

IDOT offers no valid explanation for why laches is "appropriately invoked in this case." (Resp., p. 52.) This is because the doctrine should not apply. As an initial matter, "[t]he Board has previously held that the equitable doctrine of laches generally does not apply to enforcement actions brought" under the Act. *People v. Big O, Inc.*, PCB 97-130, 1997 WL 2088664, *1 (Apr. 17, 1997) (collecting cases); *People v. Am. Waste Processing, Ltd.*, PCB 98-37, 1998 WL 138519, *2 (Mar. 19, 1998); *People v. ESG Watts, Inc*., PCB 96-107, 1998 WL 54020, **5-6 (Feb. 5, 1998) (finding laches defense inapplicable). Here, JM seeks to enforce the Act by requesting a cease and desist order from the Board and an order mandating that IDOT come into compliance with the Act. Because laches generally does not apply to enforcement cases before the Board, laches cannot serve as an affirmative defense to JM's citizen enforcement action.

While the Board has recognized that laches can apply to enforcement cases when compelling or extreme circumstances exist, IDOT has not alleged that the current case presents such circumstances. (*See* Resp., pp. 49-52.) But if the Board were to find this enforcement action to be "compelling" for some reason, IDOT's affirmative defense still falls short.

To prevail on a laches defense, it is IDOT's burden to prove that JM lacked due diligence in asserting its claim against IDOT and that IDOT suffered resultant prejudice. *Van Milligan v. Bd. of Fire and Police Comm's*, 158 Ill. 2d 85, 89 (Ill. 1994). However, IDOT has failed to prove that JM knew IDOT had caused contamination on the Sites until, at the earliest, July 8, 2008, or that JM lacked diligence in filing this action. Nor does IDOT even argue, let alone establish, that it has suffered prejudice in any fashion.

Before laches can attach, a plaintiff must know that a viable claim exists. *Colucci v. Chi. Crime Comm'n*, 31 Ill. App. 3d 802, 810 (1st Dist. 1975) ("Laches is such a neglect or omission to assert a right, taken in conjunction with lapse of time and other circumstances causing prejudice to the opposite party, as will operate as a bar in a court of equity."). It necessarily follows that a party cannot neglect to assert a right if the right has not yet been established or accrued. As outlined below, there is no evidence that JM was aware that it possessed a claim against IDOT in 2000. (*Infra* § X.D.) IDOT then argues that, from 2000 to June 2007, JM "lobbied the agency to name IDOT as a PRP for Sites 3 and 6." (Resp., p. 51.) This is factually incorrect. As noted above, Site 6 was not discovered until 2002 and thus JM could not have been advocating USEPA to name IDOT as a PRP in 2000.

Furthermore, instead of "lobbying" USEPA to name IDOT as a PRP, what Mr. Tracy, who was actually involved in those conversations, explained was that JM had "raised the issue with the EPA on different occasions that we believed that IDOT had operator status under

CERCLA." (Tr. May 24, pp. 215:15-216:1; *see also* pp. 216:20-217:16; 231:16-24.) Operator status under CERCLA is a low threshold—a person need not cause contamination under CERCLA to be an operator; rather the person must merely conduct operations on the Site at the time a disposal occurs. (*Id*., pp. 229:18-230:4.) Thus, liability under the Act hinges on different considerations than under CERCLA. As Mr. Tracy explained, "if you feel there are parties that meet the definition [of operator], you generally try to include those parties." (*Id*., p. 213:16-22.) Courts have interpreted "operator" broadly over the years and JM was incentivized to convince USEPA to name all persons that might remotely qualify as PRPs. *See Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F. 2d 837 (4th Cir. 1992) (when assessing whether one is an owner or operator "at the time of disposal" under CERCLA, "disposal" can include passive migration of contamination); *PCS Nitrogen Inc. v. Ashley II of Charleston LLC*, 714 F.3d 161, 177–78 (4th Cir. 2013) (inferring from the facts that person who graded contaminated soil was an operator).

Notably, as Mr. Tracy stated and consistent with Exhibit 58-1, all JM knew about the Project when it signed the Administrative Order on Consent ("AOC") (Ex. 62) in 2007 was that IDOT had constructed a by-pass road that involved Site 3, which in JM's mind, arguably made it an "operator." (Tr. May 24; p. 231:16-22; Tr. June 24, p. 103:7-12.) IDOT is thus wrong to treat JM's suggestion that IDOT might fall into CERCLA's broad "operator" definition as equivalent to knowledge that IDOT buried and used ACM as fill on Site 3 in violation of Section 21.

The evidence at hearing revealed that it was not until July 8, 2008 that JM realized that IDOT had buried ACM on the Sites. On or shortly after that date, JM received notice that Transite pipe had been found during a ComEd power line excavation in an area "reportedly constructed in the early 1970s during the reconstruction of the Pershing Road/Greenwood Avenue intersection." (Ex. 74.) As Dr. Ehibara testified, in 2008, he did not have an

"understanding of IDOT's prior construction acts on Site 3;" rather, all he knew about how the ACM came to be located on Site 3 was "from Johns Manville, I understood that Transite pipe was used as parking lot bumpers." (Tr. May 23, pp. 71:21-72:8.) In the same vein, when Mr. Tracy was asked how JM thought the material had gone from being on the surface of the Parking Lot to being buried throughout the Sites, he testified that at that time, "the consultant had the theory that when we used the geoprobe to take the 1998 samples or the other consultant did, a geoprobe is a very small tube and they may have driven some of the pieces down lower into the cores when we did that." (Tr. June 24, p. 103:13-21.) Thus, because JM was not aware it had a claim against IDOT, laches cannot attach.

IDOT's laches argument also misses the mark because it does not offer any evidence to support an assertion, or meet its burden of proof, that JM failed to diligently pursue its claim. In fact, IDOT actually contradicts itself in this regard when it argues that JM has "sought to vindicate its claims" for years, supporting an argument that JM has, in fact, been diligent pursuing a claim. (Resp., p. 51.) Still, perhaps most fatal to IDOT's laches defense is IDOT's utter failure to cite to a single piece of evidence or even try to explain how IDOT has supposedly been prejudiced by JM's filing of this action in 2013. This is because no such evidence exists. When IDOT tried to argue laches in an earlier Motion to Dismiss, the Board found unequivocally that "laches does not apply to this case." (*See* Sept. 4, 2014 Board Order, p. 10.) Further, the Board was not convinced that IDOT was materially prejudiced, including by the death of IDOT's engineer or the dissolution of the project's general contractor. (*Id.*) The hearing record confirms this conclusion. No prejudice could possibly exist here where IDOT's expert conceded that, despite that fact he had reviewed documents identifying a number of individuals who had worked on the Project, he made no effort to locate or interview *any* of the individuals or talk to

anyone that might have worked on the Project. (Tr. May 25, pp. 222:15-226:5; 239:5-241:4; Ex. 4C-31, line 10- 4C-33, line 10.) He also conceded that if someone had been age 20 and working on the Project in 1975, that person would only be sixty-one-years old today. (Tr. May 25, p. 225:14-17.) Therefore, either he or IDOT could have contacted human resources to determine if any of them could be reached or even still worked for IDOT. But they did not. (*Id*., pp. 225:18-226:5; 235:10-238:11.) IDOT cannot prevail on its affirmative defense of laches.

D. No Statute of Limitations Bars JM's Claims

"It is well established that the Statute of Limitations is a purely legal rather than an equitable defense. Therefore, the question of whether plaintiff's amended complaint is barred by the Statute of Limitations arises only after a determination that the alleged cause of action is one at law rather than in equity." *Matchett v. Rose*, 36 Ill. App. 3d 638, 647 (1st Dist. 1976); *see also Conway v. Conners*, 101 Ill. App. 3d 121, 129 (1st Dist. 1981) ("The statute of limitations is not a defense to an equitable action."). The terms of the statute comport with this conclusion. 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 (Ill. 1992) ("Statute of limitations, applicable in legal actions, are not directly controlling in suits seeking equitable relief."). Accordingly, the statute of limitations cannot possibly apply to JM's cease and desist/come into compliance claim.

Along these same lines, for purposes of applicability of the statute of limitations, the Board has distinguished between citizen enforcement cases seeking to vindicate a public right and citizen suits seeking monetary damages. The Board has held that when citizens are seeking to enforce a public right, such as the Constitutional right to a clean environment, the statute of limitations should not apply. *Landfill Emergency Action Comm. v. McHenry Cnty. Sanitary*

Landfill & Recycling Ctr., Inc. PCB 85-9, 1985 WL 21267, *1 (Mar. 22, 1985) (holding that private plaintiff 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); *Lake Cnty. Forest Pres. v. Ostro,* PCB 92-80, 1992 WL 196684, *2 (July 30, 1992) (finding that five-year statute of limitations does not apply where District was acting as a "private attorney general" for the protection of the public's right to a clean environment); *Ill. Envt'l Prot. Agency v. Pielet Bros. Trading, Inc.,* PCB 80-185, 1981 WL 21589, *4 (Dec. 17, 1981) ("[T]he Act does not expressly limit any individual's cause of action to enforce the right to a clean environment."), *aff'd Pielet Bros. Trading, Inc. v. Pollution Control Bd.*, 110 Ill. App. 3d 752, 758 (5th Dist. 1982); *Ill. Envt'l Prot. Agency v. Cabot Corp.,* PCB 81-27, 1981 WL 21766, *1 (Apr. 16, 1981) (same). However, as IDOT indicates, the Board also has held that this exception might be inapplicable in cases "not involving the enforcement of public rights." (Resp., p. 53.) In *Caseyville Sport Choice, LLC v. Sieber*, for instance, the Board held that "an argument can be made" that the statute of limitations does not apply in private cost recovery actions. PCB 8-30, 2008 WL 4716999, *7 (Oct. 16, 2008).

Here, in seeking a cease and desist order and an order mandating compliance with the Act, JM is merely acting as a private attorneys general enforcing the public's right to a clean environment. *Int'l Union et al. v. Caterpillar, Inc.,* PCB 94-240, 1996 WL 454961, *32 (Aug. 1 1996) (stating that complainants who sought injunctive and declaratory relief were acting as "private attorneys general"); *Ostro,* 1992 WL 196684, at *2 (finding that complainants seeking equitable relief for violations of Section 21 were acting as "'private attorneys general' to protect the public's rights"); *Finley et al. v. IFCO-ICS-Chicago, Inc.*, PCB 2-209, 2002 WL 1876193

(Aug. 8, 2002) (holding that action requesting that respondent "stop polluting," including cease and desist order, was a citizen enforcement action).

After all, Section 31(d) does not differentiate between "persons" and certainly does not preclude a person with a particular interest in seeing a property cleaned up from serving as a private attorney's general. To impose such a requirement would undermine not only "the duty of each person [] to provide and maintain a healthful environment for the benefit of this and future generations," ILL. CONST., art. IX, § 1, but also the important function served by the citizen suit provision. *Caterpillar*, 1996 WL 454961, at *32 (explaining that through citizen enforcement actions complainants serve as "private attorneys general, safeguarding their important voice in Illinois process and serving a vital function in ensuring environmental protection"); *Cinnamon Creek v. Envt'l Prot. Agency*, PCB 72-377, 72-368, 1972 WL 5715, *8 (Oct. 3, 1972) (holding that citizen suit provision is "a procedure intended to provide for increased enforcement against polluters.").

JM's cost recovery claim is a different animal. Since it is a claim at law and seeks personal damages, one could argue that it should be treated differently.[15] But even if the Board were to handle it distinctly and apply the five-year statute of limitations, the claim certainly still survives. First, IDOT has failed to meet its burden of proof that JM knew that it had suffered an injury, let alone a compensable monetary injury, or that said injury was wrongfully caused in 2000 or at any point five years prior to the filing of this case in July 2013. Earlier in this case, the Board indicated that the key issue is when JM discovered the "alleged culpability of IDOT."

[15] Notably, the Board has not applied a statute of limitations in all private cost recovery cases. *See Bd. of Educ. of City of Chi. v. A, C & S, Inc.*, 131 Ill. 2d 428, 476 (1989) (statute not applied to action brought by school districts for cost recovery expended on removing and repairing ACM in buildings because addressing a significant health concerns was a sufficient public interest); *Lake Cnty. Forest Pres. Dist. v. Ostro*, PCB 92-80, 1994 WL 120267, *9 (Mar. 31, 1994) (allowing for private cost recovery action after Board previously found (in 1992) that statute of limitations did not apply).

(Sept. 4, 2014 Order, p. 9; *see also Caseyville*, 2008 WL 4716999, at *3 (finding statute began to run when complainant "discover[ed] the alleged culpability of [the respondent]").) As discussed above, JM was unaware that IDOT was actually responsible for contamination on Site 3 until July 8, 2013, which falls within the statute of limitations. But the date upon which JM knew IDOT caused contamination and the date upon which JM reasonably knew it had been *injured* and that said *injury was wrongfully caused* by IDOT are not the same.

JM, which has never owned the Sites, was not injured as a result of IDOT's conduct until the Enforcement Action Memorandum ("EAM") was issued in 2012. (Tr. May 23, pp. 37:21-23; 172:13-18; Ex. 6-18- 16-21.) Any costs JM incurred before that time were attributable to JM's liability as a PRP for leaving concrete Transite pipes on the surface of Site 3. 42 U.S.C. § 9607(a)(4)(B). (*See also* Tr. June 24, pp. 102:19-103:2 (Mr. Tracy explaining that JM understood it had CERCLA liability because it had placed Transite pipe tire bumpers on the Site 3 Parking Lot).) While JM's proposed remedy centered on surficial pick up of ACM, USEPA rejected that remedy and instead ordered JM to dig out buried ACM and asbestos fibers that IDOT had buried. (PHB, p. 24.) IDOT does not disagree. It was at this point in 2012 that JM first discovered that IDOT's conduct would likely cause it to incur cleanup costs and therefore trigger the statute of limitations. *See e.g., Khan v. BDO Seidman,* 408 Ill. App. 3d 564 (4th Dist. 2011) (court found 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).

Second, JM demonstrated at hearing that IDOT's violations are continuing in nature and thus subject to Illinois' "continuing violation rule." Nowhere in IDOT's Response does it dispute this point. Under the 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) (emphasis added). Stated differently, "a continuing violation is occasioned by continuing unlawful acts and conduct, not by the continual ill effects from an initial violation." *City of Evanston v. Texaco,* 19 F. Supp. 3d 817, 827 (N.D. Ill. 2014) (applying Illinois law) (finding that continuing violation applied when contaminants continued to leak onto the plaintiff's property). "The doctrine applies for the duration of the tortious conduct, as distinguished from the duration of the damages that continue after the conduct ends." *Lajim v. Gen. Elec*. Co., No. 13-cv-50348, 2015 WL 9259918, *16 (N.D. Ill. Dec. 18, 2015) (applying Illinois law).

Here, IDOT has engaged in a number of continuing violations. For example, IDOT has been conducting an illegal waste disposal operation without a permit since at least 1971 and therefore the "unlawful act" of operating without a permit continues. *See e.g., People v. Mika Timber Co., Inc.*, 221 Ill. App. 3d 192, 194 (5th Dist. 1991) (finding that operating without a permit was a "continuing violation of the Act"). Likewise, the Board has held that "open dumping" violations are "continuing violations." *See Cnty. of Sangamon v. Everett Daily*, AC 1-16, AC 1-17, 2002 WL 58936, *13 (Jan. 10, 2002). The Board has also 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 Co.,* PCB 97-84, 1997 WL 735028, *4 (Nov. 20, 1997). Here, IDOT disposed of, stored and abandoned ACM at Site 3 and Site 6 in or around 1976 and has since continued to store and abandon those materials insofar as they remain on-site. Moreover, since IDOT "owns" Parcels Nos. 0393 and 0392, IDOT could have removed the ACM and ceased violating the Act but instead elected to hide its ownership interest from USEPA and JM. The continuing violation doctrine therefore tolls any potential statute of limitations.

E. IDOT's Fifth Affirmative Defense Regarding Lack of Jurisdiction Is Erroneous

IDOT's affirmative defense regarding "lack of jurisdiction" was already stricken by the Board as improper on May 19, 2016. (*See* Order, p. 2.) Such an argument "does not defeat JM's claims." (*Id*.) Nevertheless, IDOT presses on. IDOT presents no basis for its argument that "Section 33(b) does not vest the Board with the authority to order IDOT to participate in a USEPA-mandated removal action." (Resp., p. 54.) The Board has already held otherwise:

> Section 33(a) of the Act grants the Board the authority to "issue and enter such final order, or make such final determination, as it shall deem appropriate under the circumstances." 415 ILCS 5/33(a) (2012). Further, Section 33(b) of the Act states in part that Board orders "may include a direction to cease and desist from violations of this Act." 415 ILCS 5/33(b) (2012) . . . The Board is authorized to find violations of the Act, and the complaint is therefore not frivolous in this regard. (Nov. 7, 2013 Board Order; p. 11; Sept. 4, 2014 Board Order, p. 5.)

Moreover, case law is replete with examples of the Board ordering a respondent to come into compliance with the law by some sort of affirmative conduct, including remediation. (*See* PHB, p. 6 (citing, e.g., *Kaeding v. Pollution Control Bd*., 22 Ill. App. 3d 36, 38 (2d Dist. 1974)).)

The Board is not precluded from exercising this authority because of the AOC. IDOT overstates JM's request for relief. (Resp., p. 54.) JM is not seeking to bring IDOT into the AOC as a party, it is merely requesting that it be ordered to do cleanup work for contamination it caused. Because JM has already begun remediation, IDOT's work should be consistent with the Removal Action Work Plan ("RAWP") (Ex. 67). Dr. Ebihara, who is responsible for implementing the RAWP, testified that there is no reason why IDOT could not participate in the implementation of the work so long as the work does not deviate from the remedies in the RAWP. (Tr. May 23, pp. 75:24-76:24.) He also said that JM would not need to deviate from that plan in order for IDOT to assist in the work. (*Id*., p. 77:1-5.) In reality, JM has already hired

numerous third parties, not parties to the AOC (Ex. 62) or EAM (Ex. 65) to perform work under the AOC *without the approval of* USEPA. (Tr. May 23, p. 76:13-24.)

Lastly, IDOT claims, in conclusory fashion, that the Board cannot award monetary relief. (Resp., p. 55.) The Board, however, has previously awarded cleanup costs to private parties. (*See* Sept. 4, 2014 Board Order, p. 5 (citing *Union Oil. Co. of Cal. V. Barge-Way Oil Co., Inc*., PCB 98-169, slip op. at 3 (Jan. 7, 1999)).) IDOT cannot avoid this result by hiding behind the shield of sovereign immunity. *See Boyd Bros., Inc. v. Abandoned Mined Lands Reclamation Council*, PCB 94-275, 1995 WL 78118, *3 (Feb. 16, 1995) ("[S]overeign immunity is *not a bar* when the legislature has provided a mechanism for the state to be made a party," as under the plain and unambiguous language of the Act, which "includes state agencies in the group of responsible parties that may be enforced against for violations of the Act before the Illinois Pollution Control Board."). Consequently, for the reasons set forth herein, IDOT's affirmative defense fails.

F. IDOT's Sixth Affirmative Defense of Failure to Join Necessary Parties Is Improper

IDOT inexplicably continues to assert arguments and its affirmative defense of "failure to join necessary parties" (*see* Resp., pp. 55-56) despite that this defense was already stricken by the Board as improper on May 19, 2016. (*See* May 19, 2016 Board Order, p. 2.) If IDOT believed that another party should have been brought before the Board, it could have moved the Board to join that party or filed a third-party complaint against the party. *People v. Peabody Coal Co*., PCB 99-134, 2003 WL 21405850, *9 (June 5, 2003) (citing 35 Ill. Admin, Code 101.403, 35 Ill. Admin. Code 103.206). Here, IDOT never did, though it had ample opportunity to do so. Undoubtedly, IDOT did not believe that USEPA's interest in this case was as "obvious and fundamental" as IDOT now contends. (Resp., p. 56.) If IDOT really believed its own arguments,

IDOT would have moved to join USEPA or ComEd to this lawsuit. IDOT did not. IDOT's Sixth Affirmative Defense fails for this reason alone. *Peabody*, 2003 WL 21305850, at * 9.

Nonetheless, neither ComEd nor USEPA were necessary parties to this action. In Illinois, a party "necessary" to litigation is one who has an interest such that the "legal entanglement cannot be resolved without either (1) affecting that interest or (2) leaving the interest of those who are before the court in an embarrassing or inequitable position." *See Safeco Ins. Co. of Ill. v. Treines*, 238 Ill. App. 3d 541, 549; s*ee also People v. Michel Grain Co., Inc*., PCB 96-143, 2003 WL 22334782, *3 (Oct. 2, 2003) (finding that respondents failed to show the need of adding additional parties as respondents in order for Board to be able to decide the merits of the case). IDOT had not produced any evidence that ComEd or USEPA's interests would be affected or that IDOT's interests are left in an "embarrassing or inequitable position." In fact, IDOT's Sixth Affirmative Defense does not discuss at all why ComEd is required to be joined. IDOT's Sixth Affirmative Defense fails.

CONCLUSION

WHEREFORE, Complainant JOHNS MANVILLE respectfully requests that the Board enter an Order against Respondent ILLINOIS DEPARTMENT OF TRANSPORTATION awarding the relief requested by JM in its Post-Hearing Brief.

Dated: November 14, 2016

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, the undersigned, certify that on November 14, 2016, I caused to be served a true and correct copy of *Complainant's Post-Hearing Brief Reply* 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.

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