

ILLINOIS POLLUTION CONTROL BOARD
December 15, 2016

JOHNS MANVILLE,)
)
 Complainant,)
)
 v.) PCB 14-3
) (Citizens Enforcement - Land)
 ILLINOIS DEPARTMENT OF)
 TRANSPORTATION,)
)
 Respondent.)

SUSAN BRICE AND LAUREN CAISMAN, BRYAN CAVE LLP, APPEARED ON BEHALF OF JOHNS MANVILLE; and

EVAN MCGINLEY AND ELLEN O’LAUGHLIN, ASSISTANT ATTORNEYS GENERAL, APPEARED ON BEHALF OF ILLINOIS DEPARTMENT OF TRANSPORTATION.

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

Johns Manville (JM) claims that the Illinois Department of Transportation (IDOT) violated the Environmental Protection Act (Act) by burying asbestos waste during road construction in Waukegan, Lake County. After lengthy discovery and a five-day hearing, the Board finds that IDOT violated the Act by open dumping waste along the south side of Greenwood Avenue.

JM entered into a consent order with the United States Environmental Protection Agency (USEPA) to clean up property neighboring its facility. JM alleges that IDOT exacerbated the scope of the cleanup during road construction in the 1970s. According to JM, IDOT dispersed and buried asbestos in fill. The Board specifically addresses two areas of IDOT’s construction: building a detour road and reconstructing Greenwood Avenue.

The Board finds that JM has not proven that asbestos waste is present along the detour road in fill IDOT placed. However, the Board finds that IDOT did place asbestos waste in fill material when reconstructing Greenwood Avenue. IDOT also continues to control a parcel south of Greenwood where asbestos waste is located. IDOT therefore violated the Act by causing or allowing open dumping of waste, conducting an unpermitted waste disposal operation, and illegally disposing waste.

The Board also finds that the record is insufficient to determine the appropriate relief to address IDOT’s open dumping. JM seeks an estimated \$3,582,000 from IDOT to reimburse JM’s cleanup costs. However, JM has not finalized this amount or shown that it is reasonable. The Board therefore directs the hearing officer to hold an additional hearing.

PROCEDURAL HISTORY

JM started this case over three years ago. To prepare for hearing, the parties conducted extensive discovery, including written discovery and depositions. The current version of the complaint is the third amended complaint (Compl.) filed on August 12, 2016, to which IDOT has answered (Ans.) and asserted defenses. The Board held five days of hearing in May and June 2016 (Tr.; Exh.), and received no public comment. JM filed its post-hearing brief (JM Br.); IDOT filed its post-hearing brief (IDOT Br.); JM filed its reply (JM Reply); and IDOT moved to file a sur-reply. The Board grants both parties' motions to file briefs in excess of 50 pages, and grants IDOT's motion for leave to file its sur-reply.

After post-hearing briefs were due, JM filed a status report changing its requested relief. Rather than ordering IDOT to participate in future cleanup, JM instead asks that the Board order IDOT to reimburse JM for cleanup completed at the site. IDOT responded, asking that the Board deny leave to file the status report. Below, the Board considers the status report as a motion to amend the complaint and grants the motion.

FACTS

Below, the Board first describes the properties involved in this case including JM's manufacturing facility and so-called "Site 3" and "Site 6." The Board then finds facts about asbestos sampling and cleanup at Site 3 and Site 6.

JM Facility

JM owned and operated a facility in Waukegan that manufactured items such as roofing materials, pipe insulation, Transite pipe, packing and friction materials, gaskets, and brake shoes. Compl. at ¶ 6; Ans. at ¶ 6; Tr. May 23 at 42-43 (Clinton). Some of the items contained asbestos. *Id.* For example, JM manufactured asbestos-containing (typically 20-30%) concrete Transite pipe ranging in diameter from 2 to 48 inches and in length from 10 to 12 feet. Tr. May 23 at 43-44 (Clinton). JM ceased operations at its facility in 1998, and conducted remediation there. Compl. at ¶¶ 8, 9; Tr. May 23 at 44 (Clinton). The JM facility is located at the northeast corner of the intersection of Greenwood Avenue and Pershing Road. Compl. at ¶ 13. Greenwood runs east to west, and Pershing runs north to south.

Site 3 and Site 6

The complaint concerns two off-site areas near the JM facility known as Site 3 and Site 6. Both sites are south of the JM facility.

Site 3 is a generally rectangular property located at the southeast corner of Greenwood Avenue and Pershing Road. Compl. at ¶ 13; Ans. at ¶ 13. Commonwealth Edison (ComEd) owns Site 3. Compl. at ¶ 11; Tr. May 23 at 34 (Clinton). In 1956, ComEd gave JM access to Site 3 to use as a parking lot. Exh. 50; Tr. May 23 at 49 (Clinton); Compl. at ¶ 20; Ans. at ¶ 20. The parking lot was rectangular and located in the northcentral part of Site 3. Exh. 53A (1961 aerial); Tr. May 23 at 51-52 (Clinton).

Site 6 has a linear shape comprised of the unpaved area along the north and south sides of Greenwood Avenue. Exh. 62 (AOC) at 7; Compl. at ¶ 14; Ans. at ¶ 14. The western boundary is the point where Greenwood rises to reach Pershing Road, roughly 400 feet east of Pershing. Exh. 62 (AOC) at 7. Site 6 runs east along Greenwood to the entrance for the Waukegan Generating Station. Tr. May 23 at 33 (Clinton); Tr. May 23 at 90 (Ebihara).

In September 1971, IDOT awarded a contract to Eric Bolander Construction Co. for road construction involving Greenwood Avenue and Pershing Road (Amstutz project). Exh. 20 (Notice to Bidders); Exh. 25 (IDOT Memo). The Amstutz project included raising Greenwood over railroad tracks and the Amstutz Expressway. Compl. at ¶ 22; Ans. at ¶ 22. IDOT standard specifications and construction plans were discussed in depth at the hearing. *See* Exh. 19 (1971 IDOT specifications); Exh. 21 (IDOT Plans). The project covered more than 2,000 feet along Greenwood and overlapped with approximately 300 feet of the western portion of Site 6. *See* Exh. 21A at 1, 8, 23 (IDOT Plans). IDOT also constructed a detour road extending from Pershing to Greenwood. Exh. 21A (IDOT plans); Compl. at ¶ 24; Ans. at ¶ 24. This detour road passed diagonally through Site 3 from the southwest to the northeast; the detour road also passed through a portion of Site 6 where the road connected with Greenwood. Ans. at ¶¶ 25-27.

Soil Sampling at Site 3 and Site 6

Asbestos-containing material (ACM),¹ as well as asbestos fibers from this material, has been found on property near JM's facility, including Site 3 and Site 6. Compl. at ¶¶ 9, 15-18. Since 1998, three companies (ELM Consulting, LFR Inc., and AECOM) sampled soil to identify where ACM is located. JM's expert witness, Douglas Dorgan, and IDOT's expert witness, Steven Gobelman, relied on these investigations. Exh. 6 at 34 (Dorgan report); Exh. 8 at 18 (Gobelman report).

In 1998, ELM investigated Site 3. Exh. 57 (ELM report). ELM visually inspected the site surface and found 74 suspected ACM fragments. *Id.* at 23. ELM removed this surficial ACM from the site. *Id.* ELM described 65 of the suspected ACM fragments as Transite pipe² and the remaining as concrete, felt paper, tar paper, roofing material, or insulation. *Id.* at 177-179. ELM characterized this surficial suspected ACM as located "throughout Site 3 with the

¹ Illinois and federal regulations define ACM as material containing more than 1% asbestos. 225 ILCS 207/5 (2014); 40 C.F.R. § 61.141. JM's consultants variously reported asbestos content using analytical thresholds of 1.0%, 0.25%, and 0.1%. ELM used the 1.0% threshold. Exh. 57 at 14 (ELM report). Subsequently, USEPA required analysis using polarized light microscopy to 0.25% and transmission electron microscopy (TEM) to 0.10%. Exh. 62 at 9 (AOC).

² W.D. Clinton, a JM engineer, testified that asbestos-containing Transite pipe is darker grey than non-asbestos concrete pipe and it would be difficult for a lay person to discern the difference. Tr. May 23 at 43-44. T. Ebihara, a JM consultant, testified that Transite pipe has a darker color, the fiber structure can be seen within a broken edge, and the press or mold makes a visible pattern on the surface. Tr. May 23 at 72-73. He also stated that LFR and AECOM workers would be able to tell the difference between Transite and non-asbestos pipe. *Id.*

exception of the south-central portion of the Site” and that description is consistent with Figure 14 of the ELM report depicting locations of the 74 suspected ACM fragments. *Id.* at 23, 45, 535.

At Site 3, ELM also collected 48 soil core samples drilled to a depth of 4 feet. Exh. 57 (ELM report) at 35. In boring logs, ELM described visible ACM as Transite, insulation, and raw material. *Id.* at 191-196, 289, 300. Samples from 16 locations contained asbestos—6 being located on Site 3 along Greenwood Avenue at 50-foot intervals. *Id.* at 541 (Fig. 20). The remaining locations were elsewhere on Site 3. *Id.*

In 2008, LFR Inc. (later known as Arcadis) sampled soil on Site 3 and Site 6. Exh. 63 (LFR report). At Site 3, LFR dug test pits at 14 locations to determine whether asbestos was present below 3 feet. *Id.* at 13. LFR did not observe visually suspect ACM below 3 feet. *Id.* at 15. Two test pits, one located on the former detour road near Greenwood Avenue and one located on the western portion of the former parking lot, contained visually suspect ACM above 3 feet. *Id.* In boring logs, LFR described these samples as Transite. *Id.* at 112, 115.

At Site 6, LFR collected more than 200 soil samples from 88 locations along unpaved shoulders on the north and south sides of Greenwood Avenue. Exh. 63 (LFR report) at 22. Underground utilities, including natural gas, telecommunication, and fiber optic, were present along the sampling areas. *Id.* at 535. LFR visually identified ACM at 28 locations along Greenwood. *Id.* at 22, 64-68 (Table 4), 86 (Fig. 10). LFR described visually suspect ACM as Transite, fibrous sludge, roofing material, fibrous material, and brake shoes. *Id.* at 64-68 (Table 4), 285-300 (App. D). Of these 28 locations, eight were on the south side of Greenwood along the border with Site 3. *Id.* at 86 (Fig. 10).

Also in 2008, LFR excavated soil along the south side of Greenwood Avenue, and west of Site 6, to expose two electric lines. Exh. 74 (LFR letter report). LFR removed soil to 7 feet below the surface. *Id.* at 2. Starting from the surface, LFR reported that the top 3.5 to 4 feet consisted of “topsoil and clay-rich fill material” and the layer below was granular fill. *Id.* LFR observed pieces of Transite pipe in the clay layer and concluded that this pipe was in a layer placed by IDOT during construction. *Id.*

In 2013, AECOM performed two rounds of sampling at Site 3 to delineate asbestos in soil within a 25-foot corridor centered on the 20-foot natural gas line generally running east-west through the center of Site 3. Exh. 66 at App. H (AECOM report). In May 2013, AECOM installed nine hydraulic excavation points and 18 test pits. *Id.* at 771. Using polarized light microscopy, seven samples detected asbestos and all were at 0.25% or lower. *Id.* In August 2013, AECOM advanced 17 soil borings to maximum depth of 9 feet and collected 126 soil samples. *Id.* at 772. One sample showed asbestos content of 0.25%. *Id.*

Asbestos Cleanup at Site 3 and Site 6

JM entered into an administrative order on consent (AOC) with USEPA in 2007, requiring JM to investigate and remove asbestos from areas near JM’s facility, including Site 3 and Site 6. Exh. 62 (AOC) at 9-10; Compl. at ¶ 10; Ans. at ¶ 10. IDOT is not a party to the AOC. Compl. at ¶ 31; Ans. at ¶ 31.

USEPA selected remedies to address asbestos in soil at Site 3 and Site 6. Compl. at ¶ 42; Ans. at ¶ 42. In general, USEPA required excavation and disposal of soil containing asbestos, backfill with clean soil, and controls where asbestos remained in the soil. Compl. at ¶ 47, 49; Ans. at ¶ 47, 49. JM recently informed the Board that it mostly completed this work in late 2016. Status Report at 2. JM estimates spending \$3,582,000 in investigation and remediation costs. *Id.* at 3.

VIOLATIONS AND DEFENSES

JM contends that IDOT dispersed and buried ACM waste during road construction on what is now known as Site 3 and Site 6. Accordingly, USEPA required JM to perform a more extensive cleanup than if IDOT had not built its project. Based on this, JM alleges two counts against IDOT for violating the Act.

Count I is for violations of Sections 21(a), (d), and (e) of the Act beginning in the 1970s and continuing as long as ACM waste remains. JM alleges that IDOT violated Section 21(a) by open dumping waste, Section 21(d) by conducting unpermitted waste disposal, and Section 21(e) by illegally disposing waste. The Board finds IDOT open dumped ACM waste violating Section 21(a) of the Act. Similarly, because the disposal site was not a permitted waste disposal facility, IDOT violated Sections 21(d) and 21(e), which prohibit disposing waste at an unauthorized site. IDOT's open dumping occurred along the south side of Greenwood Avenue on Site 6 and the northeast portion of Site 3, as identified by specific sampling locations below.

Count II is for violating the 1970 versions of these provisions. The Board finds it unnecessary for JM to plead violations of historic provisions of the Act, because current Sections 21(a), (d), and (e) apply to IDOT's construction activities in the 1970s and the continuing presence of ACM waste.

Count I - Section 21(a) **Open Dumping**

Section 21(a) of the Act prohibits any person from open dumping waste. 415 ILCS 5/21(a) (2014). Specifically, the Act provides:

No person shall:

- (a) Cause or allow the open dumping of any waste. *Id.*

A person open dumps by consolidating refuse (meaning waste) at a disposal site that does not meet the requirements of the Act. 415 ILCS 5/3.305, 3.385 (2014). Nothing in the record shows that either Site 3 or Site 6 is a permitted waste disposal site. As unpermitted facilities, neither Site 3 nor Site 6 meets the requirements of the Act for waste disposal.

The Board finds that IDOT violated Section 21(a) of the Act because IDOT open dumped ACM waste. The Board first addresses two preliminary issues: IDOT is subject to

Section 21 and ACM found on the sites is waste. The Board then addresses three arguments as to whether IDOT, through its own conduct, open dumped ACM waste at the sites by: (i) building the former detour road; (ii) reconstructing Greenwood Avenue; and (iii) restoring Site 3 after construction. *See* Compl. at ¶ 67; JM Br. at 21. JM also asserts that IDOT allowed open dumping, regardless of who deposited ACM waste, by owning or controlling the right-of-way for Greenwood. Compl. at ¶ 12; JM Br. at 38-42.

IDOT Is Subject to Section 21

Section 21(a) prohibits “persons” from open dumping. The Act defines “persons” to include State agencies such as IDOT. *See* 415 ILCS 5/3.315 (2014). Illinois state agencies are required to comply with the Act. 415 ILCS 5/47(a) (2014). The Board finds IDOT may be enforced against for violating the Act. *See Boyd Brothers, Inc. v. Abandoned Mined Lands Reclamation Council*, PCB 94-311, slip op. at 3 (Feb. 16, 1995).

ACM Found on Site 3 and Site 6 Is Waste

Section 21(a) prohibits open dumping waste. Waste includes discarded material. 415 ILCS 5/3.535 (2014). ACM present at Site 3 and Site 6 was discarded and constitutes waste. On the surface of Site 3, ACM included Transite pipe, felt paper, tar paper, roofing material, and insulation. Exh. 57 (ELM report) at 177-179. Below the surface at Site 3, ACM includes Transite, insulation, and raw material. *Id.* at 289, 300. Below the surface at Site 6, ACM includes Transite, fibrous sludge, roofing material, fibrous material, and brake shoes. Exh. 63 (LFR report) at 22, 64-68 (Table 4), 285-372 (App. D). These materials were abandoned at the sites and serve no useful purpose. When formerly useful materials such as Transite pipe were abandoned on the sites, they were removed from the economic mainstream and became waste. *See Alternative Fuels, Inc. v. IEPA*, 215 Ill. 2d 219, 233 (2004) (materials stored without the likelihood of being returned to the economic mainstream are waste).

Building Former Detour Road

JM contends that IDOT crushed and buried ACM in building the former detour road. The former detour road crossed Site 3 and connected with Greenwood Avenue on Site 6. JM’s expert used IDOT’s construction plans and prior environmental reports to show that ACM is buried in IDOT-deposited materials along the former detour road. The Board finds JM has not proven that IDOT is responsible for ACM waste along the former detour road.

JM’s expert reviewed IDOT’s plans to determine where IDOT placed fill in constructing the detour road. JM and IDOT agree that IDOT’s plans (Exh. 21A at 23) specified that 1,102 cubic yards of fill was needed for the entire detour road and there would be 5,148 cubic yards of excavated material (referred to as “cut”) as part of the construction activities, which could be used as fill. Exh. 16 at 6 (Dorgan rebuttal); Exh. 8 at 7, 10 (Gobelman report). For the portion of Site 3 on which the detour road would be built, the then-existing surface elevation varied from 587.5 feet at the southwest corner to 588.5 feet over most of Site 3. Exh. 21A at 23 (IDOT plans); Exh. 6 at 8 (Dorgan report). The proposed elevation for the detour road was 590 feet all the way to Greenwood. Exh. 21A at 23; Tr. May 24 at 287 (Gobelman). Further, IDOT’s plans

did not specify removal of unsuitable material for the detour road. *Id.*; Exh. 16 at 6 (Dorgan rebuttal); Exh. 8 at 7, 10 (Gobelman report). It follows then that no cut was needed for the detour road on Site 3 because it was already below the desired level.

Some amount of material was needed to bring the detour road up to 590 feet. JM's expert concluded that up to 2.5 feet of fill was needed along the detour road. Exh. 16 at 6 (Dorgan rebuttal). IDOT contends that needed fill would have been taken from the 5148 cubic yards of available cut. Tr. May 24 at 290 (Gobelman). Both conclusions are supported by the record. The Board finds that the southwest corner of Site 3 required 2.5 feet of fill, the remaining length of the detour road required minimal fill to bring it up to 590 feet, and that IDOT used available cut for this fill. *See* Exh. 21A at 23; JM Reply at 5 (Exh. 21A "indicates that the elevation of the land across the entire stretch of Detour Road A is consistently at or near 590 feet" and the former parking lot was not higher than surrounding land).

IDOT also placed fill in constructing the intersection where the detour road connected with Greenwood Avenue on Site 6. Initially, it is helpful to understand that IDOT's plans used a system for marking points along each road at 100-foot intervals. These points were called stations. Measured along Greenwood, the intersection with the detour road was east of Station 7. Measured along the detour road, the intersection with Greenwood was at Stations 14 to 15. Exh. 21A at 23 (IDOT plans). As discussed above, IDOT's plans illustrated a profile of the detour road. *Id.* From Station 14 to 15, IDOT's plans showed that fill was needed to raise the detour road approximately two feet to connect to Greenwood. *Id.*; Tr. June 23 at 190 (Gobelman).

The Board turns next to the question of whether any ACM has been found within fill placed by IDOT for the detour road. JM's expert notes that ACM analysis detected asbestos in samples along the former detour road. Exh. 6 at 27 (Dorgan report). The samples on Site 3 were taken within 3 feet below the surface; at the time of sampling, the surface level was 587.5 feet, *i.e.*, below the 590-foot elevation of the detour road. *Id.* IDOT removed the detour road at the end of construction and restored the surface level on Site 3. Tr. June 23 at 156 (Gobelman). Accordingly, any fill placed by IDOT on Site 3 during construction was removed and the samples were taken below the fill level.

JM's expert depicted these Site 3 samples as a cross-section to illustrate the depth of ACM in soil. Exh. 6 at 27 (Figure 4) (corrected version, *see* Tr. May 23 at 200-205). He concluded that ACM waste is within fill material placed by IDOT. *Id.* However, IDOT would have needed to excavate below 587.5 feet and place fill below 587.5 feet to be responsible for ACM at this depth. The record does not show excavation to the depth of these samples. Rather, the record shows that IDOT's work along the detour road on Site 3 was above the depth where ACM is now found.

On the cross-section, JM's expert drew a dotted line beneath the sample depths at approximately 583 feet and titled it "approximate depth of fill material." Exh. 6 at 27 (Dorgan Report) (Figure 4). At hearing, he explained that he determined the depth of fill material from IDOT's plans or boring logs. Tr. May 23 at 200. As detailed above, however, IDOT's plans did not provide for excavation or fill to 583 feet. Turning to the boring logs for these samples, consultants described a predominantly sand and gravel substrate. Exh. 57 at 311 (ELM report);

Exh. 66 at 800, 801 (AECOM report). There was no other testimony or explanation in the record that this was IDOT-placed fill material. ACM detected below 587.5 feet along the former detour road on Site 3 is below IDOT's activities.

Similarly, JM has not proven that ACM waste is located in fill placed by IDOT to connect the detour road to Greenwood Avenue on Site 6. JM's expert depicted these Site 6 samples as a cross-section to illustrate the depth of ACM in the soil. Exh. 6 at 27 (Figure 4). He opined that ACM is located within material placed by IDOT. *Id.* At hearing, JM's expert produced additional cross-sections along the south side of Greenwood. Tr. May 23 at 216-220, 297-302 (Dorgan); Exh. 84 (Dorgan cross-section). One of the cross-sections is on Site 6 and illustrates depth of ACM in the soil. *Id.* Two ACM samples were taken at this intersection. *Id.* JM's expert also prepared cross-sections perpendicular to Greenwood for these two samples. *Id.* at 2. Again, JM used the cross-sections to assert that ACM materials are within IDOT-placed fill. Tr. May 23 at 218-220, 304 (Dorgan). In particular, cross-sections H and I illustrate depth of ACM found in soil samples 5S and 6S. Exh. 84 at 2.

However, JM's depictions show that ACM is below the current surface level of approximately 588.5 feet. Exh. 6 at 27; Exh. 84. This is the same surface elevation prior to IDOT's construction in this area. *Id.*; Exh. 21A at 23. Accordingly, ACM detected at this level is below IDOT's activities. Furthermore, JM's expert depicts ACM continuing to below 586 feet in this area and nothing in IDOT's plans shows excavation to this depth. Exh. 84. Therefore, the Board finds that ACM in the area where the former detour road connected to Greenwood is not attributable to IDOT's activities.

Based on the above, the Board finds JM has not proven that ACM waste found along the former detour road is present in material IDOT placed. Therefore, JM failed to prove that IDOT open dumped ACM waste in constructing the detour road.

Reconstructing Greenwood Avenue

JM contends that IDOT deposited ACM waste in reconstructing Greenwood Avenue. Again, JM's expert used IDOT's plans to show that ACM is buried in IDOT-deposited material and correlated that to where ACM was found. The Board finds IDOT open dumped by depositing ACM waste along Greenwood.

Initially, the Board clarifies the area along Greenwood Avenue relevant to the complaint and this argument. As defined by USEPA, Site 6 is the unpaved area along the north and south sides of Greenwood. Exh. 62 (AOC) at 7. The western boundary is the point where Greenwood rises to reach Pershing Road (*id.*) and is Station 9+22 along Greenwood (meaning 22 feet west of Station 9) on IDOT's construction plans. Exh. 6 at 15 (Dorgan report). Moving east, IDOT's plans for pavement work on Greenwood covered Station 9+22 to Station 7. Exh. 21A at 8, 72 (expressly providing that the construction limit was at Station 7). Continuing east, IDOT's plans also provide for the detour road to connect to Greenwood east of Station 7 (discussed above). *Id.* at 23. This point where the detour road met Greenwood is also on Site 6.

As to the portion of Greenwood Avenue between Stations 9+22 to the west and Station 7 to the east, the parties disagree as to the amount of material IDOT removed and replaced during construction. According to IDOT, this portion of Greenwood was rebuilt at the same level as the prior road and little fill was needed. IDOT Br. at 17. IDOT's expert explained that IDOT's plans called for excavating existing pavement. Tr. May 24 at 299 (Gobelman). The elevation began to increase at Station 9. *Id.* The amount of fill needed for this section (Station 9 to 9+22) of the embankment above then-existing ground was approximately one foot. Tr. May 25 at 169 (Gobelman); Exh. 21A at 72-73 (IDOT plans).

JM's expert opined that IDOT excavated this portion of Greenwood Avenue to an elevation of 585 feet and replaced that material. Tr. May 23 at 213-14 (Dorgan). Thus, material now found above 585 feet was placed by IDOT. *Id.* The Board agrees. The record, including IDOT's plans and IDOT's expert's testimony, supports JM's position. *See* Exh. 21A at 72 (IDOT plans); Tr. June 23 at 193-196 (Gobelman).

The Board finds that IDOT excavated down to 585 feet and replaced the excavated material up to approximately 590 feet. Exh. 21A at 72 (IDOT plans). IDOT's plans included drawings for Stations 7+60, 8, and 9. *Id.* For each station, the plans specified the elevations of the existing and proposed road, an amount of unsuitable material to be removed, and an amount of porous granular fill, as well as cut and fill areas. *Id.* IDOT's plans showed the existing pavement at these stations and excavation to 585 feet. *Id.* The plans also showed soil profiles for these stations indicating "black cindery fill" below the existing pavement and unsuitable material to be removed below the cinder layer. *Id.* at 26. The replacement material included porous granular material, fill, and pavement. Tr. June 23 at 193-196 (Gobelman).

The Board turns next to whether any ACM has been found within material placed by IDOT on Greenwood Avenue between Stations 9+22 and 7. At hearing, JM's expert produced cross-sections along the south side of Greenwood. Tr. May 23 at 216-220, 297-302 (Dorgan); Exh. 84 (Dorgan cross-section). One of the cross-sections is on Site 6 and illustrates ACM within 3 feet of the surface. *Id.* It illustrates types of buried ACM, including Transite, roofing material, and fibrous sludge. *Id.* JM's expert also prepared a series of cross-sections perpendicular to Greenwood. *Id.* at 2. JM uses the cross-sections to show that IDOT placed fill above 585 feet and ACM materials are within IDOT-placed fill. Tr. May 23 at 218-220, 304 (Dorgan).

Based on the above, the Board finds that ACM waste is located in material placed by IDOT to reconstruct Greenwood Avenue. Specifically, IDOT is responsible for ACM waste found in samples 1S, 2S, 3S, and 4S. IDOT open dumped by depositing ACM waste along Greenwood. IDOT therefore violated Section 21(a) by open dumping ACM waste at these locations. *See* 415 ILCS 5/21(a) (2014).

Restoring Site 3 after Construction

JM contends that IDOT deposited ACM waste when it restored Site 3 after construction. JM Br. at 21. Specifically, IDOT removed the detour road (discussed above), filled ditches and culverts, and generally spread and buried ACM in soil. The Board finds that IDOT is

responsible for ACM waste found on the north portion of Site 3 along Greenwood Avenue and the south portion of Site 6 at locations specified below. However, the record contains insufficient information to find IDOT liable for ACM waste found elsewhere on Site 3.

IDOT's plans called for a ditch along the south side of Greenwood Avenue. The plans included cross-sections showing the ditch starting at Station 9 running west along the embankment. Exh. 21A at 72-81. At Station 9, the center of the ditch was 45 feet south of the center of Greenwood. *Id.* Moving west, as the embankment rises, the cross-sections for Greenwood showed the ditch farther away from Greenwood. *Id.* at 73. Another page of IDOT's plans showed the ditch starting farther east, near Station 7. Exh. 21A at 8. JM's expert depicted this ditch as running along the northern portion of Site 3 starting at Station 7. Exh. 16 at 18 (Dorgan rebuttal); Tr. June 24 at 212 (Dorgan testifying that ditch started at Station 9).

At hearing, JM's expert opined that IDOT filled the Greenwood Avenue ditch after construction. Tr. June 24 at 213-214 (Dorgan). IDOT's plans show that the bottom of the ditch was at an elevation of 584 feet. Exh. 21A at 72-73. JM's expert used ACM samples taken in or near the ditch to opine that ACM is present in IDOT-placed material there. Exh. 6 at 17 (Dorgan report). In a cross-section, he illustrated soil samples along the northern edge of Site 3 in, next to, and near the ditch. Exh. 6 at 28 (Figure 5). At hearing, he testified that three of the samples were near the ditch. Tr. June 24 at 214 (Dorgan). Other samples showed no ACM. Exh. 6 at 28 (Figure 5). Also at hearing, JM's expert produced additional cross-sections showing the presence of ACM waste in IDOT-placed materials. Exh. 84 (Dorgan) (cross-sections B and D). Because this ACM is located in materials placed by IDOT during construction, the Board finds that IDOT is responsible for ACM found at sample locations B3-25, B3-16, and B3-15. *See also* Exh. 57 at 97-100 (ELM report).

As to the ditch south of the detour road, IDOT's plans called for a ditch between Stations 10 and 12 along that road. Exh. 21A at 23. JM's expert depicted this ditch in his rebuttal report. Exh. 16 at 18 (Figure 2). He testified that ACM was found near this ditch; however, the samples he identified were located on the former detour road and were addressed by the Board above. *See* Tr. June 24 at 216 (Dorgan). The Board finds this ditch was present during IDOT's construction and IDOT restored this area to the surface level after construction. However, JM has not shown that ACM waste was found in soil samples taken from this area. Further, as discussed above regarding the detour road, JM has failed to prove that ACM found in samples along the former detour road are attributable to IDOT's construction.

JM also argues that IDOT installed a temporary culvert under the detour road on Site 3 and would have needed to remove the culvert and restore the area with fill. JM Reply at 17. JM's expert testified that a culvert was located near the ditch along the former detour road (Tr. June 24 at 216 (Dorgan)) and identified its location on an exhibit at hearing (Tr. May 24 at 51 (marking culvert on Exh. 16-17)). IDOT's expert also testified that a culvert was located under the former detour road on Site 3, but he disputed whether restoring the culverts after construction would require fill. Tr. June 23 at 159-160 (Gobelman). The record supports that a culvert was constructed under the former detour road on Site 3, but does not show that any ACM waste has been detected in that area.

Control over Greenwood Avenue Right-of-Way

JM also argues that, regardless of who deposited ACM waste, IDOT owns or controls the right-of-way along Greenwood Avenue and is responsible for allowing ACM waste there.³ Compl. at ¶ 12; JM Br. at 38-42. As to a portion of the Greenwood right-of-way (Parcel 0393), the Board finds that IDOT controls that parcel and continues to allow ACM waste in the soil.

Section 21(a) creates liability for a person who causes or allows open dumping. An alleged polluter may be liable because he controls the pollution or he controls the premises where pollution occurred. People v. Davinroy, 249 Ill. App. 3d 788, 793 (5th Dist. 1993). Above, the Board discussed IDOT's liability for open dumping caused by its construction activity at the sites. Now, the Board considers whether IDOT is liable by allowing open dumping at property it controls, whether or not caused by IDOT's construction.

JM argues that IDOT has control over the right-of-way for Greenwood Avenue, making IDOT liable for ACM waste found there. JM uses "right-of-way" to mean both sides of Greenwood. On the south side, JM means the existing right-of-way for the then-existing Greenwood plus an additional right-of-way IDOT acquired for the Amstutz project (Parcel 0393). *See, e.g.*, Compl. at ¶ 12; JM Reply at 16. On the north side, JM means the existing right-of-way. *Id.* In JM's view, the south right-of-way includes portions of Site 3 and Site 6 and the north right-of-way includes portions of Site 6. Compl. at ¶ 12. In response, IDOT maintains that it holds a right-of-way on Parcel 0393, which is not within Site 6, and a right-of-way on the north side of Greenwood, which does not lie within Site 3 or Site 6. Ans. at ¶ 12. The Board examined the record to make sense of the parties' statements.

In 1971, ComEd granted IDOT the right to use ComEd property for the Amstutz project. *See* Exh. 41 (1971 grant). This grant was re-recorded in 1974 and 1984. Exh. 42 (1974 grant); Exh. 43 (1984 grant). The grant gave IDOT the "right to use" ComEd property "for highway purposes only." Exh. 43 at 2-5. Parcel 0393 is covered by the grant and runs along the "south line" of Greenwood Avenue from Pershing Road east approximately 643 feet. *Id.* at 3. Parcel 0393 is illustrated on Exhibit 15 and a portion of it covers the north edge of Site 3. Exh. 15 (IDOT plat). While JM later claimed Exhibit 15 is "inherently unreliable" (JM Reply at 19, n. 6), JM's post-hearing brief cited Exhibit 15 as depicting the parcel's contours (JM Br. at 9) and JM used this exhibit at hearing to identify the parcel (Tr. May 24 at 63-65 (Blaczek)).

In addition, Parcel 0393 is identified in IDOT's plans consistent with Exhibit 15. *See, e.g.*, Exh. 21A at 27. IDOT used Parcel 0393 to build the embankment raising Greenwood Avenue (Tr. May 25 at 48 (Stumpner)) and the parcel appears to follow that contour. The northern edge of Parcel 0393 ends at the pre-existing right-of-way for Greenwood and what is

³ JM also contends that a temporary easement for Parcel E393—property not identified in JM's complaint—gave IDOT control over the detour road during construction, making IDOT liable for ACM waste dumped there. JM Br. at 39. However, as discussed, the Board cannot determine from the record that ACM present in soil along the former detour road was deposited there during IDOT's construction or removal of the former detour road, and therefore does not find IDOT responsible for ACM waste in that area.

now Site 3's north edge. Parcel 0393 does not extend into Site 6. Parcel 0393 is owned by ComEd, which as noted above conveyed to IDOT the right to use the parcel. ComEd did not convey any area of the pre-existing right-of-way in the grant.

Based on the above, the Board finds that a portion of Parcel 0393 falls on Site 3 but no part of Parcel 0393 falls on Site 6. While JM's complaint and post-hearing briefs take a broader view of IDOT's Greenwood right-of-way to include the pre-existing right-of-way, Parcel 0393, and possibly other parcels, the record only contains sufficient information to analyze IDOT's interest in Parcel 0393. The Board also notes that the JM expert's opinions were limited to Parcel 0393 and IDOT's interest in that parcel. Exh. 18 (Fortunato report). With that clarification, the Board continues to JM's argument on IDOT's interest in Parcel 0393.

JM contends that ComEd's grant gave IDOT an ownership interest in Parcel 0393 during the project and today – namely, a permanent easement. As support, JM cites the testimony of an attorney JM used as an expert witness and numerous statements by witnesses at hearing. *See, e.g.* Tr. June 24 at 123 (Stoddard stating right-of-way was a permanent easement). IDOT acknowledges that it retains an interest in this parcel, but not an ownership interest.

Whether IDOT's interest is an ownership interest is not the relevant question under Section 21. Section 21(a) creates liability for a person who causes or allows open dumping. Above, the Board found that IDOT *caused* open dumping in certain areas. The question here is whether IDOT, by controlling Parcel 0393 where ACM waste is now present, *allowed* open dumping. *See Phillips Petroleum Co. v. PCB*, 72 Ill. App. 3d 217, 220 (2nd Dist. 1979) (transporter had sufficient control over railcars to be liable for pollution due to train derailment). Ownership can result in sufficient control over the location of open dumping to result in responsibility even if the owner did not actually open dump. *Meadowlark Farms v. PCB*, 17 Ill. App. 3d 851, 861 (5th Dist. 1974) (current owner liable for pollution seeping from waste pile created by prior owner). Other forms of control over a site may also result in liability. *See McDermott v. Metropolitan Sanitary District*, 240 Ill. App. 3d 1, 26 (1st Dist. 1992) (an easement interest rendered holder liable for failure to maintain a property).

The Board finds that IDOT's interest in Parcel 0393 gave and continues to give it control over open dumping on that property. *See Davinroy*, 249 Ill. App. 3d at 793. For example, an IDOT witness stated that removal of the Greenwood Avenue embankment requires IDOT approval. Tr. May 25 at 54 (Stumpner). Another IDOT witness testified that IDOT can do what is necessary to maintain the property for highway purposes, public safety, and traffic flow. Tr. June 24 at 118-119 (Stoddard). Furthermore, as long as Parcel 0393 is being used for highway purposes, as it is today, IDOT's interest in the parcel continues. *Id.* at 121-122.

ACM waste has been found in samples located on Parcel 0393 (B3-25, B3-15, B3-16, B3-50) and a sample appearing to be on the border of the parcel (B3-45). JM claims that ACM was found in 18 locations "within easement parcels," but most of these samples were located off Parcel 0393 and one sample did not exist. *See JM Br.* at 39. IDOT contends that no Transite pipe was found on Parcel 0393, but this statement ignores asbestos found in soil samples on the parcel. *See IDOT Br.* at 22.

IDOT continues today to hold an interest in Parcel 0393. Part of Parcel 0393 falls on Site 3. IDOT's interest in Parcel 0393 therefore gives it the right to control a portion of Site 3. Within that portion of Site 3, ACM waste is present in the soil. By continuing to control the portion of Parcel 0393 falling within Site 3, IDOT continues to allow ACM waste in that soil. Above, the Board found that IDOT is responsible for ACM found at sample locations B3-25, B3-16, and B3-15 due to its road construction. Additionally, the Board finds that IDOT allowed open dumping through its control over Parcel 0393 at sample locations B3-25, B3-16, B3-15, B3-50, and B3-45 (to the extent sample B3-45 falls on Parcel 0393) on Site 3. *See* Exh. 57 at 97-100 (ELM report).

Board Summary on Section 21(a)

The Board finds that IDOT caused open dumping of ACM waste along the south side of Greenwood Avenue within Site 6 (1S-4S) and adjacent areas along the north edge of Site 3 (B3-25, B3-16, and B3-15). Additionally, IDOT allowed open dumping on Parcel 0393 (B3-25, B3-15, B3-16, B3-50, and B3-45 (to the extent sample B3-45 falls on Parcel 0393)). The Board therefore finds that IDOT violated Section 21(a) of the Act.

Count I - Section 21(d) **Unpermitted Waste Disposal**

Section 21(d) of the Act prohibits any person from conducting waste disposal without a permit. 415 ILCS 5/21(d) (2014). Specifically, the Act provides:

No person shall: . . .

- (d) Conduct any waste-storage, waste-treatment, or waste-disposal operation:
 - (1) without a permit granted by the Agency; [or]
 - (2) in violation of any regulations or standards adopted by the Board under this Act *Id.*

ACM found at the sites is waste and neither site is covered by a waste disposal permit. IDOT violated Section 21(d) because it disposed asbestos waste without a permit, in the locations specified above.

Count I - Section 21(e) **Illegal Waste Disposal**

Section 21(e) of the Act prohibits disposal, storage, and abandonment of waste, except at a facility meeting the Act's requirements. 415 ILCS 5/21(e) (2014). The Act provides:

No person shall: . . .

- (e) Dispose, treat, store or abandon any waste . . . except at a site or facility which meets the requirements of this Act and of regulations and standards thereunder. *Id.*

Again, ACM found at the sites is waste and neither site is covered by a permit. IDOT violated Section 21(e) because it disposed asbestos waste at locations specified above, which are not permitted for waste disposal.

Count II - Historic Section 1021

Sections 21(a), (d), and (e) of the Act did not exist when IDOT’s construction started in 1971. Accordingly, in count II, JM alleges that IDOT violated corresponding provisions in historic Section 1021 of the 1970 version of the Act. Specifically, JM alleges that IDOT violated Section 1021(b) prohibiting open dumping of refuse, Section 1021(e) prohibiting refuse disposal without a permit, and Section 1021(f) prohibiting disposal of refuse except at a proper disposal facility. Compl. at ¶¶ 89-91, citing IL ST CH 111½ ¶ 1021(b), (e), (f) (1970). The Board finds that it is unnecessary for JM to plead violations of historic Section 1021 because Sections 21(a), (d), (e) apply retrospectively to IDOT’s construction activities in the 1970s.

When determining whether an amended statute applies, the Illinois Supreme Court follows the Landgraf approach set forth by the United States Supreme Court. People v. J.T. Einoder, Inc., 2015 IL 117193, ¶ 29 (2015), citing Landgraf v. USI Film Products, 511 U.S. 244 (1994). Under this approach, the first step is to determine whether the legislature stated that the amendment is to be applied prospectively or retrospectively. Einoder, 2015 IL 117193, ¶ 29. If the legislature did not state its intent, the court must determine whether applying the amendment retrospectively would have an impermissible retroactive impact. *Id.* An amended statute has a retroactive impact if the amendment impairs rights a party possessed when he acted, increases a party’s liability for past conduct, or imposes new duties as to transactions already completed. *Id.* at ¶ 30. If a retroactive impact is found, the court must presume that the legislature did not intend that the amendment be so applied. *Id.*

Here, Sections 21(a), (d), and (e) may be applied retrospectively to IDOT’s construction activities in the 1970s. Following the Supreme Court’s roadmap, the Board initially notes that the legislature did not state in Section 21 whether amendments creating the current language apply retrospectively or prospectively. Accordingly, the Board next analyzes whether applying the current language would have an impermissible retroactive impact.

Comparing the 1970 version with the current language of Section 21, the substantive requirements of the two versions have remained the same from 1970 to today. Section 1021(b), (e), (f) correspond to Sections 21(a), (d), and (e) as follows:

Current Version	1970 Version
21(a) No person shall . . . Cause or allow the open dumping of any waste.	1021(b) No person shall . . . Cause or allow the open dumping of any other refuse . . .

21(d)(1) No person shall . . . Conduct any waste-storage, waste-treatment, or waste-disposal operation . . . without a permit . . .	1021(e) No person shall . . . Conduct any refuse-collection or refuse-disposal operations . . . without a permit.
21(e) No person shall . . . Dispose, treat, store or abandon any waste . . . except at a site . . . which meets the requirements of this Act . . .	1021(f) No person shall . . . Dispose of any refuse . . . except at a site . . . which meets the requirements of this Act . . .

The two versions of the Act prohibit the same conduct. The changes essentially substitute “refuse” in the old language with “waste” in the new. In Illinois, “refuse” means “waste.” EPA v. PCB, 219 Ill. App. 3d 975, 979 (5th Dist. 1991). This is supported by definitions of both terms. Historic Section 1003 of the Act defined “refuse” as “any garbage or other discarded solid materials.” IL ST CH 111½ ¶ 1003(k). “Waste” is currently defined in part as “garbage . . . or other discarded material.” 415 ILCS 5/3.535 (2014). This word change, as well as the renumbering, are not substantive and do not create new liabilities. Accordingly, the Board finds no retroactive impact in applying current Sections 21(a), (d), and (e) to IDOT’s construction activities in the 1970s. The Board therefore dismisses count II as unnecessary.

Defenses

In this section, the Board explains why IDOT’s six defenses do not apply.

Five-Year Statute of Limitation

IDOT contends that JM’s complaint is untimely and barred by a five-year statute of limitation. Ans. at 41. Specifically, IDOT argues that JM is barred by the five-year deadline for “civil actions not otherwise provided for” in Section 13-205 of the Illinois Code of Civil Procedure (735 ILCS 5/13-205 (2014)). *Id.* JM filed this case on July 8, 2013 and, according to IDOT, the five-year period expired before July 8, 2008. The Board finds, however, that no limitation period applies because IDOT’s violations continue each day until the contamination is remedied.

JM brings its complaint under the citizen suit provision of Section 31(d) of the Act to enforce Section 21 of the Act. 415 ILCS 5/21, 31(d) (2014). The Act does not contain an express limitation period on bringing this claim. IDOT argues that the Board has acknowledged that the five-year limit in Section 13-205 may apply, citing Caseyville Sports Choice v. Seiber, PCB 08-30, slip op. at 2 (Oct. 16, 2008). In Caseyville, the Board denied a respondent’s motion to dismiss based on a statute of limitation, finding that, when taking complainant’s allegations as true, the Board was unconvinced that the statute of limitation barred the action. Caseyville, PCB 08-30, slip op. at 3. The Board relied on Barge-Way, where the Board denied a motion for summary judgment based on a statute of limitation because of a factual dispute as to when the injury was discovered. *See* Union Oil Co. of California v. Barge-Way Oil Co., PCB 98-169, slip op. at 4 (Feb. 15, 2001).

The five-year period does not begin to run, however, if IDOT’s actions continue to violate the Act. Under Illinois civil procedure, if a wrong involves repeated injurious behavior by the same actor, the plaintiff’s cause of action does not accrue until the date the acts cease.

Belleville Toyota, Inc. v. Toyota Motor Sales, USA, Inc., 199 Ill. 2d 325, 345 (2002). Here, IDOT's road construction began in 1971 and ended in 1976. During that project, IDOT encountered ACM waste and deposited it in the above identified areas on Site 3 and Site 6. As long as ACM waste remains in those locations, IDOT continues to violate Section 21 by allowing ACM waste to remain on the property.

The Act imposes liability for such continuing violations. For example, Section 42 provides an initial penalty as well as a penalty for each day a violation continues. 415 ILCS 5/42 (2014). The Board routinely calculates and orders penalties based on the number of days contamination remains on a property. *E.g.*, People v. ESG Watts, PCB 96-233, slip op. at 23 (Feb. 5, 1998) (calculating number of days that contamination exceeded groundwater standards); People v. Patrick Roberts Land Trust, PCB 01-135, slip op. at 6 (Sep. 19, 2002) (factoring length of time respondent ignored State remediation requests where landfill had already been closed two decades earlier); People v. J&S Companies, Inc., PCB 06-33, slip op. at 5 (Aug. 17, 2006) (factoring time from open dumping until clean up).

Here, IDOT deposited ACM waste in areas it filled along Greenwood Avenue in the 1970s. This waste remains today in the soil. Thus, asbestos contamination has continued from the time IDOT deposited it until now. The waste has also been deposited in a way that it can be further dispersed in the environment. Asbestos fibers from ACM may become airborne and inhaled. Exh. 65 at 4 (USEPA Enforcement Action Memorandum). This could be through human activity disrupting the site (*id.*), or through natural freeze/thaw cycles (*id.* at 8).

Section 33(a) of the Act further supports the Board's conclusion that IDOT's violation continues today. *See* 415 ILCS 5/33(a) (2014). Under that provision, an alleged violator cannot avoid liability by complying with the Act "except where such action is barred by any applicable State or federal statute of limitation." *Id.* This statutory language allows that there are circumstances where a violator corrects a violation and sufficient time passes to bar later enforcement. Here, IDOT has not corrected the violation. IDOT open dumped ACM waste and the waste remains. Accordingly, no statute of limitation applies.

The Illinois Supreme Court's finding in People v. AgPro, Inc. does not contradict the Board's finding that IDOT's violations continued as long as asbestos contamination remained. 214 Ill. 2d 222 (Feb. 3, 2005); *see also* Einoder, 2015 IL 117193. In AgPro, defendants operated a fertilizer and pesticide business. After the business closed, sampling at the site showed soil and groundwater contamination. The Attorney General brought an enforcement action seeking a court order forcing defendants to clean up the facility. The Court found that a prior version of Section 42(e) of the Act (authorizing injunctions to restrain violations of the Act) did not authorize a cleanup order where the pollution already occurred. AgPro, 214 Ill. 2d at 227. The Attorney General argued that the contamination caused by defendants is a continuing violation which can be restrained by an injunction. *Id.* at 232. Focusing on Section 42(e), the Court found that even if a violation continues, the Court could not order cleanup due to the restrictive language in former Section 42(e). Here, the Board is not limited by language such as the former Section 42(e) because the Board is not applying that section. The Court also focused on injunctive relief, which is not sought here. Furthermore, asbestos is a toxic material that has no

safe exposure level. The continued presence of asbestos in soil presents an ongoing exposure threat as long as it remains.

Board Jurisdiction

IDOT contends that the Board does not have authority to order JM’s requested relief. IDOT presents two arguments. First, USEPA approval would be necessary to order IDOT to participate in the cleanup. Ans. at 42; IDOT Br. at 54. The Board does not address this argument because JM no longer seeks to have IDOT participate in the cleanup.

Second, IDOT argues that, to the extent JM seeks monetary relief, only the Illinois Court of Claims can order it. IDOT Br. at 55, IDOT Sur-reply at 10-11. It is true that the Court of Claims holds exclusive jurisdiction over claims against the State founded upon State law. 705 ILCS 505/8(a) (2014). However, Illinois courts have allowed actions against a State agency where Illinois statute specifically contemplates the State as a party. People v. Randolph, 35 Ill. 2d 24, 31 (1966); Martin v. Giordano, 115 Ill. App. 3d 367, 369 (4th Dist. 1983). As noted above, Section 21(a) prohibits “persons” from open dumping, and the Act defines “persons” to include State agencies. 415 ILCS 5/3.315 (2014). The legislature’s consent to the State’s liability under the Act is therefore “clear and unequivocal.” Martin, 115 Ill. App. 3d at 369. The Board is the proper forum to hear citizen suits alleging violations of the Act. 415 ILCS 5/31(d) (2014) (“Any person may file with the Board a complaint . . . against any person allegedly violating this Act . . .”). This includes allegations against a State agency. *See Boyd Brothers*, PCB 94-311, slip op. at 6 (citizen complainant alleged state entity violated Act by allowing discharge of mine effluent). It follows then that the Board has authority to enforce the Act against a State agency and award relief allowed by the Act.

Equitable Defenses

IDOT asserts three defenses against JM’s equitable claims for a mandatory injunction: unclean hands, waiver, and laches. The Board does not address these defenses because JM no longer seeks to have IDOT participate in the cleanup.

Failure to Join Necessary Parties

IDOT contends that JM failed to name necessary parties, namely USEPA and ComEd, as respondents in this action. Ans. at 43-44. According to IDOT, the Board cannot order IDOT to participate in the USEPA-ordered cleanup without USEPA and ComEd present in this action. *Id.* Again, the Board also does not address this argument because JM no longer seeks to have IDOT participate in the cleanup.

RELIEF

To address IDOT’s open dumping violations, the Board finds it appropriate to order relief. Below, the Board begins by analyzing the factors listed in Section 33(c) of the Act relating to the reasonableness of IDOT’s actions. 415 ILCS 5/33(c) (2014). The Board then considers JM’s status report—stating that it only seeks reimbursement of JM’s cleanup costs—

and explains its authority to order cost recovery to a private party such as JM. The Board concludes with JM's request for sanctions against IDOT.

Section 33(c) Factors

In ordering relief, the Board considers facts and circumstances bearing on the reasonableness of IDOT's actions. Specifically, the Board must consider five statutory factors. 415 ILCS 5/33(c) (2014). Based on the Board's analysis of the Section 33(c) factors, the Board finds it appropriate to order relief to address IDOT's open dumping.

Character and Degree of Injury or Interference

As detailed above, ACM was found on the surface of the sites, and is present in soil. Improperly handling ACM waste endangers public health, welfare, and property. USEPA found that removing ACM waste from the site is necessary to protect public health, welfare, or the environment. Exh. 62 at 7 (AOC). The waste has also been deposited in a way that it can be further dispersed in the environment. As noted, asbestos fibers from ACM may become airborne and inhaled. Exh. 65 at 4 (USEPA Enforcement Action Memorandum). This could be through human activity disrupting the site (*id.*), or through natural freeze/thaw cycles (*id.* at 8). ACM waste and asbestos fibers on site pose a threat to the environment, as well as public health. To the extent ACM waste was placed by IDOT, the Board weighs this factor against IDOT.

Social and Economic Value of Pollution Source

JM contends that there is no social or economic value in a pollution source that has been discarded. JM Br. at 48. IDOT argues that road improvements have social and economic value. IDOT Br. at 42. The Board agrees that road improvements have social and economic value, but there is no value in disposing ACM waste to construct roads. The Board therefore weighs this factor against IDOT.

Suitability to Area in Which Located

JM contends that the sites were not permitted for waste disposal and, therefore, the sites were unsuitable for disposing ACM waste there. JM Br. at 49. IDOT agrees that disposing ACM waste is unsuitable on the sites, but contends that it was not responsible for disposing ACM waste there. IDOT Br. at 42. As explained above, the Board finds IDOT responsible for the ACM waste disposed along the south side of Greenwood Avenue. Because ACM waste is unsuitable to the area, the Board weighs this factor against IDOT.

Technical Practicability and Economic Reasonableness

Compliance with the Act is technically practical and economically reasonable. USEPA already has found that removing asbestos is technically feasible and costs are proportional to overall effectiveness of removal. Nothing in the record shows that compliance with the Act is technically impractical or economically unreasonable. As stated by USEPA, "[c]omplete

removal is relatively simple.” Exh. 65 at 17 (USEPA Enforcement Action Memorandum). The Board weighs this factor against IDOT.

Subsequent Compliance

ACM waste and asbestos remain in soil at Site 3 and Site 6. IDOT has not taken any steps to comply with the Act. The Board therefore weighs this factor against IDOT.

JM’s Status Report on Cleanup

JM recently informed the Board, through a filing styled as a status report, that it no longer seeks to force IDOT to participate in the USEPA-mandated cleanup at Site 3 and Site 6. Rather, JM seeks reimbursement for cleanup costs. IDOT responded that the Board should deny leave to file the status report because, according to IDOT, the report contains no new information, is vague, and seeks monetary relief that the Board may not grant. The Board already explained why it can grant such relief, and the status report contains new information relevant to the relief sought. The Board considers the status report as a motion to amend the complaint and, for these reasons, grants the motion.

Previously, in its complaint, JM requested the following relief:

Requiring [IDOT] to participate in the future response action on Sites 3 and 6 – implementing the remedy approved or ultimately approved by EPA – to the extent attributable to IDOT’s violations of the Act Compl. at 20.

Although the complaint included a catchall request for other relief the Board deems appropriate, JM did not request a civil penalty and did not request reimbursement of its costs. *Id.*

However, in its post-hearing brief, JM requested \$685,000 to recover investigation costs incurred after 2012, when USEPA issued the enforcement action memorandum. JM Br. at 6. JM qualifies this request by stating that it only seeks these costs “if the Board were to find that JM can seek past costs without running afoul of any affirmative defense.” *Id.*

Sometime in late 2016, JM completed a cleanup on Site 3 and Site 6. JM estimates the cost of this work is \$2,897,000 but does not identify the final cost. In addition, JM previously spent \$685,000 in investigation and remediation costs. JM now asks the Board to order IDOT to reimburse JM’s costs of \$3,582,000 (\$2,897,000 + \$685,000). JM no longer seeks IDOT’s participation in the cleanup.

Private Cost Recovery

The Act does not expressly allow the Board to order a violator to reimburse cleanup costs to a private party. *Compare* 415 ILCS 5/22.2(f) (2014) (State or local government may obtain reimbursement of costs spent to address release of hazardous substance or pesticide). The Act does specify other forms of relief. Specifically, the Board may order a violator to cease and desist from violations, impose civil penalties according to Section 42, revoke a permit, or require

a performance bond to assure that a violation is corrected. 415 ILCS 5/33(b) (2014). Section 33(a) of the Act also requires the Board to issue final orders “as it shall deem appropriate under the circumstances.” 415 ILCS 5/33(a) (2014).

Using this appropriateness requirement, the Board first recognized its authority to order reimbursement for cleanup costs in Lake County Forest Preserve District v. Ostro, PCB 92-80 (Mar. 31, 1994). In Ostro, the Board found that the prior property owner open dumped 55-gallon paint barrels. Ostro, PCB 92-80, slip op. at 7. The Board ordered the prior owner to investigate and remediate contamination. *Id.* at 12. The Board also found it had authority under the Act to order the prior owner to reimburse the current owner’s cleanup costs. *Id.* at 13. The Board then ordered additional hearing on the amount spent. *Id.* The Board explained that Section 33 of the Act gives it broader authority than circuit courts in enforcing the Act. *Id.* Also, awarding cleanup costs furthers the Act’s purposes by encouraging prompt remediation. *Id.*

In further support, the Board cited People v. Fiorini, 143 Ill. 2d 318, 574 N.E.2d 612 (1991). There, the Attorney General brought an enforcement action against owners of a dump site. The owners then sued other entities who generated the waste at the dump site. On a motion to dismiss the complaint against the generators, the Illinois Supreme Court allowed the claim to proceed and declined to hold that the remedy would not be available under appropriate facts.

Following Ostro, the Board consistently has allowed private cost recovery claims to survive procedural challenges such as motions to dismiss. However, the Board has not reached the merits in these cases or ordered reimbursement after Ostro. *See, e.g., Caseyville Sport Choice v. Seiber*, PCB 08-30 (Feb. 3, 2011).

In the absence of Illinois court opinions⁴, the federal district court has considered whether Illinois law allows reimbursement of cleanup costs. In early cases after Ostro, the federal court denied motions to dismiss and allowed cost recovery claims to proceed. For example, in Midland Life Insurance Co. v. Regent Partners, Midland cleaned up contamination from a former industrial dry cleaning operation. 1996 WL 604038 (N.D. Ill. Oct. 17, 1996). Midland alleged open dumping violations under Section 21 of the Act and sought to recover its cleanup costs. After reviewing the Board’s decision in Ostro, among other opinions, the court found an implied right for private parties to recover cleanup costs under the Act. *See also Singer v. Bulk Petroleum Corp.*, 9 F. Supp. 2d 916, 925 (N.D. Ill. 1998); Krempel v. Martin Oil Marketing, Ltd., 1995 WL 733439 (N.D. Ill. Dec. 8, 1995).

The federal court changed course in Chrysler Realty Corp. v. Thomas Indus., 97 F. Supp. 2d 877 (N.D. Ill. 2000). There, the court dismissed a cost recovery action brought under the Act. The court first concluded that the Act does not contain an express right of action for a private party to recover its costs. *Id.* at 879. The court then considered whether a right of action can be implied from the Act. *Id.* The court relied on a then-recent Illinois Supreme Court decision in Fisher v. Lexington Health Care Inc., 188 Ill. 2d 455 (1999), setting the standard for finding an implied private right of action in an Illinois statute. Applying that standard, the court concluded

⁴ *But see NBD Bank v. Krueger Ringier, Inc.*, 292 Ill. App. 3d 691 (1st Dist.1997) (affirmed dismissal of cost recovery count in tort action to address petroleum contamination).

that the Illinois Supreme Court would not find in the Act an implied right allowing private parties to recover cleanup costs. This is because the Act already provides for citizen enforcement before the Board and State enforcement. The federal district court has consistently applied this analysis in later cost recovery cases. *See Neumann v. Carlson Environmental, Inc.*, 429 F. Supp. 2d 946 (N. D. Ill. 2006); *Great Oak LLC v. Begley Co.*, 2003 WL 880994 (N.D. Ill. Mar. 5, 2003); *Norfolk Southern Ry. v. Gee Co.*, 2001 WL 710116 (N.D. Ill. June 25, 2001).

Indeed, the Act provides for citizen enforcement under Section 31(d), which allows a person to file with the Board a complaint against any person violating the Act. 415 ILCS 5/31(d) (2014). This cause of action under the Act must be brought at the Board and not circuit court or federal court. Available court opinions do not address citizen suits brought to the Board. JM, however, filed a complaint with the Board under Section 31(d). Specifically, JM alleges violations of Section 21 of the Act for open dumping. Unlike the federal cases, JM did not file a private suit for cost recovery under the Act in federal court. None of the federal cases, therefore, supports an argument to deny reimbursement for JM's costs.

An administrative agency such as the Board is a creature of statute and any authority claimed by the Board must be found in the Act. *See Granite City Division of National Steel Co., et al. v. PCB*, 155 Ill.2d 149, 171 (1993). In JM's citizen suit, Section 33 of the Act dictates what type of relief the Board has authority to order. Section 33(a) requires the Board to issue orders it deems appropriate. 415 ILCS 5/33(a) (2014). The Board continues to find it appropriate that a party recover the cost of performing cleanup as a result of another party's violations. Section 2(b) of the Act states that the Act's purpose is to restore and protect the environment and assure that adverse effects on the environment are borne by those who cause them. 415 ILCS 5/2(b) (2014). Reading the Act to allow a private party to recover cleanup costs furthers the intent of the Act by encouraging prompt cleanup and ensuring that the responsible party pays for its share.

Sanctions

JM requests that the Board sanction IDOT for false and misleading representations. JM Br. at 58. Specifically, JM asks that the Board preclude IDOT from offering defenses regarding liability associated with Parcel 0393, and award JM attorney fees attributable to IDOT's misrepresentations. *Id.*

The Board may order sanctions against any person that unreasonably fails to comply with any Board order, hearing officer order, or provision of the Board's procedural rules. 35 Ill. Adm. Code 101.800(a). The Board considers factors including: severity of the failure to comply; history of the proceeding; delay or prejudice in the proceeding; and bad faith by the offending person. 35 Ill. Adm. Code 101.800(c). The Board is precluded from awarding attorney fees as a sanction. *ESG Watts, Inc. v. PCB*, 286 Ill. App. 3d 325, 339 (3rd Dist. 1997); 35 Ill. Adm. Code 101.800(b) (types of sanctions Board may impose). The Board does not find any bad faith in IDOT's interpretations of its right-of-way interests. Similarly, both parties sought extensions throughout this proceeding and neither the Board nor the hearing officer found bad faith on the part of either party in prolonging this proceeding. The Board finds no bad faith now and denies JM's request for sanctions against IDOT.

Additional Hearing

As explained above, the Board finds that IDOT caused and allowed open dumping of ACM waste. Specifically, IDOT caused open dumping of ACM waste along the south side of Greenwood Avenue within Site 6 (1S-4S) and adjacent areas along the north edge of Site 3 (B3-25, B3-16, and B3-15). IDOT continues to allow open dumping as long as ACM waste remains in these locations. Additionally, IDOT allowed open dumping on Parcel 0393 (B3-25, B3-15, B3-16, B3-50, and B3-45 (to the extent sample B3-45 falls on Parcel 0393)).

JM seeks reimbursement of \$3,582,000 from IDOT. However, JM's status report provides no detail as to what work it performed on Site 3 and Site 6. Further, JM only provides estimated costs and not the actual amount spent. The Board, therefore, is unable to determine the reasonable costs that may be attributable to IDOT. The Board notes that the requirement of Section 58.9(a) of the Act to determine IDOT's proportionate share of JM's costs does not directly apply because the sites are subject to a USEPA order. *See* 415 ILCS 5/58.1(a)(iv) (2014), 58.9(a); *see also* 35 Ill. Adm. Code Part 741.

Having found violations, and made the above determinations as to the Section 33(c) factors and the availability of cost recovery, the Board finds that further hearing is necessary. The Board directs the hearing officer to conduct a hearing for evidence on the following issues:

1. The cleanup work performed by JM in the portions of Site 3 and Site 6 where the Board found IDOT responsible for ACM waste present in soil.
2. The amount and reasonableness of JM's costs for this work.
3. The share of the JM's costs attributable to IDOT.

After this hearing is completed, the Board will enter its final order awarding cleanup costs as the Board deems appropriate under the facts and circumstances.

CONCLUSION

The Board finds that IDOT caused open dumping of ACM waste along the south side of Greenwood Avenue within Site 6 and adjacent areas along the north edge of Site 3. IDOT allows open dumping to continue as long as ACM waste remains at these locations. The Board further finds that IDOT allowed open dumping of ACM waste on the portion of Site 3 within Parcel 0393. The Board therefore finds that IDOT violated Section 21(a) of the Act. 415 ILCS 21(a) (2014). IDOT also violated Section 21(d) by conducting an unpermitted waste disposal operation, and Section 21(e) by illegally disposing waste. 415 ILCS 5/21(d), (e) (2014). The Board dismisses the alleged violations of historic Section 1021 of the Act because those allegations are unnecessary. Due to the incomplete record on cleanup costs, the Board directs the hearing officer to conduct a hearing on this issue.

IT IS SO ORDERED.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above interim opinion and order on December 15, 2016, by a vote of 4-0, Member Santos voted Present.

A handwritten signature in black ink that reads "John T. Therriault". The signature is written in a cursive style with a long horizontal stroke at the end.

John T. Therriault, Clerk
Illinois Pollution Control Board