

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 August 12, 2016, I caused to be filed with the Clerk of the Pollution Control Board of the State of Illinois, *Complainant's Motion for Leave to File Third Amended Complaint to Conform Pleadings to Proofs*, 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: August 12, 2016

Respectfully submitted,

BRYAN CAVE LLP

Attorneys for Johns Manville

By: /s/ Susan Brice
Susan Brice, ARDC No. 6228903
Lauren J. Caisman, ARDC No. 6312465
161 North Clark Street, Suite 4300
Chicago, Illinois 60601
(312) 602-5124
Email: susan.brice@bryancave.com
lauren.caisman@bryancave.com

SERVICE LIST

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

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

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

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

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

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**COMPLAINANT’S MOTION FOR LEAVE TO FILE
THIRD AMENDED COMPLAINT TO CONFORM PLEADINGS TO PROOFS**

Complainant, JOHNS MANVILLE (“JM”), through undersigned counsel, pursuant to 735 ILCS § 5/2-616, moves for leave to file a Third Amended Complaint against Respondent ILLINOIS DEPARTMENT OF TRANSPORTATION (“IDOT”) to conform the pleadings to the proof. This Motion is based upon the testimony that was elicited and exhibits that were admitted into evidence at hearing in this matter on May 23-25, 2016 and June 23-24, 2016. In support of its Motion, JM states as follows:

INTRODUCTION

JM moves to amend the pleadings to conform to the proofs, pursuant to 735 ILCS § 5/2-616. JM seeks leave to amend its pleading to allege that: (1) IDOT has, since 1971, owned, held an interest in, and/or controlled a right of way on Site 6 and Site 3, including rights of way on both the southern and northern sides of Greenwood Avenue and that IDOT (“ROWs”) (2) has

violated not only the current version of Section 21 of the Illinois Environmental Protection Act, but also the version that was in place in 1970 and all subsequent versions thereafter.

JM's Second Amended Complaint encompasses allegations that IDOT violated the Act as to Site 3 as well as the north and south sides of Site 6. (*See* ¶¶ 14, 17, 18, 23, 32, 33, 56, 67, 68, 71, 73.)

But the Complaint did not specifically make allegations relating to the ROW on the north side of Site 6 and did not specifically allege that the ROW on the south side of Greenwood encompassed portions of Site 3. Thus, JM seeks to clarify this in a Third Amended Complaint, to the extent the Board deems this necessary.

The contamination and liability associated with the ROW on the north side of Greenwood was highlighted by IDOT at hearing and IDOT admitted that the ROW on the south side of Greenwood encompassed portions of Site 3 prior to trial and understood this at trial. (*See* Trial Exhibits 90, 164, 202; Transcript of May 24, pp. 177:19-179:3; Transcript of June 23, pp. 170:7-24; 217:9-20; Transcript of June 24, pp. 197:13-199:7; 201:21-202:22; 203:18-24; 207:16-208:4.) Once conformed, it is JM's intent that the allegations regarding violations of 21(a), (c) and (e) apply equally to the ROW on the south side (which includes both portions of Site 3 and 6) as well as the ROW on the northwest side of Greenwood (which includes portions of Site 6).

JM does not believe that it needs to allege violations of prior versions of the Act. The Act can be applied retroactively to post-1970 conduct and JM has alleged that the violations are "ongoing." (*See* JM's Partial Motion to Strike Affirmative Defenses, filed on April 20, 2016, ¶ 14.) But out of an abundance of caution, it seeks to do so.

In its Affirmative Defenses, filed on April 12, 2016, IDOT asserted that "IDOT's alleged actions were not a violation of the Environmental Protection Act at the time that they occurred." (*See* p. 34, Seventh Affirmative Defense.) While the Board granted JM's Motion to Strike that

affirmative defense on the grounds that this defense denied JM's allegations, but did not assert new matter (*see* May 19, 2016 Order, p. 3), it is unclear whether these allegations are still at issue.

To the extent that they are, JM now seeks to amend its Complaint to allege that IDOT violated the Illinois Environmental Protection Act as it existed when IDOT's violations first occurred. IDOT previously consented to JM's Complaint being viewed as conforming to the evidence in this regard and as having incorporated allegations that, in the alternative, IDOT violated the prior versions of the Illinois Environmental Protection Act and Board regulations. (*See* IDOT's Response to JM's Motion for Leave to File a Reply in Support of Its Partial Motion to Strike IDOT's Affirmative Defenses, filed on May 10, 2016, p. 2 ("IDOT believes handling the matter in this fashion would result in a fair and equitable resolution.")) Since JM has already alleged that IDOT's violations are ongoing, the conformed Third Amended Complaint is intended to allege that IDOT violated the 1970 Act and all subsequent versions of the Act.

TRIAL TESTIMONY

1. In order for IDOT to construct the Amstutz Expressway (the "Project"), IDOT had to and did obtain a permanent easement/right of way in the form of a "Grant for Public Highway" from Commonwealth Edison over Parcel 0393, which encompassed land on the southern side of Greenwood Avenue (hereinafter referred to as the "S. ROW" or Parcel No. 0393). (*See* Transcript of May 24, 2016, pp. 122:6-124:20; Trial Exhibit 41: Trial Exhibit 15.)

2. The S. ROW actually encompasses portions of Site 6 and Site 3. (*See* Trial Exhibit 15; Transcript of May 24, p. 122:6-123:17. IDOT admitted this prior to trial. (Trial Exhibit 3I-3, IDOT's Responses to Request for Admissions Nos. 1, 2 (admitting that the "Grant for Public Highway" encompasses portions of Site 6 and Site 3).)

3. IDOT's expert prepared and testified about a demonstrative exhibit that identified an "IDOT Right of Way" on the northwest portion of Site 6 ("N. ROW"). (See Transcript of May 25, pp. 149:21-150:17; Trial Exhibit 202.) It is clear from a cursory review of Trial Exhibit 202 that the N. ROW mirrors the S. ROW. (See also Trial Exhibit 77-32, 77-35, 77-46, 77-220; Trial Exhibit 90-5.) IDOT used both of these ROWs to build embankments on both sides of Greenwood during the Project and both ROWs are still held by IDOT. (Transcript of May 25, pp. 264:23-268:15; Transcript of June 23, p. 102:14-24; Trial Exhibit 202.) IDOT's expert also admitted that ACM is found within the N. ROW. (See Trial Exhibit 90-3; Trial Exhibit 202; Trial Exhibit 164; Trial Exhibit 184; Transcript of May 24, pp. 177:19-179:3; Transcript of June 23, pp. 170:7-24; 217:9-20; Transcript of June 24, pp. 197:13-199:7; 201:21-202:22; 203:18-24; 207:16-208:4;.)

4. At trial, JM's expert discussed prior versions of the Act and testified that IDOT also violated the Act that was in place in the 1970s, Section 1021, IL ST CH 111 ½ ¶ 1021. (See Transcript of June 24, pp. 234:2-236:17; Trial Exhibit 81.)

5. JM's Second Amended Complaint already alleged that IDOT's violations are "continuing in nature." (See ¶ 71.)

6. In light of this trial testimony, JM seeks to amend its allegations and file a Third Amended Complaint to conform the pleadings to this evidence. A copy of JM's proposed Third Amended Complaint is attached hereto as **Exhibit A** and a redline between the proposed Third Amended Complaint and JM's Second Amended Complaint is attached hereto as **Exhibit B**.

PROPOSED CONFORMITIES

IDOT Has Owned, Held an Interest In, and/or Controlled A Right of Way on the North Side of Greenwood Avenue

7. JM seeks to amend its allegation that the State of Illinois, acting by and through IDOT, has, since 1971, owned, held an interest in, and/or controlled a right of way on Site 6 and Site 3, including the ROWs on both the southern and northern sides of Greenwood Avenue, which is referred to in the Third Amended Complaint as the “ROWs.” (See Exhibit A, ¶ 12.) As noted above, this expanded definition of ROW clarifies that JM is alleging that IDOT violated Section 21(a), (c) and (e) with respect to the S. ROW (which includes both portions of Site 3 and 6) as well as the N. ROW (which includes portions of Site 6).

IDOT Violated Prior Versions of the Act

8. JM also seeks leave to add a Count II for violations of the historical version of the Illinois Environmental Protection Act that existed in the 1970s to its Complaint. (*Compare supra* ¶ 5 with Exhibit A, ¶¶ 77-96.)

LEGAL STANDARD

9. “Section 2-616(a) of the Code provides that at any time before final judgment, the court may permit amendments on just and reasonable terms to enable the plaintiff to sustain the claim brought in the suit.” *Ahmed v. Pickwick Place Owners’ Ass’n*, 385 Ill. App. 3d 874, 881 (1st Dist. 2008). “A pleading may be amended at any time, before or after judgment, to conform the pleadings to the proofs, upon terms as to costs and continuance that may be just.” 735 ILCS § 5/2-616(c). “Amendments to pleadings should be permitted if they further the ends of justice.” *Kern v. DaimlerChrysler Corp.*, 364 Ill. App. 3d 708, 712 (5th Dist. 2006).

10. Where amendment is made to conform the pleadings to the proofs, amendment should be allowed if the evidence already produced supports the evidence. *See Vill. of Wadsworth v. Kerton*, 311 Ill. App. 3d 829, 842-843 (2d Dist. 2000) (holding that trial court abused its discretion in not allowing amendment where evidence at trial supported the

amendment; *Cretton v. Protestant Mem. Med. Ctr., Inc.*, 371 Ill. App. 3d 841, 860, 862 (5th Dist. 2007) (allowing amendment where evidence produced supported the amendment); *Pry v. Alton & S. Ry. Co.*, 233 Ill. App. 3d 197, 213 (5th Dist. 1992) (“Here, the amended pleadings were supported by the proof presented at trial, and the court’s allowance of the amended pleadings to conform to the proof was not an abuse of discretion.”).

11. Further, the Board possesses broad discretion to allow an amendment and in exercising this discretion, the Board should consider: “(1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleading could be identified.” *Loyola Academy v. S&S Roof Maint., Inc.*, 146 Ill. 2d 263, 273 (1992); *In re Estate of Hoover*, 155 Ill. 2d 402, 416 (1993).

ARGUMENT

12. The proposed Third Amended Complaint would conform JM’s allegations to the evidence presented at hearing of this matter on May 23-25, 2016 and on June 23-24, 2016. As demonstrated above (*supra* ¶¶ 1-10), the specific allegations JM seeks to amend are tied to the testimony elicited and exhibits already admitted into evidence. Thus, amendment to conform JM’s operative Complaint to the proofs is appropriate and should be allowed. *See Cretton*, 371 Ill. App. 3d at 860, 862; *Pry*, 233 Ill. App. 3d at 213. It would be an abuse of the Board’s discretion to hold otherwise. *See Vill. of Wadsworth*, 311 Ill. App. 3d at 842-843.

13. JM’s Motion is timely. It was filed after the proofs were adduced and prior to judgment. Moreover, this Motion was filed shortly after the full transcript of the hearing became available.

14. The proposed amendment would not cause prejudice or surprise to IDOT. IDOT had ample opportunity to examine and cross examine all witnesses at trial, and JM is only seeking to match its allegations with the evidence presented at trial.

15. Further, IDOT cannot argue prejudice. IDOT already admitted in discovery propounded by JM that Parcel No. 0393 encompasses both part of Sites 3 and 6. (*See* Trial Exhibit 3I-3, IDOT's Responses to Request for Admissions Nos. 1, 2.) And, it was IDOT's own expert who injected the ownership of the north side of Site 6 into this litigation and admitted that the contamination was within an existing IDOT ROW. (*See* Trial Exhibit 202.)

16. Finally, IDOT previously agreed that it would be appropriate for JM's pleadings to conform to the evidence with respect to alleging violations of the historical text of the Illinois Environmental Protection Act and associated Board regulations:

JM appears to acknowledge that it does have the opportunity to present its case when alternatively, JM asks the Board to issue an order providing that JM's Second Amended Complaint be viewed as conforming to the evidence to be presented and incorporating allegations that in the alternative IDOT violated the prior versions of the Act and Board regulations. IDOT believes handling the matter in this fashion would result in a fair and equitable resolution.

(*See* IDOT's Response to JM's Motion for Leave to File a Reply in Support of Its Partial Motion to Strike IDOT's Affirmative Defenses, filed on May 10, 2016, p. 2.) The same should hold true with respect to the other allegations JM seeks to conform to the proofs elicited at trial.

17. The Board has granted numerous amendments in other actions, under similar circumstances after specific proof was adduced at hearing. *See, e.g., People of the State of Illinois v. ESG Watts, Inc.*, PCB 96-107, 1998 WL 54020, *3 (Feb. 5, 1998) (granting complainant's motion to amend complaint after hearing); *Environmental Protection Agency v. D & N Trucking*, PCB 74-390, 1975 WL 6754, *1 (June 13, 1975) (granting motion to amend

complaint in order to have the pleadings conform with evidence and testimony presented at hearing). The Board should do the same here.

WHEREFORE, for the foregoing reasons, Complainant respectfully requests that the Board grant it leave to file its Third Amended Complaint.

Dated: August 12, 2016

Respectfully submitted,

BRYAN CAVE LLP

Attorneys for Johns Manville

By: /s/ Susan Brice
Susan Brice, ARDC No. 6228903
Lauren J. Caisman, ARDC No. 6312465
161 North Clark Street, Suite 4300
Chicago, Illinois 60601
(312) 602-5124
Email: susan.brice@bryancave.com
lauren.caisman@bryancave.com

SERVICE LIST

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

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

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

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

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

EXHIBIT A

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THIRD AMENDED COMPLAINT

Complainant JOHNS MANVILLE (“JM”) hereby complains of Respondent ILLINOIS DEPARTMENT OF TRANSPORTATION (“IDOT”) as follows:

GENERAL ALLEGATIONS

Jurisdiction and Parties

1. This Complaint is brought before the Illinois Pollution Control Board (the “Board”) by Complainant JM on its own motion, pursuant to Section 31(d) of the Illinois Environmental Protection Act (“Act”), 415 ILCS 5/31(d).

2. Section 31(d) of the Act provides that “[a]ny person may file with the Board a complaint . . . against any person allegedly violating this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit, or any Board order.” 415 ILCS 5/31(d).

3. “Person” is defined under the Act as “any individual, partnership, co-partnership, firm, company, limited liability company, corporation, association, joint stock company, trust,

estate, political subdivision, state agency, or any other legal entity, or their legal representative, agent or assigns.” 415 ILCS 5/3.315.

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

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

Factual Background

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

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

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

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

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

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

12. On information and belief, since at least 1971, the State of Illinois, acting by and through IDOT (or its predecessor agency), has owned, held an interest in and/or controlled portions of Site 3 and Site 6, including rights of way on both the southern (“S. ROW” or “Parcel No. 0393”) and northern sides (“N. ROW”) of Greenwood Avenue. The S. ROW encompasses portions of Site 6 and Site 3. The N. ROW is located on the northwest portion of Site 6. Together, these areas shall be referred to hereafter as the “ROWs.” Other parts of Site 6 appear to be owned by the City of Waukegan, which is not a party to the AOC.

13. Site 3 is located south of Greenwood Avenue and east of North Pershing Road in Waukegan, Illinois.

14. Site 6 is located on the north and south edges of Greenwood Avenue east of North Pershing Road and north of Site 3 in Waukegan, Illinois.

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

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

17. Investigations of Site 6, including on the ROWs, have similarly revealed ACM at the surface and at a depth of one to three feet below ground surface. Pieces of Transite® pipe, a non-friable form of ACM, are the predominant ACM found at Site 3 and Site 6.

18. The northwest portion of Site 3 and the west portion of Site 6, including the ROWs, also contain miscellaneous fill material, some of which has been found to contain asbestos.

19. Many utility lines run through Site 3 and Site 6, including the ROWs.

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

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

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

23. During this construction, IDOT built embankments on the north and south side of Greenwood Avenue, including within the ROWs. These embankments involved the removal of “unsuitable material” and the placement of fill up to and above the original grade.

24. Also during construction, IDOT built three detour roads (the “Detour Roadways”).

25. Two of these detour roads, Bypasses A and B, cut through Sites 3 and 6.

26. Bypass A begins on Site 6 and cuts a large, curved swath through the former parking lot of Site 3, which was destroyed by IDOT during this construction.

27. Bypass B cuts through the western portion of Sites 3 and 6.

28. Bypasses A and B were used until the ramp construction was completed in approximately 1976.

29. Records show that a contractor was paid a “special excavation” fee to “remove and obliterate the Detour Roadways” after construction was complete. Neither Bypasses A or B nor the former parking lot are intact at Sites 3 and 6.

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

31. IDOT was not ultimately made a party to the 2007 AOC with EPA. At the time the AOC was signed, EPA took the position that there was insufficient evidence to name IDOT because IDOT did not admit to burying any ACM on or near Site 3 or 6.

32. Subsequent investigations have revealed buried Transite® pipe in the area. Portions of Transite® pipe have been found in the south side shoulder of Greenwood Avenue on parts of Site 3 and 6, including on the ROWs, at various depths, including at a depth of approximately 2.5 feet below the ground surface. The elevation of this Transite® pipe is roughly one foot higher than the adjacent surface.

33. Review of IDOT engineering drawings indicates that IDOT, among other things, used ACM as fill when building the embankments to Greenwood Avenue on Sites 3 and 6, including on the ROWs.

34. Review of IDOT engineering drawings indicates that IDOT, among other things, used, spread and/or buried ACM during its construction and/or obliteration of Bypasses A and B.

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

36. After several rounds of revisions in consultation with EPA, JM and ComEd submitted their final EE/CA to EPA on April 4, 2011 (“EE/CA Revision 4”). EE/CA Revision 4 evaluated four potential response action options for Sites 3 and 6, based on discussions with EPA.

37. EE/CA Revision 4 identified “Alternative 2” as the preferred remedy for Site 3. This alternative included limited soil excavation (approximately 660 cubic yards) in the northeast corner of Site 3 to a depth of approximately three (3) feet below the ground surface and installation of a vegetated soil barrier over the entire site, at an estimated cost of between \$595,000 and \$630,000.

38. EE/CA Revision 4 identified “Alternative 3” as the preferred remedy for Site 6. This alternative was described as a “hybrid remedy” combining excavation and off-site disposal of approximately 2400 cubic yards of ACM-affected soil with a vegetated soil barrier running adjacent to Site 3 to avoid disrupting current stormwater drainage patterns. The total cost to implement Alternative 3 on Site 6 was estimated at between \$417,500 and \$500,000.

39. EE/CA Revision 4 was approved by EPA with modifications on February 1, 2012. In its EE/CA approval letter, EPA proposed a new alternative remedy, which it termed “Alternative 5.”

40. EPA’s Alternative 5 included a new proposed remedy for Site 3—termed “Modified Alternative 2”—which was a markedly different remedy from those previously proposed by JM and ComEd. This modified alternative not only included a requirement to

remove all asbestos-impacted soils to a depth of four (4) feet below the ground surface in the northeast portion of Site 3, but also required JM and ComEd to create a clean corridor for all utilities running through Site 3 by excavating all soil to a depth of two (2) feet below each utility line and a minimum width of twenty-five (25) feet centered on each utility line. EPA's estimated cost for construction of this Modified Alternative 2 was \$2,196,000.

41. EPA's Alternative 5 also included a new proposed remedy for Site 6. This alternative—which EPA termed “Modified Alternative 1”—required excavation of “all soil contaminated with ACM and/or asbestos fibers at Site 6 including, but not limited to the area identified as “Area of Excavation for ACM Affected Soil” and “Paving and Potential Subsurface ACM” in Figure 13 in EE/CA” and to make special arrangements necessary for utilities (e.g., additional support or removal and replacement) in areas where removal of ACM is required below three (3) feet below the ground surface. Further, because “Greenwood Avenue was not sampled during the EE/CA Study” and “[i]t is unknown if ACM is located under the Greenwood Avenue Paved Road Surface,” EPA required JM to obtain an environmental covenant signed by the owner of portions of Site 6, the City of Waukegan. EPA's estimated cost for construction of this Modified Alternative 1 was \$1,869,000.

42. On November 30, 2012, EPA issued an Action Memorandum selecting a remedy for the Southwestern Sites, including the Modified Alternative 2 that it had proposed for Site 3 and the Modified Alternative 1 it had proposed for Site 6. However, the Action Memorandum included further modifications that were not previously included in the February 1, 2012 EE/CA approval letter.

43. Specifically, as to Site 3, the Modified Alternative 2 set forth in the Action Memorandum requires JM and ComEd to create a clean corridor for each utility line “extending

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

44. Similarly, as to Site 6, whereas the Modified Alternative 1 set forth in the EE/CA approval letter had merely required JM and ComEd to “make special arrangements necessary for utilities” in areas where ACM may extend below three (3) feet below the ground surface, the Modified Alternative 1 set forth in the Action Memorandum requires JM and ComEd to create a clean corridor for each utility line by excavating “all soil and sediment to a minimum width of 25 feet centered on any utility line (limited only by the edge of Greenwood Avenue to the extent it is demonstrated to provide a competent barrier to excavation) and to a minimum depth of two feet below the deepest utility line (and extending to a depth needed for protectiveness of utility workers at the deepest utility line) with placement of a continuous barrier at the base and sides of the excavation to inhibit further excavation beyond the clean fill.” No “alternative compliance alternative” was proposed for Site 6.

45. The Action Memorandum states that a response action at the Southwestern Sites is necessary “to abate or mitigate releases of hazardous substances that may present an imminent and substantial endangerment to public health and the environment posed by the presence of soils that are contaminated with hazardous substances.” It further states that a response action is

necessary to “reduce the actual and potential exposure to the nearby human population and the food chain to hazardous substances” and that the action is “expected to result in the removal and capping of contaminated materials at or near the surface which present a threat to trespassers or workers at the Site.”

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

47. The Action Memorandum directs JM and ComEd to conduct the following response actions as the selected remedy for Site 3:

- a. Excavate soil in the northeast portion of the Site 3 (approximately 0.14 acres) identified as the “limited excavation area,” to remove all ACM and asbestos fibers (estimated to a depth of 4 feet);
- b. Excavate soil and sediments contaminated with ACM and/or asbestos fibers to a minimum depth of 2 feet below each utility line and extending to a depth requested by the owner of each utility line with placement of a continuous barrier at the base and sides of the excavation to inhibit further excavation and/or exposure beyond the clean fill and a minimum width of 25 feet centered on each utility line and clean backfill to provide a clean corridor for utility maintenance on

Site 3 or, alternatively, abandon and relocate utility lines, conditioned on signed voluntary subrogation agreements from the utility owners;

- c. Conduct post-excavation sampling and analysis to confirm there are no remaining ACM or asbestos fibers in soil or sediment within either the limited excavation area or within each utility corridor;
- d. Dispose of all excavated materials in an off-site landfill;
- e. Place and maintain a vegetated soil cover in any areas of Site 3 where ACM or asbestos fibers remain in place;
- f. Implement certain institutional controls in the form of an environmental covenant, pursuant to the Illinois Environmental Covenants Act, 765 ILCS Ch. 122;
- g. Reroute, pipe, or remove surface water as needed to perform the required excavation;
- h. Install and maintain security fencing with warning signs every 100 feet and at all gates completely surrounding all areas where ACM or asbestos fibers remain in place;
- i. Conduct long-term operation and maintenance (O&M) of the vegetated soil cover for a minimum of 30 years beginning when construction is completed.

48. EPA has estimated the cost of construction of the selected remedy for Site 3 at between \$1,705,696 and \$2,107,622. JM disputed portions of EPA's remedy selected for the Southwestern Sites on December 20, 2012 and May 16, 2013, including certain of EPA's cost analyses.

49. The Action Memorandum directs JM and ComEd to conduct the following response actions as the selected remedy for Site 6, including the ROWs:

- a. Excavate all soil contaminated with ACM and/or asbestos fibers without limitation to depth including at a minimum, but not limited to the area identified as “Area of Excavation for ACM Affected Soil” and “Paving and Potential Subsurface ACM” in Figure 13 of the EE/CA (which, in non-utility areas, is anticipated to extend to a minimum depth of three (3) feet below ground surface);
- b. Excavate soil and sediments contaminated with ACM and/or asbestos fibers to a minimum depth of 2 feet below each utility line and extending to a depth requested by the owner of each utility line with placement of a continuous barrier at the base and sides of the excavation to inhibit further excavation and/or exposure beyond the clean fill and a minimum width of 25 feet centered on each utility line and clean backfill to provide a clean corridor for utility maintenance on Site 6;
- c. Conduct post-excavation sampling and analysis to confirm there are no remaining ACM or asbestos fibers in soil or sediment within either the limited excavation area or within each utility corridor;
- d. Dispose of all excavated materials in an off-site landfill or, with approval from EPA, in the JM industrial canal and/or pumping lagoon under a vegetated soil cover;
- e. Implement certain institutional controls in the form of an environmental covenant signed by the City of Waukegan, pursuant to the Illinois Environmental Covenants Act, 765 ILCS Ch. 122, or, if this environmental covenant is not feasible, provide for the investigation and full removal of any ACM or asbestos

fibers that may remain under Greenwood Avenue to prevent its potential release during road or utility maintenance;

- f. If during or after soil excavation at Site 6, samples and/or visual observation indicate the presence of ACM or asbestos fibers under Greenwood Avenue, then install and maintain security fencing with warning signs every 100 feet and at all gates completely surrounding all areas where ACM or asbestos fibers remain in place.

50. EPA has estimated the cost of construction of the selected remedy for Site 6 at \$1,868,790. JM disputed portions of EPA's remedy selected for the Southwestern Sites on December 20, 2012 and May 16, 2013, including certain of EPA's cost analyses.

51. EPA issued a Notice to Proceed with the selected remedy for all of the Southwestern Sites on May 6, 2013. Under the terms and conditions of the AOC, this Notice to Proceed triggers a 120-day period within which JM and ComEd must submit to EPA a Removal Action Work Plan ("RAWP") for performing the response actions at the Southwestern Site Area.¹

52. JM submitted a draft RAWP for the Southwestern Site Area to EPA in November 2013 and the agency provided comments on December 11, 2013.

53. JM submitted a final RAWP to EPA on January 24, 2014. The agency has not yet approved the final RAWP.

54. With the exception of removing surficial ACM, no response action has commenced at Site 3 or Site 6.

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

COUNT I

Violations of Section 21 of the Illinois Environmental Protection Act

55. Complainant realleges and incorporates herein the allegations contained in paragraphs 1-54 of this Third Amended Complaint as if set forth herein in full.

56. Respondent IDOT's actions in using, spreading, burying, placing, dumping, disposing of and abandoning ACM waste, including Transite® pipe, throughout Site 3 and portions of Site 6, including the ROWs, and in using ACM waste as fill during construction of the Greenwood Avenue ramp and expressway bypass from 1971 to 1976 constitute violations of Section 21 of the Illinois Environmental Protection Act ("Act").

57. Section 21 of the Act, 415 ILCS 5/21, provides, in pertinent part:

No person shall:

(a) Cause or allow the open dumping of any waste; [or]

(e) Dispose, treat, store, or abandon any waste, or transport any waste into this State for disposal, treatment, storage or abandonment, except at a site or facility which meets the requirements of this Act and of regulations and standards thereunder.

58. Section 21 of the Act also provides that no person shall "conduct any waste-storage, waste-treatment or waste-disposal operation" without a permit issued by the agency or in violation of any regulations or standards adopted by the Board. 415 ILCS 5/21(d).

59. Section 3.535 of the Act, 415 ILCS 5/3.535, defines "waste" as:

any garbage, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility or other discarded material, including solid, liquid, semi-solid, or contained gaseous material resulting from industrial, commercial, mining and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows, or coal-combustion products . . . or industrial discharges which are point sources subject to permits under Section 402 of the Federal Water Pollution Control Act, as now or hereafter amended, or source, special nuclear, or by-product materials as defined by the Atomic Energy Act of 1954 . . . or any solid or dissolved material from any facility subject to the Federal

Surface Mining Control and Reclamation Act of 1977 or the rules and regulations thereunder or any law or rule or regulation adopted by the State of Illinois pursuant thereto.

60. Discarded ACM at Sites 3 and 6 are “waste” within the meaning of the Act.

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

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

63. Section 3.445 of the Act, 415 ILCS 5/3.445, defines “sanitary landfill” as:

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

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

65. Site 3 and Site 6 are not disposal sites that fulfill the requirements of a sanitary landfill.

66. Site 3 and Site 6 are not permitted waste disposal sites or facilities which meets the requirements of the Act or its regulations as they relate to the disposal or abandonment of waste.

67. IDOT engaged in the open dumping of waste and disposed of ACM waste between 1971 and 1976 when it: (a) used as fill, spread, buried, dumped, placed, disposed of and abandoned ACM waste on Sites 3 and 6, including the ROWs, when it built an embankment on the north and south sides of Greenwood Avenue; (b) used as fill, spread, buried, dumped, placed, disposed of and abandoned ACM waste on Sites 3 and 6, including the ROWs, when constructed and obliterated Bypasses A and B; and (c) generally used as fill, spread, buried, dumped, placed, disposed of and abandoned ACM waste on Sites 3 and 6, including the ROWs, during construction of the Greenwood Avenue ramp and expressway bypass from 1971 to 1976.

68. The ACM waste dumped and disposed of on and under Sites 3 and 6, including the ROWs, was abandoned by IDOT around 1976 and currently remains in situ.

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

70. IDOT caused or allowed the disposal of and abandonment of ACM waste in an area that does not meet the requirements of the Act or its regulations in violation of Section 21(e) of the Act, 415 ILCS 5/21(e).

71. IDOT, as an agent of the State of Illinois, since approximately 1970 has caused and allowed and continues to cause and allow the open dumping, disposal and abandonment of ACM waste within the ROWs in violation of 415 ILCS 5/21(a), (e) and has operated and continues to operate a waste-storage, waste-treatment and/or waste-disposal operation involving the ROWs without a permit issued by IEPA and not in accordance with regulations adopted by the Board in violation of 415 ILCS 5/21(d).

72. IDOT's violations are continuing in nature.

73. By moving ACM materials both horizontally and vertically within and outside the boundaries of the areas currently designated as Sites 3 and 6, IDOT introduced contamination to Site 3 and 6, including the ROWs; exacerbated any existing contamination at those Sites and directly contributed to the scope of the EPA's selected remedy for Site 3 and for Site 6, which requires Complainant JM and ComEd to conduct extensive sub-surface excavation, including by creating clean corridors for each of the utilities running through the site, including within the ROWs.

74. JM contends that because IDOT's violations of the Act have directly impacted the scope of the proposed remedy for Sites 3 and 6, including the need to excavate buried portions of Transite® pipe and to create clean corridors around the six utilities (portions of the remedy not proposed by JM and ComEd but ordered by EPA in 2012), IDOT should be required to participate in the response action for Sites 3 and 6.

75. As JM submitted a final Remedial Action Work Plan to EPA on January 24, 2014 and must begin implementation of EPA's proposed remedy shortly after the RAWP is approved, it stands to suffer immediate and irreparable injuries for which there is no adequate remedy at law.

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

COUNT II

Violations of Section 1021 of the Illinois Environmental Protection Act²

² For purposes of this Third Amended Complaint, JM cites the provisions of the Illinois Environmental Protection Act in effect from 1970-1973. Because IDOT's violations were are and are continuing, however, subsequent versions of the Act also apply. Subsequent versions of the Act do not materially differ from the Act as effective from 1970-1973.

77. Complainant realleges and incorporates herein the allegations contained in paragraphs 1-54 of this Third Amended Complaint as if set forth herein in full.

78. Respondent IDOT's actions in using, spreading, burying, placing, dumping, disposing of and abandoning ACM refuse, including Transite® pipe, throughout Site 3 and portions of Site 6, including the ROWs, and in using ACM refuse as fill during construction of the Greenwood Avenue ramp and expressway bypass from 1971 to 1976 constitute violations of Section 1021 of the Illinois Environmental Protection Act ("Act").

79. Section 1021 of the Act, IL ST CH 111 ½ ¶ 1021, provides, in pertinent part:

No person shall:

(b) Cause or allow the open dumping of any other refuse in violation of regulations adopted by the Board; [or]

(f) Dispose of any refuse, or transport any refuse into this State for disposal, except at a site or facility which meets the requirements of this Act and of regulations thereunder.

80. Section 1021 of the Act also provides that no person shall "[c]onduct any refuse-collection or refuse-disposal operations, except for refuse generated by the operator's own activities, without a permit granted by the Agency." IL ST CH 111 ½ ¶ 1021(e).

81. Section 1003 of the Act, IL ST CH 111 ½ ¶ 1003(k), defines "refuse" as "any garbage or other discarded solid materials."

82. Discarded ACM at Sites 3 and 6 are "refuse" within the meaning of the Act.

83. Section 1003 of the Act, IL ST CH 111 ½ ¶ 1003(h), defines "open dumping" as "the consolidation of refuse from one or more sources at a central disposal site that does not fulfill the requirements of a sanitary landfill.

84. Section 1003 of the Act, IL ST CH 111 ½ ¶ 1003(l), defines "sanitary landfill" as:

The disposal of refuse on land without creating nuisances or hazards to public health or safety, by confining the refuse to the smallest practical volume and covering it with a layer of earth at the conclusion of each day's operation, or at such more frequent intervals as may be necessary.

85. Site 3 and Site 6 have never been central disposal sites that fulfill the requirements of a sanitary landfill.

86. Site 3 and Site 6 have never been permitted refuse disposal sites or facilities which meets the requirements of the Act or its regulations as they relate to the disposal of refuse.

87. IDOT engaged in the open dumping of refuse and disposed of ACM refuse between 1971 and 1976 when it: (a) used as fill, spread, buried, dumped, placed, disposed of and abandoned ACM refuse on Sites 3 and 6, including the ROWs, when it built an embankment on the north and south sides of Greenwood Avenue; (b) used as fill, spread, buried, dumped, placed, disposed of and abandoned ACM refuse on Sites 3 and 6, including the ROWs, when constructed and obliterated Bypasses A and B; and (c) generally used as fill, spread, buried, dumped, placed, disposed of and abandoned ACM refuse on Sites 3 and 6, including the ROWs, during construction of the Greenwood Avenue ramp and expressway bypass from 1971 to 1976.

88. The ACM refuse dumped and disposed of on and under Sites 3 and 6, including the ROWs, was abandoned by IDOT around 1976 and currently remains in situ.

89. IDOT caused or allowed the open dumping of ACM refuse in violation of Section 1021(b) of the Act, IL ST CH 111 ½ ¶ 1021.

90. IDOT caused or allowed the disposal of and abandonment of ACM refuse in an area that does not meet the requirements of the Act or its regulations in violation of Section 1021(f) of the Act, IL ST CH 111 ½ ¶ 1021(f).

91. IDOT, as an agent of the State of Illinois, since approximately 1970 has caused and allowed and continues to cause and allow the open dumping and disposal of ACM refuse

within the ROWs in violation of IL ST CH 111 ½ ¶ 1021(b), (f) and has operated and continues to operate a refuse-collection and/or refuse-disposal operation involving the ROWs without a permit issued by IEPA and not in accordance with regulations adopted by the Board in violation of IL ST CH 111 ½ ¶ 1021(e).

92. IDOT's violations are continuing in nature.

93. By moving ACM materials both horizontally and vertically within and outside the boundaries of the areas currently designated as Sites 3 and 6, IDOT introduced contamination to Site 3 and 6, including the ROWs; exacerbated any existing contamination at those Sites and directly contributed to the scope of the EPA's selected remedy for Site 3 and for Site 6, which requires Complainant JM and ComEd to conduct extensive sub-surface excavation, including by creating clean corridors for each of the utilities running through the site, including within the ROWs.

94. JM contends that because IDOT's violations of the Act have directly impacted the scope of the proposed remedy for Sites 3 and 6, including the need to excavate buried portions of Transite® pipe and to create clean corridors around the six utilities (portions of the remedy not proposed by JM and ComEd but ordered by EPA in 2012), IDOT should be required to participate in the response action for Sites 3 and 6.

95. As JM submitted a final Remedial Action Work Plan to EPA on January 24, 2014 and must begin implementation of EPA's proposed remedy shortly after the RAWP is approved, it stands to suffer immediate and irreparable injuries for which there is no adequate remedy at law.

161 North Clark Street, Suite 4300
Chicago, Illinois 60601
(312) 602-5124
Email: susan.brice@bryancave.com

EXHIBIT B

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

SECOND¹THIRD² AMENDED COMPLAINT

Complainant JOHNS MANVILLE (“JM”) hereby complains of Respondent ILLINOIS DEPARTMENT OF TRANSPORTATION (“IDOT”) as follows:

GENERAL ALLEGATIONS

Jurisdiction and Parties

1. This Complaint is brought before the Illinois Pollution Control Board (the “Board”) by Complainant JM on its own motion, pursuant to Section 31(d) of the Illinois Environmental Protection Act (“Act”), 415 ILCS 5/31(d).

2. Section 31(d) of the Act provides that “[a]ny person may file with the Board a complaint . . . against any person allegedly violating this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit, or any Board order.” 415 ILCS 5/31(d).

3. “Person” is defined under the Act as “any individual, partnership, co-partnership, firm, company, limited liability company, corporation, association, joint stock company, trust,

estate, political subdivision, state agency, or any other legal entity, or their legal representative, agent or assigns.” 415 ILCS 5/3.315.

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

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

Factual Background

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

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

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

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

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

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

12. On information and belief, since at least 1971, the State of Illinois, acting by and through IDOT (or its predecessor agency), has owned, held an interest in and/or controlled portions of Site 3 and Site 3⁶, including ~~a right~~⁴rights⁵ of way on both⁶ the southern ~~side~~⁷ (“S. ROW” or “Parcel No. 0393”) and northern sides (“N. ROW”)⁸ of Greenwood Avenue. ~~This area~~⁹The S. ROW encompasses portions of Site 6 and Site 3. The N. ROW is located on the northwest portion of Site 6. Together, these areas¹⁰ shall be referred to hereafter as the “~~ROW~~¹¹ROWS¹².” Other parts of Site 6 appear to be owned by the City of Waukegan, which is not a party to the AOC.

13. Site 3 is located south of ~~the ROW~~¹³Greenwood Avenue¹⁴ and east of North Pershing Road in Waukegan, Illinois.

14. Site 6 is located on the north and south edges of Greenwood Avenue east of North Pershing Road and north of Site 3 in Waukegan, Illinois.

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

16. Subsequent sub-surface investigations of Site ~~3~~¹⁵3, including the S. ROW,¹⁶ have revealed ACM at the surface and at a depth of one to three feet below ground surface (bgs), primarily at the north end of the site, and at a depth of up to four feet bgs in at least two areas of the site.

17. Investigations of Site 6, including on¹⁷ the ~~ROW~~¹⁸ROWS¹⁹, have similarly revealed ACM at the surface and at a depth of one to three feet below ground surface. Pieces of

Transite® pipe, a non-friable form of ACM, are the predominant ACM found at Site 3 and Site 6.

18. The northwest portion of Site 3 and the west portion of Site 6, including the ~~ROW~~²⁰ROWS²¹, also contain miscellaneous fill material, some of which has been found to contain asbestos.

19. Many utility lines run through Site 3 and Site 6, including the ~~ROW~~²²ROWS²³.

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

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

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

23. During this construction, IDOT built embankments on the north and south side of Greenwood Avenue, including within the ~~ROW~~²⁴ROWS²⁵. These embankments involved the removal of “unsuitable material” and the placement of fill up to and above the original grade.

24. Also during construction, IDOT built three detour roads (the “Detour Roadways”).

25. Two of these detour roads, Bypasses A and B, cut through Sites 3 and 6.

26. Bypass A begins on Site 6 and cuts a large, curved swath through the former parking lot of Site 3, which was destroyed by IDOT during this construction.

27. Bypass B cuts through the western portion of Sites 3 and 6.

28. Bypasses A and B were used until the ramp construction was completed in approximately 1976.

29. Records show that a contractor was paid a “special excavation” fee to “remove and obliterate the Detour Roadways” after construction was complete. Neither Bypasses A or B nor the former parking lot are intact at Sites 3 and 6.

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

31. IDOT was not ultimately made a party to the 2007 AOC with EPA. At the time the AOC was signed, EPA took the position that there was insufficient evidence to name IDOT because IDOT did not admit to burying any ACM on or near Site 3 or 6.

32. Subsequent investigations have revealed buried Transite® pipe in the area. Portions of Transite® pipe have been found in the south side shoulder of Greenwood Avenue on parts of Site 3 and 6, including on the **ROW**²⁶ROWS²⁷, at various depths, including at a depth of approximately 2.5 feet below the ground surface. The elevation of this Transite® pipe is roughly one foot higher than the adjacent surface.

33. Review of IDOT engineering drawings indicates that IDOT, among other things, used ACM as fill when building the embankments to Greenwood Avenue on Sites 3 and 6, including on the **ROW**²⁸ROWS²⁹.

34. Review of IDOT engineering drawings indicates that IDOT, among other things, used, spread and/or buried ACM during its construction and/or obliteration of Bypasses A and B.

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

36. After several rounds of revisions in consultation with EPA, JM and ComEd submitted their final EE/CA to EPA on April 4, 2011 (“EE/CA Revision 4”). EE/CA Revision 4 evaluated four potential response action options for Sites 3 and 6, based on discussions with EPA.

37. EE/CA Revision 4 identified “Alternative 2” as the preferred remedy for Site 3. This alternative included limited soil excavation (approximately 660 cubic yards) in the northeast corner of Site 3 to a depth of approximately three (3) feet below the ground surface and installation of a vegetated soil barrier over the entire site, at an estimated cost of between \$595,000 and \$630,000.

38. EE/CA Revision 4 identified “Alternative 3” as the preferred remedy for Site 6. This alternative was described as a “hybrid remedy” combining excavation and off-site disposal of approximately 2400 cubic yards of ACM-affected soil with a vegetated soil barrier running adjacent to Site 3 to avoid disrupting current stormwater drainage patterns. The total cost to implement Alternative 3 on Site 6 was estimated at between \$417,500 and \$500,000.

39. EE/CA Revision 4 was approved by EPA with modifications on February 1, 2012. In its EE/CA approval letter, EPA proposed a new alternative remedy, which it termed “Alternative 5.”

40. EPA’s Alternative 5 included a new proposed remedy for Site 3—termed “Modified Alternative 2”—which was a markedly different remedy from those previously proposed by JM and ComEd. This modified alternative not only included a requirement to

remove all asbestos-impacted soils to a depth of four (4) feet below the ground surface in the northeast portion of Site 3, but also required JM and ComEd to create a clean corridor for all utilities running through Site 3 by excavating all soil to a depth of two (2) feet below each utility line and a minimum width of twenty-five (25) feet centered on each utility line. EPA's estimated cost for construction of this Modified Alternative 2 was \$2,196,000.

41. EPA's Alternative 5 also included a new proposed remedy for Site 6. This alternative—which EPA termed “Modified Alternative 1”—required excavation of “all soil contaminated with ACM and/or asbestos fibers at Site 6 including, but not limited to the area identified as “Area of Excavation for ACM Affected Soil” and “Paving and Potential Subsurface ACM” in Figure 13 in EE/CA” and to make special arrangements necessary for utilities (e.g., additional support or removal and replacement) in areas where removal of ACM is required below three (3) feet below the ground surface. Further, because “Greenwood Avenue was not sampled during the EE/CA Study” and “[i]t is unknown if ACM is located under the Greenwood Avenue Paved Road Surface,” EPA required JM to obtain an environmental covenant signed by the owner of portions of Site 6, the City of Waukegan. EPA's estimated cost for construction of this Modified Alternative 1 was \$1,869,000.

42. On November 30, 2012, EPA issued an Action Memorandum selecting a remedy for the Southwestern Sites, including the Modified Alternative 2 that it had proposed for Site 3 and the Modified Alternative 1 it had proposed for Site 6. However, the Action Memorandum included further modifications that were not previously included in the February 1, 2012 EE/CA approval letter.

43. Specifically, as to Site 3, the Modified Alternative 2 set forth in the Action Memorandum requires JM and ComEd to create a clean corridor for each utility line “extending

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

44. Similarly, as to Site 6, whereas the Modified Alternative 1 set forth in the EE/CA approval letter had merely required JM and ComEd to “make special arrangements necessary for utilities” in areas where ACM may extend below three (3) feet below the ground surface, the Modified Alternative 1 set forth in the Action Memorandum requires JM and ComEd to create a clean corridor for each utility line by excavating “all soil and sediment to a minimum width of 25 feet centered on any utility line (limited only by the edge of Greenwood Avenue to the extent it is demonstrated to provide a competent barrier to excavation) and to a minimum depth of two feet below the deepest utility line (and extending to a depth needed for protectiveness of utility workers at the deepest utility line) with placement of a continuous barrier at the base and sides of the excavation to inhibit further excavation beyond the clean fill.” No “alternative compliance alternative” was proposed for Site 6.

45. The Action Memorandum states that a response action at the Southwestern Sites is necessary “to abate or mitigate releases of hazardous substances that may present an imminent and substantial endangerment to public health and the environment posed by the presence of soils that are contaminated with hazardous substances.” It further states that a response action is

necessary to “reduce the actual and potential exposure to the nearby human population and the food chain to hazardous substances” and that the action is “expected to result in the removal and capping of contaminated materials at or near the surface which present a threat to trespassers or workers at the Site.”

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

47. The Action Memorandum directs JM and ComEd to conduct the following response actions as the selected remedy for Site 3:

- a. Excavate soil in the northeast portion of the Site 3 (approximately 0.14 acres) identified as the “limited excavation area,” to remove all ACM and asbestos fibers (estimated to a depth of 4 feet);
- b. Excavate soil and sediments contaminated with ACM and/or asbestos fibers to a minimum depth of 2 feet below each utility line and extending to a depth requested by the owner of each utility line with placement of a continuous barrier at the base and sides of the excavation to inhibit further excavation and/or exposure beyond the clean fill and a minimum width of 25 feet centered on each utility line and clean backfill to provide a clean corridor for utility maintenance on

Site 3 or, alternatively, abandon and relocate utility lines, conditioned on signed voluntary subrogation agreements from the utility owners;

- c. Conduct post-excavation sampling and analysis to confirm there are no remaining ACM or asbestos fibers in soil or sediment within either the limited excavation area or within each utility corridor;
- d. Dispose of all excavated materials in an off-site landfill;
- e. Place and maintain a vegetated soil cover in any areas of Site 3 where ACM or asbestos fibers remain in place;
- f. Implement certain institutional controls in the form of an environmental covenant, pursuant to the Illinois Environmental Covenants Act, 765 ILCS Ch. 122;
- g. Reroute, pipe, or remove surface water as needed to perform the required excavation;
- h. Install and maintain security fencing with warning signs every 100 feet and at all gates completely surrounding all areas where ACM or asbestos fibers remain in place;
- i. Conduct long-term operation and maintenance (O&M) of the vegetated soil cover for a minimum of 30 years beginning when construction is completed.

48. EPA has estimated the cost of construction of the selected remedy for Site 3 at between \$1,705,696 and \$2,107,622. JM disputed portions of EPA's remedy selected for the Southwestern Sites on December 20, 2012 and May 16, 2013, including certain of EPA's cost analyses.

49. The Action Memorandum directs JM and ComEd to conduct the following response actions as the selected remedy for Site 6, including the ~~ROW-area~~³⁰ ROWS³¹:

- a. Excavate all soil contaminated with ACM and/or asbestos fibers without limitation to depth including at a minimum, but not limited to the area identified as “Area of Excavation for ACM Affected Soil” and “Paving and Potential Subsurface ACM” in Figure 13 of the EE/CA (which, in non-utility areas, is anticipated to extend to a minimum depth of three (3) feet below ground surface);
- b. Excavate soil and sediments contaminated with ACM and/or asbestos fibers to a minimum depth of 2 feet below each utility line and extending to a depth requested by the owner of each utility line with placement of a continuous barrier at the base and sides of the excavation to inhibit further excavation and/or exposure beyond the clean fill and a minimum width of 25 feet centered on each utility line and clean backfill to provide a clean corridor for utility maintenance on Site 6;
- c. Conduct post-excavation sampling and analysis to confirm there are no remaining ACM or asbestos fibers in soil or sediment within either the limited excavation area or within each utility corridor;
- d. Dispose of all excavated materials in an off-site landfill or, with approval from EPA, in the JM industrial canal and/or pumping lagoon under a vegetated soil cover;
- e. Implement certain institutional controls in the form of an environmental covenant signed by the City of Waukegan, pursuant to the Illinois Environmental Covenants Act, 765 ILCS Ch. 122, or, if this environmental covenant is not feasible, provide for the investigation and full removal of any ACM or asbestos fibers that may

remain under Greenwood Avenue to prevent its potential release during road or utility maintenance;

- f. If during or after soil excavation at Site 6, samples and/or visual observation indicate the presence of ACM or asbestos fibers under Greenwood Avenue, then install and maintain security fencing with warning signs every 100 feet and at all gates completely surrounding all areas where ACM or asbestos fibers remain in place.

50. EPA has estimated the cost of construction of the selected remedy for Site 6 at \$1,868,790. JM disputed portions of EPA's remedy selected for the Southwestern Sites on December 20, 2012 and May 16, 2013, including certain of EPA's cost analyses.

51. EPA issued a Notice to Proceed with the selected remedy for all of the Southwestern Sites on May 6, 2013. Under the terms and conditions of the AOC, this Notice to Proceed triggers a 120-day period within which JM and ComEd must submit to EPA a Removal Action Work Plan ("RAWP") for performing the response actions at the Southwestern Site Area.¹

52. JM submitted a draft RAWP for the Southwestern Site Area to EPA in November 2013 and the agency provided comments on December 11, 2013.

53. JM submitted a final RAWP to EPA on January 24, 2014. The agency has not yet approved the final RAWP.

54. With the exception of removing surficial ACM, no response action has commenced at Site 3 or Site 6.

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

COUNT I

Violations of Section 21 of the Illinois Environmental Protection Act

55. Complainant realleges and incorporates herein the allegations contained in paragraphs 1-54 of this ~~First~~³²~~Third~~³³ Amended Complaint as if set forth herein in full.

56. Respondent IDOT's actions in using, spreading, burying, placing, dumping, disposing of and abandoning ACM waste, including Transite® pipe, throughout Site 3 and portions of Site 6, including the ~~ROW~~³⁴~~ROWS~~³⁵, and in using ACM waste as fill during construction of the Greenwood Avenue ramp and expressway bypass from 1971 to 1976 constitute violations of Section 21 of the Illinois Environmental Protection Act ("Act").

57. Section 21 of the Act, 415 ILCS 5/21, provides, in pertinent part:

No person shall:

(a) Cause or allow the open dumping of any waste; [or]

(e) Dispose, treat, store, or abandon any waste, or transport any waste into this State for disposal, treatment, storage or abandonment, except at a site or facility which meets the requirements of this Act and of regulations and standards thereunder.

58. Section 21 of the Act also provides that no person shall "conduct any waste-storage, waste-treatment or waste-disposal operation" without a permit issued by the agency or in violation of any regulations or standards adopted by the Board. 415 ILCS 5/21(d).

59. Section 3.535 of the Act, 415 ILCS 5/3.535, defines "waste" as:

any garbage, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility or other discarded material, including solid, liquid, semi-solid, or contained gaseous material resulting from industrial, commercial, mining and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows, or coal-combustion products . . . or industrial discharges which are point sources subject to permits under Section 402 of the Federal Water Pollution Control Act, as now or hereafter amended, or source, special nuclear, or by-product materials as defined by the Atomic Energy Act of

1954 . . . or any solid or dissolved material from any facility subject to the Federal Surface Mining Control and Reclamation Act of 1977 or the rules and regulations thereunder or any law or rule or regulation adopted by the State of Illinois pursuant thereto.

60. Discarded ACM at Sites 3 and 6 are “waste” within the meaning of the Act.

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

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

63. Section 3.445 of the Act, 415 ILCS 5/3.445, defines “sanitary landfill” as:

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

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

65. Site 3 and Site 6 are not disposal sites that fulfill the requirements of a sanitary landfill.

66. Site 3 and Site 6 are not permitted waste disposal sites or facilities which meets the requirements of the Act or its regulations as they relate to the disposal or abandonment of waste.

67. IDOT engaged in the open dumping of waste and disposed of ACM waste between 1971 and 1976 when it: (a) used as fill, spread, buried, dumped, placed, disposed of and abandoned ACM waste on Sites 3 and 6, including the ~~ROW~~³⁶ROWS³⁷, when it built an embankment on the north and south sides of Greenwood Avenue; (b) used as fill, spread, buried, dumped, placed, disposed of and abandoned ACM waste on Sites 3 and 6, including the ~~ROW~~³⁸ROWS³⁹, when constructed and obliterated Bypasses A and B; and (c) generally used as fill, spread, buried, dumped, placed, disposed of and abandoned ACM waste on Sites 3 and 6, including the ~~ROW~~⁴⁰ROWS⁴¹, during construction of the Greenwood Avenue ramp and expressway bypass from 1971 to 1976.

68. The ACM waste dumped and disposed of on and under Sites 3 and 6, including the ~~ROW~~⁴²ROWS⁴³, was abandoned by IDOT around 1976 and currently remains in situ.

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

70. IDOT caused or allowed the disposal of and abandonment of ACM waste in an area that does not meet the requirements of the Act or its regulations in violation of Section 21(e) of the Act, 415 ILCS 5/21(e).

71. IDOT, as an agent of the State of Illinois, since approximately 1970 has caused and allowed and continues to cause and allow the open dumping, disposal and abandonment of ACM waste within the ~~ROW~~⁴⁴ROWS⁴⁵ in violation of 415 ILCS 5/21(a), (e) and has operated and continues to operate a waste-storage, waste-treatment and/or waste-disposal operation involving the ~~ROW~~⁴⁶ROWS⁴⁷ without a permit issued by IEPA and not in accordance with regulations adopted by the Board in violation of 415 ILCS 5/21(d).

72. IDOT's violations are continuing in nature.

73. By moving ACM materials both horizontally and vertically within and outside the boundaries of the areas currently designated as Sites 3 and 6, IDOT introduced contamination to Site 3 and 6, including the **ROW**⁴⁸ **ROWS**⁴⁹; exacerbated any existing contamination at those Sites and directly contributed to the scope of the EPA's selected remedy for Site 3 and for Site 6, which requires Complainant JM and ComEd to conduct extensive sub-surface excavation, including by creating clean corridors for each of the utilities running through the site, including within the **ROW**⁵⁰ **ROWS**⁵¹.

74. ⁵²JM contends that because IDOT's violations of the Act have directly impacted the scope of the proposed remedy for Sites 3 and 6, including the need to excavate buried portions of Transite® pipe and to create clean corridors around the six utilities (portions of the remedy not proposed by JM and ComEd but ordered by EPA in 2012), IDOT should be required to participate in the response action for Sites 3 and 6.⁵³

75. ⁵⁴As JM submitted a final Remedial Action Work Plan to EPA on January 24, 2014 and must begin implementation of EPA's proposed remedy shortly after the RAWP is approved, it stands to suffer immediate and irreparable injuries for which there is no adequate remedy at law.⁵⁵

76. ⁵⁶Complainant JM is not aware of any identical or substantially similar action pending before the Board or in any other forum against Respondent IDOT based on the same conduct or alleging the same violations of the Act.⁵⁷

COUNT II⁵⁸

Violations of Section 1021 of the Illinois Environmental Protection Act²⁵⁹

² For purposes of this Third Amended Complaint, JM cites the provisions of the Illinois Environmental Protection Act in effect from 1970-1973. Because IDOT's violations were and are continuing, however, subsequent versions of the Act also apply. Subsequent versions of the Act do not materially differ from the Act as effective from 1970-1973.

77. ⁶⁰Complainant realleges and incorporates herein the allegations contained in paragraphs 1-54 of this Third Amended Complaint as if set forth herein in full.⁶¹

78. ⁶²Respondent IDOT's actions in using, spreading, burying, placing, dumping, disposing of and abandoning ACM refuse, including Transite® pipe, throughout Site 3 and portions of Site 6, including the ROWs, and in using ACM refuse as fill during construction of the Greenwood Avenue ramp and expressway bypass from 1971 to 1976 constitute violations of Section 1021 of the Illinois Environmental Protection Act ("Act").⁶³

79. ⁶⁴Section 1021 of the Act, IL ST CH 111 ½ ¶ 1021, provides, in pertinent part:⁶⁵

No person shall.⁶⁶

(b) Cause of allow the open dumping of any other refuse in violation of regulations adopted by the Board; [or]⁶⁸

(f) Dispose of any refuse, or transport any refuse into this State for disposal, except at a site or facility which meets the requirements of this Act and of regulations thereunder.⁶⁹

80. ⁷⁰Section 1021 of the Act also provides that no person shall "[c]onduct any refuse-collection or refuse-disposal operations, except for refuse generated by the operator's own activities, without a permit granted by the Agency." IL ST CH 111 ½ ¶ 1021(e).⁷¹

81. ⁷²Section 1003 of the Act, IL ST CH 111 ½ ¶ 1003(k), defines "refuse" as "any garbage or other discarded solid materials."⁷³

82. ⁷⁴Discarded ACM at Sites 3 and 6 are "refuse" within the meaning of the Act.⁷⁵

83. ⁷⁶Section 1003 of the Act, IL ST CH 111 ½ ¶ 1003(h), defines "open dumping" as "the consolidation of refuse from one or more sources at a central disposal site that does not fulfill the requirements of a sanitary landfill."⁷⁷

84. ⁷⁸Section 1003 of the Act, IL ST CH 111 ½ ¶ 1003(l), defines "sanitary landfill" as:⁷⁹

The disposal of refuse on land without creating nuisances or hazards to public health or safety, by confining the refuse to the smallest practical volume and covering it with a layer of earth at the conclusion of each day's operation, or at such more frequent intervals as may be necessary.⁸⁰

85. ⁸¹Site 3 and Site 6 have never been central disposal sites that fulfill the requirements of a sanitary landfill.⁸²

86. ⁸³Site 3 and Site 6 have never been permitted refuse disposal sites or facilities which meets the requirements of the Act or its regulations as they relate to the disposal of refuse.

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87. ⁸⁵IDOT engaged in the open dumping of refuse and disposed of ACM refuse between 1971 and 1976 when it: (a) used as fill, spread, buried, dumped, placed, disposed of and abandoned ACM refuse on Sites 3 and 6, including the ROWs, when it built an embankment on the north and south sides of Greenwood Avenue; (b) used as fill, spread, buried, dumped, placed, disposed of and abandoned ACM refuse on Sites 3 and 6, including the ROWs, when constructed and obliterated Bypasses A and B; and (c) generally used as fill, spread, buried, dumped, placed, disposed of and abandoned ACM refuse on Sites 3 and 6, including the ROWs, during construction of the Greenwood Avenue ramp and expressway bypass from 1971 to 1976.⁸⁶

88. ⁸⁷The ACM refuse dumped and disposed of on and under Sites 3 and 6, including the ROWs, was abandoned by IDOT around 1976 and currently remains in situ.⁸⁸

89. ⁸⁹IDOT caused or allowed the open dumping of ACM refuse in violation of Section 1021(b) of the Act, IL ST CH 111 ½ ¶ 1021.⁹⁰

90. ⁹¹IDOT caused or allowed the disposal of and abandonment of ACM refuse in an area that does not meet the requirements of the Act or its regulations in violation of Section 1021(f) of the Act, IL ST CH 111 ½ ¶ 1021(f).⁹²

91. ⁹³IDOT, as an agent of the State of Illinois, since approximately 1970 has caused and allowed and continues to cause and allow the open dumping and disposal of ACM refuse within the ROWs in violation of IL ST CH 111 ½ ¶ 1021(b), (f) and has operated and continues to operate a refuse-collection and/or refuse-disposal operation involving the ROWs without a permit issued by IEPA and not in accordance with regulations adopted by the Board in violation of IL ST CH 111 ½ ¶ 1021(e). ⁹⁴

92. ⁹⁵IDOT's violations are continuing in nature. ⁹⁶

93. ⁹⁷By moving ACM materials both horizontally and vertically within and outside the boundaries of the areas currently designated as Sites 3 and 6, IDOT introduced contamination to Site 3 and 6, including the ROWs; exacerbated any existing contamination at those Sites and directly contributed to the scope of the EPA's selected remedy for Site 3 and for Site 6, which requires Complainant JM and ComEd to conduct extensive sub-surface excavation, including by creating clean corridors for each of the utilities running through the site, including within the ROWs. ⁹⁸

94. ~~74.~~ ⁹⁹JM contends that because IDOT's violations of the Act have directly impacted the scope of the proposed remedy for Sites 3 and 6, including the need to excavate buried portions of Transite® pipe and to create clean corridors around the six utilities (portions of the remedy not proposed by JM and ComEd but ordered by EPA in 2012), IDOT should be required to participate in the response action for Sites 3 and 6.

95. ~~75.~~ ¹⁰⁰As JM submitted a final Remedial Action Work Plan to EPA on January 24, 2014 and must begin implementation of EPA's proposed remedy shortly after the RAWP is approved, it stands to suffer immediate and irreparable injuries for which there is no adequate remedy at law.

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Susan Brice, ARDC No. 6228903
Lauren Caisman, ARDC No.

161 North Clark Street, Suite 4300
Chicago, Illinois 60601
(312) 602-5124
Email: susan.brice@bryancave.com