

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.)	

NOTICE OF FILING

To: See Attached Service List

PLEASE TAKE NOTICE that on April 20, 2016, I caused to be filed with the Clerk of the Pollution Control Board of the State of Illinois, Complainant’s Partial Motion to Strike Respondent’s Affirmative Defenses, copies of which are attached hereto and herewith served upon you via e-mail. Paper hardcopies of this filing will be made available upon request.

Dated: April 20, 2016

Respectfully submitted,

BRYAN CAVE LLP

Attorneys for Complainant Johns Manville

By: /s/ Lauren J. Caisman
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CERTIFICATE OF SERVICE

I, the undersigned, certify that on April 20, 2016, I caused to be served a true and correct copy of the attached *Notice of Filing of Complainant's Partial Motion to Strike Respondent's Affirmative Defenses* upon all parties listed on the Service List by sending the documents via e-mail to all persons listed on the Service List, addressed to each person's e-mail address. Paper hardcopies of this filing will be made available upon request.

/s/ Lauren J. Caisman

Lauren J. Caisman

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COMPLAINANT’S PARTIAL MOTION TO STRIKE RESPONDENT’S AFFIRMATIVE DEFENSES

Complainant JOHNS MANVILLE (“JM”) hereby moves, pursuant to 35 Ill. Admin. Code 101.500 and 735 ILCS 5/2-615, to strike Respondent ILLINOIS DEPARTMENT OF TRANSPORTATION’S (“IDOT”) Fifth Affirmative Defense, Sixth Affirmative Defense and Seventh Affirmative Defense. In support of its Motion to Strike, JM states as follows:

1. On March 3, 2016 the Board granted JM’s Motion for Leave to File Second Amended Complaint to Conform Pleadings to Newly Discovered Facts Without Hearing Delay (“Motion for Leave”). JM brought the Motion for Leave after uncovering that IDOT had been concealing its existing interest in Parcel No. 0393.

2. IDOT’s proffered expert, Steven Gobelman, raised the issue of Parcel No. 0393’s ownership in his Expert Report and his deposition (*see* Motion for Leave, ¶¶ 6-11 and Exhibits B, C). More specifically, he testified:

A. I believe in 1970, at the beginning of this project, there were resolutions that were created by the City of Waukegan and Lake County that they were going to purchase all right of way east of -- in essence, east of the railroad tracks.

Q. Did they do that?

A. No, they did not.

Q. And so did IDOT own it prior to that time?

A. IDOT purchased the right of way and the easements.

Q. And when did IDOT purchase the right of way and easements?

A. I believe it was sometime prior to construction, like 1970 or so.

(Gobelman Dep., 38:16-20; 39:1-6 (attached as Exhibit C to Complainant's Motion for Leave.)

Yet, he also testified:

Q. And for how long did IDOT own the right of way and the easements?

A. I am not sure when IDOT gave up the right of way, but the easements in association with Site 3 were reverted back once construction is complete.

Q. Right. How about the right of ways, though? I mean, does IDOT still own those right of ways associated with Site 3 and Site 6?

A. From my -- the information that I have that I found that Wauk- -- City of Waukegan owns the right of way and jurisdiction of the road. The right of way of Sands and Greenwood Avenue.

Q. Which right of way?

A. The right of way of Sands and Greenwood Avenue.

Q. And when did Waukegan take over that right of way from IDOT?

A. I did not investigate that aspect.

(*Id.* at 39:7-40:1).

3. However, a Title Report received by JM in mid-January 2016, told a different story. The Title Report indicated that, contrary to IDOT's assertion in its previous Answer to JM's Amended Complaint that IDOT lacked sufficient information regarding whether Site 6 was owned by the City of Waukegan (*see* Answer to Amended Complaint, ¶ 12), and contrary to IDOT's expert's report and testimony, IDOT still holds an interest in and controls Parcel No. 0393.

4. As such, other than adding the phrase “including the ROW” when discussing the right-of-way through Site 6, JM only sought leave to amend a mere four allegations of its pleading to address the fact that IDOT actually still held an interest in Parcel No. 0393. (*See* ¶¶ 12, 58, 70, 71 of JM’s Second Amended Complaint; March 3 Board Order, at p. 2.) IDOT vigorously challenged JM’s Motion for Leave, but never denied that it had concealed its interest in Parcel No. 0393 from JM. In fact, IDOT took the position that JM had been well aware of IDOT’s interest in the Parcel all along. To supposedly support such a claim, IDOT argued that JM had been in possession of the “Grant for Public Highway” conveying IDOT an interest in Parcel No. 0393 that was produced in discovery. (Response to Motion for Leave, at p. 3.) But, as JM pointed out in its Motion for Leave to File Reply and Reply, IDOT’s Response grossly mischaracterized the issue. The issue was whether IDOT still held the interest granted to it in that Grant for Public Highway, not whether the interest was granted in the first place. (*See* Motion for Leave to File Reply, at ¶ 4; Reply, at p. 2.)

5. Despite claiming that JM was well aware of IDOT’s interest in Parcel No. 0393 in responding to the Motion for Leave, IDOT now claims that it has no property interest whatsoever in Parcel No. 0393 because IDOT’s interest somehow disappeared after IDOT completed its Project in 1976.

6. In granting JM’s Motion for Leave, the Board examined a number of factors, including whether the amendment arose from the same matter already before the Board, whether IDOT was prejudiced by amendment, the extent of the amendments, the timeliness of amendment, and whether the changes to the allegations involved duplicative or frivolous claims. (*See* March 3 Board Order, at p. 3.) In reaching its determination that leave would be granted, the Board expressly noted the limited nature of JM’s proposed amendments. The Board stated

that the “extent of the amendments is limited” and “JM’s amendment to the paragraph 12 replaced an allegations JM now believes to be incorrect. JM’s proposed amendments are confined to paragraphs 12, 58, 70, and 71 of the second amended complaint, aside from the additions of the phrase ‘including the ROW.’” (*See* March 3 Board Order, at p. 3 (internal citations omitted).)

7. Given that JM’s new allegations related to the same matter the Board had already set for hearing and given that the allegations “related to IDOT’s own ownership interest in the right-of-way,” the Board found that “IDOT is not prejudiced by the proposed amendments.” (*Id.* at pp. 2-3.) The Board further “view[ed] the right-of-way ownership allegations as integral to JM’s complaint . . . Considering this, as well as the narrow scope of the amendments . . . the Board grants JM’s motion to amend the complaint.” (*Id.* at p. 3.)

8. Because of the narrow and limited amendments made by JM, the fact that the hearing was to occur within the next couple of weeks, and the fact that the Motion for Leave was necessitated solely by IDOT’s concealment of its continued legal interest in Parcel No. 0393, JM argued that “IDOT could easily file an Answer, admitting or denying the few new allegations in the proposed Second Amended Complaint” and that JM did not believe that IDOT “should be allowed to file a responsive pleading that would delay these proceedings, such as any type of motion.” (*See* Motion for Leave, at ¶ 29.) Further, to the extent that the Board was inclined to allow IDOT to file any pleading other than an Answer, JM wished to continue the Motion for Leave and proceed to hearing, rather than delaying the matter further. (*Id.*) In response, IDOT only asked for the opportunity to be able to file an Answer to JM’s Second Amended Complaint. (*See* Response, at p. 5.)

9. The Board's Order expressly limited IDOT to filing an Answer, rather than any other responsive pleading, by April 12, 2016.

10. IDOT filed its Answer and Affirmative Defenses to JM's Second Amended Complaint on April 12, 2016 (attached hereto as **Exhibit A**), but IDOT's response did not comply with the reasoning or intent of the Board's March 3 Order. Rather, IDOT's Affirmative Defenses go far beyond meeting the "narrow scope" of changes made by JM to the Second Amended Complaint. Instead, IDOT injects new affirmative defenses into this case, most of which have nothing to do with JM's narrowly tailored new allegations regarding IDOT's interest in Parcel No. 0393.

11. In particular, IDOT asserts three affirmative defenses that were never raised before in any Answer or either of IDOT's two failed Motions to Dismiss. These include a Fifth Affirmative Defense, claiming that the Board cannot order IDOT to participate in the requested remedy without the consent of the USEPA; a Sixth Affirmative Defense, arguing that JM erroneously failed to join Commonwealth Edison ("ComEd") as a necessary party to this litigation; and a Seventh Affirmative Defense, asserting that JM's Second Amended Complaint is erroneously based on violations of the Illinois Environmental Protection Act (the "Act") as it is currently drafted, that the provisions of the Act in place in the 1970s did not contain the same prohibitions and thus, that JM's Second Amended Complaint fails as a matter of law.¹

12. Here, IDOT's Fifth, Sixth, and Seventh Affirmative Defenses were not part of IDOT's two previous Motions to Dismiss or part of IDOT's Answers to JM's original Complaint or Amended Complaint. It was not the Board's intention, in re-opening the case for the limited

¹ Nor did IDOT assert any affirmative defenses pertaining to Site 6 despite that IDOT's violations of the Illinois Environmental Protection Act (the "Act") on Site 6 were at issue in JM's Amended Complaint. IDOT only does so now shortly before hearing in this action. *See* First Affirmative Defense, ¶¶ 1, 2, 3, 4, 6, 7, 8; Second Affirmative Defense, ¶ 6; Third Affirmative Defense, ¶ 6; Fourth Affirmative Defense, ¶ 6. This is likewise improper.

purpose of addressing JM's limited new allegations, to allow IDOT to recast the case in a wholly new light. In similar situations, the Illinois appellate court has found that "a defendant has no absolute right to file a new answer." *American Pharmaseal v. TEC Sys.*, 162 Ill. App. 3d 351, 359 (2d Dist. 1987). In *American Pharmaseal*, the plaintiff's third amended complaint differed only from the second amended complaint in that it added more specific allegations of actions or omissions by the defendant. *Id.* By contrast, the defendant's answer injected two new theories into its defense and incorporated new allegations regarding the plaintiff's conduct. *Id.* The appellate court found, however, that the trial court's decision to permit the defendant to file an answer to the plaintiff's third amended complaint did not authorize the defendant "to file a pleading substantially different from its earlier answers if the changes were not necessitated by any new or different claims by plaintiff." *Id.* at 359-360 (emphasis added). Here, as in *American Pharmaseal*, IDOT's Affirmative Defenses do "more than meet the changes made by" JM and are "not necessitated by" JM's new limited allegations. *See id.* In fact, these Affirmative Defenses are targeted to the entirety of JM's Second Amended Complaint and causes of action therein, rather than only to the new allegations.

13. IDOT is essentially seeking leave to amend its Answer to include at least three entirely new, never-before-asserted defenses. In reaching its decision, the appellate court in *American Pharmaseal* found that "[f]actors to be considered in evaluating the court's exercise of discretion include the timeliness of the proposed amendment and whether other parties have been prejudiced or surprised by the amendment." *American Pharmaseal*, 162 Ill. App. 3d at 360 (collecting cases). Both of these factors weigh heavily in favor of striking IDOT's new Affirmative Defenses. IDOT's arguments simply come too late. The case was filed nearly three years ago and the hearing is scheduled for slightly over three weeks from now. To allow IDOT

to attack JM's suit as legally defective for three new reasons at the eleventh hour would be improper. Notwithstanding the potential disruptive effect these new Affirmative Defenses would have on this case, as in *American Pharmaseal*, IDOT has offered no explanation, let alone a satisfactory one, for its failure to raise these defenses in the years this litigation has been pending. *See id.* at 360. IDOT's conduct can only be construed as an attempt, at best, to delay hearing in this matter and, at worst, to surprise JM at trial though these proceedings have been pending for almost three years. The Second Amended Complaint was filed only to correct facts that had been misrepresented to JM by IDOT. IDOT should not be able to profit from its misrepresentations or be allowed to grossly deviate from the intent of the Board's March 3 Order.

14. JM would be prejudiced by allowing the three new Affirmative Defenses to proceed. JM has not had an opportunity to prepare for these Affirmative Defenses. Indeed, the Seventh Affirmative Defense casts the case in an entirely new light, claiming that JM must apply the laws that existed at the time of the complained of conduct, instead of the current version of the Act. While JM believes this Affirmative Defense lack merits for many reasons — including that IDOT's conduct occurred after 1970, that IDOT's conduct amounts to continuing violations, that JM is not attempting to apply the Act retroactively, and that applicable provisions of the Act from 1970s onward prohibited the conduct at issue (although the Act originally used some different terms and addressed the open dumping of "garbage," it also addressed the disposal of "refuse" (which was defined to include "discarded material," which unambiguously would include the ACM at issue) — IDOT tries to turn this case on its head and greatly complicate how the case is to be handled at hearing.

15. Aside from the fact that these new Affirmative Defenses undermine the Board's March 3 Order, are untimely, and prejudice JM, the Sixth and Seventh Affirmative Defenses should be stricken for the additional reason that they do not qualify as an "affirmative defense" under Illinois law. Further, IDOT's new Affirmative Defenses, in particular the Sixth and Seventh Affirmative Defenses, are more akin to objections to the whole pleading, which are required to be raised by motion. *See* 735 ILCS 5/2-615(a).

16. IDOT's Sixth Affirmative Defense, "Failure to Join Necessary Parties" is improper. The "failure to join a necessary party is not an affirmative defense." *See People of the State of Illinois v. Peabody Coal Co.*, PCB 99-134, 2003 WL 21405850, *9 (IPCB June 5, 2003) (striking affirmative defense for failure to join a necessary party). Rather, if a respondent believes that another party should be brought before the Board, it can move the Board to join that party or can file a third-party complaint against the party. *Id.* (citing 35 Ill. Admin. Code 101.403, 35 Ill. Admin. Code 103.206). Here, IDOT neither moved to join ComEd nor filed a third party Complaint against ComEd though it had ample opportunity to do so. Consequently, the Sixth Affirmative Defense should be stricken. *See Peabody*, 2003 WL 21305850, at * 9.²

17. Similarly, IDOT's Seventh Affirmative Defense, alleging that the claims in JM's Second Amended Complaint "cannot stand, as they impose an impermissible imposition of retroactive liability on IDOT," fails because it does not constitute "affirmative matter." "The test to withstand a motion to strike an affirmative defense . . . requires that the defense gives color to the opposing party's claim and then asserts a new matter that would defeat the apparent right." *Motsch v. Pine Roofing Co., Inc.*, 178 Ill. App. 3d 169, 175 (1st Dist. 1988); *see also Hartmann Realtors v. Biffar*, 2014 IL App (5th) 130543, ¶¶ 20, 25. Defenses which merely negate or deny the essential elements of a plaintiff's causes of action are not affirmative ones. *See Farmers*

² The Board need not even reach the issue of whether ComEd is a necessary party to this action. *See id.* at *9.

Auto. Ins. v. Neumann, 2015 IL App (3d) 140026, ¶ 16 (finding that affirmative defense was did not assert new matter were properly stricken). In *Hartmann*, the court affirmed the striking of an affirmative defense where that defense did not allege new matter which defeated the plaintiff's claim, assuming the allegations in the plaintiff's complaint were true. 2014 IL App (5th) 130543, at ¶ 25. IDOT's Seventh Affirmative Defense suffers from the same fatal flaw. Instead of asserting new matter, IDOT's Seventh Affirmative Defense attacks the pleading itself, claiming that JM has based its case on the wrong law, the current version of the Act.

18. Because IDOT was not permitted to file a motion with respect to JM's Second Amended Complaint, it appears that IDOT has tried to mask objections to JM's pleading, which merely deny or "negate the essential elements of [JM's] cause[s] of action," as affirmative defenses. *Farmers*, 2015 IL App (3d) 140026, at ¶ 16. For instance, IDOT prayed in its Seventh Affirmative Defense that the Board issue an Order that JM's "claims cannot stand, as they impose an impermissible imposition of retroactive liability on IDOT." The Board's March 3 Order specifically only allowed IDOT to file an Answer. IDOT's efforts to circumvent this Order by disguising Motion to Dismiss-type arguments in the clothes of affirmative defenses contravenes the Board's March 3 Order. IDOT's Sixth and Seventh Affirmative Defenses should not be permitted to stand.

19. If the Board decides to allow these Affirmative Defenses to proceed despite the fact they are being raised for the first time only about three weeks before hearing, JM should not be penalized and should be able to present evidence to defend against them. In particular, as to the Seventh Affirmative Defense, the Board should allow JM to argue, in the alternative, that

IDOT violated the historical versions of the Act as if JM had made the allegations in its Second Amended Complaint.³

WHEREFORE, Complainant JOHNS MANVILLE respectfully requests that the Board enter an Order striking IDOT's Fifth, Sixth, and Seventh Affirmative Defenses in their entirety.

Respectfully submitted,

BRYAN CAVE LLP

Attorneys for Complainant Johns Manville

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³ In the alternative, JM asks that the Board permit it to amend its Complaint again. However, this is not preferable as it would further delay the proceedings.

SERVICE LIST

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EXHIBIT A

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

JOHNS MANVILLE, a Delaware corporation,)
)
 Complainant,)
)
 v.)
)
 ILLINOIS DEPARTMENT OF)
 TRANSPORTATION,)
)
 Respondent.)

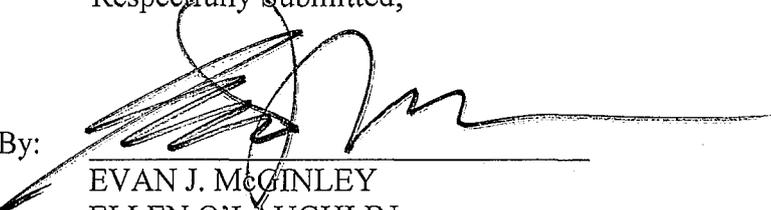
PCB No. 14-3
 (Citizen Suit)

NOTICE OF FILING

To: ALL PERSONS ON THE ATTACHED CERTIFICATE OF SERVICE

Please take note that today, April 12, 2016, I filed Respondent Illinois Department of Transportation's Answer and Affirmative Defenses to Johns Manville's Second Amended Complaint, a copy of which are hereby served upon you.

Respectfully Submitted,

By: 

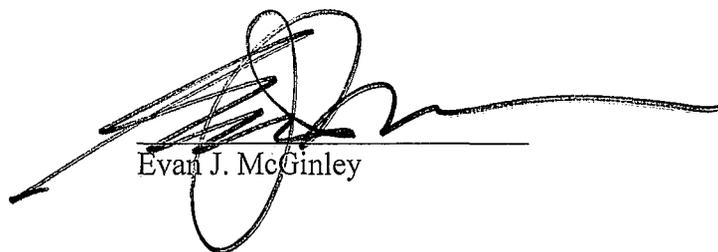
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CERTIFICATE OF SERVICE

Johns Manville v. Illinois Department of Transportation, PCB 14-3 (Citizens)

I, EVAN J. MCGINLEY, do hereby certify that, today, April 12, 2016, I caused to be served on each of the individuals listed below, by first class mail and electronic mail, a true and correct copy of Respondent Illinois Department of Transportation's Answer and Affirmative Defenses to Johns Manville's Second Amended Complaint.

John Therriault, Assistant Clerk Illinois Pollution Control Board James R. Thompson Center 100 West Randolph, Suite 11-500 Chicago, Illinois 60601 John.Therriault@illinois.gov	Bradley Halloran Hearing Officer Illinois Pollution Control Board James R. Thompson Center 100 West Randolph, Suite 11-500 Chicago, Illinois 60601 Brad.Halloran@illinois.gov
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Evan J. McGinley

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter Of:)	
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ILLINOIS DEPARTMENT OF)	
TRANSPORTATION,)	
)	
Respondent.)	

ILLINOIS DEPARTMENT OF TRANSPORTATION'S ANSWER AND AFFIRMATIVE DEFENSES TO JOHNS MANVILLE'S SECOND AMENDED COMPLAINT

Respondent, DEPARTMENT OF TRANSPORTATION ("IDOT"), through its counsel, herewith submits its answer to Complainant John Mansville's Second Amended Complaint 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).

ANSWER:

Respondent admits that JM has stated in its "Amended Complaint that it has brought its Complaint pursuant to Section 31(d) of the Act, but denies that Section 31(d) of the Act is applicable to this matter.

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).

ANSWER:

Respondent admits that Paragraph 2 accurately states a portion of Section 31(d) of Act.

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.

ANSWER:

Respondent admits that Paragraph 3 accurately states a portion of Section 3.315 of Act.

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

ANSWER:

Respondent admits the allegations in Paragraph 4.

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

ANSWER:

Respondent admits the allegations in Paragraph 5.

Factual Background

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

ANSWER:

Respondent admits the allegations in Paragraph 6.

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

ANSWER:

Respondent admits USEPA listed a 120 acre portion of the JM site on the NPL, in the Federal Register published on September 8, 1983, 48 Fed. Reg. 50658, although the EPA Superfund Record of Decision states that the site was listed on the NPL in December of 1982.

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

ANSWER:

Due to the vague and ambiguous nature of the allegations contained in Paragraph 8 of the Second Amended Complaint, IDOT lacks sufficient information to either admit or deny those allegations.

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.

ANSWER:

Due to the vague and ambiguous nature of the allegations contained in Paragraph 8 of the Second Amended Complaint, IDOT lacks sufficient information to either admit or deny the allegations relating to the nature and scope of the "operations" alleged in this paragraph or the date that "JM ceased operations onsite". IDOT admits that the

Administrative Order on Consent notes that ACM was discovered on the former parking lot in 1998. IDOT specifically denies that it is the owner of any real property located in the immediate vicinity of the former JM Site. Further responding, ACM has been found along the west and south sides of the former JM Site.

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."

ANSWER:

IDOT acknowledges that JM entered into an AOC with the USEPA on or about the time alleged in Paragraph 10. Further responding, IDOT states that the AOC speaks for itself and thus no further response on IDOT's part is required.

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

ANSWER:

IDOT acknowledges that ComEd entered into an AOC with the USEPA, but lacks sufficient information to either admit or deny the remaining allegations in Paragraph 11. Further responding, IDOT states that the AOC speaks for itself and thus no further response on IDOT's part is required.

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 6, including a right of way on the southern side of Greenwood Avenue. This area shall be referred to hereafter as the "ROW." Other parts of Site 6 appear to be owned by the City of Waukegan, which is not a party to the AOC.

ANSWER:

IDOT denies that it has "owned, held and interest in and/or controlled portions of Site 6, including a right of way on the southern side of Greenwood Avenue." Further responding, due to the vague and ambiguous nature of the balance of the allegations in this Paragraph, IDOT is unable to either admit or deny those allegations.

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

ANSWER:

IDOT denies the allegations set forth in Paragraph 13.

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.

ANSWER:

IDOT admits the allegations of Paragraph 14. Further responding, IDOT notes that the boundaries of Site 6 go beyond the "north side of Site 3" and continues past the north east edge of Site 3.

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

ANSWER:

IDOT denies the allegations in Paragraph 15, in as much as JM has always had knowledge that ACM was located at Site 3, and, further, because JM is the party that placed ACM at Site 3.

16. Subsequent sub-surface investigations of Site 3 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.

ANSWER:

IDOT lacks sufficient information to either admit or deny the allegations in Paragraph 16.

17. Investigations of Site 6, including the ROW, 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.

ANSWER:

IDOT lacks sufficient information to either admit or deny the allegations in Paragraph 17.

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

ANSWER:

IDOT admits that the AOC states that "miscellaneous fill material" has been found at Site 3, but otherwise lacks sufficient information to either admit or deny the allegations in Paragraph 19.

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

ANSWER:

Due to the vague and ambiguous nature of the allegations contained in Paragraph 19, IDOT is unable to either admit or deny any part of Paragraph 19.

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.

ANSWER:

IDOT admits that the AOC states that Site 3 was previously the site of a parking lot, but otherwise lacks sufficient information to either admit or deny the allegations in Paragraph 20.

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.

ANSWER:

IDOT lacks sufficient information to either admit or deny the allegations of Paragraph 21.

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.

ANSWER:

IDOT admits that it began construction of the project described in Paragraph 22 approximately during the alleged year.

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

ANSWER:

IDOT denies the allegations in Paragraph 23.

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

ANSWER:

IDOT admits that it constructed three temporary detour roads as part of the construction of a ramp to the Amstutz Expressway, but denies any allegations that are otherwise inconsistent with its answer to Paragraph 24.

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

ANSWER:

IDOT admits that portions of "Bypasses A and B" passed through portions of Sites 3 and 6, but, as the allegations in Paragraph 25 are lacking in detail, IDOT is unable to state precisely just what portions of Detour Roads A and B passed through portions of 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.

ANSWER:

IDOT admits that it constructed Bypass A as a temporary detour road during the Amstutz construction project, but denies that it "destroyed" the parking lot "during this construction."

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

ANSWER:

IDOT admits that it constructed Bypass B during the Amstutz construction project, but lacks sufficient information to either admit or deny the balance of the allegations in Paragraph 27.

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

ANSWER:

IDOT admits that Bypasses A and B were used while construction on the Greenwood Avenue ramp was taking place, but denies that the ramp “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.

ANSWER:

Because Johns Manville has failed to allege in Paragraph 29 just what “records” it is making reference to, or what contractor it is referring to, IDOT is unable to respond to Paragraph 29, because it lacks sufficient information to either admit or deny the allegations therein.

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.”

ANSWER:

IDOT denies that it “has admitted to EPA that it dealt with asbestos pipe during the construction project.” Further responding, IDOT denies that a retired engineer had any

authority to make any admissions against the Department's interests. IDOT further denies that it did anything with "asbestos pipe" at Site 3, including, but not limited to "burying some of it." IDOT lacks sufficient information to either admit or deny the remainder of the allegations in Paragraph 30.

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.

ANSWER:

IDOT admits that it was not made a party to the 2007 AOC. IDOT lacks sufficient information to either admit or deny the balance of the allegations in Paragraph 31.

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 the ROW, 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.

ANSWER:

Due to the vague and ambiguous nature of the allegations contained in Paragraph 32, IDOT lacks sufficient information to either admit or deny the allegations contained therein.

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 the ROW.

ANSWER:

Because JM has neither identified who conducted the review of the "IDOT engineering drawings" referred to in Paragraph 33, or what documents it is making reference to in Paragraph 33, IDOT is unable to either admit or deny the allegations in this paragraph.

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.

ANSWER:

IDOT denies the allegations in Paragraph 33.

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.

ANSWER:

IDOT lacks sufficient information to either admit or deny the allegations of Paragraph 35.

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.

ANSWER:

IDOT lacks sufficient information to either admit or deny the allegations of Paragraph 36.

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.

ANSWER:

IDOT lacks sufficient information to either admit or deny the allegations of Paragraph 37.

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.

ANSWER:

IDOT lacks sufficient information to either admit or deny the allegations of Paragraph 38.

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.”

ANSWER:

IDOT lacks sufficient information to either admit or deny the allegations of Paragraph 39.

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.

ANSWER:

IDOT lacks sufficient information to either admit or deny the allegations of Paragraph 40.

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 Site 6, the City of Waukegan. EPA's estimated cost for construction of this Modified Alternative 1 was \$1,869,000.

ANSWER:

IDOT lacks sufficient information to either admit or deny the allegations of Paragraph 41.

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.

ANSWER:

IDOT lacks sufficient information to either admit or deny the allegations of Paragraph 42.

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.

ANSWER:

IDOT lacks sufficient information to either admit or deny the allegations of Paragraph 43.

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.

ANSWER:

IDOT lacks sufficient information to either admit or deny the allegations of Paragraph 44.

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.”

ANSWER:

IDOT lacks sufficient information to either admit or deny the allegations of Paragraph 45.

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.”

ANSWER:

IDOT lacks sufficient information to either admit or deny the allegations of Paragraph 46.

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.

ANSWER:

IDOT lacks sufficient information to either admit or deny the allegations of Paragraph 47 or any of its subparagraphs therein.

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.

ANSWER:

IDOT lacks sufficient information to either admit or deny the allegations of Paragraph 48.

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:

- 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.

ANSWER:

IDOT lacks sufficient information to either admit or deny the allegations of Paragraph 49 or any of its subparagraphs therein. Further responding, IDOT denies that the Enforcement Action Memorandum contains any reference to the ROW or directs any actions being taken specifically thereon.

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.

ANSWER:

IDOT lacks sufficient information to either admit or deny the allegations of Paragraph 50.

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

ANSWER:

IDOT lacks sufficient information to either admit or deny the allegations of Paragraph 51 or the footnote thereto.

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.

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.

ANSWER:

IDOT lacks sufficient information to either admit or deny the allegations of Paragraph 52.

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

ANSWER:

IDOT lacks sufficient information to either admit or deny the allegations of Paragraph 53.

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

ANSWER:

IDOT lacks sufficient information to either admit or deny the allegations of Paragraph 54.

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 Amended Complaint as if set forth herein in full.

ANSWER:

IDOT realleges and reincorporates by reference all of its responses to paragraphs 1-54 of JM's First Amended Complaint, as if fully set forth therein.

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, 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").

ANSWER:

IDOT denies all of the allegations set forth in Paragraph 56. Further responding, no response is required as to the allegation that "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 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")", as these allegations constitute conclusions of law for which no response is required.

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.

ANSWER:

Paragraph 57 accurately states the provisions of Sections 21(a) and (e) of the Act, and no further answer is required.

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. 45 ILCS 5/21(d).

ANSWER:

Paragraph 58 accurately summarizes a portion of Section 21(d) of the Act, and no further answer is required.

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.

ANSWER:

Paragraph 59 accurately states the provisions of Section 3.535 of the Act, and no further answer is required.

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

ANSWER:

The allegations in Paragraph 60 constitute legal conclusions and thus no answer is required.

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."

ANSWER:

Paragraph 61 accurately states the provisions of Section 3.305 of the Act, and no further answer is required.

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.”

ANSWER:

Paragraph 62 accurately states the provisions of Section 3.535 of the Act, and no further answer is required.

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.

ANSWER:

Paragraph 63 accurately states the provisions of Section 3.535 of the Act, and no further answer is required.

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.”

ANSWER:

Paragraph 64 accurately states the provisions of Section 3.540 of the Act, and no further answer is required.

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

ANSWER:

The allegations in Paragraph 65 constitute conclusions of law and as such no response is required.

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.

ANSWER:

Admitted.

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 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 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 during construction of the Greenwood Avenue ramp and expressway bypass from 1971 to 1976.

ANSWER:

IDOT denies all of the allegations contained in Paragraph 66.

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

ANSWER:

IDOT denies that “the ACM waste dumped and disposed of on and under Sites 3 and 6 was abandoned by IDOT around 1976 . . .” Further responding, IDOT states that Johns Manville abandoned the ACM when it ceased using the Parking Lot.

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

ANSWER:

IDOT denies the allegations contained in Paragraph 69.

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).

ANSWER:

IDOT denies the allegations contained in Paragraph 70.

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 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 without a permit issued by IEPA and not in accordance with regulations adopted by the Board in violation of 415 ILCS 5/21(d).

ANSWER:

IDOT denies the allegation that “since approximately 1970 [it] has caused and allowed and continues to cause and allow the open dumping, disposal and abandonment of ACM waste within the ROW,” as construction work did not commence until 1971, as alleged in

Paragraph 22 of JM's Second Amended Complaint. Further responding, IDOT denies all of the allegations contained in Paragraph 71, as they constitute conclusions of law as to which no answer is required.

72. IDOT's violations are continuing in nature.

ANSWER:

The allegations in Paragraph 72 constitute conclusions of law, as to which no answer is required.

73. By moving ACM materials both horizontally and vertically within and outside the boundaries of the areas currently designated as Sites 3 and 6, including the ROW, IDOT introduced contamination to Site 3 and 6; 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 the ROW

ANSWER:

IDOT denies that it moved "ACM materials both horizontally and vertically within and outside the boundaries of the areas currently designated as Sites 3 and 6, including the ROW, IDOT introduced contamination to Site 3 and 6[.]" Further responding, IDOT denies that it "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[.]" IDOT lacks sufficient information to either admit or deny the balance of the allegations in Paragraph.

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.

ANSWER:

As the allegations set forth in Paragraph 72 consist solely of JM's contentions, and not allegations of fact, no response to this Paragraph is required.

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.

ANSWER:

IDOT denies that JM stands to suffer any "immediate and irreparable injuries[.]" Responding further, IDOT denies that JM can "suffer immediate and irreparable injuries for which there is no adequate remedy at law" where JM is responsible for causing and/or creating the conditions that have given rise to any purported "immediate and irreparable injuries."

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.

ANSWER:

IDOT lacks sufficient information to either admit or deny the allegations in Paragraph 74.

AFFIRMATIVE DEFENSES TO SECOND AMENDED COMPLAINT

IDOT's First Affirmative Defense (Unclean Hands)

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

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

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

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

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

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

7. In addition to the ACM discovered at Sites 3 and 6, ACM waste materials was discovered at Sites 4/5 (the western edge of the former JM facility) at various depths and consisted of Transite, roofing materials, brake shoe materials and other forms of ACM. Sampling

field work undertaken in the early months of 2008, showed that ACM waste materials were pervasive in the subsurface at Sites 4/5.

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

WHEREFORE, Respondent, Illinois Department of Transportation, requests that the Board enter an order in its favor and against Complainant, Johns Manville, upon IDOT's First Affirmative Defense, that Johns Manville's Second Amended Complaint is barred by the doctrine of unclean hands.

IDOT's Second Affirmative Defense (Waiver)

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

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

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

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

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

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

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

WHEREFORE, Respondent, Illinois Department of Transportation, requests that the Board enter an order in its favor and against Complainant, Johns Manville, upon IDOT’s Second Affirmative Defense is barred under the doctrine of waiver.

IDOT’s Third Affirmative Defense (Laches)

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

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

WHEREFORE, Respondent, Illinois Department of Transportation, requests that the Board enter an order in its favor and against Complainant, Johns Manville, upon IDOT's Third Affirmative Defense, finding that Johns Manville's Second Amended Complaint.

IDOT's Fourth Affirmative Defense (Statute of Limitations)

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

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

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

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

WHEREFORE, Respondent, Illinois Department of Transportation, requests that the Board enter an order in its favor and against Complainant, Johns Manville, upon IDOT's Fourth Affirmative Defense, finding that Johns Manville's Second Amended Complaint is barred by the statute of limitations set forth under 735 ILCS 5/13-205.

IDOT's Fifth Affirmative Defense (Lack of Jurisdiction)

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

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

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

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

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

WHEREFORE, Respondent, Illinois Department of Transportation, requests that the Board enter an order in its favor and against Complainant, Johns Manville, upon IDOT's Fifth Affirmative Defense, that the relief sought through Paragraph C of Johns Manville's Second Amended Complaint is unavailable to Johns Manville, as the Board does not have the statutory authority to grant the requested relief.

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

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

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

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

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

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

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

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

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

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

WHEREFORE, Respondent, Illinois Department of Transportation, requests that the Board enter an order in its favor and against Complainant, Johns Manville, upon IDOT's Sixth Affirmative Defense, that Johns Manville's Second Amended Complaint fails to name all necessary parties to this action.

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

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

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

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

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

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

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

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

WHEREFORE, Respondent, Illinois Department of Transportation, requests that the Board enter an order in its favor and against Complainant, Johns Manville, upon IDOT's Seventh Affirmative Defense, finding that Johns Manville's claims against IDOT under Second Amended

Complaint cannot stand, as they constitute an impermissible imposition of retroactive liability on IDOT..

IDOT's Eighth Affirmative Defense

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

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

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

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

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

WHEREFORE, Respondent, Illinois Department of Transportation, requests that the Board enter an order in its favor and against Complainant, Johns Manville, upon IDOT's Eighth Affirmative Defense.

Respectfully Submitted,

ILLINOIS DEPARTMENT
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