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No. 4-23-0785

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT

JOHNS MANVILLE, Petitioner/Cross-Respondent, v. ILLINOIS DEPARTMENT OF TRANSPORTATION, Respondent/Cross-Petitioner, and POLLUTION CONTROL BOARD, Respondent.	)	Cross-Petition for Direct Administrative Review of Orders of the Illinois Pollution Control Board PCB No. 14-3

CROSS-PETITION FOR DIRECT ADMINISTRATIVE REVIEW

Respondent Illinois Department of Transportation ("Department") hereby cross-petitions this Court under 415 ILCS 5/41(a) (2020), 35 Illinois Administrative Code § 101.906, and Illinois Supreme Court Rules 335 and 303(a)(3), for review of the opinions and orders of the Illinois Pollution Control Board ("Board") entered on November 7, 2013, December 15, 2016, December 21, 2017, March 22, 2018, and August 3, 2023, as well as all opinions and orders in the procedural progression leading to the entry of these opinions and orders. In these opinions and orders, the Board found that the Department was liable for causing or allowing dumping of asbestos-containing material on properties in Waukegan, Illinois, and ordered the Department to pay remediation costs in the amount of $620,203.

Respectfully submitted,

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September 13, 2023

ILLINOIS POLLUTION CONTROL BOARD
November 7, 2013

JOHNS MANVILLE, a Delaware Corporation	)	
Petitioner,	)	
v.	)	PCB 14-3 (Enforcement)
ILLINOIS DEPARTMENT OF TRANSPORTATION,	)	
Respondent.	)	

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

Johns Manville (JM) brought this complaint against the Illinois Department of Transportation (IDOT) pursuant to Section 31(d) of the Illinois Environmental Protection Act (Act). The one-count complaint alleges IDOT caused violations of Sections 21(a) and 21(e) of the Act by improper disposal of asbestos pipe and other waste at a site in Waukegan, Lake County. IDOT moved to dismiss the complaint. For the reasons below, the Board denies the motion to dismiss, finds the complaint neither duplicative nor frivolous, and accepts the complaint for hearing.

PROCEDURAL HISTORY

On July 8, 2013, JM filed its complaint (Compl.) against IDOT. IDOT filed a motion for extension of time to respond on August 29, 2013. On September 16, 2013, the Board's hearing officer granted the motion for extension of time to respond and directed IDOT to file any motions to strike or dismiss the complaint by September 27, 2013. On September 27, 2013, IDOT filed its motion to dismiss (Mot.) the complaint along with a memorandum of law in support of IDOT's motion to dismiss (Memo.). JM filed a response (Resp.) to the motion to dismiss on October 11, 2013.

SUMMARY OF COMPLAINT

Background

JM owned and operated a manufacturing facility in Waukegan (facility) that manufactured construction and other materials, some of which contained asbestos. Compl. at 2. On September 8, 1983, the United States Environmental Protection Agency (USEPA) added a portion of the facility to the National Priorities List under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), due to the presence of asbestos-containing material (ACM). *Id.* JM conducted and completed certain remediation activities at the facility under the direction and oversight of the USEPA. *Id.*

JM ceased operations at the facility in approximately 1998. Compl. at 2. ACM was thereafter discovered beyond the boundaries of the facility, on adjacent property owned by Commonwealth Edison (ComEd) and the City of Waukegan. *Id.*

On June 11, 2007, JM entered into an Administrative Order on Consent (AOC) with USEPA whereby JM agreed to perform removal action at four specific off-property areas. Compl. at 2. These four areas were designated as site 3, site 4/5 and site 6 (collectively, the "Southwestern site areas"). *Id.* ComEd, the current owner of site 3 and site 4/5, is also a party to the AOC. *Id.* at 3. ComEd has agreed to undertake certain response activities at these sites pursuant to the terms of the AOC. *Id.*

Site 3 is the focus of the complaint. Compl. at 3. Site 3 is located south of the Greenwood Avenue right-of-way and east of North Pershing Road in Waukegan, near the southwestern corner of the JM facility. *Id.* In December 1998, ACM was discovered at the surface of site 3. *Id.* Subsequent sub-surface investigations revealed ACM primarily at the north end and in at least two other areas of site 3. *Id.* The predominant ACM found at site 3 is a non-friable form of ACM called Transite pipe. *Id.* The northwest portion of site 3 also contains miscellaneous fill material, some of which has been found to contain asbestos. *Id.*

JM used site 3 as a parking lot in approximately the 1950s and 1960s pursuant to a license agreement with ComEd. Compl. at 3. Transite pipes were used for curb bumpers on the parking lot surface. *Id.* In approximately 1971, IDOT began construction of a ramp to the Amstutz Expressway as part of its reconstruction of the Pershing Road/Greenwood Avenue intersection. *Id.* During this construction, IDOT built a detour road through the former parking lot pursuant to a temporary easement with ComEd. *Id.* at 4. This construction destroyed the parking lot. *Id.* The detour road was used as an expressway bypass until the completion of the ramp construction in 1976. *Id.* A contractor was paid a "special excavation fee" to "remove and obliterate" the detour after the construction was complete. *Id.* The detour road and parking lot are no longer intact at site 3. *Id.*

JM states that IDOT acknowledged to USEPA in a CERCLA Section 104(a) response that it dealt with asbestos pipe during the construction project. Compl. at 4. IDOT is not a party to the 2007 AOC with USEPA because, at the time of signing, USEPA "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. *Id.* JM states that subsequent investigations have revealed buried Transite pipe in the area, including in the south side shoulder of Greenwood Avenue at a depth approximately one foot higher than the adjacent surface of site 3. *Id.*

On June 13, 2008, pursuant to the terms of the AOC, JM and ComEd submitted to USEPA for its review and approval an initial "Engineering Evaluation and Cost Analysis" (EE/CA) for proposed response action at the southwestern sites. Compl. at 5. JM and ComEd submitted their final EE/CA on April 4, 2011 (EE/CA Revision 4). *Id.* EE/CA Revision 4 evaluated four potential response action options for site 3. *Id.* On February 1, 2012, USEPA approved EE/CA Revision 4 with modifications. *Id.* In its EE/CA approval letter, USEPA

proposed a new alternative (modified alternative 2) for site 3, and estimated cost for construction of this modified alternative to be $2,196,000. *Id.*

On November 30, 2012, USEPA issued an Action Memorandum selecting a remedy for the southwestern sites, including modified alternative 2. Compl. at 5. This Action Memorandum included further modifications to modified alternative 2. *Id.* at 6. 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." *Id.*

USEPA estimates costs of the selected remedy for site 3 at between $1,705,696 and $2,107,622. *Id.* at 8. JM has disputed portions of USEPA's selected remedy for the southwestern sites, including parts of USEPA's cost analysis. *Id.*

On May 6, 2013, USEPA issued a Notice to Proceed with the selected remedy for all of the southwestern sites. Compl. at 8. This notice triggers a 120-day period within which JM and ComEd must submit to USEPA a Removal Action Work Plan for performing the response actions at the southwestern sites. *Id.* No response action has commenced at site 3 except for removal of surficial ACM. *Id.*

Count I – Violations of Section 21 of the Act

JM states

> IDOT's actions in breaking up, obliterating, spreading, burying, placing, dumping, disposing of and abandoning ACM, including Transite pipe, throughout [s]ite 3 and in using ACM as fill during construction of the Greenwood Avenue ramp and expressway bypass from 1971 to 1976 constitute violations of Section 21 of the [Act]. Compl. at 9.

Section 21 of the Act states in relevant 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. Compl. at 9, citing 415 ILCS 5/21 (2012).

JM contends that the discarded ACM at site 3 is a "waste" within the meaning of 415 ILCS 5/3.535 (2012). Compl. at 9. JM further contends that site 3 is neither "a disposal site that fulfills the requirements of a sanitary landfill" nor "a permitted waste disposal site or facility" which meets the requirements of the Act. *Id.*, citing 415 ILCS 5/3.445, 5/3.540 (2012).

JM argues IDOT

> engaged in the open dumping of waste and disposed of ACM waste between 1971 and 1976 when it broke up and obliterated Transite pipe that had previously been used as bumpers for a parking lot and spread, buried, dumped, placed, disposed of and abandoned the obliterated pipe on and under [site] 3. Compl. at 11.

JM states that this ACM was abandoned by IDOT around 1976 and currently remains in situ. *Id.*

JM argues that IDOT "caused the open dumping of waste" in violation of section 21(a) of the Act and "disposed of and abandoned ACM waste in an area that does not meet the requirements of the Act or its regulations" in violation of Section 21(e) of the Act. Compl. at 11, citing 415 ILCS 21(a), 21(e) (2012). JM states that the alleged violations are continuing in nature. *Id.* Further, JM contends that IDOT exacerbated any existing contamination at site 3 and directly contributed to USEPA's selected remedy for site 3 by "moving ACM materials both horizontally and vertically within and outside the boundaries of [site 3]." *Id.* JM argues that "IDOT should be required to participate in the response action for [site] 3" because IDOT's alleged violations "have directly impacted the scope of the proposed remedy" for site 3. *Id.*

JM states that "it stands to suffer immediate and irreparable injuries for which there is no adequate remedy at law" because JM must complete a work plan for the selected response action within 120 days (approximately November 2013) of receiving the notice to proceed.

JM requests that the Board (a) authorize a hearing in this matter, (b) find that IDOT has violated Sections 21(a) and (e) of the Act, (c) require IDOT to participate in the future response action on site 3 to the extent attributable to IDOT's violations of the Act, pursuant to the Board's authority to award equitable relief under Section 33 of the Act (415 ILCS 5/33 (2012)), and (d) grant other relief that the Board deems appropriate. Compl. at 12.

IDOT MOTION TO DISMISS

IDOT contends the complaint should be dismissed for two reasons: (1) JM is barred because this action is duplicative pursuant to the provisions of Section 31(d) of the Act (415 ILCS 5/31(d) (2012)) and Section 2-619(a)(9) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(9) (2012)), and (2) the complaint consists of conclusions not supported by specific pleaded facts and is substantially insufficient as a matter of law, and should be dismissed pursuant to Section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (2012)). Memo. at 1.

Duplicative Action

IDOT states that a first amended consent decree was entered by the US District Court for the Northern District of Illinois involving three parties: the US, Illinois, and Manville Sales Corporation now known as Johns Manville. Memo. at 6; US and People of State of Illinois ex rel. Madigan v. Manville Sales Corporation, Civil Action No. 88 C 630. IDOT claims that Illinois intervened in that proceeding. Memo. at 5, citing 69 Fed. Reg. 34 (Feb. 20, 2004). The amended consent decree "acknowledges and contemplates the likelihood of contribution claims on the part of Johns Manville." *Id.* IDOT contends that JM's position, that JM is unaware of any identical or substantially similar action pending before the Board or in another forum, ignores the current federal action. *Id.* at 6-7. IDOT notes that JM is a defendant and Illinois is a party to the federal lawsuit. *Id.* at 7.

IDOT states that, because it is a department in the executive branch of state government, it "does not have a legal identity separate and apart from the State of Illinois." Memo. at 7. IDOT argues that a state agency may not be a defendant in a circuit court action because state agencies are arms of the state. *Id.*, citing Rockford Mem'l Hosp. v. Dep't of Human Rights, 272 Ill. App. 3d 751, 756 (1995). IDOT states that JM is involved in a federal action with Illinois over JM's manufacturing plant, and that JM has made the same claims in that case as it has here. *Id.*

IDOT argues that the current action is duplicative of the CERCLA enforcement action being conducted by the USEPA and Illinois. Memo. at 7. IDOT states that the administrative order on consent is currently dealing with remediation of site 3, which is the same subject matter of this action. IDOT argues that nothing in the first amended consent decree prevents JM from seeking contributions from others regarding matters involving alleged environmental violations. *Id.* IDOT further states that the federal court has retained jurisdiction over the subject matter of the first amended consent decree. *Id.* at 8. IDOT notes that, at the same time, this matter is also still before the USEPA in the form of the administrative order on consent between JM, ComEd and USEPA. *Id.*

IDOT argues that there are three federal actions that have a direct bearing on site 3: (1) US and People of State of Illinois ex rel. Madigan v. Manville Sales Corporation, Civil Action No. 88 C 630; (2) the Stipulation and Order of Dismissal and Settlement entered by the Court for the Southern District of New York (91 Civ. 6683) (Global Settlement Order); and (3) the administrative order on consent with USEPA. Memo. at 8.

IDOT argues that, "[w]hat ultimately will happen in the remediation of Site 3 will take place and should take place in a federal forum." Memo. at 9. IDOT argues that CERCLA is the law that should apply. *Id.* IDOT contends that, if JM has a claim for contribution against Illinois, it should be presented in a federal forum where matters involving site 3 are located. *Id.* Further, if JM has a claim for contribution, it should be governed under CERCLA. *Id.*

IDOT contends that the USEPA already determined that IDOT should not be made a party to the federal action, and that JM's recourse is to file a contribution claim in the district

court in US and People of State of Illinois ex rel. Madigan v. Manville Sales Corporation, Civil Action No. 88 C 630. Memo. at 9. IDOT states that JM

> has the option of filing a claim in federal district court under Section 107 of CERCLA, 42 U.S.C.A. 9607, or JM can file a claim for contribution against the State of Illinois under Section 113 of the Superfund Amendments and Reauthorization Act (SARA), 42 U.S.C.A. 9613. *Id.*

Insufficient in Law

IDOT argues that the complaint contains conclusions unsupported with specific facts that are substantially insufficient as a matter of law. Memo. at 10. IDOT has not admitted to burying any Transite pipe. *Id.* USEPA has taken the position to not name IDOT as a potentially responsible party because IDOT did not admit to burying any ACM on or near site 3. *Id.* IDOT further contends that site 3 "is not the only off-site location where ACM has been discovered," noting that IDOT "did not build a temporary road" over the other locations. *Id.* at 11. IDOT believes "[it] would be more likely to conclude that the transite pipe that has been buried at Site 3 was buried when the utility companies did digging and backfilling." *Id.* at 12. IDOT argues that, taking the complaint as a whole, the conclusion that IDOT is responsible for buried ACM is a conclusion unsupported with specific facts and insufficient in law. *Id.*

IDOT further argues that JM has not alleged that IDOT "possessed transite pipe, brought it from off-site, or deposited transite pipe at Site 3." Memo. at 12. IDOT states that evidence of Transite pipe parking bumpers in a 1950s aerial photograph "does not mean [the parking bumpers] were intact and visibly identifiable on the surface of Site 3 in the early 1970s" when the road construction occurred. *Id.* IDOT describes the allegations against it as "[IDOT] caused a temporary road to be built in the area of Site 3 in the early to mid-1970s and then removed the temporary road." *Id.* at 13. IDOT concludes that "building a temporary road in the vicinity of Site 3 does not constitute open dumping" and that the complaint should be dismissed "because it is substantially insufficient as a matter of law." *Id.*

JOHNS MANVILLE RESPONSE TO IDOT MOTION TO DISMISS

JM contends that "IDOT's Motion fails to apply the proper legal standards, misconstrues the scope of the 'federal proceedings' it references, and neglects to cite any Pollution Control Board case law in support of its arguments." Resp. at 2. JM states that it

> is seeking a finding that IDOT violated the Act and equitable relief in the form of an Order requiring IDOT to participate in future response actions at Site 3, to the extent the asbestos contamination at or near Site 3 is attributable to IDOT's actions. *Id.* at 4.

The Action Is Not Duplicative

JM argues that IDOT "mischaracterizes the scope and application" of prior proceedings on the case at hand. Resp. at 6. JM states that the Board, in determining whether a case is the

same or substantially similar as one pending before the Board or another forum, looks at four factors: (1) whether the parties to the two matters are the same; (2) whether the proceedings are based on the same legal theories; (3) whether the violations alleged in the two matters occurred over the same time period; and (4) whether the same relief is sought. *Id.* at 5, citing Sierra Club v. Midwest Generation, LLC, PCB 13-15, slip op. at 22 (Oct. 3, 2013).

JM notes that IDOT cites three federal matters that IDOT claims have a direct bearing on this case: (1) the 1988 Northern District of Illinois case that led to the 2004 amended consent decree; (2) the Global Settlement Order; and (3) the 2007 AOC between JM, ComEd and USEPA. Resp. at 9-10. JM argues that "none of these actions involves . . . IDOT, and none of them addresses violations of the Act." *Id.* at 10.

JM first contends that IDOT "misrepresents the scope and application of the 2004 Consent Decree." Resp. at 11. JM states that the amended consent decree only covers response actions at the facility and that the "facility" does not include off-site areas, including site 3. *Id.* JM argues that the amended consent decree "expressly provides that it does not include response actions for [sites including site 3]," noting that these sites "will be addressed by separate actions." *Id.*, citing 2004 Consent Decree, Preamble, ¶N. The amended consent decree further provides that USEPA "may select and require implementation of any response action for any area outside the [f]acility boundaries and such decisions are not subject to this Consent Decree." *Id.*, citing 2004 Consent Decree, ¶18. JM therefore contends that the two actions are not duplicative because the amended consent decree neither covers site 3 nor seeks the same remedy at issue here. *Id.* at 12. JM further argues that, even if the amended consent decree had covered site 3, IDOT has not shown that it is "identical or substantially similar" to this case. *Id.* JM states that the amended consent decree "has nothing to do with IDOT's conduct beginning in the early 1970s . . . which forms the basis for the violations of the Act alleged [in the complaint]." *Id.* Further, the amended consent decree "has nothing to do with alleged violations of Sections 21(a) and 21(e) of the Act by anyone, let alone IDOT." *Id.* JM argues that the amended consent decree "involves different property, different alleged violations, different time periods and different requested relief." *Id.* at 13. JM also argues that the Northern District of Illinois court only retained jurisdiction over the "subject matter of the First Amended Consent Decree" which does not include off-site areas such as site 3. *Id.*

JM states that it "is unclear what relevance, if any," the Global Settlement Order has on this case. Resp. at 13. JM argues that the Global Settlement Order "was intended to address certain respects of JM's liability to [USEPA] under CERCLA, after JM's emergence from bankruptcy in 1988." *Id.* at 14. JM states that neither Illinois nor IDOT were parties to the Global Settlement Order, and that the order "has nothing to do with IDOT's historical violations of the Act." *Id.*

JM states that, while the 2007 AOC does address response actions at site 3, it does not bar JM's current action because it is not a matter before another forum, Illinois and IDOT are not parties to the AOC, and the AOC does not address IDOT's conduct or alleged violations. Resp. at 14. JM argues that the AOC "is not the product of an adjudicatory proceeding but rather is an administrative settlement." *Id.* at 15. JM states that the AOC "has not been approved or entered by a court or any other tribunal" and that the AOC "is not currently under review by any court of

administrative law judge." *Id.* Further, IDOT's actions are not a focus of the AOC. *Id.* JM also states that, because the AOC does not involve alleged violations of the Act, it is not duplicative under the law. *Id.* JM notes USEPA's decision to not include IDOT as a party to the AOC as further evidence of this point. *Id.* at 16. Further, USEPA "was exercising discretion in assessing liability under CERCLA when it elected not to add IDOT to the AOC; it was not considering violations of Section 21 of the Act." *Id.* JM states that the 2007 AOC "is not before an adjudicative forum and involves different parties, unique timeframes and disparate laws." *Id.*

JM disagrees with IDOT's position that the correct recourse for JM would be to file a contribution claim in federal district court under Section 107 or Section 113 of CERCLA. Resp. at 16. JM states that Section 31(d) of the Act "specifically authorizes citizen claims against state agencies for violations of the Act" and that the Board "has broad authority under Section 33 of the Act to award equitable relief." *Id.*

The Complaint Pleads Sufficient Facts

JM notes IDOT's position that the complaint should be dismissed because it is insufficient in law pursuant to Section 2-615 of the Illinois Code of Civil Procedure. Resp. at 17. JM argues, however, that IDOT "never claims JM's Complaint is frivolous and never attempts to equate the frivolous standard to a Section 2-615 standard." *Id.* JM contends that IDOT "is using the wrong procedural tool." *Id.* JM states that it is only required to "plead facts which, if established, would entitle it to relief" and that it "is not required to amass all possible facts and tie them together in a neat bow for IDOT." *Id.* at 17-18. JM states that, here, "IDOT does not argue that it does not understand the allegations," but rather IDOT "alleges they are wrong, based solely on conjecture and theorizing." *Id.* at 19. JM contends that it "has alleged facts sufficient to advise IDOT of the nature of the violations alleged." *Id.*

Sufficient Facts Are Alleged to State a Claim for Open Dumping

JM states that IDOT "mangles the definition of 'open dumping'" in arguing that JM cannot prove that IDOT engaged in open dumping. Resp. at 20. JM argues that the definition of open dumping does not require that waste be brought from one site to another. *Id.* at 20-21. Further, JM argues that a violation of Section 21 does not require intent and notes that the Illinois Supreme Court has established that one may "cause or allow" a violation of the Act without knowledge or intent. *Id.* at 21, citing People v. Fiorini, 143 Ill.2d 318 (1991). JM states that, even if intent were a prerequisite, IDOT's former engineer "appears to have demonstrated intentional conduct" by admitting to burying asbestos pipe during the road construction project. *Id.* JM also notes that IDOT does not raise a "lack of specificity" argument with respect to the alleged Section 21(e) violation for disposing of ACM waste. *Id.* at 20.

JM concludes that the motion to dismiss must be denied because IDOT has not shown that the complaint is frivolous or that the complaint fails to state a cause of action for a violation of Section 21(a) or 21(e) of the Act. Resp. at 21.

BOARD DISCUSSION

The Board looks to Illinois civil practice law for guidance when considering motions to strike or dismiss pleadings. 35 Ill. Adm. Code 101.100(b); s*ee also* United City of Yorkville v. Hamman Farms, PCB 08-96, slip. op. at 14-15 (Oct. 16, 2008). In ruling on a motion to dismiss, the Board takes all well-pled allegations as true and draws all reasonable inferences from them in favor of the non-movant. *See e.g.*, Beers v. Calhoun, PCB 04-204, slip op. at 2 (July 22, 2004); *see also* In re Chicago Flood Litigation, 176 Ill. 2d 179, 184, 680 N.E.2d 265, 268 (1997); Board of Education v. A, C & S, Inc., 131 Ill. 2d 428, 438, 546 N.E.2d 580, 584 (1989). "[I]t is well established that a cause of action should not be dismissed with prejudice unless it is clear that no set of facts could be proved which would entitle the plaintiff to relief." Smith v. Central Illinois Regional Airport, 207 Ill. 2d 578, 584-85, 802 N.E.2d 250, 254 (2003).

"Illinois is a fact-pleading state which requires the pleader to set out the ultimate facts which support his cause of action." Loschen v. Grist Mill Confections, Inc., PCB 97-174, slip op. at 4 (June 5, 1997), citing LaSalle National Trust, N.A. v. Village of Mettawa, 249 Ill. App. 3d 550, 557, 616 N.E.2d 1297, 1303 (2d Dist. 1993). "[L]egal conclusions unsupported by allegations of specific facts are insufficient." Village of Mettawa, 249 Ill. App. 3d at 557, 616 N.E.2d at 1303, citing Estate of Johnson v. Condell Memorial Hospital, 119 Ill. 2d 496, 509-10, 520 N.E.2d 37 (1988). A complaint's allegations are "sufficiently specific if they reasonably inform the defendants by factually setting forth the elements necessary to state a cause of action." People *ex rel.* William J. Scott v. College Hills Corp., 91 Ill. 2d 138, 145, 435 N.E.2d 463, 467 (1982).

Section 31(d)(1) of the Act provides "[u]nless the Board determines that [the] complaint is duplicative or frivolous, it shall schedule a hearing." 415 ILCS 5/31(d)(1) (2012); *see also* 35 Ill. Adm. Code 103.212(a). A complaint is duplicative if it is "identical or substantially similar to one brought before the Board or another forum." 35 Ill. Adm. Code 101.202. A complaint is frivolous if it requests "relief that the Board does not have the authority to grant" or "fails to state a cause of action upon which the Board can grant relief." *Id.*

The Complaint Is Not Duplicative

IDOT contends that this action is duplicative pursuant to the provisions of Section 31(d) of the Act (415 ILCS 5/31(d) (2012)) and Section 2-619(a)(9) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(9) (2012)).[1] Memo. at 1. IDOT notes three federal actions that it contends have a direct bearing on site 3: (1) the Northern District of Illinois action which resulted in the amended consent decree; (2) the Global Settlement Order; and (3) the 2007 Administrative Order on Consent. Memo. at 8. IDOT argues that JM's recourse is to file a contribution claim in the district court in US and People of State of Illinois ex rel. Madigan v. Manville Sales Corporation, Civil Action No. 88 C 630. However, JM is not barred from bringing this action before the Board.

[1] 735 ILCS 5/2-619(a)(9) (2012) states that a defendant may file a motion for dismissal of an action if "the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim."

In determining whether a matter before the Board is the same or substantially similar to one pending before another forum, the Board looks to whether (1) the parties to the two matters are the same; (2) the proceedings are based on the same legal theories; (3) the violations alleged in the two matters occurred over the same time period; and (4) the same relief is sought in the two proceedings. United City of Yorkville v. Hamman Farms, PCB 08-96, slip op. at 5-6 (Apr. 2, 2009).

"[W]here two actions between the same parties on the same subject are brought in different courts with concurrent jurisdiction, the first court which acquires jurisdiction retains its jurisdiction." Janson v. PCB, 387 N.E.2d 404, 751 (3rd Dist. 1979). The Northern District of Illinois does not retain jurisdiction over the claims at issue in this case. The Northern District action pertains only to the facility and not site 3, which is the subject of this proceeding. The amended consent decree states that "[n]othing contained herein is intended to or shall be interpreted as waiving any rights that the parties may have under the Global Settlement Order with respect to areas outside of the boundaries of the Facility." Memo. Exh. C at 2. The amended consent decree defines "facility" as "only the area within the boundaries depicted on the facility map attached hereto as Exhibit 3. . . . The facility does not include any areas adjacent to and/or outside of the boundaries set forth in Exhibit 3." *Id.* at 10. The amended consent decree further states that it "will be the governing document defining responsibilities for work by Johns Manville at its facility, as defined in Exhibit 3, in Lake County, Illinois." Resp. Exh. 2 at 4. With respect to the surrounding area, the amended consent decree states that

> [s]ince 1998, the parties have discovered further asbestos contamination in several areas on and/or adjacent to the Johns Manville Waukegan Disposal Area, including Sites 1, 2, 3, 4, 5, 6 and 7 as approximately depicted in Exhibit 4. This First Amended Consent Decree does not include response actions for these areas; however these Sites will be addressed by separate actions. Resp. Exh. 2 at 7.

A comparison of Exhibits 3 and 4 to the amended consent decree makes clear that site 3 is not interpreted by the Northern District of Illinois as part of the defined "facility" that is the subject of the amended consent decree. The two actions therefore do not pertain to the same subject.

The amended consent decree also states that "JM hereby covenants not to sue and agrees not to assert any claims or causes of action against the United States or the State with respect to the Facility or this First Amended Consent Decree . . . ." Memo. Exh. C at 1. Finally, the amended consent decree states that "[t]he proper completion of the Work under this First Amended Consent Decree is solely the responsibility of JM." *Id*. The issue of site 3 remediation by IDOT has not been raised in the amended consent decree.

"The intent behind the prohibition against 'duplicitous' complaints is to avoid the situation where private citizens' complaints raise the same issue and unduly harass a [respondent]." Northern Illinois Anglers' Association v. City of Kankakee, PCB 88-183, slip op. at 5 (Jan. 5, 1989). It is clear that this action and the amended consent decree are neither the same nor substantially similar. The amended consent decree specifically states that it relates only to remediation work performed at the JM facility. The original action brought before the

Northern District of Illinois was filed under Sections 106 and 107 of CERCLA (42 U.S.C. §§ 9606 and 9607), whereas this case was brought pursuant to Section 31(d) of the Act (415 ILCS 5/31(d) (2012) and pertains to violations of Sections 21(a) and 21(e) of the Act. The two actions are therefore not duplicative of one another.

With regards to the Global Settlement Order and the 2007 AOC, neither IDOT nor the State is a party to either action. None of the three federal proceedings are duplicative of the instant action. IDOT is therefore not "unduly harass[ed]" by this case.

The Complaint Is Not Frivolous

IDOT contends that the complaint should be dismissed pursuant to Section 2-615 of the Illinois Code of Civil Procedure because "it is substantially insufficient as a matter of law."[2] Memo. at 13. While IDOT does not directly equate this position to the Board's frivolity standard, the two arguments are similar and the Board addresses IDOT's position as it would apply under the Act and the Board's regulations together with its argument as to Section 2-615.

A complaint is frivolous if it requests relief that the Board does not have the authority to grant, or fails to state a cause of action upon which the Board can grant relief. 35 Ill. Adm. Code 101.202. JM requests that the Board find that IDOT violated Sections 21(a) and 21(e) of the Act, and order IDOT to participate in the future response action at site 3. Comp. at 12. Section 33(a) of the Act grants the Board the authority to "issue and enter such final order, or make such final determination, as it shall deem appropriate under the circumstances." 415 ILCS 5/33(a) (2012). Further, Section 33(b) of the Act states in part that Board orders "may include a direction to cease and desist from violations of this Act." 415 ILCS 5/33(b) (2012). IDOT does not dispute that the Board has the authority to grant the requested relief. The Board is authorized to find violations of the Act, and the complaint is therefore not frivolous in this regard.

IDOT does, however, dispute that the complaint adequately states a cause of action upon which the Board can grant relief. IDOT argues that, taking the complaint as a whole, the conclusion that IDOT is responsible for buried ACM is a conclusion unsupported with specific facts and insufficient in law. Memo. at 12. IDOT states "[it] would be more likely to conclude that the transite pipe that has been buried at Site 3 was buried when the utility companies did digging and backfilling." *Id.* JM argues in response that "IDOT does not argue that it does not understand the allegations," but rather IDOT "alleges they are wrong, based solely on conjecture and theorizing." Resp. at 19. JM contends that it is only required to "plead facts which, if established, would entitle it to relief" and that it "has alleged facts sufficient to advise IDOT of the nature of the violations alleged." *Id.* at 17-18, 19.

The Board finds that the complaint is sufficiently specific as it reasonably informs IDOT of the alleged violations. To "cause or allow" open dumping, the alleged polluter must have the

[2] 735 ILCS 5/2-615 allows, in part, a party to move that an action be dismissed after pointing out "specifically the defects complained of." 735 ILCS 5/2-615(a) (2012). A court may "terminate the litigation in whole or in part" after ruling on the motion. 735 ILCS 5/2-615(d) (2012).

"capability of control over the pollution" or "control of the premises where the pollution occurred." People v. A.J. Davinroy Contractors, 249 Ill. App. 3d 788, 793-96, 618 N.E.2d 1282, 1286-88 (5th Dist. 1993). JM contends that IDOT has violated Sections 21(a) and 21(e) of the Act through IDOT's actions

> in breaking up, obliterating, spreading, burying, placing, dumping, disposing of and abandoning ACM, including Transite pipe, throughout Site 3 and in using ACM as fill during construction of the Greenwood Avenue ramp and expressway bypass from 1971 to 1976. Resp. at 9.

The Board finds the allegations sufficient to reasonably inform IDOT of the claims being brought against it. Further, IDOT's argument that the more likely conclusion for why the Transite pipe is at site 3 is that it "was buried when the utility companies did digging and backfilling" is not adequate grounds for dismissal. Memo. at 12. When ruling on a motion to dismiss, the Board takes all well-pled allegations in the complaint as true and draws all reasonable inferences from them in favor of the complainant. JM has provided sufficient facts to set forth a scenario which, if proven, may establish a violation of the Act. The complaint is therefore not frivolous.

Accept for Hearing

Section 31(d) of the Environmental Protection Act allows any person to file a complaint with the Board. 415 ILCS 5/31(d) (2012). Section 31(d) further provides that "[u]nless the Board determines that such complaint is duplicitous or frivolous, it shall schedule a hearing." *Id.*; *see also* 35 Ill. Adm. Code 103.212(a).

Having found that the complaint is neither duplicitous nor frivolous, the Board accepts the complaint for hearing. *See* 415 ILCS 5/31(d) (2012); 35 Ill. Adm. Code 103.212(a). A respondent's failure to file an answer to a complaint within 60 days after receiving the complaint may have severe consequences. Generally, if IDOT fails within that timeframe to file an answer specifically denying, or asserting insufficient knowledge to form a belief of, a material allegation in the complaint, the Board will consider IDOT to have admitted the allegation. 35 Ill. Adm. Code 103.204(d). The Board grants IDOT until Monday, December 9, 2013, which is the first business day following the 30th day of this order, to file an answer, if it so chooses.

The Board directs the hearing officer to proceed expeditiously to hearing. Among the hearing officer's responsibilities is the "duty . . . to ensure development of a clear, complete, and concise record for timely transmission to the Board." 35 Ill. Adm. Code 101.610. A complete record in an enforcement case thoroughly addresses, among other things, the appropriate remedy, if any, for the alleged violations, including any civil penalty.

If a complainant proves an alleged violation, the Board considers the factors set forth in Sections 33(c) and 42(h) of the Act to fashion an appropriate remedy for the violation. *See* 415 ILCS 5/33(c), 42(h) (2012). Specifically, the Board considers the Section 33(c) factors in determining, first, what to order the respondent to do to correct an on-going violation, if any, and, second, whether to order the respondent to pay a civil penalty. The factors provided in

Section 33(c) bear on the reasonableness of the circumstances surrounding the violation, such as the character and degree of any resulting interference with protecting public health, the technical practicability and economic reasonableness of compliance, and whether the respondent has subsequently eliminated the violation.

If, after considering the Section 33(c) factors, the Board decides to impose a civil penalty on the respondent, only then does the Board consider the Act's Section 42(h) factors in determining the appropriate amount of the civil penalty. Section 42(h) sets forth factors that may mitigate or aggravate the civil penalty amount. These factors include the following: the duration and gravity of the violation; whether the respondent showed due diligence in attempting to comply; any economic benefits that the respondent accrued from delaying compliance based upon the "lowest cost alternative for achieving compliance"; the need to deter further violations by the respondent and others similarly situated; and whether the respondent "voluntarily self-disclosed" the violation. 415 ILCS 5/42(h) (2012). Section 42(h) requires the Board to ensure that the penalty is "at least as great as the economic benefits, if any, accrued by the respondent as a result of the violation, unless the Board finds that imposition of such penalty would result in an arbitrary or unreasonable financial hardship." *Id*. Such penalty, however, "may be off-set in whole or in part pursuant to a supplemental environmental project agreed to by the complainant and the respondent." *Id*.

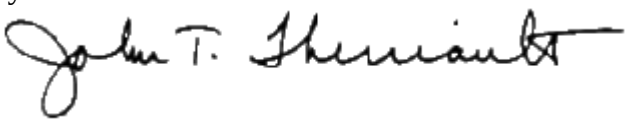
Accordingly, the Board further directs the hearing officer to advise the parties that in summary judgment motions and responses, at hearing, and in briefs, each party should consider: (1) proposing a remedy for a violation, if any, and supporting its position with facts and arguments that address any or all of the Section 33(c) factors; and (2) proposing a civil penalty, if any (including a specific total dollar amount and the portion of that amount attributable to the respondent's economic benefit, if any, from delayed compliance), and supporting its position with facts and arguments that address any or all of the Section 42(h) factors. The Board also directs the hearing officer to advise the parties to address these issues in any stipulation and proposed settlement that may be filed with the Board.

CONCLUSION

The Board finds that the complaint is neither duplicative nor frivolous. Accordingly, the Board denies IDOT's motion to dismiss the complaint, and the Board accepts the complaint for hearing. IDOT has until Monday, December 9, 2013, to file an answer to the complaint, if it so chooses.

IT IS SO ORDERED.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on November 7, 2013, by a vote of 4-0.



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John T. Therriault, Clerk
Illinois Pollution Control Board

ILLINOIS POLLUTION CONTROL BOARD
December 15, 2016

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

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

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

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

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

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

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

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

PROCEDURAL HISTORY

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

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

FACTS

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

JM Facility

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

Site 3 and Site 6

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

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

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

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

Soil Sampling at Site 3 and Site 6

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

In 1998, ELM investigated Site 3. Exh. 57 (ELM report). ELM visually inspected the site surface and found 74 suspected ACM fragments. *Id*. at 23. ELM removed this surficial ACM from the site. *Id.* ELM described 65 of the suspected ACM fragments as Transite pipe[2] and the remaining as concrete, felt paper, tar paper, roofing material, or insulation. *Id.* at 177-179. ELM characterized this surficial suspected ACM as located "throughout Site 3 with the

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

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

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

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

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

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

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

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

Asbestos Cleanup at Site 3 and Site 6

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

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

VIOLATIONS AND DEFENSES

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

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

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

Count I - Section 21(a)
Open Dumping

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

> No person shall:
>
> (a) Cause or allow the open dumping of any waste. *Id.*

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

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

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

IDOT Is Subject to Section 21

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

ACM Found on Site 3 and Site 6 Is Waste

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

Building Former Detour Road

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

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

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

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

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

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

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

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

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

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

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

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

Reconstructing Greenwood Avenue

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

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

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

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

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

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

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

Restoring Site 3 after Construction

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

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

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

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

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

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

Control over Greenwood Avenue Right-of-Way

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

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

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

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

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

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

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

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

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

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

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

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

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

Board Summary on Section 21(a)

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

Count I - Section 21(d)
Unpermitted Waste Disposal

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

> No person shall: . . .
>
> (d) Conduct any waste-storage, waste-treatment, or waste-disposal operation:
>
> (1) without a permit granted by the Agency; [or]
>
> (2) in violation of any regulations or standards adopted by the Board under this Act . . . . *Id.*

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

Count I - Section 21(e)
Illegal Waste Disposal

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

No person shall: . . .

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

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

Count II - Historic Section 1021

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

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

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

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

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

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

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

Defenses

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

Five-Year Statute of Limitation

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

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

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

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

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

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

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

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

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

Board Jurisdiction

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

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

Equitable Defenses

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

Failure to Join Necessary Parties

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

RELIEF

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

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

Section 33(c) Factors

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

Character and Degree of Injury or Interference

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

Social and Economic Value of Pollution Source

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

Suitability to Area in Which Located

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

Technical Practicability and Economic Reasonableness

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

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

Subsequent Compliance

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

JM's Status Report on Cleanup

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

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

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

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

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

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

Private Cost Recovery

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

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

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

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

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

In the absence of Illinois court opinions[4], the federal district court has considered whether Illinois law allows reimbursement of cleanup costs. In early cases after Ostro, the federal court denied motions to dismiss and allowed cost recovery claims to proceed. For example, in Midland Life Insurance Co. v. Regent Partners, Midland cleaned up contamination from a former industrial dry cleaning operation. 1996 WL 604038 (N.D. Ill. Oct. 17, 1996). Midland alleged open dumping violations under Section 21 of the Act and sought to recover its cleanup costs. After reviewing the Board's decision in Ostro, among other opinions, the court found an implied right for private parties to recover cleanup costs under the Act. *See also* Singer v. Bulk Petroleum Corp., 9 F. Supp. 2d 916, 925 (N.D. Ill. 1998); Krempel v. Martin Oil Marketing, Ltd., 1995 WL 733439 (N.D. Ill. Dec. 8, 1995).

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

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

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

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

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

Sanctions

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

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

Additional Hearing

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

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

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

1. The cleanup work performed by JM in the portions of Site 3 and Site 6 where the Board found IDOT responsible for ACM waste present in soil.

2. The amount and reasonableness of JM's costs for this work.

3. The share of the JM's costs attributable to IDOT.

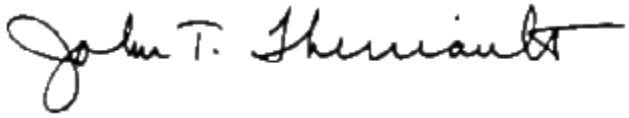
After this hearing is completed, the Board will enter its final order awarding cleanup costs as the Board deems appropriate under the facts and circumstances.

CONCLUSION

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

IT IS SO ORDERED.

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



John T. Therriault, Clerk
Illinois Pollution Control Board

ILLINOIS POLLUTION CONTROL BOARD
December 21, 2017

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

OPINION AND ORDER OF THE BOARD (by C.K. Zalewski):

Johns Manville (JM) brought this enforcement action against the Illinois Department of Transportation (IDOT). JM alleged that IDOT violated the Illinois Environmental Protection Act (Act) through open dumping of asbestos waste, conducting an unpermitted waste disposal operation, and illegally disposing of asbestos waste at two sites in Waukegan, Lake County. Last year, after lengthy discovery and a five-day hearing, the Board found that IDOT violated the Act at some but not all specified areas within the two sites.

JM has cleaned up asbestos waste at the sites and seeks reimbursement from IDOT for the costs of the cleanup. When the Board found that IDOT violated the Act, it ruled that another hearing was necessary to determine the remedy for the violations; the record was insufficient to determine the appropriate level of reimbursement. The Board directed the hearing officer to hold a second hearing to develop a factual record concerning JM's work cleaning up the waste, the amount and reasonableness of JM's costs for this work, and the share of JM's costs attributable to IDOT.

In preparation for that hearing, IDOT seeks to discover documents and conduct depositions regarding the involvement of Commonwealth Edison Company (ComEd) in the cleanup work. IDOT seeks documents and depositions from both ComEd and JM. IDOT alleges that ComEd, not a party in this action, paid JM for some cleanup costs. ComEd and JM do not admit that any cleanup cost payment arrangement exists between them. In response to IDOT's requests, JM filed an *in camera* application for non-disclosure, protective order, and *in camera* inspection of privileged and confidential material. ComEd likewise filed an *in camera* application for non-disclosure and protective order, as well as a motion to quash. JM argues that the information IDOT requests is neither relevant nor calculated to lead to relevant evidence.

At the hearing officer's request, IDOT and JM each filed briefs addressing whether IDOT's discovery requests are seeking relevant information or are calculated to lead to relevant evidence. The Board finds that the requests are not. They stray from the narrow issues articulated by the Board for the remedy hearing, which solely concern JM's cleanup work of the specified areas where IDOT violated the Act, the amount and reasonableness of JM's costs for

that cleanup work, and the share of JM's costs attributable to IDOT. The discovery requests seek irrelevant information and are not calculated to lead to relevant information. Accordingly, the Board grants JM's application for protective order. JM's application for non-disclosure and inspection of privileged and confidential material is moot. The Board also grants ComEd's application for protective order. ComEd's application for non-disclosure and motion to quash are moot. Finally, the Board denies IDOT's motion to require JM to produce a witness for a second deposition.

First, the Board summarizes the procedural history between its order that found IDOT liable and this order. Next, the Board describes the applicable discovery rules. Finally, the Board analyzes the arguments made and rules in favor of JM and ComEd.

PROCEDURAL HISTORY

The Board's December 2016 Interim Opinion and Order Found IDOT Violated the Act and Directed a Hearing on Remedy

On December 15, 2016, the Board issued an interim opinion and order, finding IDOT violated the Act in specified areas of two sites near a JM manufacturing facility in Waukegan. Johns Manville v. Illinois Dept. of Transportation, PCB 14-3 (Dec. 15, 2016) (Dec. 2016 Order). Specifically, the Board found that IDOT dispersed and buried asbestos waste in these areas during road construction. ComEd owns one of the two sites at which IDOT violated the Act. *Id*. at 2.

The Board also found that, in 2007, JM signed a consent order with the United States Environmental Protection Agency (USEPA) to clean up the sites. USEPA required excavation and disposal of waste soil, backfill with clean soil, and controls where waste remained. JM had conducted this work while its complaint was pending before the Board and completed it in 2016, just prior to the Board's December 2016 order. *Id*. at 4–5.

When it filed its complaint, JM asked the Board to require IDOT's participation in performing the cleanup. However, because the cleanup was completed before the Board found IDOT violated the Act, JM changed its request. Instead, JM asked the Board to require IDOT to reimburse JM's expenses in cleaning up the sites where IDOT violated the Act. *Id*. at 19. The Board agreed, finding it "appropriate that a party recover the cost of performing cleanup as a result of another party's violations," reflecting the Act's purpose "to restore and protect the environment and assure that adverse effects on the environment are borne by those who cause them." *Id*. at 21, *citing* 415 ILCS 5/2(b), 33(a) (2014).

JM estimated that it spent $3,582,000 to investigate and clean up the waste on the two sites. Dec. 2016 Order at 19. The Board, however, did not require IDOT to pay this amount. JM did not provide details about the work it performed on the sites. Furthermore, JM merely estimated its costs; it did not provide records showing the actual amount spent on the cleanup. The Board found that the record lacked the facts necessary to "determine the reasonable costs [of the cleanup] that may be attributable to IDOT." *Id*. at 22.

The Board directed the hearing officer to hold an additional hearing to develop facts necessary to derive the appropriate remedy. The Board specifically limited the hearing to three issues: (1) the cleanup work performed by JM in the portions of the two sites where the Board found IDOT responsible for waste present in soil; (2) the amount and reasonableness of JM's costs for this work; and (3) the share of JM's costs attributable to IDOT. *Id*. at 22. Since then, the parties have been conducting discovery in preparation for the remedy hearing.

JM and ComEd Contest IDOT's Discovery Requests

IDOT made three discovery requests. First, on May 30, 2017, IDOT filed with the Board a subpoena that it served on ComEd. The subpoena, in general, requests documents related to payments from ComEd to JM for cleanup of the two sites. On June 20, 2017, ComEd filed a motion to quash or for protective order in response to this subpoena (ComEd Mot. to Quash). IDOT responded to the motion to quash on June 22, 2017. Second, on June 23, 2017, IDOT filed a subpoena that it served on ComEd for deposition of officials pertaining to cleanup cost payments between ComEd and JM. Third, on July 18, 2017, IDOT filed a motion seeking a second opportunity to depose Frederick Scott Myers, a JM official, concerning cleanup cost payments from ComEd.

On August 4, 2017, JM filed an application for non-disclosure and protective order in response to IDOT's discovery requests (Notice of Filing JM App.). ComEd also filed such an application on August 4, 2017 (Notice of Filing ComEd App.). Because these applications discuss documents that JM and ComEd argue contain non-disclosable confidential information, only the notice of filing for each application is publicly available; the underlying applications are not. IDOT responded to these applications on September 15, 2017. ComEd and JM both filed replies to IDOT's response on October 6, 2017.

On October 5, 2017, a hearing officer order directed JM and IDOT to specifically address the legal issue of whether IDOT's three discovery requests seek relevant information or are calculated to lead to relevant information, as described in 35 Ill. Adm. Code 101.616(a). IDOT and JM both filed briefs on October 27, 2017 (IDOT Br.; JM Br.). IDOT and JM also both filed response briefs on November 13, 2017 (IDOT Resp.; JM Resp.). The October 5 hearing officer order invited ComEd to file a brief; it filed a statement in response to the hearing officer's request on November 13, 2017. JM moved for leave to file a reply *instanter* on November 27, 2017. It also filed a reply on the same day. IDOT filed a response to JM's motion for leave on November 30, 2017. It also filed a motion for leave to file a sur-reply, along with the sur-reply itself, on December 20, 2017. The Board grants the parties' motions to file these briefs.

BOARD DISCOVERY RULES

Discovery is governed by Section 101.616 of the Board's procedural rules. 35 Ill. Adm. Code 101.616. Under Section 101.616(a), "[a]ll relevant information and information calculated to lead to relevant information is discoverable," subject to specified exceptions. 35 Ill. Adm. Code 101.616(a).

The Board's procedural rules do not define "relevant information" or "relevant evidence." The Board and the Board's hearing officers have applied Section 101.616(a), but in a fact-specific manner that does not provide a general interpretation of the term. *E.g.*, Timber Creek Homes, Inc. v. Village of Round Lake Park, PCB 14-99 (Apr. 3, 2014) (Board order); Fox Moraine, LLC v. United City of Yorkville, PCB 07-146 (Sept. 20, 2007) (Hearing officer order); People v. Packaging Personified, Inc., PCB 04-16 (June 28, 2006) (Hearing officer order).

Where the Board's discovery rules are silent, the Board may look to the Illinois Supreme Court Rules for guidance. 35 Ill. Adm. Code 101.616. The Supreme Court's Illinois Rules of Evidence define "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ill. R. Evid. 401.

DISCUSSION

IDOT's Discovery Requests Seek Information That Is Neither Relevant nor Calculated to Lead to Information Relevant to the Remedy Hearing Issues

In its order finding IDOT violated the Act, the Board directed the hearing officer to conduct another hearing to gather evidence on just three issues:

(1) The cleanup work performed by JM at the portions of the sites where the Board found IDOT responsible for waste present in soil;

(2) The amount and reasonableness of JM's costs for this work; and

(3) The share of JM's costs attributable to IDOT. Dec. 2016 Order at 22.

For information to be relevant, it must pertain to a "fact that is of consequence to the determination of the action." Ill. R. Evid. 401. The "determination of the action" here is the Board's determination of the three remedy hearing issues set forth above. During this discovery then, IDOT can seek information pertaining to any fact of consequence to that Board determination or calculated to lead to that information—any other information is not discoverable. *See* Ill. R. Evid. 401; 35 Ill. Adm. Code 616(a).

As JM correctly states, the only one found to have violated the Act is IDOT. The December 2016 order did not find that "JM, ComEd, or anyone else violated the Act." JM Br. at 5. Furthermore, no complaint has even been brought before the Board alleging that anyone else violated the Act.

IDOT's arguments erroneously presume that any payments from ComEd to JM necessarily reduce IDOT's liability under the Act to pay for the cleanup resulting from its violations. IDOT stresses that it must be allowed to explore "the question of whether [ComEd] has reimbursed [JM] for any of the work". IDOT Br. at 5. But IDOT fails to explain how the answer to this question pertains to any fact that is of consequence to what cleanup work was performed, how much it cost, whether the cost was reasonable, or what share is attributable to

IDOT. The Board finds that the information IDOT seeks to discover is neither relevant nor calculated to lead to information relevant to the issues for the remedy hearing.

The Board Need Not Apply the Collateral Source Rule

JM argues that the collateral source rule would also support the conclusion that the requested information is irrelevant, preventing IDOT's discovery requests. The collateral source rule is a principle in tort law. JM explains that, where a party harmed by a tortfeasor receives payments from a collateral source, *i.e.*, some third party to the tort action, evidence of that payment is not admissible in a jury trial. *See* JM Br. at 8–9 (citations omitted). Having ruled that IDOT seeks information that is not discoverable under Section 101.616 of the Board's procedural rules, the Board finds it unnecessary to decide whether the collateral source rule can apply to enforcement actions under the Act.

JM's and ComEd's Other Requests Are Moot

JM's application, ComEd's application, and ComEd's motion to quash set forth several grounds challenging IDOT's discovery requests other than relevance. Among other things, ComEd's motion to quash argues that IDOT's first subpoena is "unreasonably duplicative, overbroad and burdensome" and "unreasonably commands production of confidential information." ComEd Mot. to Quash at 4–9. Similarly, JM's and ComEd's later filings both argue that the information IDOT requests is non-disclosable for reasons of confidentiality and privilege. *See* Notice of Filing ComEd App., JM App.

Because the Board has found that IDOT requests irrelevant information, it need not also rule on whether the request is unreasonably duplicative or whether the information is non-disclosable. Because these legal arguments are moot, the Board both declines to rule on their merits and denies ComEd's motion to quash.

CONCLUSION

The Board ordered a remedy hearing on three issues. IDOT seeks to discover information that is neither relevant nor calculated to lead to information relevant to any of those issues. Accordingly, the Board grants JM's and ComEd's applications for protective order concerning IDOT's described discovery requests. The Board also denies IDOT's motion to require JM to produce a witness for a second deposition. Finally, the Board denies JM's and ComEd's *in camera* applications for non-disclosure, JM's *in camera* application for inspection of privileged and confidential material, and ComEd's motion to quash as moot.

ORDER

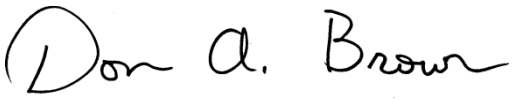
1. The Board grants JM's and ComEd's applications for protective order.

2. The Board denies IDOT's motion to require JM to produce Frederick Scott Myers for a second deposition.

3. The Board denies JM's and ComEd's *in camera* applications for non-disclosure, JM's *in camera* application for inspection of privileged and confidential material, and ComEd's motion to quash as moot.

IT IS SO ORDERED.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on December 21, 2017, by a vote of 5-0.



Don A. Brown, Clerk
Illinois Pollution Control Board

ILLINOIS POLLUTION CONTROL BOARD
March 22, 2018

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

ORDER OF THE BOARD (by C.K. Zalewski):

In this enforcement action, Johns Manville (JM) alleges that the Illinois Department of Transportation (IDOT) illegally dumped asbestos waste at two sites in Waukegan, Lake County. The Board found that IDOT violated the Environmental Protection Act (Act) (415 ILCS 5 (2016)) at certain areas within the two sites. JM cleaned up those areas and seeks reimbursement from IDOT. The Board ordered another hearing to develop additional facts regarding JM's cleanup work at those specific areas, the amount and reasonableness of JM's costs for that cleanup work, and the share of JM's costs attributable to IDOT.

For this hearing, IDOT sought to conduct discovery concerning the involvement of Commonwealth Edison Company (ComEd) in JM's cleanup activities—IDOT alleges ComEd compensated JM for cleanup costs. ComEd and JM moved to prevent IDOT from conducting this discovery. The Board found that IDOT's discovery requests pertain to information that is neither relevant nor calculated to lead to relevant evidence for the remedy hearing.

IDOT filed a motion asking the Board to reconsider this decision. IDOT argues that: (1) the Board erred in applying the law when it found that information concerning ComEd's involvement is irrelevant; and (2) the Board did not consider the entire record when making its decision. The Board denies IDOT's motion for reconsideration. IDOT's initial argument reiterates an argument that the Board's previous order addressed. IDOT's second argument fails to substantiate its claim that the Board overlooked facts in the record.

In this order, the Board first summarizes the case's procedural history, beginning with its order finding IDOT liable. Next, the Board describes the applicable law on motions for reconsideration. Finally, the Board analyzes the arguments and denies IDOT's motion.

PROCEDURAL HISTORY

On December 15, 2016, the Board issued an interim opinion and order, finding IDOT violated the Act in specified areas of two sites near a JM manufacturing facility in Waukegan. Johns Manville v. Illinois Dept. of Transportation, PCB 14-3 (Dec. 15, 2016) (Dec. 2016 Order).

Specifically, the Board found that IDOT dispersed and buried asbestos waste in these areas during road construction.

The Board directed the hearing officer to hold an additional hearing to develop facts necessary to derive the appropriate remedy for IDOT's violations. The Board limited the hearing to three issues: (1) the cleanup work performed by JM in the portions of the two sites where the Board found IDOT responsible for waste present in soil; (2) the amount and reasonableness of JM's costs for this work; and (3) the share of JM's costs attributable to IDOT. Dec. 2016 Order at 22.

Before the hearing on remedy, IDOT made several discovery requests regarding purported payments from ComEd to JM related to cleanup at the two sites. JM and ComEd both opposed the discovery requests by, among other things, filing motions with the Board. On October 5, 2017, the hearing officer directed JM and IDOT to brief the issue of whether IDOT's three discovery requests seek relevant information or are calculated to lead to relevant information.

On December 21, 2017, the Board ruled that IDOT sought information that is neither relevant nor calculated to lead to relevant information. Johns Manville v. Illinois Dept. of Transportation, PCB 14-3 (Dec. 21, 2017) (Dec. 2017 Order). IDOT moved for reconsideration on January 26, 2018 (Mot.). On February 9, 2018, both Johns Manville and Come Ed filed responses opposing IDOT's motion.

MOTION FOR RECONSIDERATION

The Board's procedural rules allow parties to file a motion for reconsideration of a Board order. When deciding a motion for reconsideration, the Board will "consider factors including new evidence, or a change in the law, to conclude that the Board's decision was in error." 35 Ill. Adm. Code 101.902. In addition to these two grounds, the Board will consider whether it erred in applying existing law. Chatham BP v. IEPA, PCB 15-173 slip op. at 2 (Nov. 5, 2015), *citing* Korogluyan v. Chicago Title & Trust Co., 213 Ill.App.3d 622 (1st Dist. 1991).

DISCUSSION

IDOT Alleges a Recognized Ground to Reconsider

IDOT makes two arguments for reconsideration. First, IDOT argues that the Board erred in finding irrelevant any payments from ComEd to JM related to the cleanup work. As noted, error in applying existing law is a recognized ground for reconsideration. *See* Chatham BP, PCB 15-173, slip op. at 2. Second, IDOT argues that the Board overlooked specific facts in the record, resulting in an erroneous application of existing law.

IDOT Reiterates an Argument Addressed in Prior Board Order

A motion to reconsider must do more than merely reiterate arguments already made by the movant and rejected by the Board. In its motion, IDOT first argues that the Board erred in

determining that information concerning ComEd's alleged payments to JM for cleanup work is not relevant to issues to be addressed at the remedy hearing. Mot. at 6-8. Specifically, IDOT argues that discovery on "any monies paid by [ComEd], or any commitments to pay" is necessary "to calculate [JM's] costs for purposes of reimbursement." *Id*. at 6. IDOT adds that Illinois case law illustrates "great latitude" for conducting discovery. *Id*. at 7–8.

IDOT made this argument in its original brief. In that brief (IDOT Br.), IDOT also argued that an agreement for payment between JM and ComEd is relevant because it "almost certainly addresses the question of how [JM] would deal with costs of the work to be performed by them [and] could be highly relevant to at least some of the issues that IDOT will be called upon to address" at the remedy hearing. IDOT Br. at 4.

In its December 2017 order, the Board addressed this argument, finding that IDOT failed to explain how payments between ComEd and JM pertain to "what cleanup work was performed, how much it cost, whether the cost was reasonable, or what share is attributable to IDOT." Dec. 2017 Order at 4. Because IDOT's first argument was already raised and rejected, it cannot be a basis for reconsideration.

IDOT Does Not Establish That the Board Overlooked Facts

IDOT asks the Board to reconsider for a second reason: the Board overlooked JM's joint obligation with ComEd to clean up the site under a federal order. Mot. at 8-9. IDOT indicates that had the Board considered these facts, it would have properly applied existing law and granted IDOT's discovery requests. IDOT argues that the Board's order "ignores the fact that [JM] and [ComEd] are both jointly obligated . . . for addressing the asbestos" and "completely ignores the fact that [JM's] Complaint makes multiple references" to its joint obligations with ComEd. *Id*. at 8.

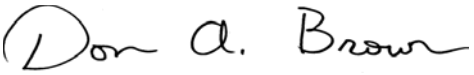
However, IDOT fails to establish that the Board overlooked these facts. On the contrary, the Board's prior order directly addressed them, finding that IDOT did not show how payment arrangements for joint obligations under a *federal* proceeding are relevant to crafting a remedy for IDOT's violations of *Illinois* law. Dec. 2017 Order at 4–5. Because the Board did not overlook these facts, IDOT's second argument cannot be a basis for reconsideration.

CONCLUSION

IDOT's first argument for reconsideration merely repeats an argument that the Board rejected in its prior order. IDOT fails to substantiate its second argument for reconsideration. The Board therefore denies IDOT's motion to reconsider the Board's December 21, 2017 order. The Board directs the parties to proceed as called for by that order.

IT IS SO ORDERED.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on March 22, 2018, by a vote of 5-0.



Don A. Brown, Clerk
Illinois Pollution Control Board

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ILLINOIS POLLUTION CONTROL BOARD
August 3, 2023

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

OPINION AND ORDER OF THE BOARD (by J. Van Wie)

SUSAN E. BRICE AND KRISTEN L. GALE OF NIJMAN FRANZETTI LLP APPEARED ON BEHALF OF COMPLAINANT; and

ELLEN F. O'LAUGHLIN AND CHRISTOPHER J. GRANT, SENIOR ASSISTANT ATTORNEYS GENERAL, ILLINOIS ATTONEY GENERAL'S OFFICE, APPEARED ON BEHALF OF RESPONDENT.

The Board found in its interim order of December 15, 2016 (Interim Order), that the Illinois Department of Transportation (IDOT) violated the Environmental Protection Act (Act) by both causing and allowing the open dumping of asbestos-containing material (ACM) at property in Waukegan, Lake County. The violations were alleged in a complaint filed by Johns Manville (JM), which had operated a nearby facility that manufactured asbestos-containing products. Since the Board issued its Interim Order, the parties have engaged in discovery, participated in a four-day hearing, and filed briefs—all concerning the remedy for IDOT's violations. JM seeks to recover from IDOT $5,579,794 in costs that JM incurred cleaning up ACM contamination. In today's final order, the Board finds IDOT liable for $620,203 of JM's cleanup costs.

The Board's main findings today follow:

- Because the Board is not a "court," but rather acts as a quasi-judicial body, the Board finds that the State Lawsuit Immunity Act does not confer sovereign immunity on IDOT in actions under Section 31(d) of the Act. Even if it did, the Board reiterates the Interim Order's finding that the Act clearly and unequivocally waives sovereign immunity in this matter.

- Given the savings clause of the Comprehensive Environmental Response and Compensation Act (CERCLA), and IDOT's failure to explain why CERCLA bars this action under the Act, the Board rejects IDOT's CERCLA statute of limitations argument.

- Based on its long-standing precedent, the Board continues to find it has the authority to award private cleanup cost recovery when appropriate as a remedy for violating the Act.

- The Board finds that proportionate share liability, joint and several liability, and proximate causation are inapplicable to determine the appropriate cost recovery amount here.

- The Board relied on the maps of AECOM Technical Services, Inc. (AECOM) in determining IDOT's violations. And JM's expert relied on AECOM's maps for this remedy phase of the proceeding. To avoid any conflicts, the Board uses the maps developed by JM's expert in identifying the site boundaries, soil boring locations, and other important features in delineating IDOT's "areas of liability".

- Cleanup costs incurred by JM are attributable to IDOT's violations in the areas represented by the nine soil borings that the Interim Order identified. Each of these soil borings represents a 50-foot by 50-foot sampling grid. Costs incurred for cleanup within each of these grid areas are attributable to IDOT, except to the extent that the Interim Order otherwise limited IDOT's liability by parcel or site boundary.

- Out of its total cleanup costs of $5,579,794, JM incurred $620,203 cleaning up the ACM contamination resulting from IDOT's violations. The $620,203 total is comprised of the following dollar amounts corresponding to each of the agreed-upon tasks associated with JM's cleanup: $0 for the "Nicor Gas Line"; $0 for the "City of Waukegan Water Line"; $30,965 for the "AT&T Lines"; $5,591 for the "Utility/ACM Excavation"; $159,794 for the "NSG Line"; $15,480 for the "Northeast Excavation"; $106,714 for "Dewatering"; $57,537 for "Filling/Capping"; $0 for "Ramp Sampling"; $180,481 for "General Site/Site Preparation"; $6,853 for "Health and Safety"; $48,167 for "USEPA Oversight"; and $8,621 for "Legal Support".

- Even if the ACM contamination in IDOT's areas of liability areas did not result *solely* from IDOT's violations, IDOT failed to establish that its own contribution to the contamination is reasonably discernable from any other contributions. Absent a record on which to find that the contamination is divisible and a reasonable basis exists for apportioning to IDOT less than 100% of the $620,203 in cleanup costs attributable to IDOT, IDOT's share of those costs is 100%.

- After considering Section 33(c) of the Act (415 ILCS 5/33(c) (2022)), the Board imposes liability on IDOT to reimburse JM for $620,203 in cleanup costs but the Board does not also order IDOT to pay a civil penalty to the Environmental Protection Trust Fund.

In this opinion, the Board first provides the factual, legal, and procedural background for this proceeding. *See infra* pp. 3-9. The Board then discusses each of the legal issues raised by the parties and provides the Board's rulings. *See infra* pp. 9-27. Next, the Board discusses the information in the record that supports an appropriate remedy. *See infra* pp. 27-67. Finally, the Board reaches its conclusion and issues its final order. *See infra* p. 67.

OVERVIEW

The Board's Interim Order found that IDOT violated the Act at specific areas referred to as "Site 3" and "Site 6." Those two sites are adjacent to the former JM manufacturing facility, which was located at the northeast corner of the intersection of Greenwood Avenue and Pershing Road in Waukegan, Lake County (JM Site). Johns Manville v. IDOT, PCB 14-3, slip op. at 13-14 (Dec. 15, 2016) (Interim Order). The Board also found that awarding private cleanup cost recovery as a remedy for violation is consistent with its authority under the Act to issue orders it deems appropriate. Interim Order at 20-21, *citing* 415 ILCS 5/33(a) (2014).

BACKGROUND

Overview

JM seeks to recover $5,579,794 in cleanup costs from IDOT for its violations of the Act based on its road construction activities and its property control. In 1971, IDOT began construction on the Amstutz project, which involved properties located adjacent to the JM Site. As part of that construction, IDOT encountered ACM waste at Site 3 and Site 6. Construction ended in 1976. Also, in 1971, IDOT acquired an easement in a portion of Site 3 called "Parcel 0393."

In 2007, JM entered into an "Administrative Settlement Agreement and Order on Consent for Removal Action" (AOC) with the United States Environmental Protection Agency (USEPA) to clean up asbestos contamination at the JM Site, as well as property neighboring the JM Site. *See* Exh. 62. Commonwealth Edison Company (ComEd), the owner of Site 3, is also a party to the AOC. On July 8, 2013, JM filed a complaint before the Board alleging, among other things, that IDOT's actions during road construction in the 1970s exacerbated the scope of the cleanup at property adjacent to the JM Site. PCB 14-3, Compl. at ¶¶ 27-37. According to JM, IDOT dispersed and buried asbestos in fill. *Id*. at ¶¶ 33, 34.

The Board split this proceeding into a violation phase and a remedy phase. *See* Interim Order at 22; *see also* 35 Ill. Adm. Code 103.212(d). The Board's Interim Order reviewed the factual, legal, and procedural background of the violation phase. Interim Order at 1-22. Here, the Board summarizes the findings of the Interim Order that are relevant to this remedy phase.

Interim Order

On December 15, 2016, after lengthy discovery and a five-day hearing, the Board issued an interim opinion and order finding that IDOT violated the Act by both causing and allowing the open dumping of ACM waste at specific locations within Sites 3 and 6. Interim Order at 13-14. The Board also found that the record was insufficient to determine the appropriate relief to address IDOT's violations. *Id*. at 22. The Board directed the parties to hearing to determine the cleanup costs JM incurred, the reasonableness of those costs, and the share of those costs attributable to IDOT. *Id*.

Specifically, the Board found IDOT violated Section 21(a), (d), and (e) the Act (415 ILCS 5/21(a), (d), (e)) by:

1. causing open dumping of ACM waste along the south side of Greenwood Avenue within Site 6 (specifically at soil boring locations 1S, 2S, 3S, and 4S) and adjacent areas along the north edge of Site 3 (specifically at soil boring locations B3-25, B3-15, and B3-16); [1]

2. allowing open dumping to continue until JM removed the ACM waste at those locations;

3. allowing open dumping of ACM waste on the portion of Site 3 within Parcel 0393 (specifically at soil boring locations B3-25, B3-16, B3-15, B3-50, and B3-45 (to the extent sample B3-45 falls within Parcel 0393)); [2]

4. conducting an unpermitted waste disposal operation at the specified locations; and

5. illegally disposing of waste at the specified locations.

Interim Order at 5-14.[3]

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[1] "[T]he Board finds that ACM waste is located in material placed by IDOT to reconstruct Greenwood Avenue. Specifically, IDOT is responsible for ACM waste found in samples 1S, 2S, 3S, and 4S" within Site 6. Interim Order at 9. "[T]he Board [also] finds that IDOT is responsible for ACM found at sample locations B3-25, B3-16, and B3-15" within Site 3 "[b]ecause this ACM is located in materials placed by IDOT during construction." *Id*. at 10.

[2] "The Board finds that IDOT's interest in Parcel 0393 gave and continues to give it control over open dumping on that property. For example, an IDOT witness stated that removal of the Greenwood Avenue embankment requires IDOT approval. Another IDOT witness testified that IDOT can do what is necessary to maintain the property for highway purposes, public safety, and traffic flow." Interim Order at 12 (citations omitted). "[T]he Board finds that IDOT allowed open dumping through its control over Parcel 0393 at sample locations B3-25, B3-16, B3-15, B3-50, and B3-45 (to the extent sample B3-45 falls on Parcel 0393) on Site 3." *Id*. at 13.

[3] In ruling that it was unnecessary for JM to plead violations of the 1970 versions of Section 21(a), (d), and (e) of the Act, the Interim Order found that because the statutory amendments creating the current text were not substantive, they applied to IDOT's construction activities in the 1970s. Interim Order at 14-15. This retroactivity analysis should have noted Section 4 of the Statute on Statutes (5 ILCS 70/4 (2022)), which provides the General Assembly's directive as to the temporal reach of statutory amendments that are silent about whether they apply retroactively. But the omission had no effect on the Board's ruling. *See* Caveney v. Bower, 207 Ill. 2d 82, 92-95 (2003) (Section 4 "represents a clear legislative indication that the retroactive application of substantive statutory changes is forbidden.").

In its initial and amended complaints, JM requested that the Board require IDOT to participate in the USEPA-mandated asbestos cleanup. In late 2016, however, after briefing that followed the violation hearing, JM moved to file a status report informing the Board that JM had largely completed the cleanup and therefore sought only reimbursement from IDOT for the cost of cleanup work already completed at Sites 3 and 6, *i.e.*, rather than IDOT's participation in the cleanup. IDOT filed a response to JM's status report. The Board construed the status report as a motion to amend JM's third amended complaint and granted the motion. Interim Order at 19.

The Board considered JM's change in requested relief when analyzing IDOT's six defenses. Interim Order at 15-17. Summarized, the Board found as follows:

- As long as ACM waste remains on the subject property, IDOT's alleged violations continue and a five-year statute of limitations does not bar this action;

- The Board is the proper forum to hear citizen suits alleging violations of the Act under Section 31(d), including allegations against a State agency; and

- IDOT's remaining defenses against the Board ordering it to participate in the cleanup (USEPA approval necessary; failure to join necessary parties; and the equitable defenses of unclean hands, waiver, and laches) are moot because JM no longer seeks an order requiring IDOT to participate in the cleanup.

Interim Order at 15-17.

The Board also considered the factors of Section 33(c) of the Act to determine the reasonableness of IDOT's actions. Interim Order at 18-19, *citing* 415 ILCS 5/33(c) (2014). The Board weighed each factor against IDOT and found it appropriate to order relief addressing IDOT's violations. Interim Order at 18.

The Board then reviewed whether private cost recovery is an available remedy under the Act. Interim Order at 19-21. Although the Act does not expressly allow the Board to order a violator to reimburse cleanup costs to a private party, the Board found that Section 33(a) of the Act requires the Board to issue orders it deems appropriate. *Id*., *citing* 415 ILCS 5/33(a) (2014). Consistent with long-standing precedent, the Board held that it "continues to find it appropriate that a party recover the cost of performing cleanup as a result of another party's violations." Interim Order at 21.

However, the Board, based on the cleanup information provided by JM at that time, found it was unable to determine the reasonable costs that may be attributable to IDOT. Interim Order at 22. The Board stated, "[h]aving found violations, and made the above determinations as to the Section 33(c) factors and the availability of cost recovery, the Board finds that further hearing is necessary." *Id*. The Board directed the hearing officer to conduct a hearing for evidence on the following issues:

1. The cleanup work performed by JM in the portions of Site 3 and 6 where the Board found IDOT responsible for ACM waste present in soil.

2. The amount and reasonableness of JM's costs for this work.

3. The share of JM's costs attributable to IDOT.

Interim Order at 22.

Additionally, the Board noted that "the requirement of Section 58.9(a) of the Act to determine IDOT's proportionate share of JM's costs does not directly apply because the sites are subject to a USEPA order." Interim Order at 22, *citing* 415 ILCS 5/58.1(a)(iv), 58.9(a) (2014); 35 Ill. Adm. Code Part 741.

The Interim Order concluded the violation phase of this case. Today's order concludes the remedy phase.

PROCEDURAL HISTORY OF REMEDY PHASE

Discovery and Related Rulings

After the Interim Order was issued, the parties engaged in limited discovery during the remedy phase. IDOT sought information about other persons that might have been involved in the cleanup. Specifically, on May 30, 2017, IDOT sought discovery of documents regarding whether ComEd was involved in the cleanup or had made any payments to JM for the cleanup. On December 21, 2017, the Board denied IDOT's discovery request and granted JM's and ComEd's applications for a related protective order. Johns Manville v. IDOT, PCB 14-3, slip op. at 2 (Dec. 21, 2017). IDOT moved the Board to reconsider its decision denying the discovery request, which was denied. Johns Manville v. IDOT, PCB 14-3, slip op. at 3 (Mar. 22, 2018).

During the remedy hearing, both parties sought to limit testimony and exhibits regarding where ACM was found. On September 13, 2019, IDOT filed a "Motion *in Limine* to Strike the Opinions of Douglas G. Dorgan, Jr.," JM's expert witness, and JM filed its "Motion to Exclude Base Maps and Related Figures and Testimony at Hearing" (JM Mot. to Excl.). On October 4, 2019, IDOT filed its response to JM's Motion to Exclude, JM filed its response to IDOT's Motion *in Limine*, and IDOT filed its "Motion to Strike the Affidavit of Douglas G. Dorgan, Jr." JM's Motion to Exclude and IDOT response concerned the parties' dispute over which map to use in the remedy phase—the map used in the violation phase of this proceeding (which IDOT argues is incorrect) or IDOT's map created for the remedy phase (which JM claims is self-serving).

On October 31, 2019, the hearing officer denied all three motions. Johns Manville v. IDOT, PCB 14-3, Hearing Officer Order at 3-4, 7 (Oct. 31, 2019). On November 14, 2019, JM moved for interlocutory appeal of the hearing officer's order denying JM's Motion to Exclude. On June 18, 2020, the Board denied JM's appeal and affirmed the hearing officer. Johns Manville v. IDOT, PCB 14-3, slip op. at 7 (June 18, 2020). The Board found that the maps and testimony were admissible as potentially relevant evidence, the weight of which could be

addressed in cross-examination and post-hearing briefing. *Id*., *citing* Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 595 (1993).

Stipulations

On August 13, 2019, the parties filed a joint stipulation (Stip.). They stipulated that JM incurred $5,579,794 in costs to remediate the entirety of Sites 3 and 6 and that the parties do not dispute the reasonableness of those costs. The stipulation specifically provides that the parties do not dispute the costs as broken out in a "Task Bucket" table. Stip. at 5-7; IDOT Pre-Hearing Rpt. at Exh. A (Sept. 2, 2020). The parties continue to dispute the share of JM's costs attributable to IDOT's violations. The parties also disagree on additional points, including "where the Board found IDOT responsible for ACM waste in the soil." JM Mot. to Excl. at 3.

Pre-Hearing Positions

Both parties filed pre-hearing documents on the amount of cleanup costs each thought was attributable to IDOT's violations. IDOT's expert witness, Steven Gobelman, P.E., claimed that only $600,050 of JM's cleanup costs were attributable to IDOT's violations. IDOT Pre-Hearing Rpt. at 2 (Sept. 2, 2020).

JM expert witness, Douglas Dorgan, Jr., opined that $3,274,917 of the total $5,579,794 in cleanup costs were attributable to IDOT's violations. JM Pre-Hearing Stmnt. at 2-3 (Aug. 31, 2020). Mr. Dorgan also contended that "the share of JM's costs attributable to IDOT" includes costs incurred to address areas 5S through 8S along Site 6. *Id*. at 5. These areas are beyond the locations where the Board found violations in the Interim Order. Interim Order at 22. JM further argues IDOT may be liable for more than its proportionate share, reiterating the Board's statement that proportionate share liability does not directly apply in this case because the sites are subject to a USEPA order. JM Pre-Hearing Stmnt. at 5.

Hearing on Remedy

From October 26 through October 29, 2020, the Board held a hearing on remedy. Exhibits 203 through 245 were admitted into the record.[4] The transcription service experienced significant technical difficulties during the hearing, which resulted in extensive errors in the

[4] Exhibits 2B through 202 were admitted at the violation hearing. Exhibits are cited "Exh. [number of exhibit] at [original page number of exhibit]." A figure and an appendix within an exhibit are cited "Fig." and "App.", respectively. Exhibits with stamped page numbers added to the original document may be cited as "Exh. [number of exhibit, dash, stamped page number of exhibit]." The list of Exhibits 2B through 202 is included in the Board's July 12, 2016 Hearing Officer Order, available through the Clerk's Office On-Line (COOL) at https://pcb.illinois.gov/documents/dsweb/Get/Document-93074. The list of Exhibits 203 through 245 is included in the Joint List of Exhibits Admitted at the PCB 14-03 Hearing filed November 30, 2021, also available through COOL at https://pcb.illinois.gov/documents/dsweb/Get/Document-104976.

transcripts. JM filed motions to correct each hearing day's transcript, which the hearing officer granted. Two more motions to correct were filed, one by JM on February 16, 2021, and one by IDOT on February 26, 2021; for those specific corrections, the Board grants both motions. A final corrected transcript was filed for each of the four hearing days.[5]

Post-Hearing Briefing

On July 22, 2021, JM filed its post-hearing brief (JM Br.). In that brief, JM requests the Board enter an order that:

A. Clarifies that the Interim Order held IDOT liable for all ACM waste found within Parcel 0393;

B. Finds that Mr. Gobelman's testimony lacked credibility and deserved no weight;

C. Awards JM a judgment for $5,579,794; or, in the alternative, awards JM a judgment for $3,274,917;

D. Amends its Interim Order, to the extent it deems necessary, to clarify certain findings and to rule that IDOT is liable for costs incurred as a result of IDOT's violations of the law at borings 5S through 8S.

JM Br. at 32.

On September 28, 2021, IDOT filed its response brief (IDOT Resp. Br.). On October 28, 2021, JM filed its reply brief (JM Reply Br.), reiterating the above requests from its opening brief. JM Reply Br. at 41. On November 18, 2021, IDOT filed a "Motion for Leave to File Sur-Reply," with the proposed sur-reply brief attached (IDOT Sur. Br.). On December 2, 2021, JM filed its response opposing IDOT's motion for leave to file a sur-reply. On February 17, 2022, the Board issued an order stating that it considered the record closed and would address IDOT's motion with the case. Johns Manville v. IDOT, PCB 14-3, slip op. at 1 (Feb. 17, 2022).

The Board has reviewed IDOT's motion for leave to file a sur-reply and JM's opposition. The Board finds that the additional information provided in the sur-reply is helpful to the Board and does not prejudice JM. Therefore, the Board grants IDOT's motion.

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[5] Transcripts are cited by hearing date (*e.g.*, "10/26/20 Tr. at _."). The final October 26, 27, and 29, 2020 corrected transcripts may be read without reference to any motions to correct. The final October 28, 2020 corrected transcript should be read along with JM's one-page table of corrections in its February 16, 2021 motion. The Board directs the Clerk to attach that table to the front of that transcript and mark the table "GRANTED." The Board does not do so for the final October 26, 27, or 29, 2020 corrected transcript because each was issued after the filing of all corresponding motions to correct.

DISCUSSION

In this section of the opinion, the Board first rules on whether JM's action is barred by sovereign immunity or a statute of limitations. The Board then rules on its authority to award cleanup cost recovery as a remedy for violating the Act. Next, the Board addresses the parties' legal arguments on the type and scope of liability that applies. Finally, the Board determines the appropriate share of JM's cleanup costs attributable to IDOT, weighs the Section 33(c) factors, and imposes cleanup cost liability on IDOT.

Sovereign Immunity

In the Interim Order, the Board denied IDOT's sovereign immunity claims. Interim Order at 17. However, IDOT raises the issue anew, citing different case law. IDOT Resp. Br. at 5-11; IDOT Sur. Br. at 3-4. As a challenge to the Board's subject matter jurisdiction may be raised at any time, the Board revisits the issue of sovereign immunity.

First, the Board addresses whether the "law of the case" doctrine bars IDOT from claiming sovereign immunity again. The Board then reviews IDOT's new arguments and concludes again that sovereign immunity does not apply here.

Law of the Case Doctrine

The Illinois Supreme Court has held that "[t]he law of the case doctrine bars relitigation of an issue previously decided in the same case." People v. Peterson, 2017 IL 120331, ¶ 25. Here, JM argues that IDOT should be barred from bringing up sovereign immunity in the remedy phase of this proceeding because that issue—whether the Board is the proper forum to hear citizen suits alleging violations of the Act against a State agency—was already decided by the Board in the Interim Order. JM Reply Br. at 6, *citing* Interim Order at 17.

JM argues that the Interim Order resolved this sovereign immunity issue, and under the doctrine of law of the case, IDOT should be barred from relitigating this issue. JM Reply Br. at 6, *citing* Elmhurst Memorial Healthcare v. Chevron U.S.A. Inc., PCB 09-66, 2011 Ill. ENV LEXIS 245, at *82 (July 7, 2011).

IDOT argues that the law of the case doctrine is just a practice that does not limit the power of the courts. IDOT Sur. Br. at 4, *citing* People v. Patterson, 154 Ill. 2d 414, 468, 469 (1992) (final judgment is required to sustain doctrine's application). IDOT also argues that the Board does not apply the doctrine in the case of error. IDOT Sur. Br. at 5, *citing* Elmhurst Memorial, PCB 09-66, 2011 Ill. ENV LEXIS 245, at *76.

The Board agrees with IDOT that the law of the case doctrine merely expresses the practice of courts to generally refuse to reopen what has been decided; it is not a limit on their power. IDOT Sur. Br. at 4, *citing* Patterson, 154 Ill. 2d at 468. In this instance, JM asks the Board to not revisit a jurisdictional issue because it was addressed in the Interim Order. JM Reply Br. at 5-6. IDOT alleges that the Interim Order was in error and not final, and both parties offer additional arguments. IDOT Sur. Br. at 4-5.

The Board recognizes that the defense of sovereign immunity can be raised at any point, including for the first time on appeal, because "the issue of subject matter jurisdiction cannot be waived." Currie v. Lao, 148 Ill. 2d 151, 157 (1992); Christiansen v. Masse, 279 Ill. App. 3d 162, 166 (1st Dist. 1996) ("subject matter jurisdiction . . . cannot be waived."). The Board finds that the additional information IDOT provided in its response and sur-reply briefs is appropriate and helpful in further evaluating whether sovereign immunity applies. Therefore, the Board declines to apply the law of case doctrine to bar IDOT's jurisdictional argument of sovereign immunity in this remedy phase of the proceeding.

Statutory Sovereign Immunity

Background. In Illinois, sovereign immunity is a creature of statute. Section 4 of Article XIII of the Illinois Constitution provides, "[e]xcept as the General Assembly may provide by law, sovereign immunity in this State is abolished." Ill. Const. 1970, art. XIII, § 4. Therefore, the only sovereign immunity in Illinois must come from a statutory provision.

The Illinois legislature reinstated the State's sovereign immunity when it passed the State Lawsuit Immunity Act (745 ILCS 5 (2022)), which provides as follows:

> Except as provided in the Illinois Public Labor Relations Act, the Court of Claims Act, the State Officials and Employees Ethics Act, and Section 1.5 of this Act, the State of Illinois shall not be made a defendant or party in any court. 745 ILCS 5/1 (2022).

In addition to the acts specifically identified in the State Lawsuit Immunity Act, the legislature may, by statute, consent to suit and waive sovereign immunity. *See* People v. Excavating & Lowboy Services, Inc., 388 Ill. App. 3d 554, 559-60 (1st Dist. 2009). However, the State's consent to be sued must be clear and unequivocal. *See In re* Special Education of Walker, 131 Ill. 2d 300, 303, 304 (1989) (any waiver of sovereign immunity must appear in "affirmative statutory language").

The Board previously ruled that the legislature's consent to the State's liability under the Act is "clear and unequivocal" because the Act defines "person" to include State agencies. Interim Order at 17.

IDOT's Position. IDOT argues that the Board erred in finding sovereign immunity inapplicable here. IDOT Sur. Br. at 5. According to IDOT, the Board incorrectly found that "the inclusion of state agencies in the definition of 'Person' in the [EP]Act . . . constituted a 'clear and unequivocal' waiver of IDOT's sovereign immunity." *Id*., *citing* Interim Order at 17. IDOT points to the 2009 decision in Lowboy, which stated that "although the [Act] demonstrates a clear intent to hold those who allegedly damage the environment accountable for their actions, it does not contain an express consent by the State to be sued or otherwise waive sovereign immunity." IDOT Resp. Br. at 7, *citing* Lowboy, 388 Ill. App.3d at 563.

IDOT states that the Lowboy court found neither the inclusion of State agencies in the definition of "person" nor the State compliance requirements of Section 47(a) of the Act met the "specific and unequivocal" language requirement to waive sovereign immunity in circuit court. IDOT Resp. Br. at 7-8, *citing* Lowboy, 388 Ill. App.3d at 561, 563. IDOT argues that waiver requires explicit statements like those found in Section 25 of the Illinois Public Relations Act (5 ILCS 315/25 (2022)) ("[f]or purposes of this Act, the State of Illinois waives sovereign immunity") and Section 19 of the Illinois Education Labor Relations Act (115 ILCS 5/19 (2022)) ("[f]or purposes of this Act, the State of Illinois waives sovereign immunity"). IDOT Resp. Br. at 8, *citing* Lowboy, 388 Ill. App.3d at 563-64.

IDOT does not address whether the State Lawsuit Immunity Act specifically applies to this Board proceeding. Rather, it argues that sovereign immunity generally applies to administrative hearings, noting that "the U.S. Supreme Court has squarely held that sovereign immunity applies equally to both court and administrative adjudicative bodies." IDOT Resp. Br. at 9, *citing* FMC v. South Carolina State Ports Authority, 535 U.S. 743, 760 (2002) ([in] "the interest in protecting States' dignity and strong similarities between FMC proceedings and civil litigation, we hold that state sovereign immunity bars the FMC from adjudicating complaints filed by a private party against a nonconsenting State.").

IDOT also argues that because the Board has been delegated adjudicative functions that are concurrent with the circuit courts, the Lowboy finding that IDOT could not be sued for Act violations in circuit court should also prevent the Board from having authority over IDOT for violations of the Act. IDOT Resp. Br. at 10-11, *citing* People v. NL Indus., 152 Ill. 2d 82, 103 (1992).

JM's Position. JM focuses on the language of the State Lawsuit Immunity Act, "the State of Illinois shall not be made a defendant or party in *any court*," to argue that the statute does not apply to the Board because "[t]he Pollution Control Board is not a court, but an administrative tribunal." JM Reply Br. at 8, *quoting* 745 ILCS 5/1 (2022) (emphasis added by JM) and *citing* North Shore Sanitary Dist. v. Pollution Control Bd., 2 Ill. App. 3d 797, 801-02 (2d Dist. 1972). JM notes that "the Legislature has vested exclusive jurisdiction in the Board to hear and grant relief in Section 31(d) cases, including those involving the State." JM Reply Br. at 9.

JM also argues that the Lynch court shows the legislature would have had no reason to waive the State's sovereign immunity in the Act because sovereign immunity does not apply to administrative agencies.[6] JM Reply Br. at 8, *citing* Lynch v. IDOT, 979 N.E.2d 113, 118 (4th Dist. 2012). JM further distinguishes IDOT's reliance on the FMC holding, asserting that FMC does not apply the State Lawsuit Immunity Act but rather the Eleventh Amendment to the U.S. Constitution. JM Reply Br. at 8-9. JM argues that the federalism issues of a State being required to answer private parties in federal courts or administrative fora do not exist in this State administrative proceeding. *Id*.

[6] IDOT argues that Lynch is limited to actions before the Illinois Department of Human Rights and Illinois Human Rights Commission. IDOT Sur. Br. at 4.

JM argues that even if sovereign immunity could apply to a Board action, the General Assembly contemplated the State as a party. JM Reply Br. at 9. JM points to the Board's finding that "[t]he plain and unambiguous language of the [Act] includes state agencies in the group of responsible parties that may be enforced against for violations of the Act before the [Board]." *Id*. at 9-10, *quoting* People v. Boyd Brothers, Inc, PCB 94-275, 94-311 (consol.), slip op. at 5 (Feb. 16, 1995).

Board Findings. In the Interim Order, the Board found that sovereign immunity is not a bar to this citizen enforcement action against IDOT under Section 31(d) of the Act.[7] Interim Order at 17. After considering IDOT's latest arguments, the Board reaffirms its findings that sovereign immunity does not apply.

The United States Supreme Court's FMC decision is inapplicable here. The Court held that the "inherent" sovereign immunity of the states—broader than the 11th Amendment,[8] "embedded in our constitutional structure," and "retained by the States when they joined the Union"—barred the Federal Maritime Commission (FMC) from adjudicating a private cruise ship operator's complaint alleging that a South Carolina port agency violated the federal Shipping Act of 1984. FMC, 535 U.S. at 752-54, 769. As "formalized administrative adjudications were all but unheard of in the late 18th century and early 19th century," the Court analogized FMC's adjudicatory proceedings to civil litigation. *Id*. at 755-59. The Court concluded that the Framers would have thought the former setting just as impermissible as the latter for a private action against a state. *Id*. at 769.

IDOT divorces the Court's analysis from its context. The Board agrees with JM that the federalism issues involved where a private party alleges violations of a federal statute by a state, either in federal court or before a federal administrative tribunal, do not exist where a private party alleges violations of an Illinois statute by an Illinois agency before an Illinois administrative tribunal. Further, the FMC Court analogized administrative adjudicatory proceedings and judicial proceedings because "States were not subject to private suits in administrative adjudications at the time of the founding or for many years thereafter." FMC, 535 U.S. at 755. But even if a Section 31(d) proceeding and civil litigation share some features, any similarities would have no bearing on whether JM's action is barred by sovereign immunity. If IDOT has sovereign immunity here, it must come from the language of the State Lawsuit Immunity Act.

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[7] Section 31(d) states: "Any 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)(1) (2022).

[8] This "inherent" sovereign immunity is broader than the 11th Amendment, which is "but one particular exemplification of that immunity." FMC, 535 U.S. at 753. The 11th Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. AMEND. 11.

The Illinois Constitution abolished sovereign immunity "in this State," without reference to forum, whether judicial or administrative. Ill. Const. 1970, art. XIII, § 4. The Illinois Constitution also authorized the General Assembly to restore sovereign immunity, and the General Assembly did so through the State Lawsuit Immunity Act. In existence *prior to* both the Illinois Constitution and the State Lawsuit Immunity Act was the Environmental Protection Act—with its citizen enforcement action before the Board and its definition of "person" (including "state agency").[9] Of course, the General Assembly knew of these Environmental Protection Act provisions when it passed the State Lawsuit Immunity Act, but the General Assembly chose to restore sovereign immunity only in "court." 745 ILCS 5/1 (2022).

The Board is not a "court." Board of Trustees of Univ. of Ill. v. IEPA, No. 13 CH 162, 2013 Ill. Cir. LEXIS 6770, at *11 (Oct. 4, 2013) ("Despite the University's attempt to characterize the Board as a 'court' to bring it within the Immunity Act, such a finding would be contrary to the plain language in the Environmental Protection Act. *** [T]he Pollution Control Board [is] a body created by statute as an administrative agency."); *see also* Lynch, 2012 IL App (4th) 111040, ¶ 27 (Illinois Department of Human Rights and Illinois Human Rights Commission "are administrative agencies, not courts" under State Lawsuit Immunity Act); County of Will v. Pollution Control Bd., 2019 IL 122798, ¶ 42 ("When the Board conducts hearings on complaints charging putative violations of the Act, it acts in a *quasi*-judicial capacity." (emphasis added)).

As exceptions to its restoration of sovereign immunity, the State Lawsuit Immunity Act lists statutory provisions that provide for *court* actions, including under the Court of Claims Act. *See* 745 ILCS 5/1 (2022). In addition to these listed exceptions, other Illinois statutes may waive the sovereign immunity provided by the State Lawsuit Immunity Act if the waiver is "clear and unequivocal." *See*, *e.g.*, Walker, 131 Ill. 2d 300, 303 (1989), *quoting* Martin v. Giordano, 115 Ill. App. 3d 367, 369 (4th Dist. 1983). But as a threshold matter, because the Board is not a "court," the State Lawsuit Immunity Act does not confer sovereign immunity on IDOT. Accordingly, there is no sovereign immunity to which an exception or waiver could apply. As the appellate court stated in Lynch, "the legislature would have had no reason to waive the State's sovereign immunity because sovereign immunity does not apply to administrative agencies." Lynch, 2012 IL App (4th) 111040, ¶ 27; *see also* Brandon v. Bonell, 368 Ill. App. 3d 492, 503 (2d Dist. 2006) ("*if* [the State] defendants are insulated from liability by sovereign immunity, exclusive jurisdiction rests in the Court of Claims" (emphasis added)). To borrow from the State Oil court's ruling on the inapplicability of proportionate share liability, "one must enter through a door before one can throw something out of the window." State Oil Co. v. People, 822 N.E.2d 876, 880 (2d Dist. 2004).

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[9] The General Assembly passed the Environmental Protection Act in 1970 and it took effect July 1, 1970. Illinois' 1970 Constitution became effective July 1, 1971, after the Sixth Illinois Constitutional Convention adopted it on September 3, 1970, and the people ratified it on December 15, 1970. The General Assembly passed the State Lawsuit Immunity Act in 1971 and it took effect January 1, 1972.

IDOT misplaces its reliance on the appellate court's Lowboy decision. In Lowboy, because the action against the State was brought in circuit court, it was uncontested that the State Lawsuit Immunity Act would bar the circuit court action under the Act unless sovereign immunity was waived. Lowboy, 388 Ill. App. 3d at 555-56, 557, 560. Here, as explained above, because there is no sovereign immunity in the first place, there is no sovereign immunity to waive. Moreover, the Lowboy court found that sovereign immunity was not waived by the words "may sue" in the Act's Section 45 (415 ILCS 5/45 (2022)), which is not at issue here. Lowboy, 388 Ill. App. 3d at 561, 563. Those words were not sufficient to confer jurisdiction on the circuit court as the designated forum and, therefore, the Court of Claims Act exception in the State Lawsuit Immunity Act applied. *Id*. at 563-64.

In sharp contrast to Section 45, the Act expressly confers jurisdiction on the Board as the designated forum to hear enforcement actions under Section 31 (415 ILCS 5/31 (2022)). On this ground, the circuit court in Univ. of Ill. distinguished Lowboy:

> [The] Act specifically authorizes the Attorney General to institute administrative proceedings for alleged violations under Section 31. 415 ILCS 5/31(c). The Act provides that such proceedings may be brought against state entities, which include the University. 415 ILCS5/31; 415 ILCS 5/3.315. Those proceedings take place before the Pollution Control Board [and] do not implicate the [State Lawsuit] Immunity Act, unlike proceedings brought under Section 45, because they do not make the University a "defendant or party in any court." Univ. of Ill., 2013 Ill. Cir. LEXIS 6770, at *11-12 (Oct. 4, 2013) (quoting Section 1 of the State Lawsuit Immunity Act).

And under Section 31(d) of the Act, the Board has exclusive jurisdiction to hear citizen complaints alleging violations of the Act. People v. State Oil Co., PCB 97-193, slip op at 5-7 (Aug. 19, 1999).

Because the Board acts as a quasi-judicial body, not a court, the Board finds that the State Lawsuit Immunity Act does not confer sovereign immunity on IDOT in Section 31(d) actions. Even if it did, the Board reiterates the Interim Order's finding that the Act clearly and unequivocally waives sovereign immunity here. The Act's prohibitions that IDOT violated apply to a "person," which is defined to include "any . . . state agency." *See* 415 ILCS 5/3.315, 21(a), (d), (e) (2022).[10] And Section 31(d) actions may be filed "against any person." *See* Boyd Brothers, PCB 94-275, 94-311 (consol.), slip op. at 6 ("the legislature has provided a specific statutory scheme for the state to be made a party in a private enforcement action" before the Board). The Board rejects IDOT's claim of sovereign immunity.

[10] Contrast these provisions with the Act's Section 21(w), which is a prohibition concerning specified debris or uncontaminated soil that expressly excludes IDOT. *See* 415 ILCS 5/21(w) (2022).

Statute of Limitations

IDOT argues that because JM failed to make IDOT a party to a Superfund case involving Sites 3 and 6 and failed to seek contribution from IDOT within three years after the AOC issued, JM is barred by the limitations period in CERCLA (42 U.S.C. §§ 9601-9675), commonly known as "Superfund." IDOT Resp. Br. at 13-14, *quoting* 42 U.S.C. § 9713(f)(3).[11]

JM does not directly respond to this argument, stating instead that it "is not seeking contribution, but even if it were, what JM could or could not do under CERCLA is irrelevant to this case brought under Section 31(d) of the Act." JM Reply Br. at 16. JM further notes that "[t]he Board has previously found that JM's claims [sic] is not barred by the applicable state law statute of limitations." *Id*. n.5, *citing* Interim Order at 15-17.

The Board finds that the costs of the remediation related to Sites 3 and 6 required under the AOC are relevant to this case. But IDOT has not articulated why failure to seek contribution under CERCLA bars JM's claim. Further, CERCLA's savings clause provides that nothing in CERCLA "shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants." 42 U.S.C. § 9652(d). Given this broad carve out, and IDOT's failure to explain why CERCLA bars this action under the Act, the Board rejects IDOT's CERCLA statute of limitations argument.

Cost Recovery under the Act

"Private" cost recovery is when a person other than the State seeks to recover cleanup costs as a remedy for a violation of the Act. The Board has repeatedly found that private cost recovery is an available remedy before the Board and furthers the intent of the Act. Interim Order at 19-21 (citations omitted).

IDOT's Position

IDOT argues that nothing in the Act allows for private cost recovery in these circumstances. IDOT Resp. Br. at 18. "Since an administrative agency is a creature of statute, any power or authority claimed by it must find its source within the provisions of the statute by which it is created." *Id*., *quoting* Granite City Div. of Nat. Steel Co. v. Pollution Control Bd., 155 Ill. 2d 149 (1993). IDOT further argues that it did not "have the opportunity to plead and respond to demands for cost recovery." IDOT Resp. Br. at 18.

JM's Position

JM argues that because the Board has "already entertained and rejected these exact legal arguments, the law of the case doctrine prevents the issue[] of whether the Board has the authority to order cost recovery at this stage in the proceeding." JM Reply Br. at 6, *citing* Elmhurst Memorial, PCB 09-66, 2011 Ill. ENV LEXIS 245, at *82. JM also responds with a list

[11] The correct citation to CERCLA's contribution section is 42 U.S.C. § 9613(f).

of cases permitting private cost recovery under the Act. JM Reply Br. at 7, *citing* Grand Pier Center LLC v. River East LLC, PCB 05-157, 2005 Ill. ENV LEXIS 387, at *11 (May 19, 2005) ("Since 1994, the Board has consistently held that pursuant to the broad language of Section 33 of the Act (415 ILCS 5/33 (2002), the Board has the authority to award cleanup costs to private parties for a violation of the Act."); Midland Life Ins. Co. v. Regent Partners I Gen. P'ship, 1996 U.S. Dist. LEXIS 15545, at *16 (N.D. Ill. Oct. 17, 1996) ("Review of relevant case authority suggests that Midland may, in fact, bring a cost-recovery action under the IEPA."); Krempel v. Martin Oil Marketing, Ltd., 1995 U.S. Dist. LEXIS 18236, at *7 (N.D. Ill. Dec. 8, 1995); Herrin Security Bank v. Shell Oil Co, PCB No. 94-178, slip op. at 2, (Sept. 1, 1994) (Board has "specifically held that [it has] the authority to award cleanup costs to private parties").

Board Findings

The Board's Interim Order addressed this question, including IDOT's reliance on Granite City:

> An administrative agency such as the Board is a creature of statute and any authority claimed by the Board must be found in the Act. *See* Granite City Division of National Steel Co., et al. v. PCB, 155 Ill. 2d 149, 171 (1993). In JM's citizen suit, Section 33 of the Act dictates what type of relief the Board has authority to order. Section 33(a) requires the Board to issue orders it deems appropriate. 415 ILCS 5/33(a) (2014). The Board continues to find it appropriate that a party recover the cost of performing cleanup as a result of another party's violations. Section 2(b) of the Act states that the Act's purpose is to restore and protect the environment and assure that adverse effects on the environment are borne by those who cause them. 415 ILCS 5/2(b) (2014). Reading the Act to allow a private party to recover cleanup costs furthers the intent of the Act by encouraging prompt cleanup and ensuring that the responsible party pays for its share. Interim Order at 21.

The Board's finding is consistent with Illinois Supreme Court precedent and years of Board rulings. In Fiorini, the Illinois Supreme Court stated that although the Act did not expressly provide for it, "we decline to hold here that an award of cleanup costs would not be an available remedy for a violation of the Act under appropriate facts." People v. Fiorini, 143 Ill. 2d 318, 350 (1991). "Rather, we believe that such a determination is properly left to the trial court's discretion." *Id*.

In Ostro, the Board examined Fiorini and the Act in determining that the Board is authorized to award private costs recovery as a remedy for violating the Act:

> While Fiorini involved a case brought in circuit court, the Board's authority is broader than the circuit court's authority to hear enforcement cases. (415 ILCS 5/31- 5/33, 5/42, 5/45 (1992).) For example, a citizen (other than the Agency, Attorney General, or state's attorney) must first bring all enforcement actions before the Board. If we were to find that the circuit court had a remedy (award of clean up costs) which was not available before the Board, we would be finding

> that citizens have fewer remedies for violations of the Act. We also find that allowing the award of clean up costs in some cases will further the purposes of the Act, by encouraging persons to remediate a threat to the environment immediately, knowing that their costs could be reimbursed. Section 33(a) specifically allows the Board to enter such final orders as it deems appropriate. We find that this broad grant of authority, coupled with the supreme court's refusal in Fiorini to find that the award of cleanup costs is not available under the Act, gives the Board the authority to award cleanup costs. Lake County Forest Preserve Dist. v. Ostro, PCB 92-80, slip. op. at 13 (Mar. 31, 1994).

In all subsequent private cost recovery cases before it, the Board has adhered to Fiorini and Ostro. *See*, *e.g.*, Herrin Security Bank v. Shell Oil. Co., PCB 94-178 (Sept. 1, 1994); Streit v. Oberweis Dairy, Inc., PCB 95-122 (Sept. 8, 1995); Richey v. Texaco Refining and Marketing, Inc., PCB 97-148 (Aug. 7, 1997); Dayton Hudson Corp. v. Cardinal Industries, Inc., PCB 97-134 (Aug. 21, 1997); Malina v. Day, PCB 98-54 (Jan. 22, 1998); MDI v. Regional Bd. of Trustees, PCB 00-181 (May 2, 2002); Village of Park Forest v. Sears, Roebuck and Co., PCB 01-77 (June 6, 2002).

IDOT's arguments do not address this case law and offer no reason to overturn this long-standing precedent. The Board continues to find it has the authority to award private cleanup cost recovery when appropriate as a remedy for violating the Act.

And, in the six and a half years since the Board issued the Interim Order, IDOT never sought leave to "plead and respond to demands for cost recovery." IDOT Resp. Br. at 18. IDOT's claim that it was deprived of any opportunity to do so is unpersuasive. In fact, IDOT filed a response to JM's status report and took the opportunity to argue against JM's cost recovery request. IDOT Resp. to JM Status Rpt. at 3 (Dec. 8, 2016). Finally, IDOT also could have, but did not, move the Board to reconsider the Interim Order. *See* 35 Ill. Adm. Code 101.520, 101.902.

Joint and Several Liability

JM incurred and paid $5,579,794 to implement the AOC at Sites 3 and 6. The parties do not dispute that these costs were reasonably incurred. Stip. at 5-7. However, they do dispute whether IDOT is jointly and severally liable for those costs.

JM's Position

JM argues that "[w]hen a site is remediated pursuant to a USEPA order, Illinois' proportionate share liability scheme does not apply," and "since IDOT was the only entity found liable, it is jointly and severally liable for all of the costs associated with the remediation." JM Br. at 5. JM therefore maintains that the Board should award the full $5,579,794 in costs JM incurred remediating Sites 3 and 6. *Id*.

JM relies on the Interim Order's statement, "the requirement of Section 58.9(a) of the Act to determine IDOT's proportionate share of JM's costs does not directly apply because the sites

are subject to a USEPA order," to argue that proportionate share liability is not applicable here. JM Br. at 5, *quoting* Interim Order at 22. JM adds that the Act's Title XVII expressly excludes its provisions, including Section 58.9(a), from applying at sites, like Sites 3 and 6, where either "the Site is on the National Priorities List" or investigation or remediation at the site has been "required by … an order *issued by the United States Environmental Protection Agency*." JM Br. at 5 (emphasis in original), *citing* 415 ILCS 5/58.1(a)(2)(i), (iv) (2022). JM claims both exclusions apply. JM Br. at 5, *citing* Exh. 62; 40 C.F.R. 300, App. B.

Rather, JM argues that joint and several liability should apply instead. First, according to JM, State Oil supports the proposition that if sites are excluded from Section 58.9(a) proportionate share liability, then joint and several liability applies. JM Br. at 5, *citing* State Oil Co., 822 N.E.2d at 880. The State Oil court held that a party "is not entitled to invoke the [proportionate share] provisions of Title XVII unless Title XVII is applicable to it in the first place." JM Br. at 6, *quoting* State Oil, 822 N.E.2d at 880 (finding that Section 58.1(a)(2) excluded party from Title XVII proportionate share liability provisions). State Oil imposed joint and several liability instead. JM Br. at 5-6.

Next, JM maintains that holding IDOT jointly and severally liable is consistent with Section 22.2(f) of the Act and federal CERCLA cases. JM Reply Br. at 14-15, *citing* U.S. v. Capital Tax Corp., 545 F.3d 525, 534 (7th Cir. 2008) ("Once a party is found to be liable under CERCLA, the party is jointly and severally liable for all of the EPA's response costs, 'regardless of that party's relative fault.'"); Burlington N. & Santa Fe Ry. Co. v. United States, 556 U.S. 599, 614 (2009) (a CERCLA defendant can be held jointly and severally liable); United States v. NCR Corp., 688 F.3d 833, 838 (7th Cir. 2012) (holding one defendant jointly and severally liable under CERCLA).

Additionally, JM argues that "where all of the Section 33(c) factors weigh against a violator, Board precedent requires that the requested relief be granted." JM Br. at 8, *citing* McCarrell v. Air Distrib. Assoc., Inc., PCB 98-55, slip op. at 11-14 (Mar. 6, 2003); People v. J&F Hauling, PCB 02-21, slip op. 12-13 (Feb. 6, 2003); Theodore Kosloff Trust v. A&B Wireform Corp., PCB 06-163, slip op. at 3 (Oct. 5, 2006). JM further notes that the Board weighed all the Section 33(c) factors against IDOT, "bolstering the imposition of joint and several liability." JM Br. at 7.

JM also asserts that IDOT alone can be held jointly and severally liable, arguing "[j]oint and several liability means that when more than one tortfeasor might have caused the plaintiff's injury, the plaintiff may sue *any one of them* and *that each defendant is potentially liable to the plaintiff for the full amount of damages*." JM Reply Br. at 15, *citing* Product Liability Litigation: Trial and Settlement, Practical Law Practice Note 8-522-5203 (emphasis added by JM).

JM concludes that "since IDOT was the only entity found liable, it is jointly and severally liable for all of the costs associated with the remediation." JM Br. at 5.

IDOT's Position

IDOT does not argue that Title XVII of the Act should apply. Rather, IDOT argues JM has not shown that absent Title XVII's applicability, joint and several liability must apply. For the $5,579,794 incurred to remediate Sites 3 and 6, IDOT argues that joint and several liability is inapplicable.

First, IDOT points out that the Board has already found IDOT was not responsible for much of the contamination at Site 3 and Site 6. IDOT Resp. Br. at 14-15, *citing* Interim Order at 13. IDOT states, "[s]pecifically, the Board limited IDOT's responsibility to the portions of Site 6 between points 1S and 4S, and [at Site 3 in] the areas of borings B3-25, B3-15, B3-16, B3-50 and, potentially, portions of B3-45." IDOT Resp. Br. at 14-15. According to IDOT, "the Board had a reasonable basis for allocating the specific geographic locations for which IDOT was responsible"—the limited areas of Sites 3 and 6 identified in the Interim Order. *Id*. at 15.

Next, IDOT argues that joint and several liability may apply only where multiple parties are found liable:

> In this matter, only IDOT is a respondent/defendant. JM is the *adversary*. IDOT cannot be held to be 'jointly liable' with its adversary. There are *no* other parties among which to allocate responsibility besides IDOT. There can be no "joint and several liability" between IDOT and JM. IDOT Resp. at 12 (emphasis in original).

IDOT distinguishes three of the Board decisions relied on by JM as they involved multiple respondents. IDOT Resp. Br. at 12-13, *citing* IEPA v. Bittle, PCB 83-163, slip op. at pp. 35-36 (Apr. 16, 1987) (owner of land where coal recovery operations created pollution was one of four respondents held liable by Board); People v. Michel Grain Co., PCB 96-143; IEPA v. J & T Recycling and John A. Gordon, AC 01-12.[12]

IDOT further distinguishes State Oil. Besides involving multiple liable respondents, that case involved Sections 57.12 and 22.2(f) of the Act—"both expressly provided for joint and several liability"—and respondents in that case failed to prove there was a reasonable basis to divide liability. IDOT Resp. Br. at 15, *citing* People v. State Oil Co., PCB 97-193, slip op at 25 (Mar. 20, 2003). In contrast, the Board found IDOT violated subsections (a), (d), and (e) of Section 21, none of which explicitly provide for joint and several liability. IDOT Resp. Br. at 15*, citing* 415 ILCS 5/21(a), 21(d), 21(e).

Board Findings

The Board agrees with both parties that proportionate share liability under Section 58.9(a)(1) does not directly apply to this proceeding. For the reasons articulated by the appellate court in State Oil, the Board again finds that proportionate share liability is limited by the

[12] IDOT also distinguishes J & T Recycling as only applicable to administrative citations. IDOT Resp. Br. at 13, *citing* J & T Recycling, AC 01-12, slip op. at 2 (Jan. 18, 2001).

applicability exclusions of Section 58.1(a)(2) of the Act. Section 58.1(a)(2) excludes Section 58.9(a)(1) from applying where "(i) the site is on the National Priorities List (Appendix B of 40 CFR 300)" or "(iv) investigation or remedial action at the site has been required by a federal court order or an order issued by [USEPA]." 415 ILCS 5/58.1(a)(2)(i), (iv) (2022). Both exclusions apply here. *See* Exh. 62; Exh. 65 at 1, 6.

However, proportionate share liability's inapplicability does not mean that joint and several liability automatically applies. First, JM does not explain why State Oil requires joint and several liability to apply here. IDOT correctly distinguishes State Oil, noting that the section of the Act at issue—Section 57.12(a)—states that the owner or operator of an underground storage tank "shall be liable for all costs" of the State in cleaning up the tank leak. 415 ILCS 5/57.12(a) (2022). There, both the current and former tank owners and operators were held jointly and severally liable. And the cross-complainant "failed to prove by a preponderance of the evidence that there is a reasonable basis for division of liability." State Oil, PCB 97-193, slip op. at 25 (Mar. 20, 2003). Unlike State Oil, this case involves violations of the Act and the appropriate remedy for those violations, not Section 57.12(a). And Section 33(c) of the Act, which the Board must consider here, is expressly inapplicable to Section 57.12(a) actions. *See* 415 ILCS 5/57.12(i) (2022).

Additionally, JM does not explain why cases imposing joint and several liability under CERCLA require doing so when the Board fashions a remedy for violations of the Act. Under CERCLA, specified categories of persons (*e.g.*, facility owner; arranger for disposal; waste transporter) "shall be liable" for "all costs" of cleaning up a release of hazardous substances. 42 U.S.C. § 9607. It is like Section 57.12(a), discussed above. Even under CERCLA, joint and several liability may give way to apportioned liability for a defendant who establishes that there is a reasonable basis for determining its contribution to a single, divisible environmental harm. *See* Burlington, 556 U.S. at 614. The Act has a provision modeled on CERCLA liability, Section 22.2(f), which provides that specified categories of persons "shall be liable for all costs" of a State cleanup of a hazardous substance or pesticide release. 415 ILCS 5/22.2(f) (2022). Actions under Section 22.2(f), like those under Section 57.12(a), are not subject to Section 33(c). *See* 415 ILCS 5/22.2(i) (2022); *see also* 415 ILCS 5/57.12(g) (2022) ("The standard of liability under [Section 57.12] is the standard of liability under Section 22.2(f) of this Act."). Here, neither CERCLA nor Section 22.2(f) applies.

Also, JM argues that the Section 33(c) factors "bolster[] the imposition of joint and several liability" and "require[] that the requested relief be granted." JM Br. at 7, 8. But the Board considers those factors in determining the appropriate remedy for IDOT's violations, not whether joint and several liability applies.

IDOT is the only party here found to have violated the Act. Any cleanup cost liability flowing from IDOT's violations, by definition, cannot be "joint and several." *See Black's Law Dictionary* (Abridged 10th ed. 2015) ("joint and several liability" means "[l]iability that may be apportioned either among *two or more* parties or to only one or a few select members *of the group*, at the adversary's discretion. Thus, *each liable party* is individually responsible for the entire obligation, but a paying party may have a right of contribution or indemnity from nonpaying parties.") (emphasis added). The Board does not question that joint and several

liability may be imposed in an action brought against one defendant, but if there is not "more than one tortfeasor," so to speak, that one defendant's liability cannot be "joint and several." JM Reply Br. at 15. JM cites Burlington, but there, discussing CERCLA liability, the U.S. Supreme Court quotes the Restatement (Second) of Torts, which supports the Board's view: "where *two or more persons* cause a single and indivisible harm, each is subject to liability for the entire harm." Burlington, 556 U.S. at 614 (emphasis added) ("Not all harms are capable of apportionment, however, and CERCLA defendants seeking to avoid joint and several liability bear the burden of proving that a reasonable basis for apportionment exists."); *see also* NCR, 688 F.3d at 836-37, 842 (the appeal involved a preliminary injunction against NCR, but the CERCLA site involved "NCR and other potentially responsible parties (a term of art under CERCLA, see *42 U.S.C. §9607(a)*)").

By essentially equating "joint and several liability" with responsibility for *all* the contamination on Sites 3 and 6, JM conflates joint and several liability with the environmental harm at issue. This contradicts the Interim Order. The Board did not find IDOT responsible for all the contamination on Sites 3 and 6. Rather, the Interim Order identified the ACM-impacted borings corresponding to IDOT's construction activities and property control on which the violations were based. In doing so, the Interim Order defined the relevant environmental harm not as ACM contamination anywhere on Site 3 or Site 6 but instead as ACM contamination "in the portions of Site 3 and Site 6 where the Board found IDOT responsible." Interim Order at 22. Any contamination on the rest of Site 3 or Site 6 is therefore excluded from the environmental harm at issue.

Regardless of the label JM attaches to its broadest liability claim, the Board declines to require that IDOT reimburse JM the full $5,579,794 for addressing all ACM contamination on Sites 3 and 6.

Causation

JM's Position

JM recognizes that proportionate share liability under Section 58.9 of the Act does not directly apply here. But JM argues that the "proximate causation" standard found within that Section and its implementing regulations can be helpful in determining an appropriate cost recovery amount.

JM argues, as an alternative to what it characterized as "joint and several" liability, that the Board should award it $3,274,917 in response costs because those are the costs its expert determined were incurred "as a result of [IDOT]'s violations." JM Br. at 9; JM Reply Br. at 16. JM quotes the Interim Order: the Board "continues to find it appropriate that a party recover the cost of performing cleanup as a result of another party's violations." Interim Order at 21. JM then cites Section 58.9(a)(1) of the Act and the Board's proportionate share liability rules (JM Br. at 9-10, *citing* 415 ILCS 5/58.9(a)(1) (2022); 35 Ill. Adm. Code 741.135), asserting that those provisions are "typically applicable to cost recovery cases, [and] provide[] that cost recovery is available for costs 'proximately caused' by the respondent" (JM Reply Br. at 17). JM quotes the entirety of Section 741.135 of the Board's rules:

> In determining proportionate shares under this Part, the Board will consider any or all factors related to the degree to which the performance or costs of a response *result from a person's proximate causation of or contribution to the release* or substantial threat of a release. These factors include the following:
>
> a) The volume of regulated substances or pesticides for which each person is responsible;
>
> b) Consistent with the provisions of 35 Ill. Adm. Code 742 and the remediation of the site in a manner consistent with its current and reasonably foreseeable future use, the degree of risk or hazard posed by the regulated substances or pesticides contributed by each person;
>
> c) The degree of each person's involvement in any activity *that proximately caused or contributed to the release* or substantial threat of a release of regulated substance or pesticides; and
>
> d) Any other factors relevant to a person's proportionate share.

JM Br. at 9-10, *quoting* 35 Ill. Adm. Code 741.135 (emphasis added by JM).

Applying what JM described as the causation standard of Sections 58.9(a)(1) and Section 741.135, JM's expert, Douglas Dorgan, attributed costs to IDOT. JM Br. at 9, 10; JM Reply Br. at 18. This analysis includes any costs that Mr. Dorgan construed as stemming from ACM found in the areas for which IDOT was found to have violated the Act. JM Br. at 10. JM states that USEPA required JM to "treat a contaminated boring on Site 3 as representative of a contaminated 50-by-50 foot grid," which Mr. Dorgan refers to as USEPA's "'Next Cleanest Boring Rule.'" *Id*. at 14, 23. JM further explains that under this Next Cleanest Boring Rule, USEPA required "all the contaminated soil within a contaminated sample grid to be cleaned up as well as all contaminated soil within any surrounding sample grids extending outward until a clean sample grid was found." *Id*. at 23-24.

Employing this Next Cleanest Boring analysis, Mr. Dorgan contended that "the share of JM's costs attributable to IDOT" for Site 6 includes costs incurred to address areas 5S through 8S, which are east of the borings used by the Interim Order to identify the areas of IDOT's Site 6 violations. JM Br. at 10. Mr. Dorgan testified that because of "the way USEPA required the Sites to be remediated and how those requirements merged with his causation methodology," restricting IDOT's area of liability to borings 1S through 4S would not change his opinion of cleanup costs attributable to IDOT. JM Br. at 14, *citing* 10/26/20 Tr. at 255:5-20; 10/27/20 Tr.at 78:15-79:24. Mr. Dorgan also attributed to IDOT all costs for work done remediating Parcel 0393 on Site 3. JM Br. at 13.

JM claims that it is irrelevant that ACM contamination was found at adjacent sites (Sites 4/5 and 2) untouched by IDOT. JM Reply Br. at 17. First, JM argues that the "record contains no evidence concerning who brought the solid Transite pipes to the Site, but the record is replete

with evidence that IDOT crushed, buried and used the ACM as fill during its Amstutz freeway construction project." *Id*. at 16-17, *citing* Interim Order at 22 (Board findings that IDOT caused and allowed open dumping of ACM waste). Second, JM asserts that even if it had brought solid Transite pipe to "the Site," it "did not proximately cause the injury and cause the need for cleanup costs." JM Reply Br. at 17. According to JM, IDOT's subsequent crushing and burying of the pipes were an "intervening cause," severing the causal link with JM, making IDOT the proximate cause. *Id*. at 16-17.

IDOT's Position

IDOT's starting position is that "it is appropriate under these circumstances to order IDOT to pay none of the cleanup costs because JM caused all of the contamination on site." IDOT Resp. Br. at 28. According to IDOT, "the circumstantial evidence suggests that all of the ACM at and surrounding the JM manufacturing facility, including the Southwest Sites, was caused and allowed by the mishandling and outright dumping of ACM[-]containing products by JM."[13] *Id*. at 16 (emphasis in original).

IDOT argues that the Board should exclude from the remedy those costs for cleaning up areas where the Board has already found JM failed to prove IDOT violated the Act. IDOT Resp. Br. at 20. IDOT then specifically addresses each area of Sites 3 and 6 fitting that description—east of soil boring location 4S (5S through 8S), detour road A, and other areas of Site 3—where JM argues IDOT should be liable for cleanup costs. *Id*. at 20-24. IDOT maintains that JM contradicts the Interim Order's findings by using USEPA's Next Cleanest Boring Rule to argue that contamination—in the areas where IDOT violated the Act—"drove the remedy." *Id*. at 26, *citing* JM Br. at 14. IDOT argues that JM's theory would expand IDOT's cleanup liability into areas for which no IDOT violations were found. IDOT Resp. Br. at 26-28. IDOT also asserts that JM's theory ignores that there was significant ACM contamination found beyond Site 3 and 6, *i.e.*, in Site 2 (immediately east of Site 3) and Site 4/5 (north of Sites 3 and 6). *Id*. at 17. "Remediation was needed in areas east of 4S because it was contaminated with ACM, not because contamination in 1S to 4S caused the need for remediation elsewhere." *Id*. at 28.

IDOT quantifies the maximum costs incurred for the areas where the Board found IDOT violated the Act at $600,050. IDOT Resp. Br. at 29, *citing* Exh. 207. Further, IDOT argues that the Board should adjust this amount downward to "reflect the culpability of the parties and equitable factors." IDOT Resp. Br. at 28; *id*. n.6, *citing* Burlington, 556 U.S. at 613-614; Kerr-McGee Chem. Corp. v. Lefton Iron & Metal Co., 14 F.3d 321, 326 (7th Cir. 1994); Env't Transp. Sys., Inc. v. ENSCO, Inc., 969 F.2d 503, 508-509 (7th Cir. 1992); Alcan-Toyo America, Inc. v. N. Ill. Gas Co., 881 F. Supp. 342, 345 (N.D. Ill. 1995). IDOT emphasizes that it did not bring ACM to Site 3 or Site 6. IDOT Resp. Br. at 16.

[13] The "property located on and adjacent to the southern and western property lines of the former Johns Manville manufacturing facility" is referred to as the "Southwestern Site Area" and includes Sites 3, 4, 5 and 6. Exh. 62 at 3; *id*. at 6, Att. 1.

IDOT identifies three overarching reasons to reduce its cleanup cost liability. First, IDOT argues that the ACM found in the areas of Sites 3 and 6 where IDOT violated the Act is like the ACM found in areas where IDOT was not found to have violated the Act:

> All of the ACM containing product found in the extensive investigation of the Southwestern Site locations (enumerated Site 3, Site 4, Site 5, and Site 6) were the type of material manufactured at the JM facility over the years. This includes shingles, roofing materials, Transite pipe, piping insulation, gaskets and similar materials. The two sites relevant to this case are Site 3 and Site 6. The ACM found on these Sites was the same as manufactured at the JM facility, principally Transite pipe and roofing materials on Site 3. On Site 6, the ACM found included Transite pipe, roofing materials, fibrous process waste, and brake liners. IDOT Resp. Br. at 16 (citations omitted).

Second, IDOT asserts that "significant ACM contamination was also found in areas close to Sites 3 and 6 where IDOT had no involvement whatsoever." IDOT Resp. Br. at 17 (emphasis in original). IDOT cites the following:

- 55 of 57 sampling test rows in Sites 4 and 5 (treated at hearing as one Site, 4/5), north of the area where IDOT did its road work, revealed ACM in the form of Transite, roofing materials, fibrous process waste, wallboard, brake liners, and flex-board. IDOT Resp. Br. at 17.

- A JM expert witness, Tat Ebihara, admitted at hearing that Site 4/5 was "much more contaminated" than Site 6. *Id*., *quoting* 10/26/20 Tr. at 110.

- Testing of Site 2, immediately east of Site 3, found significant ACM contamination, including Transite pipe, roofing material, tar paper, tubing, and insulation. IDOT Resp. Br. at 17.

- ACM contamination in Site 6 extends below what IDOT construction plans indicated in building Greenwood Avenue. *Id*. at 22, *citing* 10/28/20 Tr. at 10:4-7.

Third, IDOT identifies other persons who owned or used parts of Sites 3 and 6 where ACM was found. Site 3 is owned by ComEd. IDOT Resp. Br. at 24. JM operated its manufacturing facility for approximately 75 years near Sites 3 and 6, and used a portion of Site 3 as a parking lot at which Transite pipes were used as parking bumpers. *Id*. at 23-24, *citing* Exh. 57 at 15-16.

According to IDOT,

> It is up to the Board here . . . to determine the culpability of at least JM, Commonwealth Edison, the owner of the property, and even the City of Waukegan, who owns Greenwood Ave, (*see Exh. 65*-5) and IDOT and determine what costs, if any, IDOT should be held responsible for. IDOT Resp. Br. at 29-30.

IDOT concludes that "[t]he Board should apply equitable factors, considering that JM caused the contamination and is most culpable, and that others have property ownership, and adjust the maximum amount down from $600,500." *Id*. at 40.

Board Findings

JM purports to apply "proximate cause" in arguing what harm resulted from IDOT's violations. *See*, *e.g.*, JM Br. at 9-10; JM Reply Br. at 2-3, 17. But JM does not address the common law requirements for finding proximate causation. Nor does JM explain why the Board should look to proportionate share liability to hold IDOT liable only for the environmental harm *proximately* caused by its violations.

Neither the Act nor the Board's proportionate share liability rules define "proximate cause," but the term's meaning is well established in case law. "Where, as here, a statutory term is not defined, we assume the legislature intended for it to have its popularly understood meaning. Likewise, if a term has a settled legal meaning, the courts will normally infer that the legislature intended to incorporate that established meaning into the law." Rosenbach v. Six Flags Entertainment Corp., 2019 IL 123186, ¶ 29. In Illinois tort law, "proximate cause" describes "two distinct requirements: cause in fact and legal cause." First Springfield Bank & Trust v. Galman,188 Ill. 2d 252, 256-58 (1999). "Cause in fact" exists "only if [defendant's] conduct is a material element and a substantial factor in bringing about [plaintiff's] injury." *Id*. at 258. "Legal cause," on the other hand, "is "essentially a question of foreseeability." Galman,188 Ill. 2d at 258. For legal cause, the "relevant inquiry" is "whether the injury is of a type that a reasonable person would see as a likely result of his or her conduct. *Id*.

JM does not address the discrete "proximate cause" requirements of "cause in fact" and "legal cause." JM does quote Section 58.9(a)(1) of the Act on "proportionate share liability," which incorporates proximate causation. Specifically, when Section 58.9(a)(1) applies, it bars cleanup cost recovery from a person or requiring that person to perform a cleanup "beyond the remediation of releases . . . that may be attributed to being *proximately caused* by such person's act or omission or beyond such person's proportionate degree of responsibility for costs of the remedial action of releases . . . that were *proximately caused or contributed to* by 2 or more persons." 415 ILCS 5/58.9(a)(1) (2022) (emphasis added); *see also* Proportionate Share Liability: 35 Ill. Adm. Code 741, R97-16, slip op. at 1, 27 (Dec. 17, 1998) (Section 58.9 is "a limitation on the remedy for an action seeking costs for a response or the performance of a response."). But, as the Interim Order found and the Board reiterated above, Section 58.9(a)(1) does not apply here.

In adopting its proportionate share liability rules, the Board explained that when Section 58.9(a)(1) applies, it replaces any joint and several liability. *See* Proportionate Share Liability: 35 Ill. Adm. Code 741, R97-16, slip op. at 1, 27 (Dec. 3, 1998) ("the Illinois General Assembly adopted legislation repealing joint and several liability in actions involving environmental remediation and replaced it with proportionate share liability"; "by enacting proportionate share liability, the legislature has already determined that, as a matter of law, the contamination at a site is always divisible"). While "the proportionate share liability provisions were intended to

move away from joint and several liability" (*id*. at 27), that rulemaking did not explicitly address whether the "proximate cause" requirement of Section 58.9(a)(1) was intended to "move away" from a less exacting causation limit on cost recovery or cleanup as a remedy for a violation. *Cf*. 415 ILCS 22.2(f), 57.12(a) (2022) (no discrete "causation" element *per se* for cleanup cost recovery, although Section 58.9(a)(1) may limit recovery under Section 22.2(f)).

When the Board, as a remedy for a violation, did order a respondent to reimburse cleanup costs incurred by a "private" complainant (*i.e.*, not the State of Illinois), the respondent essentially failed to contest that its open dumping violation "caused" the contamination that was cleaned up. *See* McCarrell v. Air Distribution Associates, Inc., PCB 98-55, slip op. at 6 (Mar. 6, 2003). Here, on the other hand, IDOT argues that "all" the ACM contamination was caused by JM. *See*, *e.g.*, IDOT Resp. Br. at 2, 4, 16, 27, 28 ("JM alone created the situation that polluted and caused ACM contamination throughout the entire area at issue."; JM is attempting "to avoid responsibility for polluting the area with ACM, and causing the area to become a Superfund site"); IDOT Sur. Br. at 2 ("the USEPA AOC required JM to remediate the mess it caused with its decades-long ACM contamination of its facility and the surrounding area"). IDOT does not address whether its liability should be restricted to what its violations *proximately* caused.

The Board finds that beyond the context of Section 58.9 proportionate share liability, a respondent who violated the Act may be required to reimburse cleanup costs or perform cleanup if its violation resulted in contamination. Specifically, when Section 58.9 proportionate share liability does not apply, it is not necessary that the violation have *proximately* caused the contamination. Here, IDOT violated the Act by causing and allowing open dumping and by conducting a waste-disposal operation and disposing of waste without the required permitting. If those violations caused contamination, the Board finds it appropriate that IDOT pay for the cleanup of that contamination. This furthers core purposes of the Act "to restore, protect and enhance the quality of the environment, and to assure that adverse effects upon the environment are fully considered and borne by those who *cause* them." 415 ILCS 5/2(b) (2022) (emphasis added).

The Board further finds that requiring *proximate* causation in these situations, especially legal cause's foreseeability, "may make Illinois' programs less stringent than the federal programs under Subtitles C, D, and I of RCRA [the federal Resource Conservation and Recovery Act] and make Illinois' enforcement authority inadequate." Proportionate Share Liability: 35 Ill. Adm. Code 741, R97-16, slip op. at 9 (Dec. 3, 1998). That result, in turn, "may jeopardize the federal approvals that allow Illinois to administer these programs," an "outcome [that] would be contrary to the General Assembly's specific wishes." *Id*.; *see also*, *e.g.*, 42 U.S.C §§ 6972, 6973 (providing for suits to restrain or require actions by a person "who has contributed or who is contributing" to past or present solid or hazardous waste handling that may present an imminent and substantial endangerment to health or the environment); Cox v. City of Dallas, 256 F.3d 281, 294-95 (5th Cir. 2001) (on "contributing to" in RCRA, "we follow our sister circuits' lead and interpret 'contribute' to mean 'have a part or share in producing an effect'").

The Board also finds that JM's Next Cleanest Boring analysis ignores the ACM contamination found throughout the JM Site and off-site, adjacent properties. Sites 3 and 6 were contaminated with ACM, both in areas where IDOT was held to have violated the Act and in

areas where the Board found JM failed to prove that IDOT violated the Act. Significant ACM contamination was also found in sites adjacent to Sites 3 and 6, in areas untouched by IDOT's construction. JM's application of the Next Cleanest Boring Rule is so broad that any liability for any portion of Sites 3 and 6 could be expanded to include the entirety of each Site. Mr. Dorgan demonstrated this with his conclusion that IDOT caused ACM contamination in areas for which the Board found no IDOT violation.

In ordering a remedy hearing, the Board did not direct the parties to revisit the Interim Order's findings. The Board declines JM's invitation to do so. As discussed, the Interim Order defined the environmental harm as "ACM waste present in soil" in "the portions of Site 3 and Site 6 where the Board found IDOT responsible." Interim Order at 22, No. 1. The relevant "cleanup work" is that "cleanup work performed by JM *in the portions of Site 3 and Site 6* where the Board found IDOT responsible"; and the relevant cleanup "costs" are "JM's costs for *this work*." *Id*., Nos. 1 and 2 (emphasis added). Accordingly, cleanup work performed elsewhere on Site 3 or Site 6, as well as the costs incurred for that work, are irrelevant. Therefore, the Board's consideration of IDOT's cleanup cost liability starts where the Interim Order left off—the share of JM's reasonable costs attributable to IDOT for cleanup work performed "in the portions of Site 3 and Site 6 where the Board found IDOT responsible for ACM waste present in soil." *Id*., Nos. 1-3.

Finally, IDOT asserts that the "maximum allowable" cost recovery award of $600,050 should be "adjusted downward to reflect the culpability of the parties and equitable factors." IDOT Resp. Br. at 28. The Board has discretion in awarding private cleanup cost recovery as a remedy for violating the Act. *See* Ostro, PCB 92-80, slip op. at 13 ("The court stated that such a [cleanup cost recovery] determination is properly left to the trial court's discretion."), *citing* Fiorini, 143 Ill. 2d at 350. The Board continues to find that "allowing the award of cleanup costs *in some cases* will further the purposes of the Act." Ostro, PCB 92-80, slip op. at 13 (emphasis added). Further, "in deciding whether or not to award [cleanup] costs, reference should be made to the factors set forth in Section 33(c) of the Act." *Id.* Therefore, in determining the amount of cleanup costs "appropriate under the circumstances" (415 ILCS 5/33(a) (2022)), the Board will "take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions, discharges or deposits involved" (415 ILCS 5/33(c) (2022).

Amount of Recoverable Costs

In this section of the opinion, the Board addresses, in turn, the site maps it considers in determining JM's cleanup costs attributable to IDOT's violations; IDOT's areas of liability; JM's cleanup costs attributable to IDOT's violations; and IDOT's share of those costs.

Conflicting Site Maps

Both JM's and IDOT's experts created site maps, generally relying on the record developed during the violation phase of this proceeding. They used these maps to assign costs they consider attributable to IDOT for specified tasks JM performed at Sites 3 and 6. However, both experts criticize the accuracy of the other's maps. Below, the Board summarizes IDOT's

and JM's concerns, after which the Board identifies which maps it uses to assist in determining cleanup costs attributable to IDOT's violations.

IDOT. IDOT relies on a "Base Map" created by its expert, Mr. Gobelman, to determine the remediation costs attributable to IDOT. The Base Map, which includes identifying boundaries and key features of Site 3 and Site 6, is Figure 1 in Mr. Gobelman's August 22, 2018 report. Exh. 205. Mr. Gobelman asserted that creating the Base Map was necessary because the locations of Site 3 and Site 6 were not consistent on the figures (site maps) in the record. *Id*. at 3. He noted that the "Plat of Topographic Survey" (Exh. 204, Atwell Survey (Exhibit G)) "does not match up" with the surveyed corners of Site 3 as presented by either AECOM (Exh. 213, Fig. 2) or Mr. Dorgan (Exh. 204, Fig. 1). Exh. 205 at 3; *id.*, App. C, Exh. 1.

To create the Base Map, Mr. Gobelman used a background Google 2018 image of Site 3 showing the fencing around Site 3. He assumed that Site 3 was contained within the shown fencing except for Site 3's northwest corner. Exh. 205 at 4. Mr. Gobelman noted that because the western end of the northern fence line drops toward the southwest along the embankment slope, Site 3's northwest corner is beyond the fence. *Id.* As the northern and eastern fence lines extend beyond Site 3's northern and eastern boundaries, respectively, Site 3's northeast corner is within the fence. Exh. 205, App. C. Other than the northwest and northeast corners of Site 3, the fence appeared to be on Site 3's boundaries. *Id*.

As for Parcel 0393 on the Base Map, Mr. Gobelman relied on the legal description from the "Grant for Public Highway" dated August 3, 1971 (Exh. 41) and IDOT as-built plans (Exh. 21A at 23, 24). The Gobelman August 22, 2018 Report notes that Parcel 0393 begins at the intersection of the easterly line of Pershing Road (former Sand Street) and the south line of Greenwood Avenue. Exh. 205 at 4. The 1971 plan sheets show that IDOT Station 7+00 on Greenwood Avenue is at the eastern edge of Parcel 0393.[14] *See id*., Fig. 1.

For Site 6, Mr. Gobelman located soil boring locations (1S through 9S) along the south side of the site on the Base Map (Exh. 204, Fig. 1) based on AECOM's 2014 Work Plan Revision 2. Exh. 205 at 4, *citing* Exh. 66 at 99. He noted that the distance from the western edge of Site 6 to soil boring location 9S is 419 feet. Exh. 205 at 5, *citing* Exh. 66 at 99. Mr. Gobelman relied on a map of Site 6's proposed excavation areas from AECOM'S Remedial Action Work Plan Revision (*i.e.*, Exh. 66 at 99) to locate the Northeast Excavation on the base map. Exh. 205 at 5. He noted that the length of the Northeast Excavation is about 150 feet, extending from the excavation's western edge, which is east of boring 3S, to the excavation's eastern edge, which is slightly east of boring 6S. *Id.* The Nicor Gas line, North Shore Gas line, and City of Waukegan water line were located on the Base Map based on AECOM's 2018 Final Report. *Id.*, *citing* Exh. 213-154. Finally, Mr. Gobelman located the AT&T utility lines on the Base Map based on Figure 1 of Mr. Dorgan's 2018 Report. Exh. 205 at 5.

[14] "IDOT's plans used a system for marking points along each road at 100-foot intervals. These points were called stations." Interim Order at 7. Stations are numbered and run from east (lower number) to west (higher number) on Greenwood Avenue. Exh. 204, Fig. 1. For example, "Station 9+22" means 22 feet west of Station 9. Interim Order at 8.

JM. JM's expert, Mr. Dorgan, identified what he considered flaws in Mr. Gobelman's methodology, as well as inaccuracies in the Base Map. Exh. 206. Mr. Dorgan opined that the Base Map is inconsistent with the figures approved by USEPA and used by the Board in ruling on the issues during the violation phase. *Id*. at 3. He explained that instead of relying on AECOM's source information in creating the Base Map, Mr. Gobelman relied on observations of a Google image and other "unreliable" materials. *Id*. By comparing Mr. Gobelman's Base Map with the AECOM Final Report Map, Dorgan's Expert Report Figure 1, and the Atwell Survey, Mr. Dorgan concluded that the Base Map and other figures contained in the Gobelman August 22, 2018 Report misrepresent the boundaries and features of Sites 3 and 6 and Parcel 0393. *Id*. at 5-7.

IDOT. In response to JM, Mr. Gobelman revised the Base Map to correct the location of Parcel 0393. Exh. 207 at 1. Mr. Gobelman explained that the revised location of Parcel 0393 is based on the legal description from the August 3, 1971 Grant for Public Highway (Exh. 41-1) and IDOT's as-built plans for Detour Road A (Exh. 21A-23, 24). *Id*. With the revision, Mr. Gobelman stated that "IDOT Stationing 7+00 on Greenwood Avenue is at the eastern edge of Parcel 0393." *Id*.

JM. Mr. Dorgan maintained that the revised Base Map is still flawed even though it corrects some of his noted inaccuracies. Exh. 208 at 3. Specifically, he observed that the revised Base Map incorrectly represents the location of the borings and test pits and changes the location and dimensions of the Northeast Excavation, as well as the location of the North Shore Gas Line and City of Waukegan water line. *Id*. Mr. Dorgan compared the representations of the Site 3 and Site 6 boundaries, the boring and test pit locations, the location of the Northeast Excavation, and the location of the City of Waukegan water line in the initial and revised Base Maps with Figure 1 in his Expert Report (Exh. 204). *Id*. at 3-4; *see also* Exh. 208, Figs. 1A, 1B. Mr. Dorgan argued that Figure 1 in his Expert Report is based on "the AECOM base map used by AECOM, provided to IEPA and USEPA and adopted by this Board in the first hearing." Exh. 208 at 4. Further, Mr. Dorgan asserted that his comparison Figures 1A and 1B are accurate based on the Global Positioning System (GPS) coordinates for the Site 6 excavation locations. *Id*. Relying on Mr. Dorgan's assessment, JM argues that the Board should exclude any evidence, testimony, exhibits, and figures relating to or premised on Mr. Gobelman's Base Maps because of the flaws in his methodology, as well as inaccuracies in the Base Maps. JM Mot. to Excl. at 1, 5-6.

Board Findings. Mr. Dorgan raises some valid concerns about Mr. Gobelman's Base Maps. But the Board finds that those concerns do not rise to the level where the Board must exclude anything from the record. Mr. Dorgan compared the locations of property lines, soil borings, and excavations in Mr. Gobelman's Base Maps with those derived from AECOM and Weaver Consulting Group. Exh. 208, Figs. 1A, 1B. That comparison, however, indicates only slight differences in those features. For example, the Base Maps locate soil sample B3-45 outside of Site 3. Mr. Dorgan argued that "the location of soil boring B3-45 as presented on Figure 1 of the Dorgan Expert Report is accurate and shows B3-45 (which represents a 50-by-50-foot area) as falling within the IDOT Area of Liability." Exh. 206 at 8. However, to attribute IDOT's cleanup costs for Site 3, Mr. Gobelman treated B3-45 as falling on Parcel 0393, avoiding any arguments over that boring's location. Exh. 205 at 5. Further, Mr. Gobelman revised his

map to correct the location of Parcel 0393 and revised IDOT's cost attribution accordingly. Exh. 207 at 1.

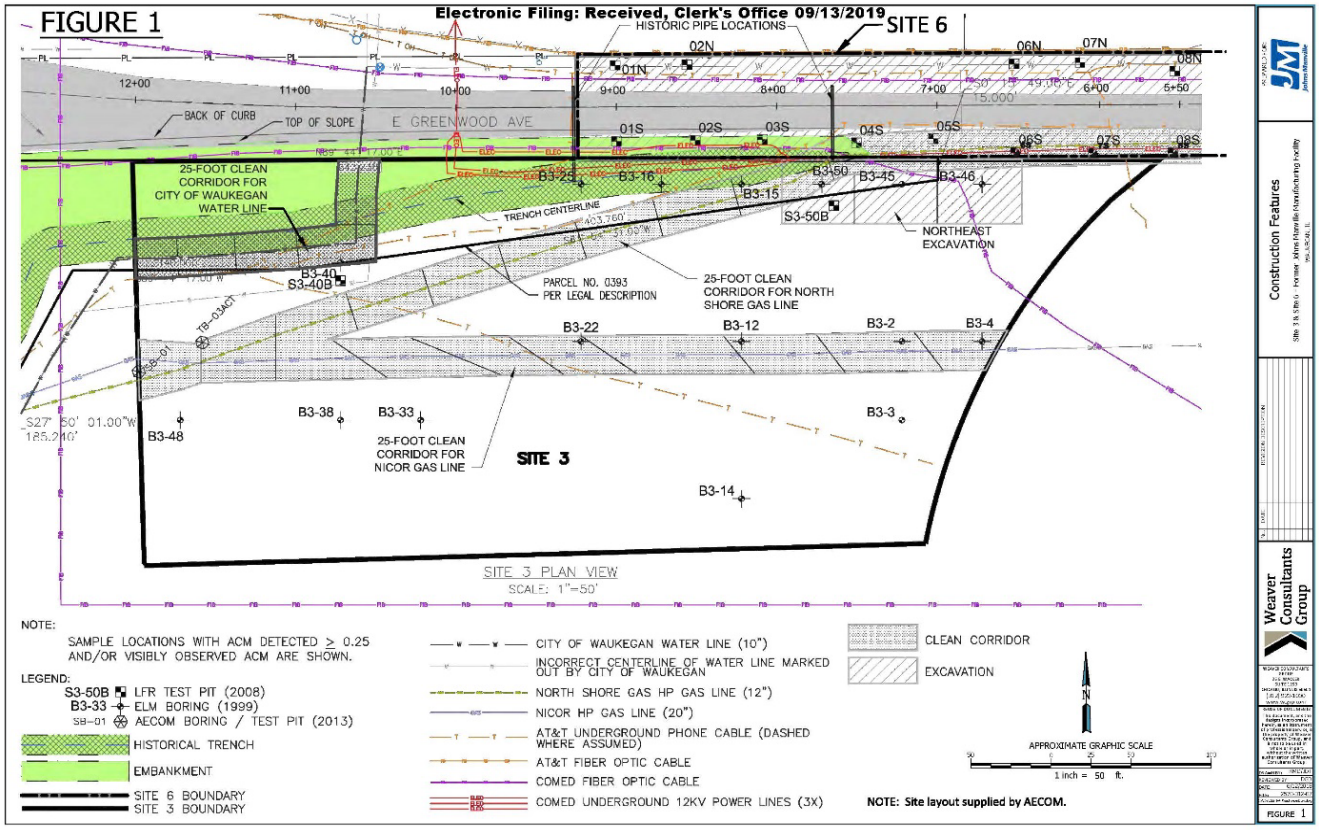
Even though differences in the location of the property lines and other features continue to exist between the respective maps created by Mr. Gobelman and Mr. Dorgan, these differences do not significantly impact determining IDOT's cleanup cost liability, as directed by the Board's Interim Order. However, the Board relied on AECOM's maps in determining IDOT's violations. To avoid any conflicts, the Board uses the maps developed by Mr. Dorgan in identifying the site boundaries, soil borings, and other important features to assist in delineating IDOT's areas of liability.

Delineation of IDOT's Liability Areas

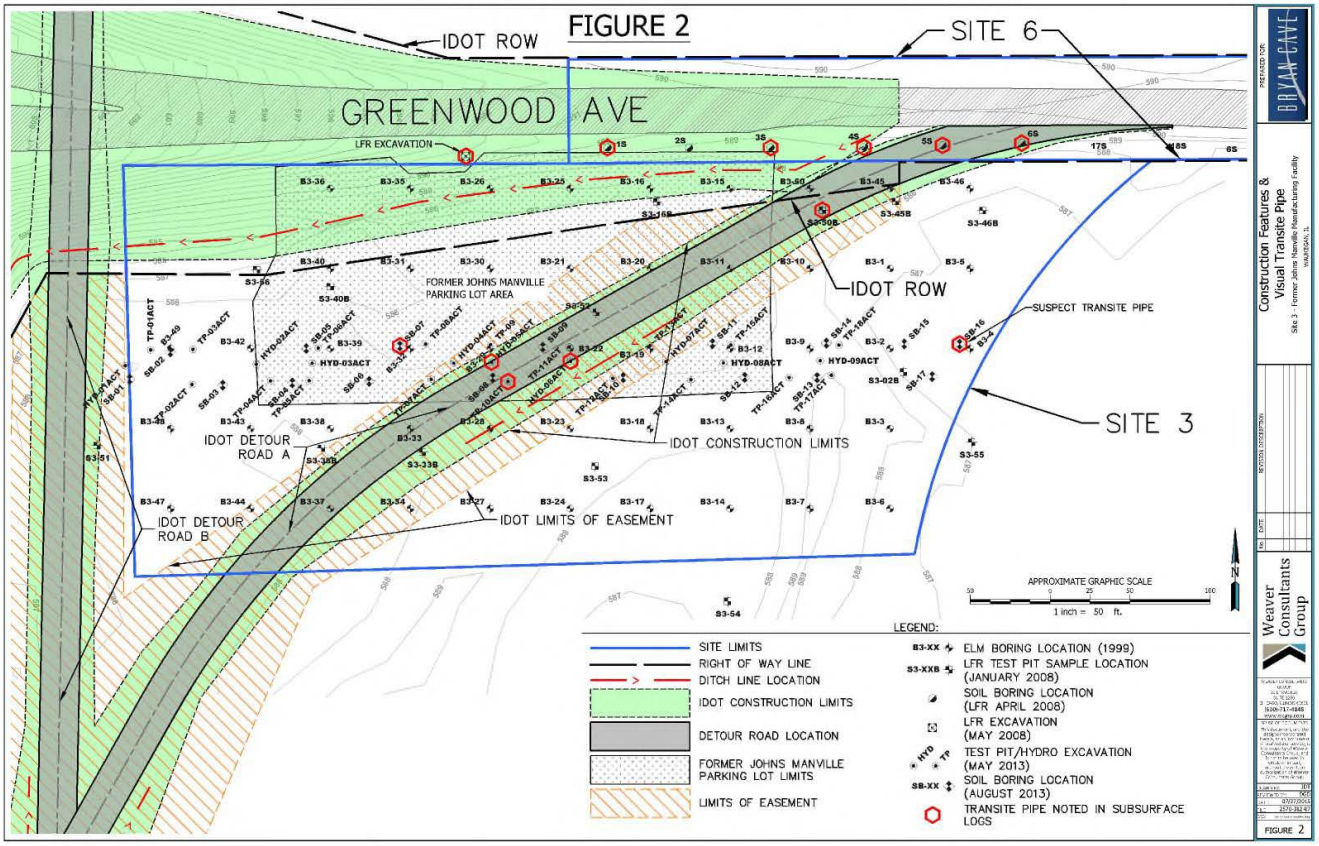
The Board found IDOT liable for ACM waste along the south side of Greenwood Avenue within Site 6 (soil boring locations 1S through 4S) and adjacent areas along the north edge of Site 3 (soil boring locations B3- 25, B3-16, and B3-15), as well as Parcel 0393 within Site 3 (soil boring locations B3-25, B3-15, B3-16, B3-50, and B3-45, to the extent B3-45 falls on Parcel 0393). Interim Order at 13. Because the parties continue to argue about the import of these boring locations, the Board addresses this issue before turning to cost attribution.

As an initial matter, JM contends that the Board's order for evidence on the costs attributable to IDOT's violations plainly encompassed much more than just the costs for work done *within* the identified soil boring locations, which are about two inches in diameter. JM Br. at 11, *citing* 10/26/20 Tr. at 221:3-22. The Board agrees with JM that IDOT's liability is not restricted to asbestos contamination that was literally within those soil borings but rather covers the areas *represented* by those borings.

Mr. Dorgan, JM's expert, asserted that each soil boring represents a 50-foot by 50-foot grid because the soil samples were taken in a grid system with a 50-foot interval. Exh. 204 at 13. As recommended by Mr. Dorgan, the Board looks to the area of the grid associated with each soil boring identified in the Interim Order, except to the extent that the Interim Order otherwise limited IDOT's liability by parcel or site boundary. For illustrative purposes, the Board provides here two of Mr. Dorgan's maps depicting features referenced in the discussion that follows.



Exh. 204, Fig. 1. As shown above, Site 6 is north of Site 3. *Id.* Site 6 encompasses the north and south sides of Greenwood Avenue. *Id.* Parcel 0393 is wedge-shaped and entirely within Site 3, running from Site 3's northwest corner eastward toward but not reaching Site 3's northeast corner. *Id.*



Exh. 16-18

Exh. 208, Fig. 2.

Parcel 0393 Within Site 3. Mr. Dorgan identified the Site 3 area of IDOT's liability as *all* of Parcel 0393 within Site 3, including the grids associated with soil borings B3-25, B3-15, B3-16, B3-50, and B3-45. Exh. 204 at 13. Mr. Dorgan included all of Parcel 0393 because the Board found IDOT liable for contamination within Parcel No. 0393 based on IDOT's interest in and control of this parcel. *Id.*

IDOT states that the Board found IDOT allowed open dumping of ACM in areas of soil borings B3-25, B3-16, B3-15, B3-50, and B3-45, based on IDOT's right-of-way easement in Parcel 0393. However, IDOT continues, the Board did not find IDOT liable for contamination beyond those areas. IDOT Resp. Br. at 25. Mr. Gobelman, IDOT's expert, stated that for Site 3, the Board defined IDOT's liability areas within Parcel 0393 based on soil boring locations B3-25, B3-15, B3-16, B3-50, and B3-45 (to the extent B3-45 falls on Parcel 0393). Exh. 205 at 5. Mr. Gobelman chose soil boring location B3-26 (the first soil boring location that did not detect asbestos at any depth) as the western extent of IDOT liability within Parcel 0393. For the eastern extent, he included boring location B3-45 to avoid any arguments based on differences between his Base Map and Mr. Dorgan's map. Exh. 205 at 5. According to Mr. Gobelman, Mr. Dorgan

incorrectly interpreted the Board-defined area of IDOT's liability as including all contamination within Parcel 0393, failing to consider the boring locations identified in the Interim Order. *Id.*

The Board finds IDOT's area of liability on Site 3, all within Parcel 0393, starts on the west midway between boring locations B3-26 and B3-25, extending eastward to 25 feet east of boring location B3-45. The Board's Interim Order identified IDOT's area of liability to be within Parcel 0393 and as represented by borings B3-25, B3-15, B3-16, B3-50, and B3-45 (to the extent B3-45 falls on Parcel 0393). For attributing cleanup costs to IDOT, Mr. Gobelman conceded that boring location B3-45 falls on Parcel 0393. Thus, IDOT's liability area consists of the 50-by-50 foot grids around those five boring locations—from west to east, B3-25, B3-15, B3-16, B3-50, and B3-45—as limited by the boundaries of Parcel 0393. Mr. Gobelman considered B3-26 as the western boundary of contamination within Parcel 0393, but that was the first soil boring location to the west that did not detect asbestos at any depth and, accordingly, the Interim Order did not identify B3-26 for IDOT's area of responsibility.

Additionally, the Board agrees with IDOT that JM incorrectly assumes all of Parcel 0393 within Site 3 was included in IDOT's area of liability. The assumption contradicts the Interim Order. Although the Board found that IDOT's interest in Parcel 0393 gave and continued to give it control over open dumping on that parcel, the Board determined the reach of IDOT's liability within Parcel 0393 by listing the soil borings from which asbestos-containing samples were collected. Interim Order at 13, 22. If the Board had found IDOT liable for the entirety of Parcel 0393, it would have said so. Therefore, IDOT's area of liability in Site 3 has a western boundary 25 feet west of boring B3-25 and an eastern boundary 25 feet east of B3-45.

Site 6. According to JM, Mr. Dorgan's assessment supports its contention that IDOT should be held liable for contamination on the south side of Site 6 extending from soil borings 1S though 8S, instead of the Board's finding of IDOT liability from boring 1S through 4S. JM Br. at 14. JM asserts that ACM beneath 4S was connected to the ACM from 5S through 8S. *Id*. JM relies on Mr. Dorgan's conversation with and the testimony of David Peterson. Mr. Peterson personally witnessed, photographed, and oversaw JM's removal work, including the excavation work in the 1S-8S area. *Id.* at 14-15, *citing* 10/26/20 Tr. at 130:7-132:6, 171:22-172:19, 188:3-15; Exh. 204 at 13, 14.

Mr. Peterson told Mr. Dorgan it became apparent during the excavation that there was a "consistent seam of the same type of ACM materials (Transite, sludge, and roofing paper) along this entire transect of 1S-8S from the ground surface to a depth of approximately 3 to 5 feet below ground surface." JM Br. at 15, *quoting* Exh. 204 at 14; *citing* Exh. 202; 10/26/20 Tr. at 242:12-243:5; 10/27/20 Tr. at 41:2-42:8. Further Mr. Peterson testified that his photographs show a "consistent seam of industrial debris, including asbestos containing material present underneath the southern—the bank next to Greenwood Avenue approximately three to five feet below grated" from 1S through 8S. JM Br. at 15, *quoting* 10/26/20 Tr. at 180:2-10; *citing* Exh. 214 at 14, 15, 17, 18, 19; 10/26/20 Tr. at 174:9-178:13, 182:1-10.

Additionally, JM argues that geotechnical drawings of the Amstutz Project "show that black cindery fill and peat existed in the soil beneath the stretch of Greenwood Avenue where test pitting at 5S-8S was subsequently done in 2008 during the investigation of Site 6." JM Br. at

16, *citing* Exh. 204 at 41; Exh. 21A at 26. JM asserts that "if IDOT had not dumped ACM along this stretch of Greenwood during that Amstutz Project, then Mr. Peterson should have found black cindery fill and peat in the soil during his excavation." *Id*. JM maintains that the ACM found in 5S through 8S was entirely within the zone where IDOT would have needed to remove material and replace it with fill. JM Br. at 16, *citing* 10/26/20 Tr. at 253:4-15.

JM further contends that the Board "apparently misinterpreted the Amstutz Project construction drawings, when it found that no construction work transpired along Greenwood Avenue east of Greenwood Avenue Station 7." JM Br. at 17. JM explains that the "substantial work that occurred at the intersection of Greenwood Avenue and Detour Road A is not contained in just one drawing. Rather, one must refer to multiple drawings to comprehend the extent of the work done at this intersection." *Id.* at 18, *citing*, *e.g.*, Exh. 21A at 23 and 26. JM states that neither Mr. Gobelman nor the Board reviewed all the drawings. JM Br. at 18. JM argues that "when these drawings are reviewed together with the stationing in mind, it becomes clear that significant construction work occurred east of Greenwood Station 7." *Id.*, *citing* Exh. 204 at 40, 41.

IDOT states that after the first hearing, the Board found it liable for cleanup costs incurred in specific areas—along the south side of Greenwood Avenue within Site 6—associated with boring locations 1S through 4S. IDOT Resp. Br. at 20, *citing* Interim Order at 22. The Board also found that IDOT did not place fill in areas to the east of boring 4S. *Id*. IDOT stresses that the Board's findings were based on reviewing and analyzing "evidence and arguments covering five days of hearing, including the IDOT work plans (*Exh. 21A*), evidence on contamination and sampling, *(e.g. ELM Report, Exh. 57; LFR Report, Ex. 63; 2013 AECOM report, Exh. 66)*," as well as considering the testimony and arguments of JM's and IDOT's respective experts. IDOT Resp. Br. at 20. The Board should again reject JM's arguments—that IDOT is liable for contamination in boring locations 5S through 8S—because those arguments "are not supported by the work plans or evidence." *Id*.

IDOT explains that the Board found it placed fill containing ACM waste on Site 6 from Station 9+22 (*i.e.*, 22 feet west of Station 9) on the west to Station 7 on the east. IDOT Resp. Br. at 20, *citing* Exh. 21A; Interim Order at 9. The Greenwood Avenue reconstruction ended on the east at Station 7+00, which corresponds to the eastern edge of Parcel 0393. The area between Station 7+00 and 7+60 (*i.e.*, 60 feet west of Station 7) was not part of the embankment but that stretch of Greenwood Avenue was "reconstructed and/or resurfaced for a smooth tie into" the rest of Greenwood Avenue east of Station 7. IDOT Resp. Br. at 20. In this proceeding's violation phase, JM argued that IDOT placed fill on Site 6 in areas east of Station 7 at borings 5S through 8S, but the Interim Order found the Site 6 violations corresponded to borings 1S through 4S, which "matches up with Stations on Greenwood [A]venue that were part of the embankment." *Id*. at 21. IDOT maintains that fill was not needed east of Station 7. The work plans and Mr. Gobelman's testimony show the embankment began at 7+60 and went west, while Greenwood Avenue's pavement was "resurfaced" from 7+60 eastward to 7+00. *Id*., *citing* 10/29/22 Tr. at 50-55; Exh. 21A at 72. IDOT's work on Greenwood Avenue began "slightly west of 4S." IDOT Resp. Br. at 21, *citing* 10/29/22 Tr. at 77:12-78:12, 82:1-22; Exh. 21A at 26.

Further, IDOT asserts that the evidence of contamination presented during the remedy hearing is consistent with the evidence of contamination considered by the Board during the violations stage. Cross-sections created for the violations hearing by Mr. Dorgan, as well as by Mr. Gobelman, collectively showed contamination in areas 5S through 8S. IDOT Resp. Br. at 21-22, *citing* Exh. 84; 6/24/16 Tr. at 191-192, 197; Exh. 90; 6/23/16 Tr. at 178. The remedy hearing showed the "excavation samples and asbestos contamination below what IDOT construction plans indicated in building Greenwood Avenue." IDOT Resp. Br. at 22, *citing* Exh. 205 at 5-6. Thus, IDOT argues that JM has not presented any new information; the Interim Order thoroughly considered the contamination at 5S through 8S. IDOT Resp. Br. at 22.

JM relies on Mr. Peterson's recollection of the excavation work to argue that areas 5S through 8S should be included in IDOT's areas of liability. But IDOT asserts that Mr. Peterson's statements are consistent with the sampling information presented at first hearing. IDOT Resp. Br. at 22. Mr. Peterson testified that he observed ACM three to five feet below grade from 1S through 8S, but he did not know how the asbestos contamination occurred in areas 5S through 8S. *Id*., *citing* 10/26/22 Tr. at 203-204. IDOT also asserts that *after* IDOT's Amstutz work, there were multiple resurfacings along Greenwood Avenue, implying that these later construction activities could have resulted in asbestos contamination in areas 5S through 8S. IDOT Resp. Br. at 22, *citing* Exh. 205 at 5-6.

Therefore, IDOT urges the Board to reject JM's unsupported theory of expanded liability for the "cherry picked" contamination at 5S through 8S. IDOT Resp. Br. at 23. Similarly, IDOT claims that JM repeats its violation-phase arguments about IDOT having placed fill containing ACM waste where Detour Road A met Greenwood Avenue. *Id*., *citing* JM Br. at 18. IDOT asserts that JM's arguments must be ignored because the Board has already considered them and found the ACM waste in that area not attributable to IDOT's activities. IDOT Resp. Br. at 23, *citing* Interim Order at 8. The Board specifically considered "the work plans, the stationing, the fill required as well as arguments by both JM and IDOT and found that IDOT did not place fill where Detour Road A met Greenwood Avenue." IDOT Resp. Br. at 24, *citing* Interim Order at 8-10. JM's arguments "should also be ignored because they go beyond the scope of the second hearing." IDOT Resp. Br. at 23.

The Board emphasizes that its Interim Order found IDOT violated the Act based on IDOT's Greenwood Avenue reconstruction resulting in ACM waste at boring locations 1S, 2S, 3S, and 4S. Interim Order at 9. In this way, the Interim Order defined the basis for IDOT's area of liability. JM argues, however, that the area of IDOT's liability must be expanded eastward to include boring locations 5S through 8S. The Board disagrees. In its Interim Order, the Board considered IDOT's work plans showing where it excavated and replaced material on Site 6 (Stations 7+60, 8, and 9), as well as what the replacement material contained (ACM in samples from borings 1S, 2S, 3S, and 4S). *Id*. The Board found that:

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

IDOT's area of liability is tethered to the boring locations identified in the Interim Order.

Additionally, the Board found that JM failed to prove a violation where IDOT connected the detour road to Greenwood Avenue, east of Station 7:

> JM's depictions show that ACM is below the current surface level of approximately 588.5 feet. Exh. 6 at 27; Exh. 84. This is the same surface elevation prior to IDOT's construction in this area. *Id.*; Exh. 21A at 23. Accordingly, ACM detected at this level is below IDOT's activities. Furthermore, JM's expert depicts ACM continuing to below 586 feet in this area and nothing in IDOT's plans shows excavation to this depth. Exh. 84. Therefore, the Board finds that ACM in the area where the former detour road connected to Greenwood is not attributable to IDOT's activities. Interim Order at 8.

JM asserts that the Board did not review all the drawings in the record. But the Board considered all the relevant evidence, including the Site 6 cross-sections prepared by Mr. Dorgan. *Id.*, *citing* Exh. 6 at 27; Exh. 84 at 2. These were the same cross-sections relied on by JM to assert that IDOT placed fill containing ACM. Interim Order at 8, *citing* 5/23/16 Tr. at 218-220, 304.

None of the evidence revisited by JM contradicts the Interim Order's findings. Nor does Mr. Peterson's testimony from the remedy hearing. The Board agrees with IDOT that his testimony about the presence of ACM to the east of soil boring 4S is consistent with sampling presented at the violations hearing. The record indicated that ACM was present on the southside of Site 6, including at soil borings 5S through 8S. Exhs. 84, 90. But JM ignores IDOT's work plans relied on by the Board. They showed where IDOT excavated and replaced material—at Stations 7+60, 8, and 9, which align with the embankment on Site 6 and boring locations 1S, 2S, 3S, and 4S, *i.e.*, all west of borings 5S, 6S, 7S, and 8S. Indeed, at the remedy hearing, Mr. Gobelman testified that the embankment construction began on the east at Station 7+60 and there was no subsurface excavation east of 7+60. 10/29/20 Tr. at 53-54. He also confirmed that Greenwood Avenue construction from 7+60 going east to 7+00 involved only pavement resurfacing. *Id*. at 52

The Board ordered the remedy hearing to address "the cleanup work performed by JM *in the portions of Site 3 and Site 6 where the Board found IDOT responsible for ACM waste present in soil*." Interim Order at 22 (emphasis added). If JM believed the Board erred, it should have timely filed a motion for reconsideration or sought an interlocutory appeal of the Interim Order. *See* 35 Ill. Adm. Code 101.520, 101.902, 101.908. It did neither. The remedy phase is not an opportunity for either party to re-litigate the alleged violations.

As explained, the Board finds it appropriate to use a 50-foot by 50-foot grid for each of the identified borings. Therefore, along the south side of Site 6, the Board uses a 50-foot by 50-foot grid for each of the identified borings. The grid starts 25 feet west of boring location 1S (corresponding with Site 6's western boundary) and extends 25 feet east of boring location 4S (midway between 4S and 5S).

Cost Attribution

The parties stipulate that JM performed tasks concerning Site 3, Site 6, or both sites that fall into 13 "Task Bucket" categories:

1. Nicor Gas Line
2. City of Waukegan Water Line
3. AT&T Lines
4. Utility/ACM Soils Excavation
5. Northeast Excavation
6. Northshore Gas Line
7. Dewatering
8. Filling and Capping
9. Ramp Sampling
10. General Site/Site Preparation
11. Health and Safety
12. USEPA Oversight
13. Legal Support

Stip. at 1; *see also* Exhs. 204, 205.

The parties do not dispute that the total amount of costs JM incurred is $5,579,794. Stip. at 1. Nor do the parties dispute that JM incurred the amount of costs under each Task Bucket stated in this table:

Task Bucket	**Site 3**	**Site 6**	**Site 3/6***	**Total**
Nicor Gas Line	$218,090	Not applicable	$360	$218,450
City of Waukegan Water Line	$61,037	$86,674	0	$147,711
AT&T Lines	$108,651	$284,266	$98,898	$491,815
Utility/ACM Soils Excavation	0	$155,318	0	$155,318
Northshore Gas Line	$332,524	$234,861	$58,157	$625,542
Northeast Excavation	$49,934	0	0	$49,934
Dewatering	$259,084	$160,587	$39,175	$458,846
Filling and Capping	$426,254	$310,353	$352,012	$1,088,619
Ramp Sampling	$20,880	0	0	$20,880
General Site/Site Preparation	$932,730	$807,329	$74,300	$1,814,359
Health and Safety	Not applicable	Not applicable	$77,000	$77,000
USEPA Oversight	$233,805	$125,675	0	$359,480
Legal Support	Not applicable	Not applicable	$71,840	$71,840

* "Site 3/6" refers to costs incurred for both Site 3 and Site 6 but not separately assignable to either Site 3 or Site 6.

Id. at 1-2. Finally, the parties do not dispute the reasonableness of the costs in the table above. *Id*. at 2.

In this section of the opinion, the Board uses these Task Buckets to analyze the cost-attribution information developed by JM's expert (Mr. Dorgan) and IDOT's expert (Mr. Gobelman). For each Task Bucket, the Board attributes costs to IDOT, consistent with the Board's Interim Order and rulings above. The Board summarizes the respective cost attributions in the tables at the end of this section.

NICOR Gas Line. Mr. Dorgan noted that "all the work done to create the Nicor Gas clean corridor occurred outside of, and was unrelated to, any IDOT Area of Liability." Exh. 204 at 15. He therefore attributed none of these costs, totaling $218,090, to IDOT. *Id.* Mr. Gobelman agreed. Exh. 205 at 7.

The Nicor Gas line runs east to west underground through the middle of Site 3. The 25-foot clean corridor around this gas line is well south of any Parcel 0393 soil boring locations identified by the Interim Order as IDOT's responsibility. Exh. 204, Fig. 1; Interim Order at 22. And for these activities, the parties stipulated that JM incurred no cost specific to Site 6. Stip. at 1-2; *see also* Exh. 204 at 15; Exh. 205 at 7. Because JM incurred no costs for the Nicor Gas line clean corridor in any IDOT liability area, the Board attributes none of these costs to IDOT.

City of Waukegan Water Line. Mr. Dorgan, JM's expert, attributed to IDOT $61,037 of JM's costs for constructing a clean corridor for the City of Waukegan water line on Site 3. Exh. 204 at 16. He asserted that the entire length of the water main on Site 3 runs within Parcel 0393; and he viewed all of Parcel 0393 as IDOT's liability area. *Id*., *citing* Fig. 1.

Mr. Gobelman, IDOT's expert, disagreed with Mr. Dorgan. Mr. Gobelman stated that the City of Waukegan water line is outside of any IDOT Site 3 liability area defined by the Interim Order. Exh. 205 at 7, *citing* Fig. 3. He noted that the water line is approximately 100 feet west of soil boring location B3-26, which is west of boring location B3-25—the farthest western boring location on Parcel 0393 identified as IDOT's responsibility by the Board. *Id.*

The Board agrees with Mr. Gobelman that the City of Waukegan water line is outside of IDOT's liability area for Site 3. This 25-foot clean corridor around this underground water line is well west of soil boring location B3-26. And the B3-26 location is approximately 50 feet west of the B3-25 location, which the Interim Order identified as the westernmost boring location for IDOT's Parcel 0393 liability area. Exh. 204, Fig. 1; Exh. 206, Fig. 3; Interim Order at 22. Mr. Dorgan incorrectly assumed that IDOT is responsible for all of Parcel 0393. Because JM incurred no costs for the City of Waukegan water line clean corridor in any IDOT Site 3 liability area, the Board attributes none of these costs to IDOT.

The Board also attributes no costs to IDOT related to excavating for the City of Waukegan water line on Site 6. Mr. Dorgan and Mr. Gobelman agreed. Exh. 204 at 16; Exh. 205 at 17. Mr. Dorgan observed that the water line is only on the *north* side of Greenwood Avenue, outside of any IDOT liability area. Exh. 204 at 16, *citing* Fig. 1. The Interim Order

identified IDOT's Site 6 liability area based on soil borings located only on the *south* side of Greenwood Avenue. Interim Order at 22.

AT&T Telephone Lines. JM's expert, Mr. Dorgan, stated that three underground AT&T telephone lines were on Site 3. Of these, "two lines travelled within Parcel No. 0393, a Site 3 Area of Liability". Exh. 204 at 16. He further stated that the third line, which travelled along the southwestern boundary of Parcel No. 0393, did not fall within IDOT's Site 3 liability area. *Id.* Mr. Dorgan attributed to IDOT 66% (2/3 of the lines) of the $108,651 total for abandoning the AT&T lines on Site 3, corresponding to the two AT&T lines on Parcel 0393. *Id.* at 17. He therefore attributed $71,710 to IDOT for the Site 3 AT&T telephone line work ($108,651 x 0.66).

Mr. Dorgan stated that there were three underground AT&T lines on Site 6—one on the south side of Site 6 and two on its north side. He noted that the two lines on the north side (telephone line and fiber optic line) were outside of IDOT's liability area. However, Mr. Dorgan maintained that the telephone line on the south side of Site 6, running through soil boring locations 4S to 8S, was within IDOT's liability area. Exh. 204 at 16-17. He also noted that IDOT is not responsible for the $15,000 professional completion cost related to the AT&T fiber optic line on Site 6's north side. *Id.* at 18. He therefore reduced JM's total Site 6 AT&T line work cost from $284,266 to $269,266. *Id.* Mr. Dorgan attributed to IDOT 33% (1/3 of the lines) of the $269,266 total abandonment cost, corresponding to the one AT&T line on Site 6's south side. He therefore attributed $88,858 to IDOT for the Site 6 AT&T line work ($269,266 x 0.33). *Id.*

Additionally, Mr. Dorgan observed that some costs associated with construction services were incurred for both Site 3 and Site 6 but are not separately assignable to either Site 3 or Site 6, *i.e.*, Site 3/6. The parties refer to these types of costs as "unsegregated" costs. Mr. Dorgan explained that to attribute part of the unsegregated costs to IDOT, he calculated an apportioning percentage of 40.9% by dividing the Site 3 and Site 6 AT&T line work costs he attributed to IDOT ($160,568 = Site 3's $71,710 + Site 6's $88,858) by the total Site 3 and Site 6 AT&T line work costs ($392,917 = Site 3's $108,651 + Site 6's $269,266). Exh. 204 at 18. In turn, he applied 40.9% to the total Site 3/6 AT&T line work costs of $98,898 to attribute $40,449 of these unsegregated costs to IDOT ($98,898 x 0.409). *Id*.

In sum, for the costs of the AT&T line work, Mr. Dorgan attributed $201,017 to IDOT (Site 3's $71,710 + Site 6's $88,858 + Site 3/6's $40,449).[15]

[15] The parties use "apportion" and "allocate" and variations of those terms interchangeably. In this section of the opinion, the Board often uses this terminology to avoid confusion but, in doing so, does not give the terms their meanings as ascribed by the courts under CERCLA. *See*, *e.g.*, Yankee Gas Servs. Co. v. UGI Utils., Inc., 852 F. Supp. 2d 229, 241-42 (D. Conn. 2012) ("Apportionment is a way of avoiding the joint and several liability that would otherwise result from a successful § 107(a) claim; allocation, under § 113(f), is the equitable division of costs among liable parties. To apportion is to request separate checks, with each party paying only for its own meal. To allocate is take an unitemized bill and ask everyone to pay what is fair.").

IDOT's expert, Mr. Gobelman, agreed with Mr. Dorgan on the locations of the AT&T lines within Sites 3 and 6, but he disagreed with Mr. Dorgan's AT&T line work cost attribution to IDOT. Exh. 205 at 7.

Relying on his revised site maps, Mr. Gobelman maintained that of the approximately 1,060 total linear feet of the three AT&T telephone lines on Site 3, only about 199 linear feet or 18.8% of those lines (199 feet/1,060 feet) is within IDOT's liability area defined by the Interim Order. Exh. 207 at 1. Thus, he asserted that IDOT is responsible for 18.8% of the total Site 3 AT&T line work costs of $108,651. Mr. Gobelman therefore attributed $20,426 of these costs to IDOT ($108,651 x 0.188). *Id*.

Similarly for Site 6, Mr. Gobelman stated that the length of AT&T telephone line within IDOT's liability area defined by the Interim Order is 90 linear feet, which is 1.6% of the approximately 5,470 total linear feet of AT&T lines on Site 6 (2,820 linear feet on the north side plus 2,650 feet on the south side), *i.e.*, 90 feet/5,470 feet. Exh. 207 at 1-2, *citing* Exh. 213 at 1261. According to Mr. Gobelman, the 90-foot length corresponds to that AT&T telephone line entering Site 6, east of soil boring location 3S, and ending halfway between boring locations 4S and 5S, all on Site 6's south side. *Id*. Mr. Gobelman therefore asserted that IDOT is responsible for $4,548, which is 1.6% of the total Site 6 AT&T line work cost of $284,266 ($284,266 x 0.016). *Id*. Unlike Mr. Dorgan, however, Mr. Gobelman did not deduct—from this $284,266 total—the $15,000 professional completion cost related to the AT&T fiber optic line on Site 6's north side.

Mr. Gobelman used Mr. Dorgan's methodology to attribute the Site 3/6 unsegregated AT&T line work costs to IDOT. By first dividing the Site 3 and Site 6 AT&T costs he attributed to IDOT ($24,974 = Site 3's $20,426 + Site 6's $4,548) by the total Site 3 and Site 6 AT&T costs ($392,917), Mr. Gobelman calculated an apportioning percentage of 6.4%. Exh. 207 at 2. By applying 6.4% to the total Site 3/6 AT&T costs of $98,898, Mr. Gobelman attributed $6,329 of these unsegregated costs to IDOT. *Id*.

Accordingly, for the AT&T line work, Mr. Gobelman attributed a total of $31,303 to IDOT (Site 3's $20,426 + Site 6's $4,548 + Site 3/6's $6,329).

The Board agrees with Mr. Gobelman that cost attribution to IDOT must be consistent with the Board's Interim Order. Mr. Dorgan's attribution of AT&T line work costs goes beyond the IDOT liability areas specified by the Interim Order. For Site 3, Mr. Dorgan considered IDOT liable for the entirety of Parcel 0393 instead of concentrating on the area represented by the soil borings that the Interim Order identified. Interim Order at 22. Mr. Dorgan also considered IDOT's Site 6 liability area as including soil boring locations 5S through 8S, even though the Interim Order limited IDOT's Site 6 responsibility to the area represented by soil borings 1S through 4S. *Id*. Additionally, to attribute AT&T line abandonment costs to IDOT, the Board finds reasonable Mr. Gobelman's methodology of using the linear footage of the AT&T lines in IDOT's liability areas. And as Mr. Dorgan noted, using linear footage does not significantly change the cost attributable to IDOT. Exh. 206 at 10.

The Board finds that the total linear footage of the three AT&T lines on Site 3 is approximately 1,060 feet, as did Mr. Gobelman. Exh. 207 at 1. Of that 1,060 linear feet, approximately 675 linear feet is within Parcel 0393. *Id*. And of that 675 linear feet, approximately 199 linear feet (18.8% of 1,060 feet) is within IDOT's Parcel 0393 liability area. *Id*. That 199 linear feet is comprised of parts of two AT&T lines, both starting on the western edge of IDOT's liability area, halfway between boring locations B3-26 and B3-25. Exh. 204, Figs. 1, 3. One line continues east to boring location B3-25 while the other line continues east to between boring locations B3-15 and B3-50. *Id*. Therefore, applying Mr. Gobelman's apportioning percentage of 18.8% to the agreed-upon $108,651 total for the AT&T line work on Site 3, the Board attributes $20,426 of these costs to IDOT ($108,651 x 0.188).

The total cost of abandoning 5,470 linear feet of AT&T lines on Site 6, including the length running through soil boring locations 5S and 8S, was estimated by Mr. Dorgan to be $269,266. The Board finds that Mr. Dorgan correctly arrived at this amount by excluding the $15,000 professional completion cost for the AT&T fiber optic line on Site 6's *north* side, not an IDOT liability area. Exh. 204 at 16-17, 18; Interim Order at 22. However, as Mr. Gobelman determined, only about 90 linear feet of AT&T line is on Site 6's south side within IDOT's liability area; that 90 feet of line extends from boring location 3S on the east to the midpoint between boring locations 4S and 5S on the west. Exh. 207 at 1-2; Exh. 204, Fig. 1. Therefore, by applying Mr. Gobelman's apportioning percentage of 1.6% (90 feet/5,470 feet) to the agreed-upon $269,266 total of the Site 6 AT&T line work, the Board attributes $4,308 of these costs to IDOT ($269,266 x 0.016).

Finally, to calculate the apportioning percentage for the Site 3/6 unsegregated costs, the Board uses the experts' shared methodology. Specifically, the Board divides the Site 3 and Site 6 AT&T costs it attributes to IDOT ($24,734 = Site 3's $20,426 + Site 6's $4,308) by the agreed-upon total Site 3 and Site 6 AT&T costs ($392,917 = Site 3's $108,651 + Site 6's $284,266) to get the apportioning percentage of 6.3%. Applying that percentage to the agreed-upon $98,898 total for Site 3/6 AT&T line work, the Board attributes $6,231 of these unsegregated costs to IDOT ($98,898 x 0.063).

In all, for the costs of the AT&T telephone line work, the Board attributes $30,965 to IDOT (Site 3's $20,426 + Site 6's $4,308 + Site 3/6's $6,231).

Utility/ACM Soils Excavation. Mr. Dorgan, JM's expert, observed that soils contaminated with ACM were required to be excavated and removed from the north and south sides of Site 6 around underground utilities; this also required removing eight utility lines from Site 6: the City of Waukegan water line (north side only); the North Shore Gas line (north and south sides, same line); the AT&T telephone lines (one line on north side, one line on south side); the AT&T fiber optic line (north side only); the ComEd fiber optic lines (one line on north side, one line on south side); and the ComEd electric line (south side only). Exh. 204. at 18-19. The total cost of this "Utility/ACM Soils Excavation" work on Site 6 was $155,318. *Id*.

Mr. Dorgan attributed costs to IDOT by using the methodology he used for the AT&T line work. Exh. 204. at 18. He noted that four of the eight utility lines in Site 6 were on its south side (AT&T phone, North Shore Gas, ComEd electric, and ComEd fiber optic) and ran through

IDOT's Site 6 liability area. *Id*. at 19. Therefore, he attributed to IDOT 50% (4/8 of the lines) of Site 6's $155,318 total for excavating ACM-impacted soils, which is $77,659 ($155,318 x 0.50). *Id*.

Mr. Gobelman, IDOT's expert, concurred with Mr. Dorgan that excavation of ACM-impacted soils occurred on both the north and south sides of Site 6. However, Mr. Gobelman attributed costs to IDOT based on the total length of Site 6 corresponding with the utility lines in IDOT's liability area defined by the Interim Order. Exh. 205 at 8. The total length of Site 6 (*i.e.*, the northern corridor's length plus the southern corridor's length) is 5,470 linear feet, but according to Mr. Gobelman, IDOT is only responsible for 197 linear feet—from the western boundary of Site 6 to the halfway point between soil boring locations 4S and 5S. *Id*. Therefore, he attributed 3.6% (197 feet/5,470 feet) of the $155,318 total to IDOT or $5,591 ($155,318 x 0.036). *Id*.

The parties stipulated that none of the costs associated with these eight utility lines concern Site 3. Stip. at 1-2; *see also* Exh. 204 at 18-19; Exh. 205 at 8. As for Site 6, the Board agrees with Mr. Gobelman that attributing costs to IDOT must be consistent with the Interim Order. The Board's determination of IDOT's liability area along the south side of Site 6 is consistent with Mr. Gobelman's assessment, *i.e.*, it starts from the western boundary of Site 6 (roughly lining up with boring location B3-25 to the south) and extends eastward to 25 feet east of boring location 4S (halfway between 4S and 5S). Therefore, the Board applies his apportioning percentage of 3.6% (197 feet/5,470 feet) to the agreed-upon $155,318 total for Site 6 Utility/ACM Soils Excavation to attribute $5,591 of these costs to IDOT ($155,318 x 0.036).

North Shore Gas (NSG). Mr. Dorgan, JM's expert, stated that initially a clean corridor for the entire North Shore Gas (NSG) line on Sites 3 and 6 was required, but later it was decided that most of this underground line would be removed. Exh. 204 at 20. He noted that "the portion of the NSG line on Site 3 was kept in place and a clean corridor was created around it. The line was capped at 4S and the portion of the line on the south side of Site 6 running east of 4S was removed." *Id*.

Mr. Dorgan asserted that all Site 3 NSG line work costs, totaling $332,524, are attributable to IDOT because the NSG line ran through a portion of Parcel 0393, including boring locations B3-15 and B3-50. Exh. 204 at 21.

Mr. Dorgan stated that capping the NSG line clean corridor occurred within the Site 6 IDOT liability area at boring location 4S. As a result, he maintained that IDOT is responsible for all NSG line capping on Site 6's south side, which was limited to the area around 4S. Exh. 204 at 21. However, Mr. Dorgan noted that "USEPA required a clean corridor for the entire line from 4S and moving east, notwithstanding whether ACM had been found along those sections of the line." *Id*., *citing* Exh. 65 at 16. Thus, Mr. Dorgan asserted that IDOT's liability area "drove the need to create the entire clean corridor for NSG along the south side of site 6." Exh. 204 at 21. He observed that a total of 2,005 linear feet of the NSG line were removed from Site 6, of which 560 feet (27.9%) were on Site 6's south side. Mr. Dorgan attributed to IDOT 27.9% of JM's total costs ($234,861) for removing the NSG line on Site 6. This equals $65,597 ($234,861

x 0.279). *Id*. He clarified that these costs do not include the costs for removing ACM-impacted soils. *Id*. at 22.

Mr. Dorgan stated that some Campanella & Sons, Inc. (Campanella) time and materials (T&M) construction costs and DMP PE, PC (DMP) construction costs incurred for the NSG line applied to both Site 3 and Site 6, without distinction between the sites, *i.e.*, Site 3/6. He noted that JM incurred $58,157 total in these unsegregated costs. Exh. 204 at 22. Mr. Dorgan calculated an apportioning percentage by dividing the Site 3 and Site 6 NSG line work costs he attributed to IDOT ($398,121 = Site 3's $332,524 + Site 6's $65,597) by the total Site 3 and Site 6 NSG line work costs ($567,385 = Site 3's $332,524 + Site 6's $234,861). He applied the resulting percentage of 70.2% to the total Site 3/6 NSG line work costs of $58,157 to attribute $40,826 of these unsegregated costs to IDOT ($58,157 x 0.702). *Id*.

In sum, for the NSG line work costs, Mr. Dorgan attributed $438,947 to IDOT (Site 3's $332,524 + Site 6's $65,597 + Site 3/6's $40,826).

Mr. Gobelman, IDOT's expert, stated that the NSG line crosses a portion of Parcel 0393 near soil boring locations B3-15 and B3-50, within IDOT's liability area defined by the Interim Order. Exh. 207 at 2. He noted that the NSG line's clean corridor area within Site 3 is 10,866 square feet based on a 25-foot corridor width. *Id*. Further, the NSG line's clean corridor area within IDOT's Parcel 0393 liability area is approximately 4,271 square feet. This 4,271-square foot area is about 39.3% of the NSG line clean corridor area in Site 3 (4,271/10,866). Mr. Gobelman applied 39.3% to the $332,524 total for Site 3 NSG line work to attribute $130,682 to IDOT ($332,524 x 0.393). *Id*.

Mr. Gobelman relied on Mr. Dorgan's assertion that all capping of the NSG line's clean corridor within Site 6 was limited to the area around soil boring location 4S. Exh. 207 at 2. Further, Mr. Gobelman observed that the length of the corridor within IDOT's Site 6 liability area defined by the Interim Order is approximately 72 linear feet—starting from where the NSG line enters Site 6 to the west of soil boring location 4S and ending just east of soil boring location 4S. *Id*. at 2-3. He also relied on Mr. Dorgan's statement that the length of NSG line removed from Site 6 is approximately 2,005 linear feet. *Id*. at 2. By dividing the length of IDOT's liability area (72 feet) by the length of Site 6's removed NSG line (2,005 feet), Mr. Gobelman calculated 3.6% as an apportioning percentage. And by applying 3.6% to the total Site 6 NSG line work cost of $234,861, he attributed $8,455 to IDOT ($234,861 x 0.036). *Id*. at 3.

For Site 3/6, Mr. Gobelman attributed the unsegregated NSG line costs to IDOT by relying on Mr. Dorgan's methodology. Exh. 207 at 3. Mr. Gobelman calculated an apportioning percentage by dividing the Site 3 and Site 6 NSG line costs he attributed to IDOT ($139,321 = Site 3's $130,682 + Site 6's $8,455) by the total Site 3 and Site 6 NSG line total costs ($567,385). He applied the resulting percentage of 24.5% to the total Site 3/6 NSG line work costs of $58,157 to attribute $14,248 to IDOT ($58,157 x 0.245). *Id*.

Accordingly, for the NSG line work costs, Mr. Gobelman attributed a total of $153,385 to IDOT (Site 3's $130,682 + Site 6's $8,455 + Site 3/6's $14,248).

The Board agrees with Mr. Gobelman that IDOT is responsible for the NSG line work only within the liability areas specified by the Interim Order. For Site 3, IDOT's responsibility for NSG line work is limited to the area represented by soil boring locations B3-15 and B3-50 within Parcel 0393. Following Mr. Gobelman's methodology and relying on Mr. Dorgan's map (Exh. 204, Fig. 1), the Board finds that the NSG line clean corridor within Site 3 has an area of 11,500 square feet, based on a 25-foot corridor width and a length of 460 feet (460 x 25). Further, within IDOT's Parcel 0393 liability area, the NSG line clean corridor has an area of approximately 4,750 square feet, or about 41.3% of the NSG line clean corridor area in Site 3 (4,750/11,500). Applying 41.3% to the agreed-upon $332,524 total for Site 3's NSG line work, the Board attributes $137,332 of these costs to IDOT ($332,524 x 0.413).

For Site 6, the Board attributes costs to IDOT for the NSG line work based on the liability area defined by the Interim Order. Again, the Board uses Mr. Gobelman's methodology and Mr. Dorgan's map (Exh. 204, Fig. 1). Within IDOT's liability area, the length of the NSG line is approximately 65 linear feet—starting from where the NSG line enters Site 6 to the west of boring location 4S and ending midway between boring locations 4S and 5S. As the length of Site 6's removed NSG line is approximately 2,005 linear feet, the Board finds that the apportioning percentage is 3.24% (65/2,005). Applying 3.24% to the agreed-upon $234,861 total for Site 6's NSG line work, the Board attributes $7,632 of these costs to IDOT ($234,861 x 0.0324).

Finally, for the Site 3/6 unsegregated costs, the Board uses the experts' shared methodology to calculate an apportioning percentage: divide the NSG line work costs that the Board attributes to IDOT ($144,964 = Site 3's $137,332 + Site 6's $7,632) by the agreed-upon $567,385 total for Site 3 and Site 6 NSG line work to get 25.5%. Applying this percentage to the agreed-upon $58,157 total for Site 3/6 NSG line work, the Board attributes $14,830 of these unsegregated costs to IDOT ($58,157 x 0.255).

In all, for the NSG line work costs, the Board attributes $159,794 to IDOT (Site 3's $137,332 + Site 6's $7,632 + Site 3/6's $14,830).

Northeast Excavation. The Northeast Excavation was situated in Site 3's northeast corner, entirely within Site 3 and partially within Parcel 0393, *i.e.*, all south of Site 6. Exh. 204, Fig. 1. The parties stipulated that none of the costs related to the Northeast Excavation concern Site 6. Stip. at 1-2; *see also* Exh. 204 at 19-20; Exh. 205 at 10.

JM's expert, Mr. Dorgan, observed that the Northeast Excavation involved excavating ACM-contaminated soil 3 to 5 feet deep and backfilling with clean material over an area measuring 145 feet by 40 feet or 7,250 square feet. Exh. 204 at 19, *citing* Fig. 1. He attributed all costs ($49,934) of excavation and backfilling to IDOT because, in his view, the Northeast Excavation is within IDOT's Site 3 liability area. *Id*. at 20.

IDOT's expert, Mr. Gobelman, stated that the Northeast Excavation is approximately 150 feet by 50 feet or 7,500 square feet. Exh. 205 at 10. Based on Mr. Gobelman's revised Base Map, he estimated that 1,889 square feet or 25.2% of the Northeast Excavation is within IDOT's Parcel 0393 liability area defined by the Interim Order (1,889/7,500). Exh. 207 at 3, *citing* Fig.

6. Therefore, by applying 25.2% to the total Northeast Excavation costs of $49,934, he attributed $12,583 of these costs to IDOT ($49,934 x 0.252). *Id*. Mr. Gobelman considered soil boring location B3-45 to fall outside of Parcel 0393 but, for his cost attribution, he counted B3-45 as falling on Parcel 0393 and therefore included the full eastern extent of Parcel 0393 within the Northeast Excavation as IDOT liability area. Exh. 205 at 10. He noted that the distance between Mr. Dorgan's location of B3-45 and his location is only about four feet but "[t]he additional cost allocated to the Northeast Excavation area that would be attributed to this increased area is approximately 5 percent." *Id*.

In response to Mr. Gobelman's allocation, Mr. Dorgan maintained that Mr. Gobelman failed to consider what drove that the work in the Northeast Excavation had to be performed in 50-by-50-foot grids and extend to the nearest clean boring. Exh. 206 at 9. The Northeast Excavation work included removing soils from three square grids; each grid was represented by a soil boring, *i.e.*, B3-50 on the west, B3-45 in the middle, and B3-46 on the east. *Id*., *citing* Exh. 204, Figs. 1, 2. Regarding the easternmost grid, Mr. Dorgan stated that the grid was excavated not only because B3-46 was contaminated but also because "the Com Ed Fiber Optic line that USEPA required be removed due, in part, to the fact it ran through 1S-4S (IDOT [Site 6] Area of Liability) also travels through the Northeast Excavation." Exh. 206 at 9. Therefore, Mr. Dorgan maintained that all costs of the Northeast Excavation should be attributed to IDOT. *Id*. Finally, he noted that Mr. Gobelman's "calculation that 1,905 square feet fall within Parcel 0393 is incorrect because it is based on an inaccurate Base Map/Figure 1 and plotting of Parcel No. 0393 (see Gobelman Report Figure 6)." *Id*.

The Board disagrees with Mr. Dorgan that IDOT is liable for the entire Northeast Excavation, which, as he correctly pointed out, covers an area of 7,250 square feet. Exh. 204 at 19, *citing* Fig. 1. Consistent with its Interim Order, the Board finds IDOT responsible only for the area represented by soil boring locations B3-50 and B3-45, *i.e.,* two of the three grids identified above by Mr. Dorgan. The Interim Order did not identify boring location B3-46 for IDOT liability. Further, IDOT is responsible only for the area within Parcel 0393. Any contamination identified in the easternmost grid represented by soil boring B3-46, as well as excavation beyond Parcel 0393, was not part of the Interim Order's findings of violation. Therefore, the area of IDOT's liability for the Northeast Excavation within Parcel 0393, based on the grids represented by B3-50 and B3-45, is approximately 2,250 square feet. Exh. 204, Fig. 1. Accordingly, the apportioning percentage for the Northeast Excavation is 31% (*i.e.,* IDOT's 2,250 square-foot liability area divided by the 7,250 square-foot Northeast Excavation). By applying this percentage to the agreed-upon $49,934 total for the Northeast Excavation work, the Board attributes $15,480 of these costs to IDOT ($49,934 x 0.31).

Dewatering. Mr. Dorgan, JM's expert, stated that dewatering was undertaken at both Site 3 and Site 6 to support construction activities because of the high water table and the number of excavations. Exh. 204 at 22.

For Site 3, Mr. Dorgan explained that dewatering was needed to allow the construction of four clean corridors: (1) Nicor Gas line; (2) NSG line; (3) City of Waukegan water line; and (4) Northeast Excavation. Exh. 204 at 23. Campanella's total base bid dewatering cost for the four corridors was $140,800. *Id*. at 22. Because Mr. Dorgan determined that IDOT is responsible for

100% of the construction costs for three of these four clean corridors on Site 3 (NSG line; City of Waukegan water line; and Northeast Excavation), he applied an apportioning percentage of 75% (3/4 of the lines) to the total base bid dewatering cost of $140,800 to attribute $105,600 to IDOT ($140,800 x 0.75). *Id*. at 23.

Next, Mr. Dorgan applied this percentage (75%) to the total T&M costs of $24,325 for constructing a water line that "allowed for water to be moved from Site 3 under E. Greenwood Avenue for discharge to the North Shore Sanitary District sewer line." Exh. 204 at 23. Thus, he attributed $18,244 of these T&M dewatering costs to IDOT ($24,325 x 0.75). *Id*.

Mr. Dorgan stated that 100% of the $74,530 total for DMP's Site 3 construction management services concerned dewatering for the NSG line's clean corridor construction. He attributed all $74,530 to IDOT because he viewed IDOT as responsible for all NSG clean corridor construction activities on Site 3. In addition, Mr. Dorgan attributed to IDOT all $19,429 in Site 3's water discharge fees for discharging dewatering water to the North Shore Water Reclamation District. Exh. 204 at 22-24.

The total Site 3 dewatering cost is therefore $259,084 ($140,800 + $24,325 + $74,530 + $19,429). Of this amount, Mr. Dorgan attributed $217,803 to IDOT ($105,600 + $18,244 + $74,530 + $19,429). Exh. 204 at 24.

Regarding Site 6, Mr. Dorgan stated that JM incurred $159,250 total for Campanella's dewatering services. Exh. 204 at 24. This work was associated with the clean corridor construction and soil removal work on both the north and south sides of Site 6, extending on the south side from soil boring location 1S on the east through approximately soil boring location 9S on the west. *Id*. Based on his determination that "the level of effort for these activities would be relatively the same for work on the north side of Site 6 as for work on the south side of Site 6" and that IDOT is responsible for all of Site 6's south side, Mr. Dorgan attributed to IDOT $79,625 or 50% of JM's $159,250 total for Campanella's Site 6 dewatering services. This $79,625 amount excludes $1,337 in water discharge fees incurred for discharging dewatering water from Site 6's north side. *Id*. The total Site 6 dewatering cost is therefore $160,587 ($159,250 + $1,337). *Id*.

Finally, for Site 3/6, Mr. Dorgan attributed to IDOT some unsegregated costs of dewatering. The unsegregated dewatering costs consist of $17,675 for Campanella's T&M services and $21,500 for DMP's construction management services. Exh. 204 at 24, *citing* Tables 3, 4 of Exh. C. Mr. Dorgan calculated an apportioning percentage by dividing the $297,428 in Site 3 and Site 6 dewatering costs he attributed to IDOT (Site 3's $217,803 + Site 6's $79,625) by the $419,671 total in Site 3 and Site 6 dewatering costs (Site 3's $259,084 + Site 6's $160,587). He applied the resulting percentage of 70.9% to the total Site 3/6 dewatering costs of $39,175 ($17,675 + $21,500) to attribute $27,775 of these unsegregated costs to IDOT ($39,175 x 0.709). Exh. 204 at 24-25.

In all, for the dewatering costs, Mr. Dorgan attributed $325,203 to IDOT (Site 3's $217,803 + Site 6's $79,625 + Site 3/6's $27,775).

Mr. Gobelman, IDOT's expert, disagreed with Mr. Dorgan's allocation of dewatering costs. Mr. Gobelman provided a revised allocation of dewatering costs for Site 3, Site 6, and Site 3/6. Exh. 207 at 2-3.

For Site 3, Mr. Gobelman agreed that JM's dewatering costs are associated with constructing clean corridors for the Nicor Gas line, the NSG line, the City of Waukegan water line, and the Northeast Excavation. However, he maintained that IDOT is not liable for the Nicor Gas line or the City of Waukegan water line based on his above-described assessment of those two Task Buckets. Exh. 207 at 4. In attributing dewatering costs to IDOT, Mr. Gobelman divided the $143,265 he attributed to IDOT for the other two corridors ($130,682 NSG line + $12,583 Northeast Excavation) by the $661,585 total to complete the work for all four corridors ($218,090 (Nicor Gas line) + $332,524 (NSG line) + $61,037 (City of Waukegan water line) + $49,934 (Northeast Excavation)) to get an apportioning percentage of 21.7%. Mr. Gobelman applied this percentage to the $259,084 total for Site 3 dewatering to attribute $56,221 to IDOT ($259,084 x 0.217). *Id*.

Mr. Gobelman noted that Mr. Dorgan considered IDOT's liability area on Site 6's south side as extending from soil boring location 1S on the west to approximately soil boring location 9S on the east. Exh. 207 at 4. Mr. Gobelman observed that the length of Site 6's south side—from the western boundary of Site 6, west of soil boring location 1S, to boring location 9S is 419 linear feet. *Id*., *citing* Fig. 1. By "making the length of the north side and south side equal," Mr. Gobelman concluded that the total "length of dewatering" on Site 6 is 838 linear feet. Exh. 207 at 4. However, he asserted that the length of IDOT's Site 6 liability area defined by the Interim Order extends from Site 6's western boundary to halfway between boring locations 4S and 5S on the east, *i.e.*, only 197 linear feet or 23.5% of Site 6's total 838-foot length of dewatering. *Id*. Therefore, Mr. Gobelman applied 23.5% to the $160,587 total for Site 6 dewatering to attribute $37,738 to IDOT ($160,587 x 0.235). *Id*.

To attribute the Site 3/6 unsegregated costs, Mr. Gobelman used Mr. Dorgan's methodology. Mr. Gobelman divided the $93,959 in Site 3 and Site 6 dewatering costs he attributed to IDOT (Site 3's $56,221 + Site 6's $37,738) by the $419,671 total for Site 3 and Site 6 dewatering to get an apportioning percentage of 22.4%. Exh. 207 at 4. By applying this percentage to the total Site 3/6 dewatering costs of $39,175, Mr. Gobelman attributed $8,775 of these unsegregated costs to IDOT ($39,175 x 0.224). *Id*.

In all, for the dewatering costs, Mr. Gobelman attributed $102,734 to IDOT (Site 3's $56,221 + Site 6's $37,738 + Site 3/6's $8,775).

The Board agrees with Mr. Gobelman that IDOT is not responsible for dewatering costs associated with the NICOR Gas line or the City of Waukegan water line. Those lines are not within IDOT's liability areas. The Nicor Gas line ran east-west through the middle of Site 3; its clean corridor is well south of Parcel 0393, to which the Interim Order limited IDOT's Site 3 liability. Exh. 204, Fig. 1. The clean corridor around the City of Waukegan water line on Parcel 0393 is well to the west of soil boring location B3-25, the westernmost boring location on which the Interim Order based IDOT's Parcel 0393 liability. *Id*.

For Site 3, the Board attributes dewatering costs to IDOT for the NSG line and the Northeast Excavation. The Board divides the $152,812 it attributes to IDOT for the NSG line work and the Northeast Excavation ($137,332 NSG line work + $15,480 Northeast Excavation) by the agreed-upon total of $661,585 to complete the work for all four corridors (*i.e.*, including the Nicor Gas line and the City of Waukegan water line) to get the apportioning percentage of 23.1%. The Board applies this percentage to the agreed-upon $259,084 total for Site 3 dewatering to attribute $59,848 of these costs to IDOT ($259,084 x 0.231).

For Site 6, the Board agrees with Mr. Gobelman that IDOT is responsible for 23.5% of Site 6's total dewatering cost. IDOT's Site 6 liability area runs from the western boundary of Site 6 (roughly 22 feet west of boring location 1S) extending eastward to halfway between boring locations 4S and 5S, all on the south side of Greenwood Avenue. This area's length is only 197 linear feet, which is 23.5% of Site 6's total length of dewatering (838 linear feet), *i.e.*, 419 linear feet on the north side plus 419 linear feet on the south side. Exh. 207 at 4. By applying 23.5% to the agreed-upon $160,587 total for Site 6 dewatering, the Board attributes $37,738 of these costs to IDOT ($160,587 x 0.235).

Next, the Board agrees with how Mr. Gobelman apportioned the unsegregated costs associated with both Site 3 and Site 6 using Mr. Dorgan's methodology. The Board calculates 23.3% as the apportioning percentage by dividing the $97,586 it attributes to IDOT for Site 3 and Site 6 dewatering (Site 3's $59,848 + Site 6's $37,738) by the agreed-upon $419,671 total for dewatering on Site 3 and Site 6. Exh. 207 at 4. By applying 23.3% to the agreed-upon $39,175 total for Site 3/6 dewatering costs, the Board attributes $9,128 of these unsegregated costs to IDOT ($39,175 x 0.233).

In sum, the Board attributes $106,714 to IDOT for dewatering costs (Site 3's $59,848 + Site 6's $37,738 + Site 3/6's $9,128).

Filling and Capping. JM's expert, Mr. Dorgan, stated that the Enforcement Action Memorandum and the Remedial Action Work Plan under the AOC required installing a vegetative "cap" or soil cover "across Site 3." Exh. 204 at 25. The cap consists of "a six-inch layer of sand overlain by 15 inches of compacted clay, overlain by a minimum of 3 inches of topsoil to support a vegetative cover." *Id*. This cap was required to include "a geotextile placed between the base sand layer and overlying compacted clay." *Id*. Mr. Dorgan explained that the filling and capping costs include the costs of removing soils from both the north and south sides of Site 6. *Id*.

For Site 3, Mr. Dorgan attributed filling and capping costs to IDOT based on "what drove the requirement for the cap to be constructed across Site 3." Exh. 204 at 25. He noted that five Task Buckets applicable to Site 3 "drove the need" for a cap: (1) Nicor Gas line; (2) City of Waukegan water line; (3) NSG line; (4) AT&T lines; and (5) Northeast Excavation. *Id*. at 25-26. And he maintained that four of these five Task Buckets—all but Nicor Gas line—addressed the ACM contamination within IDOT's Site 3 liability areas. *Id*. Therefore, to reflect 4/5 of these Site 3 Task Buckets, Mr. Dorgan applied an apportioning percentage of 80% to JM's total Site 3 filling and capping costs of $426,254 to attribute $341,003 to IDOT ($426,254 x 0.80). *Id*. at 26.

For Site 6, Mr. Dorgan noted that a vegetative layer was placed on both the north and south sides of Site 6. Exh. 204 at 26. As four of the eight utility lines on Site 6 were on its south side, Mr. Dorgan applied an apportioning percentage of 50% (4/8 of the lines) to JM's $310,353 total for Site 6 filling and capping to attribute $155,177 of these costs to IDOT ($310,353 x 0.50). *Id*.

For Site 3/6, Mr. Dorgan observed that some costs associated with T&M services ($231,862) and construction management ($120,150) were unsegregated. Exh. 204 at 26. Mr. Dorgan divided the Site 3 and Site 6 filling and capping costs he attributed to IDOT ($496,180 = Site 3's $341,003 + Site 6's $155,177) by the total Site 3 and Site 6 filling and capping costs ($736,607) to get an apportioning percentage of 67.4%. *Id*. By applying this percentage to the $352,012 total for Site 3/6 filling and capping ($231,862 + $120,150), he attributed $237,256 of these unsegregated costs to IDOT ($352,012 x 0.674). *Id*.

Accordingly, for the filling and capping costs, Mr. Dorgan attributed a total of $733,436 to IDOT (Site 3's $341,003 + Site 6's $155,177 + Site 3/6's $237,256).

IDOT's expert, Mr. Gobelman, also noted that JM installed a vegetative soil cap across Site 3. Exh. 205 at 12. He determined that Site 3 has an area of 3.1 acres. *Id*. He asserted that based on the Interim Order, IDOT's Site 3 liability area starts within Parcel 0393 on the west between soil boring locations B3-25 and B3-26 and extends eastward to the eastern boundary of Parcel 0393. *Id*. at 13. Mr. Gobelman estimated this liability area to be 0.2 acres or 6.5% of the 3.1-acre area of Site 3. *Id*., *citing* Fig. 8. He applied 6.5% to the total Site 3 filling and capping costs of $426,254 to attribute $27,707 of these costs to IDOT ($426,254 x 0.065). *Id*. at 13.

Mr. Gobelman observed that the total length of Site 6 is approximately 5,470 linear feet, combining the lengths of its northern corridor (about 2,820 linear feet) and southern corridor (about 2,650 linear feet). Exh. 205 at 8. But he maintained that the length of IDOT's Site 6 liability area, based on the Interim Order, is only 197 linear feet, *i.e.*, from Site 6's western boundary to the mid-point between soil boring locations 4S and 5S on Site 6's south side. *Id*. at 13. Mr. Gobelman calculated that IDOT is therefore responsible for 3.6% of Site 6's length. He applied 3.6% to the $310,353 total for Site 6 filling and capping to attribute $11,173 of these costs to IDOT ($310,353 x 0.036). *Id*.

Mr. Gobelman relied on Mr. Dorgan's methodology in attributing to IDOT Site 3/6 unsegregated filling and capping costs. Exh. 205 at 13. Mr. Gobelman calculated an apportioning percentage by dividing the Site 3 and Site 6 filling and capping costs he attributed to IDOT ($38,880 = Site 3's $27,707 + Site 6's $11,173[16]) by the total Site 3 and Site 6 filling and capping costs ($736,607). *Id*. He applied the resulting percentage of 5.3% to the $352,012 total for Site 3/6 filling and capping to attribute $18,657 of these unsegregated costs to IDOT ($352,012 x 0.053). *Id*.

[16] Mr. Gobelman's report states that his total attribution to IDOT for Site 3 and Site 6 filling and capping costs is $38,879 but the one-dollar discrepancy did not affect his apportioning percentage. Exh. 205 at 13, Table 1.

In sum, for the filling and capping costs, Mr. Gobelman attributed $57,537 to IDOT (Site 3's $27,707 + Site 6's $11,173 + Site 3/6's $18,657).

The Board agrees with Mr. Gobelman that IDOT's responsibility for filling and capping costs is limited to the portions of Site 3 and Site 6 represented by the soil boring locations identified in the Interim Order. For Site 3, IDOT's liability area is limited to Parcel 0393, starting 25 feet west of boring B3-25 (midway between B3-26 and B3-25) and extending eastward to 25 feet east of boring B3-45. This liability area covers approximately 0.2 acres of the 3.1-acre filling and capping area or 6.5% of Site 3. Exh. 204, Figs. 1, 3; Exh. 213 at 1218. The Board therefore applies the 6.5% apportioning percentage to the agreed-upon $426,254 total for Site 3 filling and capping to attribute $27,707 of these costs to IDOT ($426,254 x 0.065).

For Site 6, the Board agrees with Mr. Gobelman that IDOT is responsible for filling and capping on the south side of Greenwood Avenue, starting from Site 6's western boundary, roughly 25 feet east of soil boring location 1S, and extending eastward to midway between soil boring locations 4S and 5S, a length of 197 feet. Based on Site 6's total length of 5,470 feet (*i.e.*, the lengths of Site 6's northern and southern corridors combined), IDOT is responsible for 3.6% (197/5,470) of the agreed-upon total Site 6 filling and capping costs of $310,353. By applying the 3.6% apportioning percentage to $310,353, the Board attributes $11,173 to IDOT ($310,353 x 0.036).

Regarding the Site 3/6 unsegregated costs for filling and capping, the Board again uses the experts' shared methodology. The Board divides the Site 3 and Site 6 filling and capping costs it attributes to IDOT ($38,880 = Site 3's $27,707 + Site 6's $11,173) by the agreed-upon total Site 3 and Site 6 filling and capping cost ($736,607) to get the apportioning percentage of 5.3%. The Board applies this percentage to the agreed-upon $352,012 total for Site 3/6 filling and capping to attribute $18,657 of these unsegregated costs to IDOT, as Mr. Gobelman did ($352,012 x 0.053).

In all, the Board attributes $57,537 to IDOT for the filling and capping costs (Site 3's $27,707 + Site 6's $11,173 + Site 3/6's $18,657).

Ramp Sampling. Within Parcel 0393, JM sampled for asbestos on the ramp, which was located at the western end of the Greenwood Avenue embankment. Exh. 213-1222, 1232, 1254; Exh. 204 at 26, Figs. 1, 3, Exh. F; *see also* 10/26/20 Tr. at 83-84. The parties stipulated that no costs associated with this sampling concern Site 6. Stip. at 1-2.

Mr. Dorgan, JM's expert, stated that because of the steep slopes of the Greenwood Avenue embankment on Parcel 0393, AECOM and USEPA deemed it impracticable to install the required vegetative cap over parts of the embankment. Exh. 204 at 26. However, Mr. Dorgan noted that AECOM sampled for asbestos on the ramp to demonstrate that a cap would not be needed for that portion of the embankment in any event. *Id*. Because the sampling costs were, in his view, incurred entirely within IDOT's Site 3 liability area, he attributed to IDOT all those costs, totaling $20,880. *Id*.

Mr. Gobelman, IDOT's expert, agreed that due to site conditions, it was not practical to install the required vegetative cap in an area on Site 3's northwest corner. Exh. 205 at 12. He observed that "instead of a vegetative cap[,] a three-inch stone aggregate layer was placed over the compacted clay in lieu of topsoil, adjacent to a low off-site wet area." *Id*. Mr. Gobelman indicated that the ramp sampling occurred west of soil boring location B3-25, beyond IDOT's Parcel 0393 liability area. *Id*., *citing* Fig. 7; *see also* Exh. 205, Table 1; Exh. 207, Fig. 7. Therefore, Mr. Gobelman attributed none of the $20,880 ramp costs to IDOT. Exh. 205 at 12.

The Board finds that the ramp sampling took place within Parcel 0393 on Site 3, but well west of the midway point between soil boring location B3-26 and B3-25. Exh. 213-1222, 1232, 1254; Exh. 204 at 26, Figs. 1, 3; Exh. 206, Fig. 4. Therefore, the ramp sampling cost does not fall within an IDOT liability area. The Board attributes no Site 3 ramp sampling costs to IDOT.

General Site/Site Preparation. JM's expert, Mr. Dorgan, stated that the "General Site/Site Preparation" (GSSP) activities include a range of services that relate to general implementation of the work on both Site 3 and Site 6. These services include general project management; support to and communication with regulatory authorities; professional services oversight of construction work; future operation and maintenance (O&M); surveying support for construction activities; installation and maintenance of stormwater controls; traffic control; and site clearing and grubbing to prepare for construction. Exh. 204 at 26-27. Mr. Dorgan noted that these tasks do not fall under any of the other specific Task Buckets. *Id*. at 27.

For Site 3, Mr. Dorgan listed five types of GSSP costs that he attributed to IDOT. First, he addressed $355,534 in costs incurred by JM for "Site Preparation Professional Engineering Services" rendered by LFR, Arcadis, and AECOM. Exh. 204 at 28. To calculate an apportioning percentage, Mr. Dorgan divided the Site 3 construction services costs he attributed to IDOT ($1,094,891[17]) by the total Site 3 construction services costs ($1,476,454[18]). He applied the resulting construction services apportioning percentage (74.2%) to the total costs for Site Preparation Professional Engineering Services on Site 3 ($355,534) to attribute $263,806 to IDOT ($355,534 x 0.742). *Id*.

Second, Mr. Dorgan considered "Site Preparation Professional Engineering Services - Completion Costs" for Site 3, which include costs for "Project Management, Regulatory Support, and AECOM Oversight." Exh. 204 at 28. He stated that these costs are projected to total approximately $70,621. Mr. Dorgan attributed $52,401 to IDOT by applying his construction services apportioning percentage (74.2%) to the projected total costs for these services ($70,621 x 0.742). *Id*. at 29.

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[17] Mr. Dorgan attributed Site 3 construction services costs to IDOT for the City of Waukegan water line work ($61,037), the AT&T line work ($71,710), the NSG line work ($332,524), dewatering ($217,803), the Northeast Excavation ($49,934), filling and capping ($341,003), and the ramp sampling ($20,880). Exh. 204, Exh. F.

[18] $1,476,454 = $218,090 (Nicor Gas line) + $61,037 (City of Waukegan water line) + $108,651 (AT&T lines) + $332,524 (NSG line) + $259,084 (dewatering) + $49,934 (Northeast Excavation) + $426,254 (filling and capping) + $20,880 (ramp sampling). Exh. 204, Exh. F.

Third, Mr. Dorgan addressed the approximately $310,903 in Site 3 O&M costs that JM will incur over the next 30 years, primarily for the vegetative cap. Mr. Dorgan applied the apportioning percentage he used for the filling and capping Task Bucket (80%) to the total Site 3 O&M cost ($310,903) to attribute $248,722 to IDOT ($310,903 x 0.80). Exh. 204 at 29.

Fourth, Mr. Dorgan addressed the cost of Campanella's base bid site preparation work on Site 3, which totaled $138,310 and covered surveying, constructing stormwater controls, installing traffic controls, and clearing and grubbing. Exh. 204 at 29. He applied his construction services apportioning percentage of 74.2% to these Campanella costs to attribute $102,626 to IDOT ($138,310 x 0.742). *Id*.

Finally, Mr. Dorgan addressed "miscellaneous construction costs" (*e.g.*, installing a fence and gate) totaling $57,362 for Site 3. Exh. 204 at 29. Again, he applied 74.2% to this amount to attribute $42,563 to IDOT ($57,362 x 0.742). *Id*.

In all, for the Site 3 GSSP costs, Mr. Dorgan attributed $710,118 to IDOT ($263,806 + $52,401 + $248,722 + $102,626 + 42,563).

Mr. Dorgan attributed Site 6's GSSP costs in the same way he did for Site 3. He started with $519,027 in Site 6 costs for Site Preparation Professional Engineering Services rendered by LFR, Arcadis, and AECOM. To calculate an apportioning percentage, Mr. Dorgan divided the Site 6 construction services costs he attributed to IDOT ($466,915[19]) by the total Site 6 construction services costs ($1,232,059[20]). Exh. 204 at 29. He applied the resulting construction services apportioning percentage (37.9%) to the total costs for Site Preparation Professional Engineering Services on Site 6 ($519,027) to attribute $196,711 to IDOT (519,027 x 0.379). *Id*.

Next, Mr. Dorgan considered Site Preparation Professional Engineering Services - Completion Costs for Site 6, which include costs for project management, regulatory support, and AECOM oversight. Exh. 204 at 30. He noted that costs for these services are projected to total approximately $53,250. By applying his construction services apportioning percentage (37.9%) to the projected total costs for these services, Mr. Dorgan attributed $20,182 to IDOT ($53,250 x 0.379). *Id*.

Mr. Dorgan addressed the $95,560 total for Campanella's base bid site preparation work on Site 6. Exh. 204 at 30. As with Site 3, site preparation work included surveying, constructing stormwater controls, installing traffic controls, and clearing and grubbing. He again applied

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[19] Mr. Dorgan attributed Site 6 construction services costs to IDOT for the AT&T line work ($88,858), the Utility/ACM Excavation ($77,659), the NSG line work ($65,579), dewatering ($79,625), and filling and capping ($155,177). Exh. 204, Exh. F.

[20] $1,232,059 = $86,674 (City of Waukegan water line) + $284,266 (AT&T lines) + $155,318 (Utility/ACM Excavation) + $234,861 (NSG line) + $160,587 (dewatering) + $310,353 (filling and capping). Exh. 204, Exh. F.

37.9% to the total site preparation work costs of $95,560 to attribute $36,217 to IDOT ($95,560 x 0.379).

In turn, Mr. Dorgan addressed the cost of Campanella's T&M construction services for site preparation work on Site 6, which totaled $37,410 and included relocating and subsequently removing temporary fencing around Site 6. Exh. 204 at 30. Mr. Dorgan attributed $14,178 to IDOT by applying his construction services apportioning percentage of 37.9% to the $37,410 in total site preparation work costs ($37,410 x 0.379). *Id*.

Finally, Mr. Dorgan addressed "miscellaneous subcontractor costs" (*e.g.*, installing a fence and gate) totaling $102,082 for Site 6. Exh. 204 at 30. Again, he applied 37.9% to this amount in attributing $38,689 to IDOT ($102,082 x 0.379). *Id*.

In all, for the Site 6 GSSP costs, Mr. Dorgan attributed $305,977 to IDOT ($196,711 + $20,182 + $36,217 + $14,178 + $38,689). [21]

Mr. Dorgan stated that DMP allocated some of its management services costs to site preparation for both Site 3 and Site 6, without distinguishing between the two, *i.e.*, Site 3/6. These unsegregated costs totaled $74,300 and covered services such as overseeing the construction entrance, overseeing fence installation and relocation, preparing bid specifications, supporting the bidding process, and participating in utility meetings. Exh. 204 at 31. To calculate an apportioning percentage, Mr. Dorgan divided the Site 3/6 construction services costs he attributed to IDOT ($346,307[22]) by the total costs of Site 3/6 construction services ($548,602[23]). He applied the resulting percentage (63.1%) to the total Site 3/6 costs for DMP's management services ($74,300) to attribute $46,883 of these unsegregated GSSP costs to IDOT ($74,300 x 0.631). *Id*.

Accordingly, for GSSP costs, Mr. Dorgan attributed a total of $1,062,978 to IDOT (Site 3's $710,118, Site 6's $305,977, and Site 3/6's $46,883).

IDOT's expert, Mr. Gobelman, agreed with the scope of services included within the GSSP Task Bucket. Exh. 207 at 5. And he used Mr. Dorgan's methodology to attribute GSSP costs to IDOT. *Id*. at 5-6.

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[21] Mr. Dorgan's report states that his total attribution to IDOT for Site 6 GSSP costs is $305,978. Exh. 204 at 30, 33, Exh. F.

[22] Mr. Dorgan attributed Site 3/6 construction services costs to IDOT for the AT&T line work ($40,449), the NSG line work ($40,826), dewatering ($27,775), and filling and capping ($237,256). Exh. 204, Exh. F.

[23] $548,602 = $360 (Nicor Gas line) + $98,898 (AT&T lines) + $58,157 (NSG line) + $39,175 (dewatering) + $352,012 (filling and capping). Exh. 204, Exh. F.

For Site 3 construction services costs, Mr. Gobelman calculated an apportioning percentage. He divided the Site 3 construction services costs he attributed to IDOT ($247,619[24]) by the total Site 3 construction services costs ($1,476,454[25]). Exh. 207 at 5. He applied the resulting construction services apportioning percentage (16.8%) to the total costs for Site Preparation Professional Engineering Services on Site 3 ($355,534) to attribute $59,730 to IDOT ($355,534 x 0.168). *Id*.

Next, Mr. Gobelman attributed to IDOT $11,864 of the Site Preparation Professional Engineering Services - Completion Costs for Site 3 by applying his construction services apportioning percentage (16.8%) to JM's $70,621 total for these services ($70,621 x 0.168). Exh. 207 at 5.

For the O&M costs of the vegetative cap, Mr. Gobelman used the same apportioning percentage he calculated for installing the Site 3 vegetative cap (6.5%). By applying that percentage to the total O&M costs of approximately $310,903 that JM will incur for Site 3, he attributed $20,209 to IDOT ($310,903 x 0.065). Exh. 207 at 5.

For the $138,310 total of Campanella's base bid site preparation work on Site 3, Mr. Gobelman applied the same apportioning percentage he used for construction services (16.8%). By applying that percentage to the $138,310 total for this base bid site preparation work, he attributed $23,236 to IDOT ($138,310 x 0.168). Exh. 207 at 5.

Mr. Gobelman repeated this process by applying 16.8% to the $57,362 total for Site 3 miscellaneous construction costs. Exh. 207 at 5. He therefore attributed $9,637 to IDOT ($57,362 x 0.168). *Id*.

In all, Mr. Gobelman attributed $124,676 to IDOT for JM's Site 3 GSSP costs ($59,730 + $11,864 + $20,209 + $23,236 + $9,637).

For Site 6, Mr. Gobelman first calculated an apportionment percentage. He divided the Site 6 construction services costs he attributed to IDOT ($67,505[26]) by the total Site 6 construction services costs ($1,232,059[27]). Exh. 207 at 5. He applied the resulting construction services apportioning percentage (5.5%) to the total costs for Site Preparation Professional Engineering Services on Site 6 ($519,027) to attribute $28,546 to IDOT ($519,027 x 0.055). *Id*.

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[24] Mr. Gobelman attributed Site 3 construction services costs to IDOT for AT&T line work ($20,426), the NSG line work ($130,682), the Northeast Excavation ($12,583), dewatering ($56,221), and filling and capping ($27,707). Exh. 207, Table 1.

[25] This sum's components are stated in footnote 18.

[26] Mr. Gobelman attributed Site 6 construction services costs to IDOT for the AT&T line work ($4,548), the Utility/ACM Excavation ($5,591), the NSG line work ($8,455), dewatering ($37,738), and filling and capping ($11,173). Exh. 207, Table 1.

[27] This sum's components are stated in footnote 20.

Next, by applying the same apportioning percentage (5.5%) to the approximately $53,250 in total projected Site Preparation Professional Engineering Services - Completion Costs for Site 6, Mr. Gobelman attributed $2,929 to IDOT ($53,250 x 0.055). Exh. 207 at 6.

Regarding Campanella's total Site 6 base bid cost of $95,560 for site preparation work, Mr. Gobelman applied his construction services apportioning percentage of 5.5% to attribute $5,256 to IDOT ($95,560 x 0.055). Exh. 207 at 6.

For Campanella's total Site 6 T&M construction services costs of $37,410 for site preparation work, Mr. Gobelman again used 5.5% and attributed $2,058 to IDOT ($37,410 x 0.055). Exh. 207 at 6.

Finally, Mr. Gobelman applied his construction services apportioning percentage of 5.5% to Site 6's total miscellaneous subcontractor costs of $102,082 to attribute $5,615 to IDOT ($102,082 x 0.055). Exh. 207 at 6.

In sum, Mr. Gobelman attributed $44,404 to IDOT for JM's Site 6 GSSP costs ($28,546 + $2,929 + $5,256 + $2,058 + $5,615).[28]

For Site 3/6, Mr. Gobelman divided the Site 3/6 construction services costs he attributed to IDOT ($48,010[29]) by the total costs of construction services for Site 3/6 ($548,602[30]) to get an apportioning percentage of 8.8%. He applied that percentage to the total Site 3/6 costs of $74,300 to attribute $6,538 in these unsegregated costs to IDOT ($74,300 x 0.088).

In all, for Site 3, Site 6, and Site 3/6 GSSP costs, Mr. Gobelman attributed $175,618 to IDOT (Site 3's $124,676 + Site 6's $44,404 + Site 3/6's $6,538).

The Board agrees with Mr. Dorgan on the contents of the GSSP Task Bucket, as did Mr. Gobelman: general implementation work on Site 3 and Site 6 related to general project management; support to and communication with regulatory authorities; professional services oversight of construction work; future O&M; surveying support for construction activities; installation and maintenance of stormwater controls; traffic control; and clearing and grubbing. And like Mr. Gobelman, the Board uses Mr. Dorgan's methodology to attribute GSSP costs to IDOT for Site 3, Site 6, and Site 3/6.

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[28] Mr. Gobelman's report states that his total attribution to IDOT for Site 6 GSSP costs is $44,403. Exh. 207 at 5-6, Table 1.

[29] Mr. Gobelman attributed Site 3/6 construction services costs to IDOT for the AT&T line work ($6,329), the NSG line work ($14,248), dewatering ($8,775), and filling and capping ($18,657). Exh. 204, Exh. F.

[30] This sum's components are stated in footnote 23.

For Site 3, the Board divides the Site 3 construction services costs it attributes to IDOT ($260,793[31]) by the agreed-upon $1,476,454 total for Site 3 construction services to get the construction services apportioning percentage of 17.7%. The Board applies 17.7% to the following costs identified by Mr. Dorgan under the GSSP Task Bucket:

1. Of the agreed-upon total Site Preparation Professional Engineering Services costs ($355,534) for Site 3, the Board attributes $62,930 to IDOT ($355,534 x 0.177).

2. Of the agreed-upon total Site Preparation Professional Engineering Services - Completion Costs ($70,621) for Site 3, the Board attributes $12,500 to IDOT ($70,621 x 0.177).

3. Of the agreed-upon total costs for Campanella's base bid site preparation work on Site 3 ($138,310), the Board attributes $24,481 to IDOT ($138,310 x 0.177).

4. Of the agreed-upon total miscellaneous construction costs ($57,362) for Site 3, the Board attributes $10,153 to IDOT ($57,362 x 0.177).

For the O&M costs that JM will incur on Site 3's vegetative cap, the Board uses the apportioning percentage it used above for filling and capping (6.5%). Applying 6.5% to the agreed-upon total O&M cost of approximately $310,903, the Board attributes $20,209 to IDOT ($310,903 x 0.065).

In all, for Site 3 GSSP costs, the Board attributes $130,273 to IDOT ($62,930 + $12,500 + $24,481 + $10,153 + $20,209).

As with Site 3, the Board calculates the construction services apportioning percentage for Site 6: divide the Site 6 construction services costs that the Board attributes to IDOT ($66,442[32]) by the agreed-upon total Site 6 construction services costs ($1,232,059). The Board applies the resulting percentage of 5.4% to the following costs identified by Mr. Dorgan under the GSSP Task Bucket:

1. Of the agreed-upon total Site Preparation Professional Engineering Services costs ($519,027) for Site 6, the Board attributes $28,027 to IDOT ($519,027 x 0.054).

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[31] Above in this opinion, the Board attributes Site 3 construction services costs to IDOT for AT&T line work ($20,426), the NSG line work ($137,332), the Northeast Excavation ($15,480), dewatering ($59,848), and filling and capping ($27,707).

[32] Above in this opinion, the Board attributes Site 6 construction services costs to IDOT for the AT&T line work ($4,308), the Utility/ACM Excavation ($5,591), the NSG line work ($7,632), dewatering ($37,738), and filling and capping ($11,173).

2. Of the agreed-upon total Site Preparation Professional Engineering Services - Completion Costs ($53,250) for Site 6, the Board attributes $2,876 to IDOT ($53,250 x 0.054).

3. Of the agreed-upon total costs for Campanella's base bid site preparation work on Site 6 ($95,560), the Board attributes $5,160 to IDOT ($95,560 x 0.054).

4. Of the agreed-upon total T&M costs for Campanella's construction services on Site 6 ($37,410), the Board attributes $2,020 to IDOT ($37,410 x 0.054).

5. Of the agreed-upon total miscellaneous subcontractor costs ($102,082) for Site 6, the Board attributes $5,512 to IDOT ($102,082 x 0.054).

In all, for the Site 6 GSSP costs, the Board attributes $43,595 to IDOT ($28,027 + $2,876 + $5,160 + $2,020 + $5,512).

The Board uses the experts' shared methodology for attributing costs that could not be separately assigned to either Site 3 or Site 6 but were incurred for both sites, *i.e.*, the Site 3/6 unsegregated costs, which consist of the costs for DMP's management services. The Board divides the unsegregated costs it attributes to IDOT ($48,846[33]) by the agreed-upon total costs of construction services for Site 3/6 ($548,602) to get the apportioning percentage of 8.9%. Applying that percentage to the agreed-upon total Site 3/6 costs ($74,300), the Board attributes $6,613 in unsegregated costs to IDOT ($74,300 x 0.089).

Therefore, for GSSP costs, the Board attributes a total of $180,481 to IDOT (Site 3's $130,273 + Site 6's $43,595 + Site 3/6's $6,613).

Health and Safety. Mr. Dorgan, JM's expert, noted that some costs in Campanella's base bid concern "Health and Safety Officer Daily Expenses" for activities on Site 3 and Site 6 without distinguishing between either site, *i.e.*, Site 3/6. He stated that JM incurred $77,000 in unsegregated costs for these health and safety services. Exh. 204 at 31, *citing* Table 1, Exh. C. Mr. Dorgan divided the Site 3/6 construction services costs he attributed to IDOT ($346,307[34]) by the total Site 3/6 construction services costs ($548,602[35]) to get an apportioning percentage of 63.1%. He applied that percentage to the total Site 3/6 health and safety costs ($77,000) to attribute $48,587 of these unsegregated costs to IDOT ($77,000 x 0.631). *Id*.

[33] Above in this opinion, the Board attributes Site 3/6 construction services costs to IDOT for the AT&T line work ($6,231), the NSG line work ($14,830), dewatering ($9,128), and filling and capping ($18,657).

[34] This sum's components are stated in footnote 22.

[35] This sum's components are stated in footnote 23.

Mr. Gobelman, IDOT's expert, relied on the Mr. Dorgan's methodology to attribute these unsegregated health and safety costs to IDOT. Exh. 207 at 6. Mr. Gobelman divided the Site 3/6 construction services costs he attributed to IDOT ($48,010[36]) by the total Site 3/6 construction services costs ($548,602) to get an apportioning percentage of 8.8%. He applied that percentage to the Site 3/6 health and safety costs of $77,000 to attribute $6,776 of these unsegregated costs to IDOT ($77,000 x 0.088). *Id*.

The Board attributes the unsegregated health and safety costs to IDOT using the methodology shared by the experts. The Board divides the Site 3/6 construction services costs it attributes to IDOT ($48,846[37]) by the agreed-upon total costs of construction services for Site 3/6 ($548,602) to get an apportioning percentage of 8.9%. Applying this percentage to the agreed-upon total Site 3/6 health and safety costs of $77,000, the Board attributes $6,853 of these unsegregated costs to IDOT ($77,000 x 0.089).

USEPA Oversight Costs. JM's expert, Mr. Dorgan, stated that, as part of the AOC, JM agreed to reimburse USEPA for oversight costs. Exh. 204 at 31. For oversight performed from July 2006 through June 2016, he noted that JM paid USEPA $233,805 for Site 3 and $125,675 for Site 6. *Id*. Mr. Dorgan noted that it was unknown whether USEPA would issue any additional invoices for oversight. *Id*.

To calculate IDOT's portion of USEPA's Site 3 oversight costs, Mr. Dorgan divided the Site 3 construction services costs he attributed to IDOT ($1,094,891[38]) by the total Site 3 construction services costs ($1,476,454[39]). He applied the resulting apportioning percentage of 74.2% to USEPA's total Site 3 oversight costs of $233,805 to attribute $173,483 to IDOT ($233,805 x 0.742). Exh. 204 at 32.

Similarly for Site 6, Mr. Dorgan calculated an apportioning percentage by dividing the Site 6 construction services costs he attributed to IDOT ($466,915[40]) by the total Site 6 construction services costs ($1,232,059[41]). He applied the resulting apportioning percentage (37.9%) to USEPA's total Site 6 oversight costs ($125,675) to attribute $47,631 to IDOT ($125,675 x 0.379). Exh. 204 at 32.

In sum, for USEPA oversight costs, Mr. Dorgan attributed $221,114 to IDOT (Site 3's $173,483 + Site 6's $47,631).

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[36] This sum's components are stated in footnote 29.

[37] This sum's components are stated in footnote 33.

[38] This sum's components are stated in footnote 17.

[39] This sum's components are stated in footnote 18.

[40] This sum's components are stated in footnote 19.

[41] This sum's components are stated in footnote 20.

IDOT's expert, Mr. Gobelman, relied on Mr. Dorgan's methodology in attributing USEPA oversight costs to IDOT. Exh. 207 at 7. Mr. Gobelman divided the Site 3 construction services costs he attributed to IDOT ($247,619[42]) by the total Site 3 construction services costs ($1,476,454) to get an apportioning percentage of 16.8%. He applied this percentage to USEPA's total Site 3 oversight costs ($233,805) to attribute $39,279 to IDOT ($233,805 x 0.168). *Id*.

Similarly for Site 6, Mr. Gobelman calculated an apportioning percentage by dividing the Site 6 construction services costs he attributed to IDOT ($67,505[43]) by the total Site 6 construction services costs ($1,232,059). He applied the resulting percentage (5.5%) to USEPA's total Site 6 oversight costs ($125,675) to attribute $6,912 to IDOT ($125,675 x 0.055). Exh. 207 at 7.

In sum, for Site 3 and Site 6 USEPA oversight costs, Mr. Gobelman attributed $46,191 to IDOT (Site 3's $39,279 + Site 6's $6,912).

The Board uses the experts' shared methodology in attributing Site 3 and Site 6 USEPA oversight costs to IDOT. For Site 3, the Board divides the total Site 3 construction services costs it attributes to IDOT ($260,793[44]) by the agreed-upon total Site 3 construction services costs ($1,476,454) to get an apportioning percentage of 17.7%. The Board applies this percentage to the agreed-upon $233,805 total for USEPA's Site 3 oversight to attribute $41,384 of these costs to IDOT ($233,805 x 0.177).

For Site 6, the Board divides the total Site 6 construction services costs it attributes to IDOT ($66,442[45]) by the agreed-upon total Site 6 construction services costs ($1,232,059) to get an apportioning percentage of 5.4%. The Board applies this percentage to the agreed-upon $125,625 total for USEPA's Site 6 oversight to attribute $6,783 of these costs to IDOT ($125,625 x 0.054).

Accordingly, for USEPA oversight costs, the Board attributes a total of $48,167 to IDOT (Site 3's $41,384 + Site 6's $6,783).

Legal/Legal Support. According to Mr. Dorgan, JM's expert, JM incurred $71,840 in legal fees and related costs to negotiate easements and other agreements that allowed the utility work required by the Remedial Action Work Plan to be performed. Exh. 204 at 32, *citing* Exh. D. To attribute legal support costs to IDOT, Mr. Dorgan divided the Site 3, Site 6, and Site 3/6

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[42] This sum's components are stated in footnote 24.

[43] This sum's components are stated in footnote 26.

[44] This sum's components are stated in footnote 31.

[45] This sum's components are stated in footnote 32.

utility work costs he attributed to IDOT ($778,660[46]) by the total Site 3, Site 6, and Site 3/6 utility work costs ($1,638,837[47]). He applied the resulting apportioning percentage (47.5%) to the total legal support costs ($71,840) to attribute $34,124 of these costs to IDOT ($71,840 x 0.475). *Id*.

Again, Mr. Gobelman, IDOT's expert, followed Mr. Dorgan's methodology. Exh. 207 at 7. For attributing legal support costs to IDOT, Mr. Gobelman first divided the Site 3, Site 6, and Site 3/6 utility work costs he attributed to IDOT ($190,281[48]) by the total Site 3, Site 6, and Site 3/6 utility work costs ($1,638,837). Mr. Gobelman applied the resulting apportioning percentage (11.6%) to the total legal support costs ($71,840) to attribute $8,333 of these costs to IDOT ($71,840 x 0.116). *Id*.

The Board attributes legal support costs to IDOT using the experts' shared methodology. By dividing the Site 3, Site 6, and Site 3/6 utility work costs that the Board attributes to IDOT ($196,350[49]) by the agreed-upon total Site 3, Site 6, and Site 3/6 utility work costs ($1,638,837), the Board calculates an apportioning percentage of 12%. By applying this percentage to the agreed-upon $71,840 total for legal support, the Board attributes $8,621 of these costs to IDOT ($71,840 x 0.12).

Share of JM's Costs Attributable to IDOT

As detailed above, JM incurred $620,203 to clean up the ACM contamination "in the portions of Site 3 and Site 6" where IDOT violated the Act. In its Interim Order, the Board found that IDOT violated Section 21(a) of the Act (415 ILCS 5/21(a) (2022)) by both "causing" and "allowing" the open dumping of ACM waste.

IDOT "caused" open dumping during its road construction activities by depositing ACM waste along the south side of Greenwood Avenue within Site 6 and adjacent areas along the north edge of Site 3. *See* Interim Order at 22; *see also id*. at 8-10 ("ACM waste is located in material placed by IDOT to reconstruct Greenwood Avenue"; "ACM is located in materials placed [in or near a ditch along the south side of Greenwood Avenue] by IDOT during construction"). IDOT "allowed" open dumping by leaving ACM waste unremedied on an easement under its control—Parcel 0393 within the northern portion of Site 3. *Id*. at 11-13 ("As

[46] Mr. Dorgan attributed utility work costs to IDOT for the City of Waukegan water line work ($61,037), the AT&T line work ($201,017), the Utility/ACM Excavation ($77,659), and the NSG line work ($438,947). Exh. 204, Exh. F.

[47] $1,638,837 = $218,450 (Nicor Gas line) + $147,711 (City of Waukegan water line) + $491,815 (AT&T lines) + $155,318 (Utility/ACM Excavation) + $625,542 (NSG line). Exh. 204, Exh. F.

[48] Mr. Gobelman attributed utility work costs to IDOT for the AT&T line work ($31,304), the Utility/ACM Excavation ($5,591), and the NSG line work ($153,385). Exh. 207, Table 1.

[49] Above in this opinion, the Board attributes utility work costs to IDOT for the AT&T line work ($30,965), the Utility/ACM Excavation ($5,591), and the NSG line work ($159,794).

to a portion of the Greenwood right-of-way (Parcel 0393), the Board finds that IDOT controls that parcel and continues to allow ACM waste in the soil."). In addition, the Interim Order found that through these acts and omissions, IDOT also violated Section 21(d) and (e) of the Act (415 ILCS 5/21(d), (e) (2022)) by conducting a waste-disposal operation and disposing of waste without the required permitting. *Id*. at 1, 13-14.

In these portions of Site 3 and Site 6, the Board finds that the ACM contamination resulted from IDOT's violations. The environmental harm was brought about materially and substantially by IDOT's road construction activities; and the harm persisted for decades on IDOT's easement due materially and substantially to IDOT's failure to remedy the contamination.

Even if finding that IDOT's violations "proximately" caused the ACM contamination were a prerequisite to imposing cleanup cost liability on IDOT, the preponderance of the evidence supports that finding. Knowledge or intent is not an element of these violations. *See* Fiorini, 143 Ill. 2d at 335. But if, in the remedy phase, the Board must determine whether IDOT's violations were a *proximate* cause of the ACM contamination, then that would entail not only "cause in fact" but also "legal cause." The findings above satisfy the former. The latter, however, calls for determining whether a reasonable person would have foreseen the harm as of a type that is a likely result of the acts or omissions constituting the violations.

When asked in 2000, IDOT's engineer on the road construction project, Duane Mapes, "recalled dealing with asbestos pipe during the project and burying some of it." Exh. 60 at 4-5. And as the Board found in its Interim Order, ELM Consulting visually inspected Site 3's surface in 1998, finding and removing 74 suspected ACM fragments (65 described as Transite pipe) that were throughout Site 3 (except on its south-central portion, which is away from Parcel 0393). Interim Order at 3-4, citing Exh. 57 at 23, 45, 177-179, 535.

In September 1971, IDOT awarded a contract for the road construction project. IDOT's road construction began that year and ended in 1976. On March 31, 1971, USEPA identified asbestos as a "hazardous air pollutant" under the Clean Air Act. *See* 36 Fed. Reg. 5931 (Mar. 31, 1971). The Board adopted final asbestos regulations on January 6, 1972. *See* Asbestos Regulations, R71-16 (Jan. 6, 1972). On April 6, 1973, USEPA promulgated the asbestos National Emission Standard for Hazardous Air Pollutants (NESHAP). *See* 38 Fed. Reg. 8820 (Apr. 6, 1973). The Board mentions these regulatory developments only as indications of the awareness in the early 1970s of the hazards posed by asbestos. However, even if reasonable persons would have been unaware of these specific hazards, the ACM at Site 3 and Site 6 had plainly been abandoned and no longer served a useful purpose, as the Board found in determining that the ACM was "discarded" material and therefore constituted "waste." *Id*. at 6. The relevant definitions and prohibitions in the 1970 version of the Act did not substantively differ from those in the current version of the Act. Interim Order at 14-15.[50]

[50] For example, "[h]istoric Section 1003 of the Act defined 'refuse' as 'any garbage or other discarded solid materials.' IL ST CH 111½ ¶ 1003(k). 'Waste' is currently defined in part as 'garbage . . . or other discarded material.' 415 ILCS 5/3.535 (2014). This word change, as well as the renumbering, are not substantive and do not create new liabilities." Interim Order at 15.

IDOT encountered and buried what it knew to be ACM during its 1970s road construction activities on Sites 3 and 6. Reasonable persons conducting those construction activities would have seen ACM contamination as a type of harm that is a likely result of those acts. In the late 1990s, 74 suspected ACM fragments were visible on and removed from the surface of Site 3, which includes Parcel 0393.[51] Reasonable persons holding that easement would have seen the continued presence of ACM contamination as of type of harm that is a likely result of their failure to remedy the contamination on land under their control. *See* Ney v. Yellow Cab Co., 2 Ill. 2d 74, 79 (1954) (to establish proximate cause, it is not essential that the "precise injury" have been reasonably foreseeable). Although the Board has determined that proximate causation is not a prerequisite to imposing cleanup cost liability on IDOT, the Board finds that IDOT's violations were a proximate cause of the environmental harm at issue.[52]

Nowhere in this order is the Board finding that the environmental harm resulted solely from IDOT's violations. IDOT was not the source of the ACM. Others have held property interests in Site 3 and Site 6. But in response to JM's complaint, IDOT did not file a counter-complaint or third-party complaint. No one other than IDOT has been *alleged* to have violated the Act let alone been found to have done so.

Even if others contributed to this contamination, IDOT has not endeavored to establish that its own contribution to the harm is reasonably discernable from any other contributions. *See* Burlington Northern, 556 U.S. at 614-15 ("apportionment is proper when 'there is a reasonable basis for determining the contribution of each cause to a single harm'" (citation omitted); "Equitable considerations play no role in the apportionment analysis; rather, apportionment is proper only when the evidence supports the divisibility of the damages jointly caused . . . ."); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 810-11 (S.D. Ohio 1983) ("If the harm is divisible and if there is a reasonable basis for apportionment of damages, each defendant is liable only for the portion of harm he himself caused. In this situation, the burden of proof as to apportionment is on each defendant. On the other hand, if the defendants caused an indivisible harm, each is subject to liability for the entire harm." (citations omitted)). And because Section 58.9(a) of the Act does not apply, JM had no burden to prove IDOT's proportionate share. *See* 35 Ill. Adm. Code 741.205(a).

Under these circumstances, the Board finds that the "share of the JM's costs attributable to IDOT" is 100% or $620,203. Interim Order at 22, No. 3. By this finding, the Board does not

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[51] The borings associated with IDOT's violations based on its construction activities are borings 1S through 4S on Site 6 and borings B3-25, B3-16, and B3-15 on Site 3. The borings associated with IDOT's violations based on its property control are borings B3-25, B3-16, B3-15, B3-50, and B3-45 on Parcel 0393 and within Site 3. *See* Interim Order at 13, 22.

[52] JM argues that "even if JM brought the solid Transite pipes to the Site, it did not proximately cause the injury and cause the need for cleanup costs" because "IDOT's crushing and burial of said pipes was an intervening cause under Illinois law, cutting off any conceivable JM liability." JM Reply Br. at 17-18. The Board need not reach JM's argument, given this order's rulings.

impose "joint and several liability" on IDOT. As discussed, IDOT is the only party found liable and this liability, by definition, cannot be "joint and several." *Cf.* State Oil, PCB 97-103, slip op. at 25-26 (multiple respondents held "jointly and severally" liable for State's cleanup costs). However, even if IDOT's liability were characterized as "joint and several" based on the CERCLA obligations of JM and ComEd under the AOC, the label has no bearing on today's order.

TABLE 1
A Comparison of Costs Attributable to IDOT for Site 3, Site 6, and Site 3/6

Task Bucket	JM's Total Cost ($)	JM's Attribution to IDOT (Exh. 204) ($)	IDOT's Attribution to Itself (Exhs. 205 & 207) ($)	Costs Attributed by Board to IDOT ($)
1. Nicor Gas Line	218,090	0	0	0
2. City of Waukegan Water Line	147,711	61,037	0	0
3. AT&T Lines	491,815	201,017	31,303	30,965
4. Utility/ACM Excavation	155,318	77,659	5,591	5,591
5. NSG Line	625,542	438,947	153,385	159,794
6. Northeast Excavation	49,934	49,934	12,583	15,480
7. Dewatering	458,846	325,203	102,734	106,714
8. Filling/Capping	1,088,619	733,436	57,537	57,537
9. Ramp Sampling	20,880	20,880	0	0
10. General Site/Site Preparation	1,814,359	1,062,978	175,618	180,481
11. Health and Safety	77,000	48,587	6,776	6,853
12. USEPA Oversight	359,480	221,114	46,191	48,167
13. Legal Support	71,840	34,124	8,333	8,621
Total	5,579,434	3,274,916	600,051	**620,203**

TABLE 2
Breakdown of Board Cost Attribution to IDOT

Task Bucket	Site 3 ($)	Site 6 ($)	Site 3/Site 6 ($)	Total $
1. Nicor Gas Line	0	0	0	0

2. City of Waukegan Water Line	0	0	0	0
3. AT&T Lines	20,426	4,308	6,231	30,965
4. Utility/ACM Excavation	0	5,591	0	5,591
5. NSG Line	137,332	7,632	14,830	159,794
6. Northeast Excavation	15,480	0	0	15,480
7. Dewatering	59,848	37,738	9,128	106,714
8. Filling/Capping	27,707	11,173	18,657	57,537
9. Ramp Sampling	0	0	0	0
10. General Site/Site Preparation	130,273	43,595	6,613	180,481
11. Health and Safety	0	0	6,853	6,853
12. USEPA Oversight	41,384	6,783	0	48,167
13. Legal Support	0	0	8,621	8,621
Total	432,450	116,820	70,933	**620,203**

Section 33(c) Analysis for Remedy

Section 33(c) of the Act specifies what the Board must consider "[i]n making its orders and determinations":

> [T]he Board shall take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions, discharges or deposits involved including, but not limited to:
>
> (i) the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
> (ii) the social and economic value of the pollution source;
> (iii) the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved;
> (iv) the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and
> (v) any subsequent compliance.

415 ILCS 5/33(c) (2022).

Section 33(c)'s Enumerated Factors

The Board incorporates by reference the Interim Order's findings on the five enumerated factors of Section 33(c). Interim Order at 18-19. The Board weighed all five factors against IDOT and, based on that analysis, found it appropriate to order relief to address IDOT's violations. Below, the Board analyzes these same Section 33(c) factors based on the complete record, including the evidence received during the remedy phase.

Character and Degree of Injury or Interference. ACM was found on the surface of the sites and in the soil. Improperly handling ACM waste endangers public health, welfare, and property. USEPA found that removing and capping ACM was necessary to protect public health, welfare, or the environment. Exh. 62 at 7 (AOC). The waste was deposited in a way that it could be further dispersed in the environment. Asbestos fibers from ACM may become airborne and inhaled. Exh. 65 at 4 (USEPA Enforcement Action Memorandum). This could be through human activity disrupting the site (*id*.) or through natural freeze/thaw cycles (*id.* at 8). ACM waste and asbestos fibers that were on site posed a threat to the environment, as well as public health. The Board weighs this factor against IDOT.

Social and Economic Value of Pollution Source. Road improvements have social and economic value, but there is no value in disturbing of ACM waste to construct roads. The Board weighs this factor against IDOT.

Suitability of the Pollution Source to Area in Which It Is Located. The sites were not permitted for waste disposal and therefore were unsuitable for disposing of ACM waste there. The Board weighs this factor against IDOT.

Technical Practicability and Economic Reasonableness of Reducing or Eliminating the Deposits. The completed remedy was technically practicable and economically reasonable. USEPA found that the remedy of removing and capping asbestos is technically feasible and its costs are proportional to the remedy's overall effectiveness. Exh. 65 at 17-18. IDOT agrees that JM's cleanup costs were reasonable. The Board weighs this factor against IDOT.

Subsequent Compliance. IDOT took no steps to clean up the ACM contamination in the areas where it violated the Act. The Board weighs this factor against IDOT.

All the Facts and Circumstances Bearing on the Reasonableness of the Emissions, Discharges, or Deposits Involved

The enumerated factors in Section 33(c) is, however, not exhaustive. "In making its orders and determinations," the Board must "take into consideration *all the facts and circumstances* bearing upon the reasonableness of the emissions, discharges or deposits involved." 415 ILCS 5/33(c) (2022) (emphasis added).

Both parties argue that Section 2(b) of the Act supports their respective positions. Specifically, Section 2(b) states that the purpose of the Act includes "to assure that adverse effects upon the environment are fully considered and borne by those who cause them." 415 ILCS 5/2(b) (2022).

The origin of the ACM cleaned up on Sites 3 and 6 is not disputed. JM began manufacturing at the JM Site around 1922. 5/23/16 Tr. at 42. There, JM manufactured roofing materials, pipe insulation, Transite pipe, packing and friction materials, gaskets, and brake shoes. *Id*. Some of JM's products contained asbestos, including Transite pipe. *Id*. at 43. JM used asbestos in products for its temperature resistance and its reinforcing quality. *Id.* The JM Site ceased manufacturing in 1998. *Id*. at 44.

Beginning in the late 1950s and extending into the 1960s, JM used a portion of Site 3 as a parking lot for the JM Site. 5/23/16 Tr. at 19, 34, and 45. Site 3 is owned by ComEd. *Id.* at 34, 45; Exh. 50 1-10 (License Agreement between JM and ComEd). As wheel bumpers for the parking lot at Site 3, JM used asbestos-containing Transite pipe split in two. 5/23/16 Tr. at 19, 45-46, 50-51, 60-61, 72, 133-134, 226-227; 6/24/16 Tr. at 102-103. The Transite pipe manufactured by JM contained typically 20% to 30% asbestos. 5/23/16 Tr. 42-43. In addition to Transite pipe, other forms of ACM were found on Site 3. 5/23/16 Tr. at 264-267; Exh. 57-115.

Site 6 contained ACM materials (Transite, sludge, and roofing paper) in the 1S-8S area from the ground surface to approximately 3 to 5 feet below the ground surface. Exh. 204 at 14; Exh. 202; 10/26/20 Tr. at 242-243; *see also* 10/26/20 Tr. at 130-132, and 242-243; 10/27/20 Tr. at 41-42.

The Board finds that Sites 3 and 6 were contaminated with ACM, both in areas where the Board found IDOT violated the Act and in areas where JM failed to prove that IDOT violated the Act. *See* Interim Order at 1-22; 5/23/16 Tr. at 34, 35, 54, 71-73, 187-188, 218-219, and 226-227. Beyond Sites 3 and 6, ACM contamination was found on sites adjacent to the JM Site where IDOT conducted no construction. 5/23/16 Tr. at 313-314; 6/24/16 Tr. at 55-56.

The ACM that IDOT disturbed and buried during its construction of the Amstutz Project contained products manufactured by JM or resulting from their manufacture (*i.e.*, Transite pipe, roofing materials, brake shoes, sludges). The record contains no evidence of any ACM source other than JM's manufacturing operation and use of split Transite pipe as parking bumpers. It is more probably true than not that the origin of the ACM cleaned up on Sites 3 and 6 was JM. Accordingly, for the areas where IDOT violated the Act, the source of the ACM was JM, not IDOT or anyone else. The preponderance of the evidence demonstrates that without JM's activities, none of that ACM would have ended up in IDOT's construction project or easement. And yet, IDOT realized at the time of the road construction project that it was encountering asbestos-containing pipes and proceeded to handle and bury the waste.

Board Conclusion Based on Section 33(c)

After considering Section 33(c) of the Act, the Board finds that the appropriate remedy for IDOT's violations is to require that IDOT reimburse JM for cleanup costs in the amount of $620,203 but not to also require that IDOT pay a civil penalty to the Environmental Protection Trust Fund under Section 42(a) of the Act (415 ILCS 5/42(a) (2022) (Board may impose a civil penalty of up to $50,000 for each violation and up to $10,000 for each day during which the violation continues)). IDOT asks for the "maximum allowable" cost recovery award to be

"adjusted downward" based on "equitable factors" (IDOT Resp. Br. at 28, 40; IDOT Sur. Br. at 8-9) but fails to propose let alone support any specific reduction. JM did not ask for civil penalties, but the Board may impose civil penalties for violations of the Act regardless of whether a complainant requests them. *See* 415 ILCS 5/33(b), 42(a) (2022). Given IDOT's cleanup cost liability under today's order and the fact that JM, not IDOT, was the source of the ACM, the Board finds that adding to the remedy a civil penalty against IDOT is unwarranted.

CONCLUSION

The Board has given "due consideration of the written and oral statements" and "the testimony and arguments . . . submitted at the hearing." 415 ILCS 5/33(a) (2022). Accordingly, the Board must now "issue and enter such final order, or make such final determination, as it shall deem appropriate under the circumstances." *Id*. Based on the record and the Board's analysis under Section 33(c) of the Act, the Board orders IDOT to pay JM $620,203 in reimbursement of the costs JM incurred cleaning up the ACM contamination resulting from IDOT's violations. This order furthers the purpose of this Act to "restore, protect and enhance the quality of the environment" and "assure that adverse effects upon the environment are fully considered and borne by those who cause them." 415 ILCS 5/2(b) (2022).

Nothing in this order precludes IDOT from filing a complaint that alleges others violated the Act and seeks to recover some of the cleanup costs for which it is held liable today. The Board expresses no view about the merits or viability of any such complaint.

The Board incorporates by reference its Interim Order's findings of fact and conclusions of law. This final opinion constitutes the Board's findings of fact and conclusions of law.

ORDER

1. The Board finds that IDOT violated Section 21(a), (d), and (e) of the Act (415 ILCS 5/21(a), (d), (e) (2022)).

2. The Board finds IDOT liable for $620,203 of JM's cleanup costs.

3. IDOT must pay $620,203 to JM by September 18, 2023, which is the first business day following the 45th day after the date of this order.

IT IS SO ORDERED.

Board Member M.D. Mankowski abstained.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2022); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final

orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702. Filing a motion asking that the Board reconsider this final order is not a prerequisite to appealing the order. 35 Ill. Adm. Code 101.902.

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I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above final opinion and order on August 3, 2023, by a vote of 3-0.

Don A. Brown

Don A. Brown, Clerk
Illinois Pollution Control Board

CERTIFICATE OF FILING AND SERVICE

I certify that on September 13, 2023, I electronically filed the foregoing Notice of Appeal with the Clerk of the Illinois Appellate Court, Fourth Judicial District, by using the Odyssey eFileIL system.

I further certify that the other participants in this appeal, named below, are registered service contacts on the Odyssey eFileIL system, and thus will be served through the Odyssey eFileIL system.

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Under penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct to the best of my knowledge, information, and belief.

/s/ Jonathan J. Sheffield
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