

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

To: See Attached Service List

PLEASE TAKE NOTICE that on November 30, 2016, I caused to be filed with the Clerk of the Pollution Control Board of the State of Illinois, *Complainant's Status Report*, a copy of which is attached hereto and herewith served upon you via e-mail. Paper hardcopies of this filing will be made available upon request.

Dated: November 30, 2016

Respectfully submitted,

BRYAN CAVE LLP

Attorneys for Johns Manville

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COMPLAINANT JOHNS MANVILLE’S STATUS REPORT ON REMEDIATION OF THE SITES

Complainant JOHNS MANVILLE (“JM”) hereby requests leave to provide this Status Report to the Board regarding remediation of Site 3 and the western end of Site 6 (the “Sites”). Because of the passage of time between hearing of this matter on May 23-25 and June 23-24, 2016, the filing of JM’s Post-Hearing Brief on August 12, 2016, and the time at which the Board will render a decision on the merits of this case, the status of remediation of the Sites has progressed and will continue to progress. JM believes the following information should be considered by the Board in fashioning a proper remedy, if the Board rules in JM’s favor.

JM’S REQUESTED RELIEF

1. In this case, among other things, JM has requested: “[t]hat the Board order IDOT: (1) to cease and desist violating the Act; (2) to come into compliance with the Act by participating in JM’s ongoing CERCLA removal action; (3) to comply with such further relief the Board deems necessary; and (4) to sanction IDOT for its misrepresentations.” (Post-Hearing Brief (“PHB”), pp. 5-6.) At the time of hearing, “the removal action ha[d] just begun and [wa]s estimated to cost \$5,265,000 million, of which at least \$2,897,000 is for Site 3 and the west end

of Site 6).” (PHB, p. 58.) JM also has requested that the Board order IDOT to pay JM’s investigation and remediation costs “incurred since the EAM [Enforcement Action Memorandum]” issued in November 2012, which at the time of hearing amounted to \$685,000. (PHB, p. 58; *see also* pp. 2, 6.)

REMEDY STATUS

2. In the more than five months that have passed since JM’s witnesses testified regarding the costs of cleanup efforts at the Sites, JM has continued to implement the Removal Action Work Plan (“RAWP”) for the Sites, as required by the U.S. EPA, and continued to remediate waste dispersed and buried by IDOT without participation from IDOT.

3. As of the date of this Status Report, JM has just completed the majority of the active cleanup work on the Sites necessary to implement the RAWP. Only minor work remains to be done. At hearing, JM witnesses testified that JM did investigation work at the Sites prior to the EAM issued in November 2012, including four versions of an EE/CA (PHB, pp. 23-24); that it had incurred \$685,000 in investigation and remediation costs regarding the Sites since the issuance of the EAM; and that it would incur an additional \$2,897,000 in cleanup costs to implement the RAWP at the Sites. (PHB, p. 58.) None of this testimony was disputed at hearing or in IDOT’s Post-Hearing Brief.

4. Given the fact that JM has implemented the majority of the RAWP between hearing and the date of this Status Report, JM points out that that its request for relief can be satisfied by the Board ordering IDOT to pay JM \$2,897,000 as its way of participating in the remedy (which is, in the very least, the amount IDOT would have had to spend if ordered to implement the remainder of the remedy at or before hearing) or as a means of fulfilling part of JM’s cost recovery claim. At hearing, the costs incurred since the EAM stood at \$685,000.

Therefore, if treated as part of JM's cost recovery claim, the total cost recovery claim would be \$3,582,000.

5. It should be noted that if IDOT had not misled U.S. EPA, the Board and JM about its ownership interests in the right of ways (which caused several months of delay in this case) or if IDOT had not actively sought to delay these proceedings on multiple occasions, there would likely be no need for this Status Report because the hearing and post hearing briefing would have been completed prior to any significant physical work being performed at the Sites or substantial completion of the remedy. (*See* Motion for Leave to File Second Amended Complaint, filed February 16, 2016, ¶¶ 23-28; JM's Notice of Correction, filed February 29, 2016, ¶¶ 5, 8-10; IDOT's Motion to Reschedule Hearing, filed April 18, 2016; JM's Response to Motion Reschedule Hearing, filed April 20, 2016; April 7, 2016 Hearing Officer Order; April 28, 2016 Hearing Officer Order; May 2, 2016 Hearing Officer Order; IDOT's Motion to Toll Filing of its Post-Hearing Brief, filed August 25, 2016; IDOT's Motion to Extend Time to Submit Post-Hearing Brief, filed October 16, 2016.)

6. JM brought this lawsuit in 2013 and has consistently objected to IDOT's delay tactics in large part because of their potential impact on portions of JM's requested relief. For example, after expert discovery was allowed to be re-opened over JM's objection, the parties discussed holding the hearing before the Board in February 2016. This time frame was chosen due to JM's concerns about further delay and the potential impact any delay might have on some of the aspects of JM's requested relief. (*See* JM's Motion for Leave to File Second Amended Complaint, filed February 16, 2016, ¶ 28.) Likewise, once JM learned that IDOT had misrepresented and concealed its ownership interests in the right of ways, JM immediately filed a Motion to Amend the Complaint "*Without Hearing Delay.*" (Filed February 16, 2016

(emphasis added).) As JM stated in that Motion, “it would be unfair and prejudicial to JM to let IDOT further delay this matter and avoid participating in JM’s remedial efforts when IDOT either knew, or should have known, the true ownership status of the ROW and neglected to tell JM.” (*Id.*, ¶ 32.) This history justifies the Board ordering IDOT to pay JM \$2,897,000 not only as a means of participating in the remedy or as a cost recovery mechanism, but also as “such other relief the Board deems necessary,” including, but not limited to, as a sanction and to avoid rewarding IDOT’s delay tactics. (PHB, pp. 5-6, 58.)

CONCLUSION

WHEREFORE, Complainant JOHNS MANVILLE seeks leave to submit this Status Report for the Board’s consideration when evaluating the appropriate remedy and requests that the Board consider this Status Report when fashioning in this matter.

Dated: November 30, 2016

Respectfully submitted,
BRYAN CAVE LLP
Attorneys for Complainant Johns Manville

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CERTIFICATE OF SERVICE

I, the undersigned, certify that on November 30, 2016, I caused to be served a true and correct copy of *Complainant's Status Report* upon all parties listed on the Service List by sending the documents via e-mail to all persons listed on the Service List, addressed to each person's e-mail address.

/s/ Lauren J. Caisman

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