

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter Of:)
)
JOHNS MANVILLE, a Delaware)
corporation,)
)
Complainant,)
)
v.)
)
ILLINOIS DEPARTMENT OF)
TRANSPORTATION,)
)
Respondent.)

PCB No. 13-

14-3

RECEIVED
CLERK'S OFFICE
JUL 08 2013
STATE OF ILLINOIS
Pollution Control Board

 **ORIGINAL**

NOTICE OF FILING

To: See Attached Service List

PLEASE TAKE NOTICE that on July 8, 2013, I caused to be filed with the Clerk of the Pollution Control Board of the State of Illinois, a COMPLAINT and APPEARANCE, copies of which are attached hereto and herewith served upon you. Failure to file an answer to this Complaint within 60 days may have consequences. Failure to answer will mean that all allegations in this Complaint will be taken as if admitted for purposes of this proceeding. If you have any questions about this procedure, you should contact the hearing officer assigned to this proceeding, the Clerk's Office or an attorney.

Dated: July 8, 2013

Respectfully submitted,

BRYAN CAVE LLP

Attorneys for Complainant Johns Manville

By: 
Susan Brice

ARDC No. 6228903

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STATE OF ILLINOIS
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CERTIFICATE OF SERVICE

I, the undersigned, certify that on July 8, 2013, I caused to be served by Certified Mail, with postage thereon fully prepaid, by depositing in a United States Post Office Box in Chicago, Illinois, a true and correct copy of the enclosed NOTICE OF FILING, APPEARANCE, and COMPLAINT upon the Respondent listed on the Service List. Proof of service will be filed with the Clerk's Office upon completion of service.



Susan Brice

SERVICE LIST

Illinois Department of Transportation
Office of Chief Counsel
DOT Administration Building
2300 South Dirksen Parkway, Room 300
Springfield, IL 62764

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ENTRY OF APPEARANCE

On behalf of the Complainant JOHNS MANVILLE, the law firm Bryan Cave LLP and attorneys Susan Brice and Kathrine Hanna, attorneys licensed to practice law in the State of Illinois, hereby enter their appearances as attorneys of record. Susan Brice is designated as lead attorney.

Dated: July 8, 2013

Respectfully submitted,
BRYAN CAVE LLP

Attorneys for Complainant Johns Manville

By: 
Susan Brice
ARDC No. 6228903

Kathrine Hanna
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143
PCB No. 13-

COMPLAINT FOR ORDER COMPELLING EQUITABLE RELIEF

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

GENERAL ALLEGATIONS

Jurisdiction and Parties

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

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

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

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

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

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

Factual Background

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

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

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

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

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

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

12. Site 3, the focus of the instant action, is located south of the Greenwood Avenue right-of-way and east of North Pershing Road in Waukegan, Illinois, near the southwestern corner of the former JM manufacturing facility.

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

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

15. Transite® pipe, a non-friable form of ACM, is the predominant ACM found at Site 3.

16. The northwest portion of Site 3 also contains miscellaneous fill material, some of which has been found to contain asbestos.

17. Six utility lines run through Site 3.

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

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

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

21. During this construction, pursuant to a temporary easement agreement with ComEd, IDOT built a detour road cutting a large, curved swath through the former parking lot in the area currently designated as Site 3 and destroyed the parking lot during this construction.

22. This detour road was used as an expressway bypass until the ramp construction was completed in 1976.

23. Records show that a contractor was paid a “special excavation” fee to “remove and obliterate” the detour after construction was complete. The detour road and the former parking lot are no longer intact at Site 3.

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

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

26. Subsequent investigations have revealed buried Transite® pipe in the area. Portions of Transite® pipe have been found in the south side shoulder of Greenwood Avenue at a depth of approximately 2.5 feet below the ground surface. The elevation of this Transite® pipe is roughly one foot higher than the adjacent surface of Site 3.

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

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

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

30. EE/CA Revision 4 was approved by EPA with modifications on February 1, 2012. In its EE/CA approval letter, EPA proposed a new alternative for Site 3—“Modified Alternative 2”—which was a markedly different remedy from those previously proposed by JM and ComEd. This modified alternative not only included a requirement to remove all asbestos-impacted soils to a depth of four (4) feet below the ground surface in the northeast portion of Site 3, but also required JM and ComEd to create a clean corridor for all utilities running through Site 3 by excavating all soil to a depth of two (2) feet below each utility line and a minimum width of twenty-five (25) feet centered on each utility line. EPA’s estimated cost for construction of this Modified Alternative 2 was \$2,196,000.

31. On November 30, 2012, EPA issued an Action Memorandum selecting a remedy for the Southwestern Sites, including the Modified Alternative 2 that it had proposed for Site 3.

However, the Action Memorandum included further modifications to EPA's Modified Alternative 2 that were not previously included in the February 1, 2012 EE/CA approval letter.

32. Specifically, the Modified Alternative 2 set forth in the Action Memorandum requires JM and ComEd to create a clean corridor for each utility line "extending to a depth requested by the owner of the utility line with placement of a continuous barrier at the base and sides of the excavation to inhibit further excavation and/or exposure beyond the clean fill." It also includes a new "compliance alternative" of abandoning and relocating utility lines in lieu of creating clean utility corridors, pending written approval from EPA and provided that each utility owner signs a voluntary subrogation agreement to abandon its line(s). Any new utility lines would be required to bypass the ACM-contaminated areas of the site or to be fully enclosed within utility vaults so as to eliminate the need for excavation during repair or maintenance activities.

33. 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."

34. According to the Action Memorandum, the potential health risks associated with ACM contamination at the Southwestern Sites include "exposure to asbestos fibers via inhalation [which] results in significant health effects including mesothelioma, lung cancer, asbestosis,

thickening of pleural lining around the lungs and pulmonary deficits. Exposures to soils containing asbestos fibers have been associated with all of these health effects including cancer.” Due to the presence of asbestos in soils, the Action Memorandum indicates that “adverse health risks are reasonably anticipated in the event that exposure occurs.”

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

- a. Excavate soil in the northeast portion of the Site 3 (approximately 0.14 acres) identified as the “limited excavation area,” to remove all ACM and asbestos fibers (estimated to a depth of 4 feet);
- b. Excavate soil and sediments contaminated with ACM and/or asbestos fibers to a minimum depth of 2 feet below each utility line and extending to a depth requested by the owner of each utility line with placement of a continuous barrier at the base and sides of the excavation to inhibit further excavation and/or exposure beyond the clean fill and a minimum width of 25 feet centered on each utility line and clean backfill provide a clean corridor for utility maintenance on Site 3 or, alternatively, abandon and relocate utility lines, conditioned on signed voluntary subrogation agreements from the utility owners;
- c. Conduct post-excavation sampling and analysis to confirm there are no remaining ACM or asbestos fibers in soil or sediment within either the limited excavation area or within each utility corridor;
- d. Dispose of all excavated materials in an off-site landfill;
- e. Place and maintain a vegetated soil cover in any areas of Site 3 where ACM or asbestos fibers remain in place;

- f. Implement certain institutional controls in the form of an environmental covenant, pursuant to the Illinois Environmental Covenants Act, 765 ILCS Ch. 122;
- g. Reroute, pipe, or remove surface water as needed to perform the required excavation;
- h. Install and maintain security fencing with warning signs every 100 feet and at all gates completely surrounding all areas where ACM or asbestos fibers remain in place;
- i. Conduct long-term operation and maintenance (O&M) of the vegetated soil cover for a minimum of 30 years beginning when construction is completed.

36. EPA has estimated the cost of construction of the selected remedy for Site 3 at between \$1,705,696 and \$2,107,622. JM disputed portions of EPA's remedy selected for the Southwestern Sites on December 13, 2012 and May 16, 2013, including certain of EPA's cost analyses.

37. EPA issued a Notice to Proceed with the selected remedy for all of the Southwestern Sites on May 6, 2013. Under the terms and conditions of the AOC, this Notice to Proceed triggers a 120-day period within which JM and ComEd must submit to EPA a Removal Action Work Plan for performing the response actions at the Southwestern Site Area.¹ With the exception of removing surficial ACM, no response action has commenced at Site 3.

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

COUNT I

Violations of Section 21 of the Illinois Environmental Protection Act

38. Complainant realleges and incorporates herein the allegations contained in paragraphs 1-37 of this Complaint as if set forth herein in full.

39. Respondent 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 constitute violations of Section 21 of the Illinois Environmental Protection Act ("Act").

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

No person shall:

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

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

41. Section 3.535 of the Act, 415 ILCS 5/3.535, defines "waste" as "any garbage, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility or other discarded material, including solid, liquid, semi-solid, or contained gaseous material resulting from industrial, commercial, mining and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows, or coal-combustion products . . . or industrial discharges which are point sources subject to permits under Section 402 of the Federal Water Pollution Control Act, as now or hereafter amended, or source, special nuclear, or by-product materials as defined by the Atomic Energy Act of 1954 . . . or any solid or dissolved material

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

42. Discarded ACM at Site 3 is a “waste” within the meaning of the Act.

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

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

45. Section 3.445 of the Act, 415 ILCS 5/3.445, defines “sanitary landfill” as “a facility permitted by the Agency for the disposal of waste on land meeting the requirements of the Resource Conservation and Recovery Act, P.L. 94-580, and regulations thereunder, and without creating nuisances or hazards to public health or safety, by confining the refuse to the smallest practical volume and covering it with a layer of earth at the conclusion of each day’s operation, or by such other methods and intervals as the Board may provide by regulation.”

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

47. Site 3 is not a disposal site that fulfills the requirements of a sanitary landfill.

48. Site 3 is not a permitted waste disposal site or facility which meets the requirements of the Act or its regulations as they relate to the disposal or abandonment of waste.

49. 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.

50. The ACM waste dumped and disposed of on and under Site 3 was abandoned by IDOT around 1976 and currently remains in situ.

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

52. IDOT 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, 415 ILCS 5/21(e).

53. IDOT's violations are continuing in nature.

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

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

56. As JM must complete a Work Plan for the selected response action within 120 days of receiving the Notice to Proceed (approximately November 2013) and must begin implementation of EPA's proposed remedy shortly thereafter, it stands to suffer immediate and irreparable injuries for which there is no adequate remedy at law.

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

PRAYER FOR RELIEF

WHEREFORE, Complainant JOHNS MANVILLE respectfully requests that the Board enter an Order against Respondent ILLINOIS DEPARTMENT OF TRANSPORTATION:

A. Authorizing a hearing in this matter at which time Respondent will be required to answer the allegations herein;

B. Finding that the Respondent has violated Section 21(a) and (e) of the Act, 415 ILCS 5/21, as alleged herein;

C. Requiring Respondent to participate in the future response action on Site 3—implementing the remedy approved or ultimately approved by EPA—to the extent attributable to IDOT's violations of the Act, pursuant to the Board's broad authority to award equitable relief under Section 33 of the Act, 415 ILCS 5/33; and

D. Grant such other and further relief as the Board deems appropriate.

Dated: July 8, 2013

Respectfully submitted,

BRYAN CAVE LLP

Attorneys for Complainant Johns Manville

By:



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