BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

JOHNS MANVILLE, a Delaware corporation,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB No. 14-3
	)	(Citizen Suit)
ILLINOIS DEPARTMENT OF TRANSPORTATION,	)	
	)	
	)	
Respondent.	)	

NOTICE OF FILING AND SERVICE

To: ALL PERSONS ON THE ATTACHED CERTIFICATE OF SERVICE

Please take note that today, December 8, 2016, I have filed the Illinois Department of Transportation's Motion for Leave to File a Sur-Reply with the Clerk of the Pollution Control Board, and have served each person listed on the attached service list with a copy of the same.

Respectfully Submitted,

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

JOHNS MANVILLE, a Delaware corporation, Complainant,	)	
v.	)	PCB No. 14-3
	)	(Citizen Suit)
ILLINOIS DEPARTMENT OF TRANSPORTATION, Respondent.	)	

RESPONDENT'S MOTION FOR LEAVE TO FILE SUR-REPLY

NOW COMES RESPONDENT, the Illinois Department of Transportation ("IDOT"), through its attorney LISA MADIGAN, Attorney General of the State of Illinois, which moves the Pollution Control Board ("Board"), pursuant to Board Rule 101.616(b), 35 Ill. Adm. Code 101.616(b), for a leave to file the Sur-Reply which is attached hereto as Exhibit A to Complainant's November 14, 2016 Post-Hearing Brief Reply ("Reply"), in order to address certain new, prejudicial and erroneous arguments which are contained Johns Manville's ("JM") 50 page Reply.

ARGUMENT

1. With respect to the 54-page Reply filed by JM, there are four reasons why IDOT's Motion should be granted to file a 11 page Sur-Reply. First and chief amongst these reasons is the fact that JM's Reply contains at least two new arguments/theories which it has not previously made during five days of hearing in this matter or in its opening Post-Hearing Brief. Specifically, JM now claims that Commonwealth Edison filled the land on which the Parking Lot was constructed (Reply, pp. 3-5), an entirely false proposition that must be rebutted. JM also proffers a new theory regarding the purpose of the rights of way for Parcel 0393 which has no

support, whatsoever, in the Record. (Reply, p. 15.) IDOT would be prejudiced if these false claims were accepted, uncontested, by the Board. Accordingly, IDOT deserves the opportunity to provide the Board with brief responses to each of these new theories.

2. IDOT's Motion should also be granted so that it can address certain deceptive, inflammatory and wholly unsupported arguments advanced by JM in its over 50 page Reply, such as its completely erroneous and totally foundationless assertion that IDOT is somehow claiming that "vandals" were responsible for disposing of ACM at Sites 3 and 6 after the construction on the Project ceased (Reply, pp. 13-14), when IDOT has never made any such claim. Additionally, IDOT should be afforded the opportunity to rebut JM's outlandish assertion that only an expert is able to state where Parcel 0393 is located on a map relative to Sites 3 and 6 (Reply, pp. 19-20). IDOT could cite additional examples to the Board; however, in the interest of brevity, it has chosen not to do so here.

3. IDOT's Motion should also be granted because it will cause no prejudice to, and will amount to only a minimal amount of additional briefing which the Board would have to consider in this matter. In perspective, with the filing of its Reply, Johns Manville now has filed a combined total of 108 pages in post-hearing written arguments. IDOT now seeks to file a 11 page Sur-Reply, which, if accepted by the Board, would bring IDOT's total number of pages in filed post-hearing brief documents to 66 pages. A full 40 pages less than what Johns Manville has filed to date. Indeed, it would be absurd for JM to argue prejudice to IDOT's filing of a 10 page Sur-Reply in response to its 50 page Reply.

4. Finally, IDOT's Motion should be granted because it is timely, considering that it seeks leave for filing a Sur-Reply brief that, combined with its Response, is almost equal in

length to JM's initial Post-Hearing Brief, for which JM was given significantly more time to prepare than IDOT had to draft a Response.

WHEREFORE, Respondent, IDOT, respectfully requests that the hearing officer:

1. Grant IDOT's Motion and accept its sur-reply for filing with the Board; and,

2. Grant such other relief as the hearing officer deems to be appropriate and just.

Respectfully Submitted,

ILLINOIS DEPARTMENT OF TRANSPORTATION

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CERTIFICATE OF SERVICE

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

I, EVAN J. McGINLEY, do hereby certify that, today, December 8, 2016, I caused to be served on the individuals listed below, by electronic mail, a true and correct copy of Illinois Department of Transportation's Motion for Leave to File a Sur-Reply on each of the parties listed below:

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EXHIBIT A

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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v.	)	PCB No. 14-3
	)	(Citizen Suit)
ILLINOIS DEPARTMENT OF TRANSPORTATION, Respondent.	)	

ILLINOIS DEPARTMENT OF TRANSPORTATION'S SUR-REPLY

Now comes Respondent, ILLINOIS DEPARTMENT OF TRANSPORTATION ("IDOT"), who herewith sets forth its limited Sur-Reply to Complainant's, JOHNS MANVILLE ("JM"), 51 page reply brief, filed in support of its initial 59 page post-hearing brief.[1]

1) **Without any Evidentiary Support Whatsoever, JM Advances a New Theory in its Reply Brief That Commonwealth Edison Filled in the Land on Which the Parking Lot Was Constructed**

After lengthy litigation, five days of hearing, and the filing of its initial Post-Hearing Brief, JM suddenly advances a new theory in its Reply Brief about the Parking Lot, namely, that ComEd filled in the area on which the Parking Lot was constructed. (Reply, p 5.) As support for this new theory, it cites hearing testimony from IDOT's expert witness, Steven Gobelman, as well as the expert rebuttal report prepared by its expert, Douglas Dorgan. (Id.) However, while couching its theory in terms of a certainty ("Indeed, this is exactly what happened [e.g., that Commonwealth Edison filled in the area]."), JM does not know this and the "evidence" that they

[1] Through its sur-reply, IDOT does not seek to challenge each and every point set forth in Johns Manville's Reply Brief. Rather, it has sought to use the 11 pages of its sur-reply to address only the most prejudicial and misleading arguments set forth in Johns Manville's reply, as well as those arguments which Johns Manville makes for the very first time in its Reply. The fact that IDOT has not chosen to address any of the many issues or arguments raised by Johns Manville in its Reply should not be construed as IDOT's acquiescence or acceptance of Johns Manville's position on any issues not addressed herein.

cite for this new theory is completely conjectural. (*Id.* citing Mr. Gobelman's testimony on May 25th and Ex. 16-9 and 10.)

The more likely scenario is that it was JM - not Commonwealth Edison - that imported the fill material that allowed the parking lot to be built, as its License Agreement with Commonwealth Edison contains no language prohibiting it from doing so. (*See generally,* Ex. 50, particularly page 2, paragraph 7.) In any event, the area was filled, by JM or less likely, Commonwealth Edison, and with material that could have contained ACM.

JM further attempts to muddy the waters about how the Parking Lot was constructed and what materials were used for this purpose by citing to the hearing testimony of Denny Clinton. (Reply, pp. 3-4.) JM notes that notwithstanding statements contained in the ELM report (Ex. 57-11 and 16) to the contrary, Mr. Clinton never told anyone at ELM that ACM was used in the construction of the Parking Lot. Seemingly, this is the only issue which Mr. Clinton apparently had with accuracy of the ELM Report, a report that was done to characterize the nature and extent of contamination of Sites 2 and 3. (Ex. 57-13.) It also seems to be a recently-realized issue, as it is worth noting that JM never introduced any evidence at hearing or ever took any issue with any of the findings or conclusions reached by ELM in its report, prior to its submission to USEPA in late 1998.

2) JM Has Failed to Prove That ACM or Transite Pipe Was Present at the Parking Lot When IDOT Began Work on the Project in Late 1971

In its Reply, Johns Manville contends that Transite was present at Site 3 at the time IDOT began its work there. There are several problems with this assertion. First, JM failed to present any testimony or evidence that showed that Transite pipe was still present on the Parking Lot at the time that work on the Project began. Amongst the exhibits received into evidence by the Board at hearing was August 6, 1971 "Notice to Bidders" for the project. (Ex. 20.) Prior the

issuance of this notice, IDOT had apparently only conducted some limited field work for the Project. Moreover, IDOT would not have had the legal right to come onto Commonwealth Edison's property to conduct any type of significant work there, until after it had first entered into the Grant for Public Highway with Commonwealth Edison. (Ex. 41.)

Yet historic aerial photographs from some point in 1970, such as Exhibit 54T, demonstrate that, while the perimeter of the parking lot is readily discernable, the interior of the parking lot is disturbed and not uniform in appearance. (Ex. 54T.) Since the photo was taken before IDOT had obtained the Grant for Public Highway for the project, and before IDOT had put the project out to bid, it follows that IDOT could not have been responsible for the change in conditions on the Parking Lot. Thus, the timing and the photographs show that it is most likely that JM removed the Transite pipes prior to IDOT's work.

3) Despite Its Claim, JM is Unable to Point to any Direct and Definite Evidence That Shows IDOT "Encouraged" and "Did" Bury Transite Pipe or ACM in its Construction of the Project

JM states that "the evidence shows that IDOT's contactor was actually encouraged to, and did, bury ACM in the Embankment." (Reply, p. 9.) This statement continues JM's pattern of making misleading and unsupported statements. There is absolutely no evidence in the record before the Board that shows – let alone suggests – that IDOT's contractors ever buried any ACM during their work on the in the Greenwood Avenue Embankment. Were evidence to exist that demonstrated IDOT's contractors had actually used ACM or Transite as fill in the Greenwood Avenue Embankment, JM most assuredly would have introduced that evidence or elicited such testimony. Thus, it is entirely baseless for JM to assert that the "evidence shows" that IDOT's contractor did what it is accused of having done.

In an effort to support their baseless assertion, JM cites three exhibits which it claims demonstrates that IDOT buried ACM in the Embankment. (Reply, p. 9.) But these three exhibits, i.e., Ex. 6-28, 84 and 202, only show that various forms of ACM were found in the Embankment. These exhibits do not shed any light on how the ACM came to be there. And most certainly, these exhibits do not support JM's assertion that they show that "IDOT's contractor was actually encouraged to, and did, bury ACM in the Embankment." (Reply, p. 9.) JM's argument in Section C of its Reply that the presence of ACM in the Embankment that IDOT built means that IDOT placed the ACM there is tautological in the extreme.

Additionally, at hearing, Steve Gobelman specifically testified as to why IDOT wouldn't have used ACM in the Embankment. Specifically, where ACM was found in the Embankment, the rise was too small to have allowed IDOT's contractor to have used or utilized ACM as fill material. Moreover, specifications for the Project specifically dictated that "porous granular" material, dissimilar to crushed Transite pipe, be used as the fill for the Embankment. (Ex. 20-7.) Simply stated, the Project's specifications would not have permitted IDOT's contractor to make use of ACM materials such as asbestos-containing roofing materials or sludges, materials which JM's own expert documented to be present (in abundance) in the Embankment. (Ex. 84.) Ultimately, rather than showing that "IDOT's contractor was actually encouraged to, and did, bury ACM in the Embankment," Exhibits 6-28, 84 and 202 raise more questions than they answer regarding the critical question of how ACM came to be present in the Embankment. (Reply, p.9).

4) JM's Assertion That There is "No Evidence That ACM was Buried With Utility Lines Except for the Water Line Which IDOT Moved" is Contradicted by the Conclusions Reached by its Own Consultants

This assertion, like many others which JM makes in its Post-Hearing and Reply Briefs, stands in direct contradiction to the facts, statements, conclusions, and characterizations which JM's own consultants have made about the presence of ACM being located in conjunction with utility lines located at Sites 3 and 6. In the Remedial Action Work Plan (version 2) ("RAWP") (Exhibit 66), which was prepared for JM and submitted to the USEPA by Tat Ebihara, Johns Manville's own consultant and witness at hearing, clearly and unequivocally states that: "The results from the multiple investigations reveal that ACM occurrences are sporadic across the Site and typically coincide with the location of utilities or other structures installed after the mid-1950s." (Ex. 66-766.) The same portion of the RAWP also notes that Nicor installed a gas pipeline across Site 3 in 1948 and that "ACM will not be present below the gas line but potentially adjacent to and/or above the gas line." (Id.) As further noted in the RAWP, Dr. Ebihara's statements about the relationship between ACM detections and their coincidence with the location of utility lines at the Sites is based on a significant number of sub-surface investigative work. (Id; *See also,* Tr. May 24, p:54:11-21.) Johns Manville's deliberate attempts to misrepresent the record on this issue in this case should be rejected by the Board.

5) Johns Manville's "Vandals" Characterization is a Gross Distortion of IDOT's Position.

In its Response brief, IDOT noted that from the end of IDOT's construction in 1975 through 1998, Site 3 has never been secured. (Response, p. 19.) IDOT further noted that Douglas Dorgan never bothered to investigate what might have occurred at the Site during this

approximately 23 year period, even though he was apparently aware of work done in the area by the City of Waukegan. (Id.)

Johns Manville in its Reply twists entirely valid questions about the thoroughness of its expert's work and attempts to put words into IDOT's mouth. IDOT has never argued that "vandals" might have disposed of ACM at Sites 3 and 6. Rather, IDOT has raised justifiable questions about the scope and sufficiency of JM's expert's work, i.e., that he seems to have focused on reaching a pre-ordained conclusion, and avoided inconvenient facts that did not fit the theory that he was retained by Johns Manville to provide.[2] For example, although he reviewed and cited to the Removal Action Work Plan (Ex. 66.), in his expert report he gave no consideration of the statements in the work plan developed by Dr. Ebihara that: "The origin of the ACM in Site 6 is not known but presumed to be debris that fell from trucks while driving on Greenwood Avenue." (Ex. 66-766.) Given the statements made by JM's own consultant and witness, it is ludicrous for JM to mischaracterize IDOT's claims by insinuating that vandals somehow placed the ACM at Site 3.

6) Johns Manville has Made New Claims About the Purpose of the Rights of Way for Parcel 0393 in its Reply Brief

JM's Reply brief, for the first time and without citation to any supporting testimony from the five days of hearing held in this matter or the over 100 exhibits accepted into evidence, asserts that "Parcel 0393 is - a right of way/permanent easement necessary for vehicular traffic to the Amstutz." (Reply, p. 15.)

The record from the hearing shows that Parcel 0393 is bounded to the west by Sand Street (now known as Pershing Road) and to the north by Greenwood Avenue. (Cite.) The Board also received into evidence at hearing two quitclaim deeds, each of which was over one

[2] Indeed, as stated in his expert report, his mission was to determine whether IDOT was responsible for the ACM at Sites 3 and 6. (Ex. 6.)

hundred years old (e.g., Exhibits 162 and 163), which established that Sand Street and Greenwood Avenue were created by the City of Waukegan. Additionally, uncontroverted testimony from IDOT employee James Stumpner affirmed that these streets are maintained by and continue to be under the City of Waukegan's jurisdiction. (Tr. May 25, p.34:8-18.) The only reasonable conclusion from this uncontested evidence is that the streets adjacent to Parcel 0393 serve the City of Waukegan's purposes, and that Parcel 0393 is not necessary for facilitating traffic to and from the Amstutz Expressway, as newly claimed by JM. Accordingly, the Board should not consider this wholly novel argument contained in Johns Manville's Reply brief. Illinois courts have long held that arguments not raised in an appellant's opening brief cannot be advanced for the first time in their reply brief. *People v. English*, 2011 ILL App. (3d) 100764, ¶ 22 (citing *Holiday v. Shepard*, 269 Ill. 428, 436 (1915).

7) Johns Manville's Argument that IDOT Controls Parcels 0392 and 0393 is a Fabrication of the Record

In its Reply Brief, Johns Manville intentionally and falsely misrepresented the location of Parcels 0392 and 0393. (Reply at 19.) It bears noting that at no point during the presentation of its case in chief at hearing did it ever seek to get its purported expert witnesses, Joseph Fortunato or Douglas Dorgan, to even attempt to correlate the locations of Parcels 0392 and 0393 to either Sites 3 or 6. Indeed, in hindsight, it appears that Johns Manville purposely sought to maintain a degree of "strategic ambiguity" about this point.

In its opening brief, Johns Manville was silent about any perceived correlation between the location of the Embankment and Parcel 0393. IDOT's Response, however, discussed the relationship between the then-existing rights of way on Greenwood Avenue and the subsequently obtained rights of way pursuant to Parcel 0393 and the corresponding Grant for Public Highway

(i.e., Ex. 41.) (Response, pp. 21-22.)[3] Contrary to Johns Manville's claims, IDOT did not offer any new opinion in its Response. (Reply, pp. 19-20.) Rather, it simply articulated what is evident in Exhibit 15, the plat of survey for Parcel 0393 and E393: that Parcel 0393 does not run up to Greenwood Avenue. Rather, that the northern boundary of Parcel 0393 meets up with already existing rights of way located south of Greenwood Avenue, not with Greenwood Avenue itself. (Id.) Where Parcels 0393 and 0392 are located is a matter of fact, not opinion. JM is therefore incorrect to suggest that there is any need for opinion testimony to establish the location of these parcels.

Similarly, in its Reply Brief, Johns Manville also seeks to advance misleading argument concerning the very real nature of jurisdiction, as that concept pertains to IDOT's management of the highway system under its control. (Reply, pp. 13-15). IDOT presented uncontroverted testimony at hearing that IDOT does not have any maintenance responsibility or jurisdiction over the Embankment. (Tr. May 23, pp.104:24-105:16; Ex. 49.) Notably, Johns Manville never presented testimony from any witness regarding how highways are managed and operated in this State. With its false and self-serving arguments, JM wishes to entirely reject and rewrite the rules that govern jurisdiction and maintenance responsibility for roads in the state of Illinois. This subject is something that IDOT and its expert knows intimately, and that JM does not.

Finally, in its Reply, Johns Manville continues to insist that IDOT's survey work for a 2010 project (involving wetland soil sampling on Parcel 0393) could only have occurred if IDOT continued to hold a right of way over the parcel. As argued in its underlying Response, this assertion is false and was directly contradicted by the testimony of IDOT's own witness, John Baczek. Baczek testified that IDOT did not need to have a right of way over any given parcel,

[3] IDOT is prepared to present such additional evidence and testimony on this point as the Board may believe to be helpful or necessary.

public or private, in order to conduct preliminary survey work similar to that performed in 2010. IDOT has this right by virtue of at least two separate statutory authorities, another inconvenient fact that Johns Manville entirely ignores in its Reply brief.

8) JM has Failed to set Forth any Evidence Regarding IDOT's Waste Handling/Management Practices During the Project

Johns Manville continues to claim that IDOT engaged in the open dumping and illegal disposal of waste at Sites 3 and 6. (Reply, p. 28.) Yet this claim is made without any evidence in the record to support it. At hearing, Johns Manville never introduced any evidence how IDOT handled or managed what might, today, be considered as "waste" under the Environmental Protection Act. Despite the claim that IDOT does not dispute this assertion in the JM Reply brief, it is because JM has entered nothing into the Record about the issue that IDOT does dispute that it has any liability for open dumping and disposal of waste.

9) Johns Manville's Assertions Regarding the Section 33 Factors are Based on Unfounded Hyperbole, and are Without Merit

The single greatest irony about Johns Manville's arguments regarding why the Section 33 factors implicate IDOT is that all of the ACM waste at Sites 3 and 6 was almost certainly produced by Johns Manville and then discarded on the Sites by Johns Manville along with Johns Manville asbestos-containing roof shingles and fibrous sludge. (See generally, Reply, pp. 29-34.) Moreover, Johns Manville's own consultants have stated in reports and in documents submitted to USEPA, pursuant to the 2007 Administrative Order on Consent, that ACM waste was apparently disposed of at these Sites by Johns Manville itself, going so far as to speculate that ACM waste fell off trucks traveling to and from the Johns Manville plant along Greenwood Avenue. (Ex 66-766.) Consequently, Johns Manville's arguments that IDOT is somehow solely responsible for the disposal of the same types of Johns-Manville manufactured ACM waste at Sites 3 and the western portion of Site 6 that were also found at Sites 4 and 5, and the eastern

part of Site 6, is absurd. The better explanation is that the reason that the same types of ACM waste were found at Sites 3, 4, 5 and 6, is that they were put there by the same entity – Johns Manville – using the same disposal process at different locations surrounding its facility, including Sites 3 and 6.

Ultimately, what JM's Reply demonstrates is that over the course of the litigation of this case, and continuing through the post-hearing briefing phase, it has changed the theory of its case. No longer does JM argue that IDOT "crushed, buried and spread" Transite pipe in the course of constructing the Project. Now, as set forth in its Reply, it argues, without any direct evidence, that because Transite pipe was found in the fill material for the Embankment, and because IDOT constructed the Embankment, it must therefore follow that IDOT is the source of and depositor of the Transite pipe material, as well as all of the other forms of ACM found at Sites 3 and 6, such as brake pads and asbestos-containing sludge, and a host of other asbestos containing waste products. Such an assertion is tantamount to JM advancing a *res ipsa loquitor* theory of causation, a theory that has apparently never been offered or considered in any prior case before the Board. Due to progressive realization that there is no evidence to support its original accusations, and IDOT's unwillingness to agree to JM's fantasy claims through settlement, the desperation of Johns Manville has caused its claims to slowly evolve into absurdity.

10) Johns Manville's Requested Relief Cannot Be Obtained from the Board

Finally, even if leave is granted and the "Status Report" is entered into the record, it should be dually noted that JM's statements in the "Status Report" make it clear that it seeks a money judgment award from the Board: "JM points out 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."

(Complainant John's Manville's Status Report on Remediation of the Sites, filed November 30, 2016, ¶ 4). JM neither requests nor proposes any other remedy than reimbursement for its past and future clean-up expenses.

Illinois law states that the Illinois Court of Claims has exclusive jurisdiction over all "claims against [IDOT] founded upon any law of the State of Illinois or upon any regulation adopted thereunder by an executive or administrative officer or agency…" 705 ILCS 505/8. It is undisputed that JM's monetary claim for $2,897,000 against IDOT is based under the Illinois Environmental Protection Act. Consequently, JM has asked the Board to fashion a remedy that would unequivocally violate Illinois law.

Respectfully Submitted,

ILLINOIS DEPARTMENT OF TRANSPORTATION

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