

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

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

**NOTICE OF FILING**

To: See Attached Service List

PLEASE TAKE NOTICE that on October 25, 2019, I caused to be filed with the Clerk of the Pollution Control Board of the State of Illinois, *Complainant's Pre-Hearing Statement*, 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: October 25, 2019

Respectfully submitted,

BRYAN CAVE LEIGHTON PAISNER LLP

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	)	
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**COMPLAINANT’S PRE-HEARING STATEMENT**

Complainant JOHNS MANVILLE (“JM”) hereby submits the following Pre-Hearing Statement for the hearing scheduled for November 19-22, 2019.

**SUMMARY OF CONTESTED ISSUES**

The Board has held Respondent ILLINOIS DEPARTMENT OF TRANSPORTATION (“IDOT”) liable for causing and allowing open dumping of ACM waste on property in Waukegan, Illinois that has been referred to in this action as Sites 3 and 6. (December 15, 2016 Interim Opinion and Order (“Interim Opinion”).) The Board determined that JM is entitled to recover costs it has incurred in investigating and remediating portions of Sites 3 and 6. (*Id.*, pp. 19-21.) In fashioning an appropriate remedy, the Board weighed every equitable factor *against* IDOT and in favor of JM and ordered that IDOT must pay JM for cleanup costs JM had incurred “as a result of [IDOT]’s violations”, in part to ensure fulfillment of the Illinois Environmental Protection Act’s stated purpose that “adverse effects on the environment are borne by those who cause them.” (*Id.*, p. 21.) In rendering this decision, 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. *See* 415 ILCS 5/58.1(a)(iv) (2014), 58.9(a); *see also* 35 Ill. Adm. Code Part 741.” (*Id.*, p. 22).

Needing a more fulsome record on cleanup costs, however, 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 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 JM’s costs attributable to IDOT.

(*Id.*, pp. 18-19, 21 22.)

JM incurred \$5,579,794 in total costs to implement the USEPA’s Administrative Order on Consent at Sites 3 and 6 (hereinafter referred to as “Implementation Costs”).<sup>1</sup> The amount and the reasonableness of these Implementation Costs, considering the work required and performed, are not in dispute. (*See* Stipulations, filed August 13, 2019.)

Consistent with the Board’s direction, JM’s expert, Mr. Douglas Dorgan, looked at the cleanup costs that resulted from IDOT’s violations of the Act, which entailed: assessing the extent of ACM connected with a given boring through documentary, photographic and observational evidence; examining the location of the areas of liability identified by IDOT (including Parcel No. 0393) and how those areas were connected to the work required by USEPA and performed by JM; and reviewing the language in the USEPA’s Enforcement Action Memorandum and other documents in the record to identify the drivers of the removal action required. Based on this analysis, Mr. Dorgan opined that **\$3,274,917** of JM’s Implementation

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<sup>1</sup> There are other costs that JM incurred, but it is not seeking those in this matter.

Costs were attributable to IDOT's violations of the Act as found by the Board in the Interim Opinion.

Mr. Dorgan opined that the costs attributable to IDOT can be broken down as follows by various "Task Buckets," representing general categories of tasks that were performed as part of the removal action on Sites 3 and 6:

<b>Task Bucket</b>	<b>Site 3</b>	<b>Site 6</b>	<b>Sites 3 and 6</b>	<b>Total</b>
Nicor Gas	\$0	\$0	\$0	\$0
City of Waukegan Water Line	\$61,037	\$0	\$0	\$61,037
AT&T	\$71,710	\$88,858	\$40,449	\$201,017
Utility/ACM Excavation	\$0	\$77,659	\$0	\$77,659
North Shore Gas	\$332,524	\$65,597	\$40,826	\$438,947
Dewatering	\$217,803	\$79,625	\$27,775	\$325,203
Northeast Excavation	\$49,934	\$0	\$0	\$49,934
Filling/Capping	\$341,003	\$155,177	\$237,256	\$733,436
Ramp	\$20,880	\$0	\$0	\$20,880
General Site/Site Preparation	\$710,118	\$305,978	\$46,883	\$1,062,979
Health and Safety	\$0	\$0	\$48,587	\$48,587
USEPA Oversight Costs	\$173,483	\$47,631	\$0	\$221,114
Manikas/Walker Wilcox Matousek	\$0	\$0	\$34,124	\$34,124
<b>Total</b>	<b>\$1,978,492</b>	<b>\$820,525</b>	<b>\$475,900</b>	<b>\$3,274,917</b>

(Expert Report of Douglas G. Dorgan Jr. on Damages Attributable to IDOT, dated June 13, 2018, § 3.2.2.) IDOT does not dispute how Mr. Dorgan identified the various Task Buckets and

allocated the costs incurred into the various Task Buckets. (*See Stipulations*, filed August 13, 2019, ¶¶ 1, 3.)

The experts diverge only on the exact areas for which the Board held IDOT liable and the *amount* of JM's costs that should be *attributed to IDOT*. Mr. Dorgan claims this number is \$3,274,917 and Mr. Gobelman claims it is \$600,050.

This attribution dispute arises mainly for three reasons. First, instead of relying on the maps used in the first Hearing by the parties and the Board to determine liability, IDOT's "expert," Steven Gobelman created an entirely new "Base Map" that moves key features—such as the boundaries of Sites 3 and 6, soil boring locations, and remedial feature locations—from where they were positioned on the maps used at the first Hearing to new locations, so that the removal work performed around and in connection with those key features presumably falls outside of the areas where the Board found IDOT liable. Second, Mr. Gobelman takes an extremely narrow view of what constitutes an IDOT area of liability and, in doing so, uses inconsistent methodologies and makes incorrect assumptions. For example, Mr. Gobelman, does *not* consider the amount of ACM connected to each boring, the scope of work tied to the ACM in each boring, and/or whether the ACM in each boring was driving particular work or the overall remedy—all facts that bear on "what cleanup work was performed in the portions of the Sites where the Board found IDOT liable" as well as the costs "attributable to IDOT." Finally, Mr. Gobelman incorrectly thinks that IDOT is liable for ACM contamination only at certain boring locations on Parcel No. 0393 as opposed to the entirety of Parcel No. 0393. The Board found that "IDOT's interest in Parcel 0393"—not merely IDOT's interest in certain borings within Parcel No. 0393—"gave and continues to give [IDOT] control over open dumping on that property," not merely control over dumping in certain boring locations on that property.

(Interim Opinion, p. 12.) “By continuing to control the portion of Parcel No. 0393 falling within Site 3,” the Board found, “IDOT continues to allow ACM waste in that soil.” (*Id.*, p. 13.) To the extent JM incurred Implementation Costs to remediate any features on Parcel No. 0393, this was done *as a result of* IDOT’s open dumping in or control of Parcel No. 0393. As such, JM contends that IDOT should be liable for these costs.

Mr. Dorgan also contends that “the share of JM’s costs attributable to IDOT” includes costs incurred to address areas 5S to 8S along Site 6 for numerous reasons. These include their connection to the contamination from 1S-4S (contaminated areas the Board found were due to IDOT’s violations of the Act), which JM’s contractor will testify that, upon excavation, was part of a consistent seam of ACM materials that was placed at the same time. Excavation records, sampling records, and IDOT records support this conclusion.

The \$3,274,917 in Implementation Costs that Mr. Dorgan claims are attributable to IDOT were all incurred “as a result of [IDOT’s] violations” of the Act. (Interim Opinion, p. 21.) Given the Board’s statement 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” (*id.*, p. 22), IDOT may be legally liable for more than its proportionate share. *See In Re: Proportionate Share Liability*: 35 Ill. Adm. Code 741, R97-16 (December 3, 1998), pp. 1, 27 (stating that “[i]n 1995, the Illinois General Assembly adopted legislation repealing joint and several liability in actions involving environmental remediation and replaced it with proportionate share liability). As such, the Board should find in JM’s favor and award it the cleanup costs it is entitled to under the law.

**STIPULATIONS REACHED**

On August 13, 2019, JM and IDOT filed Stipulations as follows:

1. JM performed tasks with respect to Sites 3 and 6 that fall into the following “Task Bucket” categories, as identified in Section 3.2 and Exhibit F of the Expert Report of Douglas G. Dorgan Jr. on Damages Attributable to IDOT dated June 13, 2018 (“Dorgan Report”) and Section 3 of the Expert Rebuttal Report of Steven Gobelman on Damages Attributable to IDOT Based on IPCB Order of December 15, 2016 (“Gobelman Report”): (a) Nicor Gas Line; (b) City of Waukegan Water Line; (c) AT&T; (d) Comed/Utility/ACM Soils Excavation; (e) Northshore Gas; (f) Northeast Excavation; (g) Dewatering; (h) Filling and Capping; (i) Ramp Work; (j) General Site and Preparation Work; (k) Health and Safety; (l) Legal Support Services by Walker, Wilcox & Matousek; and (m) USEPA Oversight.

2. The parties do not dispute the overall amount of costs JM has incurred with respect to Sites 3 and 6 (\$5,579,794).

3. The parties do not dispute the amount of costs JM has incurred under each Task Bucket as set forth in Section 3.2 and Exhibit F of the Dorgan Report, Section 6 of the Gobelman Report and the Table below:

Task Bucket	Site 3	Site 6	Site 3 and 6	Total
Nicor Gas	\$218,090		\$360	\$218,450
City of Waukegan Water Line	\$61,037	\$86,674	0	\$147,711
AT&T	\$108,651	\$284,266	\$98,898	\$491,815
Comed/Utilities/ACM Soils Excavation <sup>2</sup>	0	\$155,318	0	\$155,318
Northshore Gas	\$332,524	\$234,861	\$58,157	\$625,542
Northeast Excavation	\$49,934	0	0	\$49,934

<sup>2</sup> The Reports gave them different names but they are the same Task.

Dewatering	\$259,084	\$160,587	\$39,175	\$458,846
Filling & Capping	\$426,254	\$310,353	\$352,012	\$1,088,619
Ramp	\$20,880	0	0	\$20,880
General Site/Site Preparation	\$932,730	\$807,329	\$74,300	\$1,814,359
Health & Safety				\$77,000
EPA Oversight	\$233,805	\$125,675	0	\$359,480
Legal Support Services			\$71,840	\$71,840

4. The parties do not dispute the reasonableness of costs set forth in the Table above in Paragraph #3.

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The parties have also agreed to stipulate to the genuineness and admissibility of certain Exhibits and still need to discuss other Exhibits. These stipulations and exceptions are reflected on the Joint Exhibit List, filed concurrently herewith.

Dated: October 25, 2019

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, the undersigned, certify that on October 25, 2019, I caused to be served a true and correct copy of *Complainant's Pre-Hearing Statement* 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 Caisman

Lauren Caisman

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