

**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 January 13, 2014, I caused to be filed with the Clerk of the Pollution Control Board of the State of Illinois, Complainant's Reply to Respondent's Affirmative Defenses, copies of which are attached hereto and herewith served upon you via e-mail. Paper hardcopies of this filing will be made available upon request.

Dated: January 13, 2014

Respectfully submitted,

BRYAN CAVE LLP

Attorneys for Complainant Johns Manville

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**CERTIFICATE OF SERVICE**

I, the undersigned, certify that on January 13, 2014, I caused to be served a true and correct copy of Complainant's Reply to Respondent's Affirmative Defenses 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. Paper hardcopies of this filing will be made available upon request.

  
Kathrine Hanna

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<b>ILLINOIS DEPARTMENT OF TRANSPORTATION,</b>	)	
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<b>Respondent.</b>	)	

**COMPLAINANT’S RESPONSE TO RESPONDENT’S AFFIRMATIVE DEFENSES**

Complainant JOHNS MANVILLE (“JM”) hereby submits its Reply to Respondent ILLINOIS DEPARTMENT OF TRANSPORTATION’S (“IDOT”) Affirmative Defenses as follows:

**FIRST AFFIRMATIVE DEFENSE**

1. The Illinois State Geographical Survey topography map for the land area encompassing Site 3 indicates in 1908 that Site 3 is in a low-lying marshy area.

**ANSWER:** Complainant lacks sufficient knowledge thereof to form a belief as to the truth or falsity of the allegations in paragraph 1 and therefore denies said allegations. Further, the allegations purport to characterize a document which speaks for itself and is the best evidence of its content.

2. The Illinois State Geographical Survey topography map for the land area encompassing Site 3 indicates in 1914 that Site 3 is in a low-lying marshy area.

**ANSWER:** Complainant lacks sufficient knowledge thereof to form a belief as to the truth or falsity of the allegations in paragraph 2 and therefore denies said allegations. Further, the allegations purport to characterize a document which speaks for itself and is the best evidence of its content.

3. The Illinois State Geographical Survey topography map for the land area encompassing Site 3 indicates in 1929 that Site 3 is in a low-lying marshy area.

**ANSWER:** Complainant lacks sufficient knowledge thereof to form a belief as to the truth or falsity of the allegations in paragraph 3 and therefore denies said allegations. Further, the allegations purport to characterize a document which speaks for itself and is the best evidence of its content.

4. The Illinois State Geographical Survey topography map for the land area encompassing Site 3 indicates in 1939 that Site 3 is in a low-lying marshy area.

**ANSWER:** Complainant lacks sufficient knowledge thereof to form a belief as to the truth or falsity of the allegations in paragraph 4 and therefore denies said allegations. Further, the allegations purport to characterize a document which speaks for itself and is the best evidence of its content.

5. The Illinois State Geographical Survey topography map for the land area encompassing Site 3 indicates that from some time before 1960 that the land upon which Site 3 is located is no longer classified as being a low-lying marshy area.

**ANSWER:** Complainant lacks sufficient knowledge thereof to form a belief as to the truth or falsity of the allegations in paragraph 5 and therefore denies said allegations. Further, the allegations purport to characterize a document which speaks for itself and is the best evidence of its content.

6. Sometime before 1960 "fill material" was placed upon Site 3.

**ANSWER:** Complainant lacks sufficient knowledge thereof to form a belief as to the truth or falsity of the allegations in paragraph 6 and therefore denies said allegations.

7. Johns Manville placed an assortment of Asbestos Containing Material ("ACM") upon Site 3 to form a base for its parking lot on Site 3.

**ANSWER:** Complainant denies each and every allegation contained in paragraph 7.

### **SECOND AFFIRMATIVE DEFENSE**

8. When JM ceased using Site 3 as a parking lot, it abandoned all of the ACM on Site 3, including but not limited to Transite pipe, it had deposited at Site 3.

**ANSWER:** Complainant denies each and every allegation contained in paragraph 8.

9. The ACM fill material that JM abandoned at Site 3 constitutes the ACM waste that the US EPA is requiring JM to remediate in the Administrative Order on Consent.

**ANSWER:** Complainant denies each and every allegation contained in paragraph 9.

**THIRD AFFIRMATIVE DEFENSE**

10. Site 3 is located on the South side of East Greenwood Street.

**ANSWER:** Complainant admits that Site 3 is located on the South side of East Greenwood Avenue.

11. East Greenwood Street was the main access road to JM's main facility located North of East Greenwood Street, all during the time period of the operation of JM's manufacturing facility in Waukegan.

**ANSWER:** Complainant admits that East Greenwood Avenue west of Pershing Road provided access to the JM manufacturing facility during the time of its operation but denies all remaining allegations contained in paragraph 11.

12. In the early 1970s when the Amstutz Expressway was constructed, JM's executives, management personnel, and other agents of JM drove by Site 3 on a daily basis and witnessed the road construction work being performed in the area.

**ANSWER:** Complainant lacks sufficient knowledge thereof to form a belief as to the truth or falsity of the allegations in paragraph 12 and therefore denies said allegations.

13. JM was aware of the presence of the ACM it had placed at Site 3.

**ANSWER:** Complainant admits that JM was aware of the presence of Transite® pipe in the vicinity of what is currently Site 3 when it used that material as curb "bumpers" in the parking lot area but denies the remaining allegations contained in paragraph 13.

14. JM was aware of the health risks posed by inhalation of asbestos fibers all during the time period when the road work was done in the 1970s.

**ANSWER:** Complainant admits that in the 1970s JM was aware of the existence of some studies linking inhalation of certain types of asbestos to health effects but denies that at that time JM was aware of the health risks currently known to be associated with inhalation of certain asbestos fibers. Complainant denies the remaining allegations contained in paragraph 14.

15. Despite the knowledge of the presence of ACM at Site 3 and the awareness of the health risks of asbestos fibers, JM failed to warn the Illinois Department of Transportation of the presence of ACM at Site 3 or the risks posed by the ACM at Site 3.

**ANSWER:** Paragraph 15 states a legal conclusion, for which no response is required. To the extent any response is required, Complainant denies each and every allegation contained in paragraph 15.

16. If any ACM were to be inadvertently disturbed during road construction work it, was done with the tacit knowledge, acquiescence, and culpability of JM.

**ANSWER:** Paragraph 16 states a legal conclusion, for which no response is required. To the extent any response is required, Complainant denies each and every allegation contained in paragraph 16.

**FOURTH AFFIRMATIVE DEFENSE**

17. JM placed all of the ACM at Site 3.

**ANSWER:** Complainant admits that JM placed Transite® pipe in the vicinity of what is currently Site 3 when it used that material as curb “bumpers” in the parking lot area but denies the remaining allegations contained in paragraph 17.

18. JM was aware of the presence and danger of the ACM at Site 3 from the time JM first placed it there and continually since then to the present.

**ANSWER:** Complainant admits that JM was aware of the presence of Transite® pipe in the vicinity of what is currently Site 3 when it used that material as curb “bumpers” in the parking lot area. Complainant further admits that in the 1970s JM was aware of the existence of some studies linking inhalation of certain types of asbestos to health effects but denies that at that time JM was aware of the health risks currently known to be associated with inhalation of certain asbestos fibers. Complainant denies the remaining allegations contained in paragraph 18.

19. As to JM, the “discovery” of the ACM at Site 3 relates back to the time JM placed the ACM on Site 3.

**ANSWER:** Paragraph 19 states a legal conclusion, for which no response is required. To the extent any response is required, Complainant denies each and every allegation contained in paragraph 19.

20. If the nature and extent of the ACM contamination at Site 3 was not discovered by “others” until after 1998, as JM asserts in its pleading, then that discovery date is of no legal significance or benefit to JM because JM knew all along that the ACM was at Site 3.

**ANSWER:** Paragraph 20 states a legal conclusion, for which no response is required. To the extent any response is required, Complainant denies each and every allegation contained in paragraph 20.

21. JM has been aware of the road work done in the vicinity of Site 3 since the early 1970s.

**ANSWER:** Complainant admits that JM was aware that road work was done in the early 1970s but denies that it knew the specifics of the road work or that IDOT buried ACM during the road work. Complainant denies any remaining allegations contained in paragraph 21.

22. JM has been aware of the presence of ACM at Site 3 since before the 1970s.

**ANSWER:** Complainant admits that before the 1970s JM was aware of the presence of Transite® pipe in the vicinity of what is currently Site 3. Complainant denies the remaining allegations contained in paragraph 22.

23. If the Department performed a tortious act by inadvertently burying some ACM, as alleged by JM, then the last tortious act would have occurred when the temporary road in the vicinity of Site 3 was removed.

**ANSWER:** Paragraph 23 states a legal conclusion, for which no response is required. To the extent any response is required, Complainant denies each and every allegation contained in paragraph 23.

24. The temporary road in the vicinity of Site 3 was removed prior to 1977.

**ANSWER:** Complainant lacks sufficient knowledge thereof to form a belief as to the truth or falsity of the allegations in paragraph 24.

25. JM's cause of action, if any, accrued prior to 1977.

**ANSWER:** Paragraph 25 states a legal conclusion, for which no response is required. To the extent any response is required, Complainant denies each and every allegation contained in paragraph 25.

26. In July of 2013, JM filed the present action before the Pollution Control Board.

**ANSWER:** Complainant admits the allegations contained in paragraph 26.

27. JM has been guilty of laches for over 36 years.

**ANSWER:** Paragraph 27 states a legal conclusion, for which no response is required. To the extent any response is required, Complainant denies each and every allegation contained in paragraph 27.

28. The Department is prejudiced by JM's laches in that the vast number of Department employees that were involved in the Amstutz Expressway and the work in the vicinity of

Site 3 are deceased or otherwise unavailable to aid the Department in defense of this matter.

**ANSWER:** Complainant lacks sufficient knowledge thereof to form a belief as to the truth or falsity of the allegation in paragraph 28 that “the vast number of Department employees that were involved in the Amstutz Expressway and the work in the vicinity of Site 3 or deceased or otherwise unavailable.” Further, paragraph 28 states a legal conclusion, for which no response is required. To the extent any response is required, Complainant denies each and every allegation contained in paragraph 28.

**FIFTH AFFIRMATIVE DEFENSE**

29. JM place [sic] all of the ACM at Site 3.

**ANSWER:** Complainant admits that JM placed Transite® pipe in the vicinity of what is currently Site 3 when it used that material as curb “bumpers” in the parking lot area but denies the remaining allegations contained in paragraph 29.

30. JM was aware of the presence and danger of the ACM at Site 3 from the time JM first placed it there and continually since then to the present.

**ANSWER:** Complainant admits that JM was aware of the presence of Transite® pipe in the vicinity of what is currently Site 3 when it used that material as curb “bumpers” in the parking lot area. Complainant further admits that in the 1970s JM was aware of the existence of some studies linking inhalation of certain types of asbestos to health effects but denies that at that time JM was aware of the health risks currently known to be

associated with inhalation of certain asbestos fibers. Complainant denies the remaining allegations contained in paragraph 30.

31. As to JM, the “discovery” of the ACM at Site 3 relates back to the time JM placed the ACM on Site 3.

**ANSWER:** Paragraph 31 states a legal conclusion, for which no response is required. To the extent any response is required, Complainant denies each and every allegation contained in paragraph 31.

32. If the nature and extent of the ACM contamination at Site 3 was not discovered by “others” until after 1998, as JM asserts in its pleading, then that discovery date is of no legal significance or benefit to JM because JM knew all along that the ACM was at Site 3.

**ANSWER:** Paragraph 32 states a legal conclusion, for which no response is required. To the extent any response is required, Complainant denies each and every allegation contained in paragraph 32.

33. JM has been aware of the road work done in the vicinity of Site 3 since the early 1970s.

**ANSWER:** Complainant admits that JM was aware that road work was done in the early 1970s but denies that it knew the specifics of the road work or that IDOT buried ACM during the road work. Complainant denies any remaining allegations contained in paragraph 33.

34. JM has been aware of the presence of ACM at Site 3 since before the 1970s.

**ANSWER:** Complainant admits that before the 1970s JMt was aware of the presence of Transite® pipe in the vicinity of what is currently Site 3. Complainant denies the remaining allegations contained in paragraph 34.

35. If the Department performed a tortious act by inadvertently burying some ACM, as alleged by JM, then the last tortious act would have occurred when the temporary road in the vicinity of Site 3 was removed.

**ANSWER:** Paragraph 35 states a legal conclusion, for which no response is required. To the extent any response is required, Complainant denies each and every allegation contained in paragraph 35.

36. The temporary road in the vicinity of Site 3 was removed prior to 1977.

**ANSWER:** Complainant lacks sufficient knowledge thereof to form a belief as to the truth or falsity of the allegations in paragraph 36.

37. JM's cause of action, if any, accrued prior to 1977.

**ANSWER:** Paragraph 37 states a legal conclusion, for which no response is required. To the extent any response is required, Complainant denies each and every allegation contained in paragraph 37.

38. JM's cause of action herein is barred by the five year statute of limitations found at 735 ILCS 5/13-205.

**ANSWER:** Paragraph 38 states a legal conclusion, for which no response is required. To the extent any response is required, Complainant denies each and every allegation contained in paragraph 38.

**SIXTH AFFIRMATIVE DEFENSE**

39. JM placed all of the ACM at Site 3.

**ANSWER:** Complainant admits that JM placed Transite® pipe in the vicinity of what is currently Site 3 when it used that material as curb “bumpers” in the parking lot area but denies the remaining allegations contained in paragraph 39.

40. JM was aware of the presence and danger of the ACM at Site 3 from the time JM first placed it there and continually since then to the present.

**ANSWER:** Complainant admits that JM was aware of the presence of Transite® pipe in the vicinity of what is currently Site 3 when it used that material as curb “bumpers” in the parking lot area. Complainant further admits that in the 1970s JM was aware of the existence of some studies linking inhalation of certain types of asbestos to health effects but denies that at that time JM was aware of the health risks currently known to be associated with inhalation of certain asbestos fibers. Complainant denies the remaining allegations contained in paragraph 40.

41. JM failed to warn the Department that JM had placed large amounts of ACM at Site 3.

**ANSWER:** Paragraph 41 states a legal conclusion, for which no response is required. To the extent any response is required, Complainant denies each and every allegation contained in paragraph 41.

42. If the Department performed a tortious act by inadvertently burying some ACM at Site 3, as alleged by JM, then that action would have a *de minimis* effect upon the already thoroughly contaminated site.

**ANSWER:** Paragraph 42 states a legal conclusion, for which no response is required. To the extent any response is required, Complainant denies each and every allegation contained in paragraph 42.

43. If all of the allegations of actions purportedly performed by the Department were found to be true, then the Department's actions have still not contributed to the condition of Site 3 which was already thoroughly contaminated by ACM.

**ANSWER:** Paragraph 43 states a legal conclusion, for which no response is required. To the extent any response is required, Complainant denies each and every allegation contained in paragraph 43.

**SEVENTH AFFIRMATIVE DEFENSE**

44. Six utility lines run through Site 3.

**ANSWER:** Complainant admits the allegations contained in paragraph 36.

45. Paragraph 30 of JM's Complaint before the Pollution Control Board indicates that the US EPA, as part of the remediation to Site 3 pursuant to the AOC, requires JM to remove all asbestos impacted soils to a depth of four (4) feet below the ground surface in the northeast portion of Site 3, and requires 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.

**ANSWER:** Complainant admits that Respondent purports to characterize a portion of Paragraph 30 of JM's Complaint, which speaks for itself and is the best evidence of its content.

46. Maintenance and construction of the utility lines requires excavation work on Site 3 within the parameters stated in the above paragraph 45.

**ANSWER:** Complainant admits that maintenance and construction of utility lines can require excavation but lacks sufficient knowledge thereof to form a belief as to the truth or falsity of the remaining allegations in paragraph 46 and therefore denies them.

47. The Department's alleged activities in the vicinity of Site 3 ceased sometime prior to the year 1977.

**ANSWER:** Complainant lacks sufficient knowledge thereof to form a belief as to the truth or falsity of the allegations in paragraph 47 and therefore denies them.

48. Since 1977 maintenance and construction work has been performed on the utility lines that run through Site.

**ANSWER:** Complainant lacks sufficient knowledge thereof to form a belief as to the truth or falsity of the allegations in paragraph 48 and therefore denies them.

49. The work performed on the utility lines that run through Site 3 from 1977 to the present has included excavation work that disturbed the plentiful supply of ACM that is present on Site 3 and which was placed on Site 3 by JM.

**ANSWER:** Complainant lacks sufficient knowledge thereof to form a belief as to the truth or falsity of the allegations in paragraph 49 and therefore denies them.

50. The contractors that performed utility line construction and/or maintenance within Site 3 are necessary parties in this action in that JM is alleging that excavation work performed at Site 3 has exacerbated the condition of Site 3 in that the contractors allegedly disturbed the ACM that JM placed in the parking lot at Site 3.

**ANSWER:** Paragraph 50 states a legal conclusion, for which no response is required. To the extent any response is required, Complainant lacks sufficient knowledge thereof to form a belief as to the truth or falsity of the allegations in paragraph 50 and therefore denies them.

51. JM has failed to join these contractors as necessary parties.

**ANSWER:** Paragraph 51 states a legal conclusion, for which no response is required.

**EIGHTH AFFIRMATIVE DEFENSE**

52. JM alleges in paragraph 23 of the complaint: "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."

**ANSWER:** Complainant admits that Respondent purports to characterize a portion of Paragraph 23 of JM's Complaint, which speaks for itself and is the best evidence of its content.

53. The physical construction work in the vicinity of Site 3 was performed by independent contractors rather than by employees of the Department.

**ANSWER:** Complainant denies the allegations in paragraph 53 to the extent it is aware that IDOT employees, including Mr. Duane Mapes, were involved in the work as set forth at Paragraph 24 of the Complaint ("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."). Complainant lacks sufficient knowledge thereof to form a belief as to the truth or falsity of the remaining allegations in paragraph 53 and therefore denies them.

54. JM's allegations in paragraph 23 of the complaint recognize that independent contractors performed the work in the vicinity of Site 3.

**ANSWER:** Complainant admits that Respondent purports to characterize a portion of Paragraph 23 of JM's Complaint, which speaks for itself and is the best evidence of its content.

55. The independent contractors who performed the construction work in the vicinity of the parking lot at Site 3 would be the entities that allegedly disturbed the ACM that JM placed in the parking lot at Site 3.

**ANSWER:** Complainant denies the allegations in paragraph 55 to the extent it is aware that IDOT employees, including Mr. Duane Mapes, were involved in the work as set forth at Paragraph 24 of the Complaint (“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.”). Complainant further denies the allegations in paragraph 55 to the extent that it is aware that, to the extent contractors were used, they were acting under the direction of the Department and following Department specifications. Complainant lacks sufficient knowledge thereof to form a belief as to the truth or falsity of the remaining allegations in paragraph 55 and therefore denies them.

56. JM has failed to join these contractors as necessary parties.

**ANSWER:** Paragraph 56 states a legal conclusion, for which no response is required.

#### **NINTH AFFIRMATIVE DEFENSE**

57. JM placed all of the ACM at Site 3.

**ANSWER:** Complainant admits that JM placed Transite® pipe in the vicinity of what is currently Site 3 when it used that material as curb “bumpers” in the parking lot area but denies the remaining allegations contained in paragraph 57.

58. JM was aware of the presence and danger of the ACM at Site 3 from the time JM first placed it there and continually since then to the present.

**ANSWER:** Complainant admits that JM was aware of the presence of Transite® pipe in the vicinity of what is currently Site 3 when it used that material as curb “bumpers” in the parking lot area. Complainant further admits that in the 1970s JM was aware of the existence of some studies linking inhalation of certain types of asbestos to health effects but denies that at that time JM was aware of the health risks currently known to be associated with inhalation of certain asbestos fibers. Complainant denies the remaining allegations contained in paragraph 58.

59. As to JM, the “discovery” of the ACM at Site 3 relates back to the time JM placed the ACM on Site 3.

**ANSWER:** Paragraph 59 states a legal conclusion, for which no response is required. To the extent any response is required, Complainant denies each and every allegation contained in paragraph 59.

60. If the nature and extent of the ACM contamination at Site 3 was not discovered by “others” until after 1998, as JM asserts in its pleading, then that discovery date is of no legal significance or benefit to JM because JM knew all along that the ACM was at Site 3.

**ANSWER:** Paragraph 60 states a legal conclusion, for which no response is required. To the extent any response is required, Complainant denies each and every allegation contained in paragraph 60.

61. Under Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), 42 U.S.C. Section 9607(a), only an innocent party may bring an action for cost recovery against another potentially responsible party.

**ANSWER:** Paragraph 61 states a legal conclusion, for which no response is required. To the extent any response is required, Complainant denies each and every allegation contained in paragraph 61.

62. JM is not an innocent party under Section 107 of CERCLA.

**ANSWER:** Paragraph 62 states a legal conclusion, for which no response is required. To the extent any response is required, Complainant denies each and every allegation contained in paragraph 62.

63. If there are two parties who both injured the property, then a contribution action by one responsible party against another responsible party must be undertaken pursuant to Section 113(f) of the Superfund Amendments and Reauthorization Act (“SARA”), 42 U.S.C. Section 9613(f).

**ANSWER:** Paragraph 63 states a legal conclusion, for which no response is required. To the extent any response is required, Complainant denies each and every allegation contained in paragraph 63.

64. Section 31(d) of the Illinois Environmental Protection Act (the “Act”), 415 ILCS 5/31(d) is analogous to Section 107 of CERCLA.

**ANSWER:** Paragraph 64 states a legal conclusion, for which no response is required. To the extent any response is required, Complainant denies each and every allegation contained in paragraph 64.

65. Because JM is not an “innocent party”, JM should not be allowed to recover anything against the Department under Section 31(d).

**ANSWER:** Paragraph 65 states a legal conclusion, for which no response is required. To the extent any response is required, Complainant denies each and every allegation contained in paragraph 65.

Dated: January 13, 2014

Respectfully submitted,

BRYAN CAVE LLP

Attorneys for Complainant Johns Manville

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**AFFIDAVIT OF KATHRINE HANNA**

I, Kathrine Hanna, upon oath, depose and state that I have read the allegations of Respondent's Affirmative Defenses, that I composed the answers to each of the allegations of Respondent's Affirmative Defenses, that those answers that state that I have no knowledge sufficient to form a belief as to the truth or falsity of said allegations constitute statements that are true in substance and in fact.

Date 1/13/14

Kathrine Hanna

Kathrine Hanna

County of Cook )

) ss

State of Illinois )

Sworn and subscribed to before me, a Notary Public registered with the State of Illinois, on this 13<sup>th</sup> day of January, 2014.

Date: \_\_\_\_\_

Shelley L Clifford

NOTARY PUBLIC

My commission expires on October 4, 2015

