BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
JOHNS MANVILLE, a Delaware Corporation,	)	
Complainant,	)	
v.	)	**No. 14-3**
ILLINOIS DEPARTMENT OF TRANSPORTATION,	)	
Respondent.	)	

NOTICE OF FILING

To: See Attached Service List

PLEASE TAKE NOTICE that on September 27, 2013, I caused to be filed with the Clerk of the Pollution Control Board of the State of Illinois, Respondent's Motion to Dismiss and accompanying Memorandum of Law with duplicate service upon all persons on the attached Service List. Service has been made via Email. If you want a "paper hardcopy" sent to you, it will be sent upon request.

Dated: September 27, 2013.

Respectfully submitted,

ILLINOIS DEPARTMENT OF TRANSPORTION,
Respondent,

By: Phillip McQuillan
Phillip McQuillan
Special Assistant Attorney General

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Illinois Pollution Control Board, No. 14-3

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v.	)	**No. 14-3**
ILLINOIS DEPARTMENT OF TRANSPORTATION,	)	
Respondent.	)	

RESPONDENT'S MOTION TO DISMISS

On behalf of Respondent, Illinois Department of Transportation, Lance T. Jones, Special Assistant Attorney General, and Phillip McQuillan, Special Assistant Attorney General, pursuant to Section 2-619.1 of the Code of Civil Procedure, 735 ILCS 5/2-619.1, and pursuant to the Rules of the Pollution Control Board, title 35 Ill. Adm. Code Section 101.100 et seq., submit Respondent's Motion to Dismiss, and states as follows:

1. Johns Manville should be barred, pursuant to the provisions of Section 31(d) of the Act, 415 ILCS 5/31(d), and pursuant to Section 2-619(a)(9) of the Code of Civil Procedure, 735 ILCS 5/2-619(a)(9), from proceeding on this duplicative action before the Board.

2. The complaint filed by Johns Manville should be dismissed pursuant to Section 2-615 of the Code of Civil Procedure, 735 ILCS 5/2-615, because it consists wholly of the conclusions of the pleader and the conclusions are not supported by specific pleaded facts; the complaint is substantially insufficient as a matter of law.

3. Attached hereto is Memorandum of Law in Support of Respondent's Motion to Dismiss which Respondent incorporates by reference as if fully set forth herein.

Wherefore, Respondent request that the complaint filed by Johns Manville be dismissed.

Respectfully submitted,

ILLINOIS DEPARTMENT OF TRANSPORTION,
Respondent,

By: Phillip McQuillan
Phillip McQuillan
Special Assistant Attorney General

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v.	)	
	)	
ILLINOIS DEPARTMENT OF TRANSPORTATION,	)	
	)	
Respondent.	)	

MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT'S MOTION TO DISMISS

Respondent, the Illinois Department of Transportation, by Lance T. Jones, Special Assistant Attorney General, and by Phillip McQuillan, Special Assistant Attorney General, pursuant to Section 2-619.1 of the Code of Civil Procedure, 735 ILCS 5/2-619.1, and pursuant to Rules of the Board, title 35 Ill.Adm.Code 101.100 et seq., presents Memorandum of Law in Support of Respondent's Motion to Dismiss.

STATEMENT OF FACTS

Complainant, Johns Manville ("JM"), a Delaware corporation, brought this action before the Illinois Pollution Control Board on its own motion pursuant to Section 31(d) of the Illinois Environmental Protection Act (the "Act"), 415 ILCS 5/31(d) (Complaint, par. 1).

A. The Site.

JM operated a manufacturing facility in Waukegan, Illinois on a tract of land it owned consisting of approximately 300 acres (Complaint, par. 6). Site 3 is a small portion of land on the south side of Greenwood Avenue. At all times relevant herein Site 3 was owned by Commonweath Edison ("ComEd"). 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 (Complaint, par. 18). 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 (Complaint, par. 19).

B. National Priorities List.

On September 8, 1983, the United States Environmental Protection Agency (the "US 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 contamination (Complaint, par. 7).

C. Federal and State Enforcement Action.

JM's complaint herein is silent regarding the State of Illinois' involvement in the federal CERCLA action. According to the *Federal Register*, Volume 69, No. 34, Friday, February 20, 2004, under Notices, appears the following:

> Under 42 U.S.C. 9622(d), notice is hereby given that on February 11, 2004, a proposed First Amended Consent Decree ("Amended Decree") in *United States and People of the State of Illinois, ex rel. Madigan v. Manville Sales Corporation,* Civil Action No. 88C 630, was lodged with the United States District Court for the Northern District of Illinois.
>
> In this action, the United States asserted claims under 42 U.S.C. 9606 and 9607 to require Manville Sales Corporation, now known as Johns Manville, to perform certain response actions and to reimburse response costs incurred by the United States in response to releases and threatened releases of hazardous substances at a facility known as the Johns Manville Waukegan Disposal Area in Waukegan, Illinois (the "Site"). **The State of Illinois intervened in the action [emphasis added]**, which was resolved in March of 1988 through entry of a Consent Decree (the "1988 Decree") that provided for Johns Manville to perform a remedial action that the United States Environmental Protection Agency ("EPA") selected in a Record of Decision dated June 30, 1987.
>
> During construction of the remedy required under the 1988 Decree, EPA issued two Explanations of Significant Differences approving changes to certain aspects of the remedy. The Amended Decree provides for implementation of these changes.

As stated in the *Federal* Register, JM entered into a Consent Decree in 1988 and was entering into a First Amended Consent Decree in 2004 regarding its former manufacturing facility in Waukegan, Illinois. The Respondent asks the Board to take judicial notice of the *Federal Register*, an official publication of the United States government and judicial notice of *United States and People of State of Illinois ex rel. Madigan v. Manville Sales Corporation,* in the United States District Court for the Northern District of Illinois, Eastern Division in Civil

Action No. 88 C 630, the record of which is maintained by the Judicial Branch of the United States government as a public court record. Court records are public information and available on the internet through the PACER system.

D. First Amended Consent Order.

On December 16, 2004, a First Amended Consent Decree was entered by the United States District Court—Northern District of Illinois, Eastern Division, Civil No. 88C 630, involving three parties: the United States, the State of Illinois, and Manville Sales Corporation, now known as Johns Manville. A copy of the cover page containing the caption of the action and the signature pages—pages 71 through 75 are attached hereto as Respondent's Exhibit A. Site 3 is specifically outlined within the First Amended Consent Decree as Exhibit 4 to First Amended Consent Decree. Exhibit 4 to the First Amended Consent Decree is attached hereto as Respondent's Exhibit B.

E. Administrative Order on Consent.

On June 11, 2007, Complainant JM entered into an Administrative Order on Consent ("AOC") with [US] EPA whereby JM agreed to conduct a "removal" action at four specific off-site areas—one of them is designated as "Site 3" (Complaint, par. 10). 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 (Complaint, par. 12).

F. Asbestos Contamination Off-Site.

JM ceased operations at its facility in approximately 1998. Also in 1988, asbestos containing material ("ACM") was discovered beyond the boundaries of the JM owned Site, on adjacent property owned by ComEd and by the City of Waukegan (Complaint, par. 9). In December 1998, ACM was discovered at the surface of the area currently designated as Site 3 (Complaint, par. 13). Subsequent subsurface investigations of Site 3 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. (Complaint, par. 14). Transite pipe, a non-friable form of ACM, is the predominant ACM found at Site 3 (Complaint, par. 15). The northwest portion of Site 3 contains miscellaneous fill material, some of which has been found to contain asbestos (Complaint, par. 16).

G. Road Construction.

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 (Complaint, par. 20). 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 (Complaint, par. 21). This detour was used as an expressway bypass until the ramp construction was completed in 1976 (Complaint, par, 22). 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 (Complaint, par. 23).

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 where the 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 infoemation." (Complaint, par. 24). 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 [emphasis added]** (Complaint, par. 25).

H. Remediation of Site 3.

The "Engineering Evaluation and Cost Analysis" ("EE/CA") Revision 4 approved by [US] EPA on February 12, 2012, for Site 3—Modified Alternative 2'—includes 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, and also 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 (Complaint, paragraphs 27-30). The Action Memorandum included further modifications that were not previously included in the February 1, 2012, EE/CA approval letter. 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 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 [US] EPA and provided 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 (Complaint, paragraphs 31-32).

ARGUMENT

I. JM should be barred, pursuant to 31(d) of the Act, 415 ILCS 5/31(d) and pursuant to Section 2-619(a)(9) of the Code of Civil Procedure, 735 ILCS 5/2-619(a)(9), from proceeding on this duplicative action before the Board.

Section 31(d) of the Act, 415 ILCS 5/31(d), states in pertinent part: " * * * Unless the Board determines that such complaint is duplicative or frivolous, it shall schedule a hearing and serve written notice thereof * * * ." It is clear from JM's complaint that the US EPA and the State of Illinois have been proceeding against JM pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C.A. Section 9601 et seq. JM's complaint makes it very clear that JM has been the subject of an enforcement action brought by the US EPA and Illinois. See paragraphs 7, 8, 10, 24, 25, 27 through 37, 55, and 56 of JM's complaint.

A. US District Court Action under CERCLA.

JM's complaint herein is silent regarding the State of Illinois' involvement in the federal CERCLA action. According to the *Federal Register*, Volume 69, No. 34, Friday, February 20, 2004, under Notices, appears the following:

> Under 42 U.S.C. 9622(d), notice is hereby given that on February 11, 2004, a proposed First Amended Consent Decree ("Amended Decree") in *United States and People of the State of Illinois, ex rel. Madigan v. Manville Sales Corporation,* Civil Action No. 88C 630, was lodged with the United States District Court for the Northern District of Illinois.
>
> In this action, the United States asserted claims under 42 U.S.C. 9606 and 9607 to require Manville Sales Corporation, now known as Johns Manville, to perform certain response actions and to reimburse response costs incurred by the United States in response to releases and threatened releases of hazardous substances at a facility known as the Johns Manville Waukegan Disposal Area in Waukegan, Illinois (the "Site"). **The State of Illinois intervened in the action [emphasis**

> **added]**, which was resolved in March of 1988 through entry of a Consent Decree (the "1988 Decree") that provided for Johns Manville to perform a remedial action that the United States Environmental Protection Agency ("EPA") selected in a Record of Decision dated June 30, 1987.
>
> During construction of the remedy required under the 1988 Decree, EPA issued two Explanations of Significant Differences approving changes to certain aspects of the remedy. The Amended Decree provides for implementation of these changes.
>
> * * *

As stated in the *Federal* Register, JM entered into a Consent Decree in 1988 and was entering into a First Amended Consent Decree in 2004 regarding its former manufacturing facility in Waukegan, Illinois. The State of Illinois was an intervening party. The Respondent asks the Board to take judicial notice of the *Federal Register*, an official publication of the United States government and judicial notice of *United States and People of State of Illinois ex rel. Madigan v. Manville Sales Corporation,* in the United States District Court for the Northern District of Illinois, Eastern Division in Civil Action No. 88 C 630, the record of which is maintained by the Judicial Branch of the United States government as a public court record. Court records are public information and available on the internet through the PACER system.

On December 16, 2004, a First Amended Consent Decree was entered by the United States District Court—Northern District of Illinois, Eastern Division, Civil No. 88C 630, involving three parties: the United States, the State of Illinois, and Manville Sales Corporation, now known as Johns Manville. A copy of the cover page containing the caption of the action and the signature pages—pages 71 through 75 are attached hereto as Respondent's Exhibit A. Site 3 is specifically outlined in Exhibit 4 to First Amended Consent Decree. Exhibit 4 to the First Amended Consent Decree is attached hereto as Respondent's Exhibit B.

The First Amended Consent Decree acknowledges and contemplates the likelihood of contribution claims on the part of Johns Manville in a section of the First Amended Consent Decree with a subheading: "XVII. Covenants by JM, Other Claims, Contribution Protection". This section is found on pages 63, 64, and 65 of the First Amended Consent Decree. These pages are attached hereto as Exhibit C.

Although JM says in paragraph 57 of the complaint before the Board the following: "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", the statement ignores what has taken place on the federal level and what is still taking place on the federal level. JM is a defendant in the federal lawsuit regarding the same manufacturing plant that created and used Site 3, the parking lot, which is the subject of the instant action before the Board. The State of Illinois is a party to the federal lawsuit regarding the same manufacturing plant that created and used Site 3, the parking lot, which is the subject of the instant action before the Board. The Illinois Department of Transportation is a department in the executive branch of state government (see, 20 ILCS 5/5-15). The Department does not have a legal identity separate and apart from the State of Illinois—it is not a separate body, corporate and politic. An agency of the State may not be a defendant in a circuit court action; state agencies are arms of the State itself. *Rockford Mem'l Hosp. v. Dep't of Human Rights*, 272 Ill. App. 3d 751, 756 (1995). JM has been in federal court with the State of Illinois regarding its manufacturing plant which is the source of the transite pipe that JM refers to in allegations before the Board. JM has made the same claims, as made here before the Board, to the US EPA and to Illinois.

B. Administrative Order on Consent under CERCLA.

Site 3 is the subject of Administrative Order on Consent, Region Five, US EPA No. V-W-07-870 between JM and ComEd and US EPA. Clearly the issues surrounding Site 3 are currently being dealt with in an administrative action brought by the US EPA. The complaint before the Board is duplicative of the CERCLA enforcement action being conducted by the US EPA and the State of Illinois. The federal Administrative Order on Consent is currently dealing with the remediation of Site 3—the same subject matter as the instant action filed with the Board. There is nothing in the First Amended Consent Decree that prevents JM from seeking contribution from others regarding matters involving alleged environmental violations commited by others on property defined as not being a "Manville Owned Site". Paragraph 67 of the First Amended Consent Decree states:

> The parties agree that the Facility defined herein is a "Manville Owned Site" within the meaning of paragraphs 27 and 41 of the Stipulation and Order of Dismissal and Settlement entered by the Court for the Southern District of New York (91 Civ. 6683 [RWS]) ("Global Settlement Order"). Nothing contained herein is intended to or shall be interpreted as waiving any rights that the parties may have under the Global Settlement Order with respect to areas outside of the boundaries of the facility. *See* Respondent's Exhibit C.

This further supports the Respondent's position that the Complaint filed by JM is duplicative.

C. Jurisdiction is still in the federal forum.

The record in the federal case leaves little doubt that JM was aware of the fact that asbestos contamination at Site 3 was an issue—that enforcement action would be taken for the remediation of Site 3. In December 1998, ACM was discovered at the surface if the area currently designated as Site 3 (Complaint, par. 13). Site 3 is specifically noted as "Exhibit 4 to the First Amended Consent Decree in United States et al. v. Manville Sales Corporation (N.D. Ill. Civ. Action No. 88C 630) See Respondent's Exhibit B attached hereto. JM has been aware of the road construction in the vicinity of Site 3 since the construction occurred in the 1970s. The road construction in the 1970s was open for all to see—part of it occurred on the road on the south side of the street across from the JM manufacturing facility. The federal court has retained jurisdiction over the subject matter of the First Amended Consent Decree. (See Respondent's Exhibit A, page 71, par. 81 of First Amended Consent Decree). Paragraph 81 states:

> This Court retains jurisdiction over the subject matter of the First Amended Consent Decree and over JM for the duration of the performance of the provisions of the Decree, for the purpose of enabling the parties to apply to the Court for such further Order, direction and relief as may be necessary for construction or modification of The Decree, to enforce compliance with its terms or to resolve disputes in Accordance with Section XII (Dispute Resolution).

The federal court has retained jurisdiction to deal with this matter. At the same time this matter is still before the US EPA in the form of the Administrative Order on Consent, Region Five, US EPA No. V-W-07-870 between JM and ComEd and US EPA.

There are at least three federal matters that have a direct bearing on Site 3: (1) the case, *United States and People of State of Illinois ex rel. Madigan v. Manville Sales Corporation,* in the United States District Court for the Northern District of Illinois, Eastern Division in Civil Action No. 88 C 630, (2) the federal action known as the "Global Settlement Order", specifically paragraphs 27 and 41 of the Stipulation and Order of Dismissal and Settlement entered by the Court for the Southern District of New York (91 Civ. 6683 [RWS[) ("Global Settlement Order"), and (3) Administrative Order on Consent ("AOC") with [US] EPA whereby JM agreed to conduct a "removal" action at four specific off-site areas—one of them is designated as "Site 3"—the same site at issue before the Board. (Complaint, par. 10). JM

should be barred from bringing this action in yet another forum—the Illinois Pollution Control Board.

What ultimately will happen in the remediation of Site 3 will take place and should take place in a federal forum. The law that should be applied is the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C.A. Section 9601 et seq. The State of Illinois has been a party to the federal action. If JM has a viable claim for contribution against the State of Illinois, it should be presented in a federal forum where matters involving Site 3 are presently located. If JM has a viable claim for contribution, it should be governed by the law under CERCLA—the law that has been applied to the JM matters surrounding the JM manufacturing facility in Waukegan, Illinois.

The US EPA considered whether the Department should be made a party in the federal action, and the US EPA determined that the Department would not be made a party. See Complaint, paragraph 25. If JM is not satisfied with the determination of the US EPA, the correct recourse is for JM to file a contribution claim in the district court in *United States and People of State of Illinois ex rel. Madigan v. Manville Sales Corporation,* in the United States District Court for the Northern District of Illinois, Eastern Division in Civil Action No. 88 C 630 and to proceed therein. JM has the option of filing a claim in federal district court under Section 107 of CERCLA, 42 U.S.C.A. 9607, or JM can file a claim for contribution against the State of Illinois under Section 113 of the Superfund Amendments and Reauthorization Act ("SARA"), 42 U.S.C.A. 9613.

II. JM's complaint should be dismissed pursuant to Section 2-615 because it is substantially insufficient in law.

JM makes the following allegations against the Department:

> 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. (Complaint, par. 20).
>
> 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. . (Complaint, par. 21).

The detour road was used as an expressway bypass until the ramp construction was completed in 1976. . (Complaint, par. 22).

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. . (Complaint, par. 23).

JM alleges IDOT has admitted to EPA that it dealt with asbestos pipe during the construction project. JM alleges 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." (Complaint, par. 24).

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.** (Complaint, par. 25).

A. The complaint contains conclusions of the pleader, but the conclusions are not supported with specific facts and are substantially insufficient as a matter of law.

The Department has not admitted burying any transite pipe at Site 3. Mr. Mapes, a retired IDOT employee did not admit that the Department buried any transite pipe at Site 3. JM is leaping to conclusions that the Department buried transite pipe at Site 3, but these conclusion are not supported with facts. JM has presented these facts to the US EPA. The US EPA has taken the position that there are insufficient facts to name the Department as a potentially responsible party because the Department has not admitted that it buried any ACM on or near Site 3. See Complaint, par. 25.

In *Beck v. Budget Rent-a-Car,* 283 Ill.App.3d 541, 669 N.E.2d 1335 (App. 1st Dist. 1996), the Court addressed the standard to apply in a motion to dismiss pursuant to Section 2-615 of the Code and stated:

> The question presented by a section 2-615 motion to dismiss a complaint for failure to state a cause of action is whether sufficient facts are stated in the complaint which, if established, could entitle the plaintiff to relief. *Illinois Graphics Co. v. Nickum,* 159 Ill.2d 469, 639 N.E.2d 1282 (1994). In ruling on such a motion, the court must take all well-pleaded facts in the complaint as true and draw reasonable inferences from those facts which are favorable to the pleader. *Ziemba v. Mierzwa,* 142 Ill.2d 42, 153 Ill.Dec. 259, 566 N.E.2d 1365 (1991). However, conclusions of law or fact contained within the challenged pleading will not be taken as true unless supported by specific factual allegations. *Ziemba,* 142 Ill.2d at 47, 153 Ill.Dec. 259, 566 N.E.2d 1365. Id., 669 N.2d at 1337.

The Department has not admitted burying any transite pipe at Site 3. Mr. Mapes, a retired IDOT employee did not admit that the Department buried any transite pipe at Site 3. Site 3 is specifically noted as "Exhibit 4 to the First Amended Consent Decree in United States et al. v. Manville Sales Corporation (N.D. Ill. Civ. Action No. 88C 630) See Respondent's Exhibit B attached hereto. Please note that Site 3 is not the only off-site location where ACM has been discovered. The Department did not build a temporary road over Sites 1, 2, 4, 5, 6, or 7, yet they contain ACM.

Six utility lines run through Site 3. (Complaint, par. 17). The complaint also alleges that the US EPA wants JM and ComEd to remediate Site 3 by doing the following:

a. Excavate soil in the northeast portion of 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 [to] 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; (Complaint, par. 35. b).

There are inferences that can reasonably be drawn from paragraphs 17 and 35 of the complaint—there are 6 utility lines that run through Site 3 and the utility lines are **underground**

utility lines. What else could explain the remediation request by the US EPA as to the utility lines going through Site 3? Underground utility lines during replacement and/or repair require digging and backfilling. It would be more likely to conclude that the transite pipe that has been buried at Site 3 was buried when the utility companies did digging and backfilling. If the complaint is taken as a whole, then the conclusion that the Department is responsible for buried transite ACM at Site 3 is a conclusion wholly of the pleader, not supported with specific facts, and insufficient in law.

B. The lawful activity of building a roadway does not constitute open dumping.

JM alleges that the Department built a temporary road across Site 3 and then later removed it. From this, JM goes on to conclude that the Department committed the act of "open dumping" of transite pipe at Site 3. One might wonder who committed open dumping of ACM at Sites 1, 2, 4, 5, 6, and 7. The federal enforcement action names JM. See Respondent's Exhibit B for the locations of these other Sites.

This matter against the Department has been incorrectly characterized in JM's complaint before the Board as "open dumping". 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:
>
> * * *
>
> (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.

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."

JM has failed to allege that the Department possessed transite pipe, brought it from off-site, or deposited transite pipe at Site 3. Just because the transite pipe was present in an aerial photograph in the 1950s (Complaint, paragraph 19), does not mean that the transite pipe "parking bumpers" were intact and visibly identifiable on the surface of Site 3 in the early 1970s when the road construction work was done. The allegations against the Department essentially

say that the Department caused a temporary road to be built in the area of Site 3 in the early to mid-1970s and then removed the temporary road. The Department did not cause or allow the dumping of waste. The Department did not "treat, store or abandon transite pipe" or other ACM at Site 3. Building a temporary road in the vicinity of Site 3 does not constitute open dumping. Neither the intended road work nor any actual roadwork was for the purpose of the "open dumping" of transite pipe or other ACM. Based on the long history of the JM facility and JM's dumping of ACM on its own property and on adjacent property not owned by JM (See Sites 1, 2, 4, 5, 6, and 7 depicted in Respondent's Exhibit B)—JM's allegations against the Department wholly consist of conclusions of the pleader and are not based upon specific facts. The complaint should be dismissed because it is substantially insufficient as a matter of law.

CONCLUSION

JM's complaint before the Board is duplicative of the CERCLA enforcement action being conducted by the US EPA and the State and should be dismissed. JM's complaint should be dismissed because it consists wholly of the conclusions of the pleader and the conclusions are not supported by specific facts. The complaint should be dismissed as being substantially insufficient as a matter of law.

Respectfully submitted,

ILLINOIS DEPARTMENT OF TRANSPORTION,
Respondent,

By: Phillip McQuillan
Phillip McQuillan
Special Assistant Attorney General

Phillip McQuillan, #3122873
Special Assistant Attorney General
Illinois Department of Transportation
Office of Chief Counsel
2300 South Dirksen Parkway, Room 313
Springfield, IL 62764
Phone: 217-782-3215
Fax: 217-524-0823
E-mail: Phillip.McQuillan@illinois.gov

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, and PEOPLE OF THE STATE OF ILLINOIS, ex rel. LISA MADIGAN, Attorney General of the State of Illinois, Plaintiff-Intervenor -v- MANVILLE SALES CORPORATION (now known as Johns Manville) Defendant.	CIV. ACTION NO. 88C 630

FIRST AMENDED CONSENT DECREE

Date Lodged with Court: 2/11/04

Date Entered by Court: 12/16/04

XXXVII. RETENTION OF JURISDICTION/ FINAL JUDGMENT

81. This Court retains jurisdiction over the subject matter of the First Amended Consent Decree and over JM for the duration of performance of the provisions of the Decree, for the purpose of enabling any of the Parties to apply to the Court for such further order, direction and relief as may be necessary for construction or modification of the Decree, to enforce compliance with its terms or to resolve disputes in accordance with Section XII (Dispute Resolution).

82. This First Amended Consent Decree and its exhibits constitute the final, complete, and exclusive agreement and understanding among the parties with respect to the settlement embodied in the First Amended Consent Decree. The parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this First Amended Consent Decree.

83. Upon approval and entry by the Court, this First Amended Consent Decree shall constitute a final judgment between and among the United States, the State and JM. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

DEC 0 1 2004

SO ORDERED THIS __ DAY OF _____, 20__.

United States District Judge

The undersigned parties enter into this First Amended Consent Decree in the matter of United States et al. v. Manville Sales Corporation (now known as Johns Manville), Civil Action No. 88C 630, N.D. Illinois, Eastern Division

FOR THE UNITED STATES OF AMERICA

Date: 2.2.04

Tom Sansonetti

THOMAS L. SANSONETTI
Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice

Date: 2.4.04

Miriam L. Chesslin by STW

MIRIAM L. CHESSLIN
Trial Attorney
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
Post Office Box 7611
Washington, DC 20044
(202) 514-1491

PATRICK FITZGERALD
United States Attorney for the
Northern District of Illinois

Date: _____

_____

LINDA WAWZENSKI
Assistant U.S. Attorney
219 S. Dearborn Street
Chicago, IL 60604
(312) 353-1994

The undersigned parties enter into this First Amended Consent Decree in the matter of United States et al. v. Manville Sales Corporation (now known as Johns Manville), Civil Action No. 88C 630, N.D. Illinois, Eastern Division

Date: 1.12.04

THOMAS V. SKINNER
Regional Administrator
U.S. Environmental Protection
Agency, Region 5

Date: 1-5-04

JANET R. CARLSON
Associate Regional Counsel
U.S. Environmental Protection
Agency, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604
(312) 886-6059

The undersigned parties enter into this First Amended Consent Decree in the matter of United States et al. v. Manville Sales Corporation (now known as Johns Manville), Civil Action No. 88C 630, N.D. Illinois, Eastern Division

FOR THE STATE OF ILLINOIS

LISA MADIGAN
Attorney General
State of Illinois

MATTHEW J. DUNN
Chief, Environmental Enforcement/
Asbestos Litigation Division

Date: 12/2/03

BY: _____
ROSEMARIE CAZEAU
Chief, Environmental Bureau
Assistant Attorney General
188 West Randolph St
20th Floor
Chicago, IL 60601
(312) 814-3094

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

Date: 11/25/03

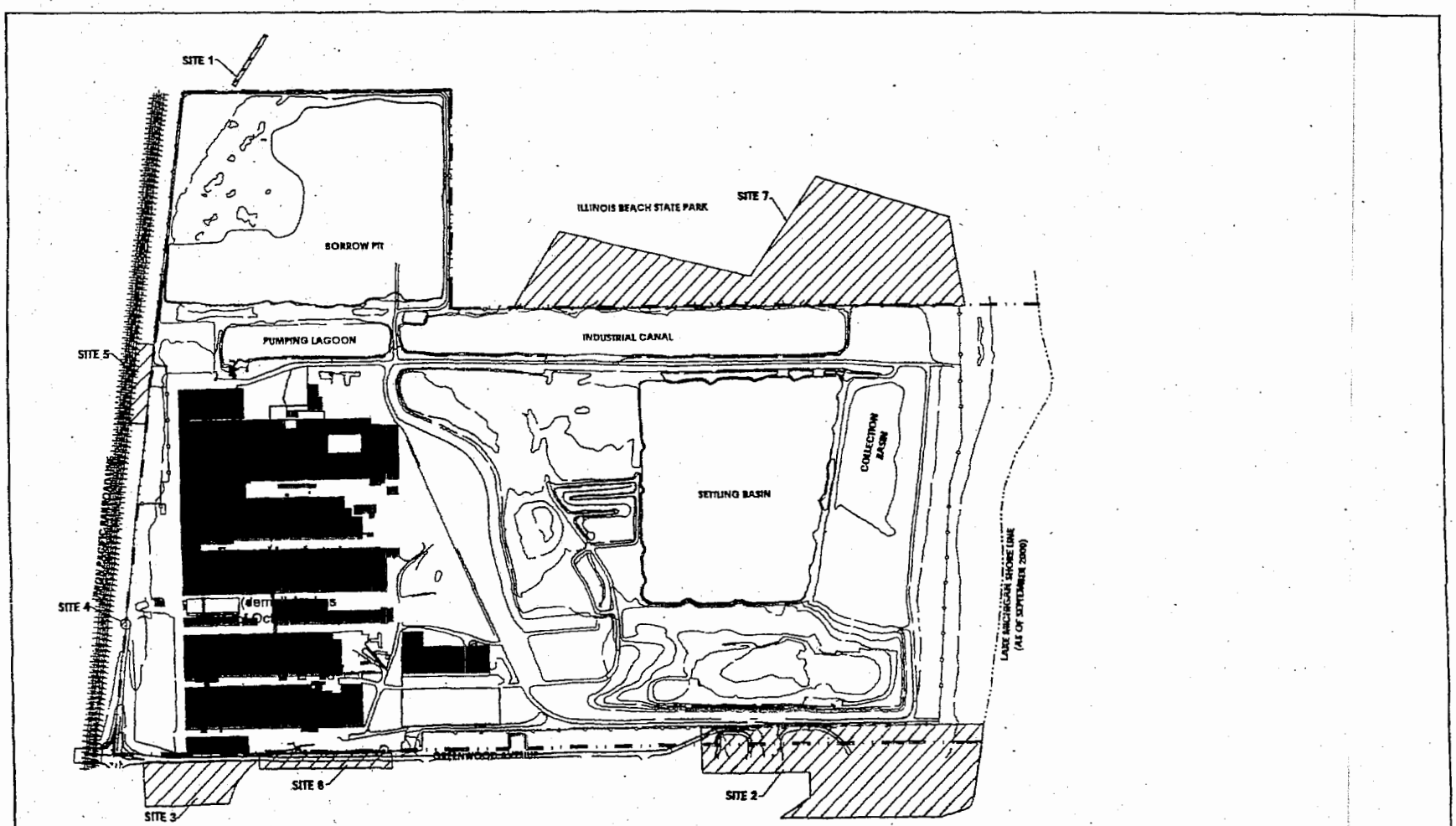
BY: _____
JOSEPH E. SVOBODA
Chief Counsel
Division of Legal Counsel
1021 Grand Avenue East
Springfield, Illinois 62794-9276
(217) 782-5544

The undersigned parties enter into this First Amended Consent Decree in the matter of United States et al. v. Manville Sales Corporation (now known as Johns Manville), Civil Action No. 88C 630, N.D. Illinois, Eastern Division

FOR JOHNS MANVILLE

12/17/03
Date

BRUCE D. RAY
Associate General Counsel
717 17th Street (80202)
P.O. Box 5108
Denver, Colorado 80217
(303) 978-3527



JOHNS MANVILLE
Waukegan, Illinois

SITES 1, 2, 3, 4, 5, 6 and 7

Exhibit 4 to First Amended Consent Decree in United States et al. v. Manville Sales Corporation (N.D. Ill. Civ. Action No. 88C 630)

Respondent's Exhibit B

not to sue regarding any claim or cause of action against any person corporation or other entity not a signatory to this Decree for any liability it may have arising out of or relating to the JM Waukegan Facility. The United States and the State expressly reserve the right in their unreviewable discretion to sue any person other than JM in connection with the Facility.

XVII. COVENANTS BY JM, OTHER CLAIMS, CONTRIBUTION PROTECTION

63. JM agrees to indemnify, save and hold harmless the United States, the State and/or their representatives from any and all claims or causes of action arising from acts or omissions of JM and/or its representatives in carrying out the activities pursuant to this First Amended Consent Decree, except for such claims or causes of action arising from acts or omissions of the United States, and the State, their employees, agents, and assigns. The United States and the State shall notify JM of any such claims or actions within 60 working days of receiving notice that such a claim or action is anticipated or has been filed. The United States and the State agree not to act with respect to any such claim or action without first providing JM an opportunity to participate.

64. The United States and the State are not to be construed as parties to, and do not assume any liability for, any contract entered into by JM in carrying out the activities pursuant to this First Amended Consent Decree. The proper completion of the Work under this First Amended Consent Decree is solely the responsibility of JM.

65. JM hereby covenants not to sue and agrees not to assert any claims or causes of action against the United States or the State with respect to the Facility or this First Amended Consent Decree, including, but not limited to:

(a) any direct or indirect claim for reimbursement from the Hazardous Substance

Superfund (established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507) through CERCLA Sections 106(b)(2), 107, 111, 112, 113 or any other provision of law;

(b) any claims against the United States and/or the State under CERCLA Sections 107 or 113, 42 U.S.C. §§ 9607 or 9613; or

(c) any claim arising out of response actions or in connection with the Facility, including any claim under the United States Constitution, the State Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law.

66. U.S. EPA agrees that upon entry of the Original Consent Decree, the June 14, 1984 Administrative Order by Consent described in the Preamble (B above), has been completed by JM to U.S. EPA's satisfaction and has been terminated. On September 1, 1987, U.S. EPA entered an Administrative Order against JM requiring JM to implement the ROD at the Facility. U.S. EPA agrees that upon entry of the Original Consent Decree, the September 1, 1987 Administrative Order was withdrawn and is of no further force or effect.

67. The parties agree that the Facility defined herein is a "Manville Owned Site" within the meaning of paragraphs 27 and 41 of the Stipulation and Order of Dismissal and Settlement entered by the Court on October 28, 1994 in Manville Corp. et al. v. United States of America, United States District Court for the Southern District of New York (91 Civ. 6683 [RWS]) ("Global Settlement Order"). Nothing contained herein is intended to or shall be interpreted as waiving any rights that the parties may have under the Global Settlement Order with respect to areas outside of the boundaries of the Facility.

68. In any subsequent administrative or judicial proceeding initiated by the United

States or the State for injunctive relief, recovery of response costs, or other appropriate relief relating to the Facility, JM shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States or the State in the subsequent proceeding were or should have been brought in the instant case.

69. The Parties agree, and by entering this First Amended Consent Decree this Court finds, that JM is entitled, as its effective date, to protection from contribution actions or claims as provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2) for matters addressed in this First Amended Consent Decree. Matters addressed include the Work set forth in Section V and the response costs pursuant to Section XIV.

XVIII. NOTICES

70. Whenever, under the terms of this First Amended Consent Decree, notice is required to be given by one party to another, or service of any papers or process is necessitated by the dispute resolution provisions of Section XII hereof, such correspondence shall be directed to the following individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing:

As to the United States:

Chief, Environmental Enforcement Section
Environmental Enforcement Section
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044-7611
DJ# 90-11-1-7B

Illinois Pollution Control Board, No. 14-3

CERTIFICATE OF SERVICE

I, Phillip McQuillan, herein certify that I have served a copy of the foregoing, Motion to Dismiss and Memorandum of Law, upon:

Susan Brice
Attorney at Law
Bryan Cave LLP
161 North Clark St., Suite 4300
Chicago, IL 60601
susan.brice@bryancave.com

Illinois Pollution Control Board
Brad Halloran, Hearing Officer
James R. Thompson Center
100 W. Randolph, Suite 11-500
Chicago, IL 60601
Brad.Halloran@illinois.gov

Kathrine Hanna
Attorney at Law
Bryan Cave LLP
161 North Clark St., Suite 4300
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Illinois Pollution Control Board
John Therriault, Clerk of the Board
James R. Thompson Center
100 W. Randolph, Suite 11-500
Chicago, IL 60601
John.Therriault@illinois.gov

by sending the documents via Email to all persons listed on the service list addressed to each person's email address on September 27, 2013. If you require a "paper hardcopy" sent to you, it will be sent upon request.

By: Phillip McQuillan
Phillip McQuillan
Special Assistant Attorney General

Phillip McQuillan, #3122873
Illinois Department of Transportation
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2300 South Dirksen Parkway, Room 313
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