

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

**In the Matter Of:** )  
 )  
**JOHNS MANVILLE, a Delaware** )  
**corporation,** )  
 )  
                                  **JM,** )          **PCB No. 14-3**  
 )  
                                  **v.** )  
 )  
**ILLINOIS DEPARTMENT OF** )  
**TRANSPORTATION,** )  
 )  
                                  **Respondent.** )

**NOTICE OF FILING**

To: See Attached Service List

PLEASE TAKE NOTICE that on August 30, 2016, I caused to be filed with the Clerk of the Pollution Control Board of the State of Illinois, *Complainant's Response to Respondent's Motion to Toll Briefing*, 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: August 30, 2016

Respectfully submitted,

BRYAN CAVE LLP

Attorneys for Johns Manville

By: /s/ Lauren J. Caisman  
Susan Brice, ARDC No. 6228903  
Lauren J. Caisman, ARDC No. 6312465  
161 North Clark Street, Suite 4300  
Chicago, Illinois 60601  
(312) 602-5079  
Email: lauren.caisman@bryancave.com

**SERVICE LIST**

Evan J. McGinley  
Office of the Illinois Attorney General  
69 West Washington Street, Suite 1800  
Chicago, IL 60602  
E-mail: emcginley@atg.state.il.us

Matthew D. Dougherty  
Assistant Chief Counsel  
Illinois Department of Transportation  
Office of the Chief Counsel, Room 313  
2300 South Dirksen Parkway  
Springfield, IL 62764  
E-mail: Matthew.Dougherty@illinois.gov

Ellen O'Laughlin  
Office of Illinois Attorney General  
69 West Washington Street, Suite 1800  
Chicago, IL 60602  
E-mail: eolaughlin@atg.state.il.us

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

Illinois Pollution Control Board  
John Therriault, Clerk of the Board  
James R. Thompson Center  
100 W. Randolph, Suite 11-500  
Chicago, IL 60601  
E-mail: John.Therriault@illinois.gov

**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>	)	

**COMPLAINANT’S RESPONSE TO RESPONDENT’S MOTION TO TOLL BRIEFING**

Complainant JOHNS MANVILLE (“JM”) hereby responds to Respondent ILLINOIS DEPARTMENT OF TRANSPORTATION’S (“IDOT”) Motion to Toll Briefing (“Motion”) as follows:

1. Notably, nowhere in its Motion does IDOT argue that JM’s proposed Third Amended Complaint does not conform to the proofs introduced at trial.

2. IDOT’s Motion fails to set forth any reason why post-hearing briefing in this matter should be tolled. Rather, after having an opportunity to review and analyze JM’s Post-Hearing Brief for *almost two weeks*, IDOT now essentially seeks an extension of time to respond despite that it was well aware of the issues raised in JM’s Second Amended Complaint, in JM’s Post-Hearing Brief, in JM’s proposed Third Amended Complaint, and by the testimony elicited and exhibits admitted into evidence during five full days of hearing in this matter.

3. Yet, IDOT now claims that it should not be required to file its own Post-Hearing Brief until the Board issues an order on JM’s Motion for Leave to File Third Amended Complaint so that IDOT can have “a full and complete understanding of the issues which it must

be prepared to address in its post-hearing brief.” (Motion, ¶ 5.) Such an assertion is belied by not only the fact that these issues were fully vetted at hearing, but also by IDOT’s own words. IDOT now wants the Hearing Officer and the Board to forget about what it said in response to JM’s Motion to Strike and what IDOT said in response to JM’s mid-hearing Objections to IDOT’s Expert Testimony because those statements contradict a position it wants to take now. IDOT cannot have it both ways.

4. IDOT had ample notice that JM intended to allege that IDOT violated the Environmental Protection Act as it existed when IDOT’s violations first occurred. IDOT first raised the historical violations issue in its Affirmative Defenses to JM’s Second Amended Complaint, which were filed on April 12, 2016. JM Filed a Motion to Strike. In response, IDOT stated that that it would be “fair” and “equitable” for the Board to view JM’s Second Amended Complaint “as conforming to the evidence to be presented and incorporating allegations that in the alternative IDOT violated the prior versions of the Act and Board regulations” without JM formally amending its Complaint as it seeks to do now. (See IDOT’s Response to JM’s Motion for Leave to File a Reply in Support of Its Partial Motion to Strike IDOT’s Affirmative Defenses, filed on May 10, 2016, p. 2.) IDOT is now reversing course.

5. The same holds true with respect to the issues regarding the north side of Site 6. JM’s Second Amended Complaint *did* encompass allegations concerning, and put at issue, IDOT’s violations of the Act as to Site 3, and as to the north and south sides of Site 6 (see ¶¶ 14, 17, 18, 23, 32, 33, 56, 67, 68, 71, 73). In its Motion to Conform, JM merely seeks to make more specific allegations regarding the north side of Site 6 that were litigated at trial. In fact, it was IDOT, not JM, which pressed the issue at hearing. On May 18, 2016, IDOT produced a “demonstrative” exhibit created by its expert, Mr. Steven Gobelman. (See Trial Exhibits 90 or

164.) At hearing, Mr. Gobelman used an updated version of the Exhibit, Exhibit 202. Exhibits 90/164 and Exhibit 202 plainly identify ACM detected within an IDOT right of way on the north side of Site 6. Because these documents were not produced until well after discovery was closed, JM could not take Mr. Gobelman's deposition and did not know what he was going to say about the document. Mr. Gobelman then testified that ACM material "also exists on the north side of Greenwood Avenue," that "there were pieces of Transite pipe on the north end of Site 3 *and also on the north and south end of Site 6,*" and that Mr. Gobelman's demonstrative actually "added some locations to the eastern end of Site 6 and along the northern right-of-way of Site 6" where asbestos was located. (Transcript of May 25, pp. 177:19-179:3; Transcript of June 23, pp. 170:7-24 (emphasis added); Transcript of June 24, pp. 197:13-199:7; *see also* Transcript of June 23, p. 217:9-20; Transcript of June 24, pp. 201:21-202:22; 203:18-24; 207:16-208:4.) When JM called into question whether IDOT had discussed these specific opinions in Mr. Gobelman's Expert Report, IDOT vigorously denied it. IDOT stated that Mr. Gobelman's opinions concerning Exhibit 202, which addressed both the north and south side of Site 6, are "not new" and that "contrary to JM's arguments, it is not a 'new opinion' that IDOT did not place fill material on Site 6 or in the embankment area that contains asbestos containing material." (Response to JM's Brief in Support of its Objections to Expert Testimony, filed June 14, 2016, pp. 3-4.) The Hearing Officer ultimately found that Mr. Gobelman could "flesh[] out" his original opinions and statements and afforded Mr. Gobelman room to "elaborate on disclosed opinions." (June 21, 2016 Hearing Officer Order, p. 4.) Thus, IDOT cannot now reverse course and argue that it is unable to brief an argument that it claims was addressed by its own expert in his Expert Report, in his demonstrative exhibits and in testimony at trial, and that the Hearing Officer allowed into evidence at IDOT's request.

6. It should be noted that JM did not believe amending the Complaint was necessary given the time constraints that existed when these new issues came to light. The Board ruled on the Motion to Strike on May 19, 2016, four days before hearing and the demonstrative Exhibit 90/164 was only produced one week before hearing. As the Board is well aware, the hearing was delayed numerous times over JM's objections. Another delay was not warranted given that IDOT had conceded that it would be "fair" and "equitable" for the Board to view JM's Second Amended Complaint "as conforming to the evidence to be presented and incorporating allegations that in the alternative IDOT violated the prior versions of the Act and Board regulations" and since JM was not certain what Mr. Gobelman was say about Exhibit 90/164.

7. Based on the foregoing, IDOT cannot reasonably claim that it needs more time or a Board order to address such allegations in a post-hearing brief. IDOT was well aware of these issues before hearing and introduced evidence on these issues at hearing. Indeed, if anyone were to be prejudiced by not allowing the Motion to Conform and by tolling the briefing schedule, it would be JM.

8. JM moved for leave to conform the pleadings to the proofs at the earliest opportunity. Unquestionably, this could only be done once the proofs were submitted. JM was able to submit its Post-Hearing Brief, which addressed all of the issues raised at trial and in JM's proposed Third Amended Complaint without a ruling on JM's Motion for Leave to File Third Amended Complaint. IDOT is capable of doing the same and presents no basis for holding otherwise.

### **CONCLUSION**

WHEREFORE, Complainant JOHNS MANVILLE respectfully requests that the Board deny IDOT's Motion to Toll Briefing.

Dated: August 30, 2016

Respectfully submitted,

BRYAN CAVE LLP

Attorneys for Complainant Johns Manville

By:       /s/ Lauren J. Caisman  
Susan Brice, ARDC No. 6228903  
Lauren J. Caisman, ARDC No. 6312465  
161 North Clark Street, Suite 4300  
Chicago, Illinois 60601  
(312) 602-5079  
Email: lauren.caisman@bryancave.com