**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

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

**NOTICE OF FILING AND SERVICE**

To: ALL PERSONS ON THE ATTACHED CERTIFICATE OF SERVICE

Please take note that today, September 28, 2021, I have filed with the Clerk of the Pollution Control Board Illinois Department of Transportation's Brief Following the October 2020 Hearing, and have served each person listed on the attached service list with a copy of the same.

Respectfully Submitted,

By: s/ *Ellen F. O'Laughlin*

ELLEN F. O'LAUGHLIN
CHRISTOPHER J. GRANT
Assistant Attorneys General
Environmental Bureau
69 W. Washington, 18th Floor
Chicago, Illinois 60602
(312) 814-3153
ellen.olaughlin@ilag.gov
maria.cacaccio@ilag.gov

MATTHEW J. DOUGHERTY
Assistant Chief Counsel
Illinois Department of Transportation
Office of the Chief Counsel, Room 313
2300 South Dirksen Parkway
Springfield, Illinois 62764
(217) 785-7524
matthew.dougherty@Illinois.gov

**CERTIFICATE OF SERVICE**

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

I, ELLEN F. O'LAUGHLIN, do hereby certify that, today, September 28, 2021, caused to be served on the individuals listed below, by electronic mail, a true and correct copy of Illinois Department of Transportation's Brief Following the October 2020 Hearing on each of the parties listed below:

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

Don Brown
Clerk of the Pollution Control Board
James R. Thompson Center
100 West Randolph, Suite 11-500
Chicago, Illinois 60601
Don.Brown@illinois.gov

Susan Brice
Kristen L. Gale
NIJMAN FRANZETTI LLP
10 South LaSalle street, Suite 3600
Chicago, Illinois 60603
sb@nijmanfranzetti.com
kg@nijmanfranzetti.com

s/ *Ellen F. O'Laughlin*
Ellen F. O'Laughlin

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

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

**ILLINOIS DEPARTMENT OF TRANSPORTATION'S BRIEF FOLLOWING THE OCTOBER 2020 HEARING**

## I. INTRODUCTION

Johns Manville ("JM") came to the Illinois Pollution Control Board ("Board") to seek money from the Illinois Department of Transportation ("IDOT") for JM's remediation costs near its former manufacturing facility in Waukegan, Illinois.

IDOT is an Illinois agency and has statutory responsibility for the planning, construction, operation and maintenance of Illinois' extensive transportation network, which encompasses highways and bridges, airports, public transit, rail freight and rail passenger systems. 20 ILCS 2705 /2705 *et seq*. Among other things, IDOT builds and maintains thousands of miles of roads throughout the State of Illinois.

Since 1920, JM has occupied an approximately 353 acre property in Waukegan, Illinois where JM constructed a manufacturing facility in the 1920s. JM manufactured a large amount of construction related asbestos containing products at the facility from the 1920s until 1985. *Exh. 66-14, AECOM, Removal Action Work Plan*. Extensive asbestos containing material (ACM) contamination has been found throughout the area surrounding the JM manufacturing facility since 1985. *Id.*

In conducting its business, JM manufactured and then sold asbestos containing products for decades on a large scale. JM directly caused asbestos contamination throughout a wide expanse of the area near the manufacturing facility. This fact cannot be overlooked by the Board. JM alone created the situation that polluted and caused ACM contamination throughout the entire area at issue.

Due to the extensive contamination, the area south and west of JM's manufacturing facility was named a superfund site, and the United States Environmental Protection Agency ("USEPA") entered into an Administrative Order on Consent with JM and Commonwealth Edison in 2007. *Exh. 62, Administrative Order on Consent.* The USEPA then issued an Enforcement Action Memorandum because it determined investigation and remediation were needed to protect the public health, welfare or the environment. *Exh. 65, USEPA Enforcement Action Memorandum*.

The USEPA had authority to require all potentially responsible parties to contribute to the necessary remediation. JM wanted the USEPA to include IDOT in the Administrative Order on Consent and make IDOT a responsible party. The USEPA declined to do so after it had made information requests and evaluated whether IDOT had any role in contaminating the area. Although it could have done so, JM did not file an action for contribution under CERCLA, the Comprehensive Environmental Response and Liability Act. Instead, JM took the extraordinary step of coming to the Board under the citizen suit provision of the Illinois Environmental Protection Act to attempt to get money from IDOT and the State of Illinois taxpayers to pay for the remediation of JM's asbestos contamination. Undoubtedly, JM has the ability to pay for the cleanup costs itself, and has done so, but it now wishes to avoid and shift its corporate responsibility to IDOT and Illinois taxpayers pay for its pollution.

IDOT did not bring any ACM to the area. It only conducted nearby road building activities for a short time, which IDOT has done for literally tens of thousands of miles of roadway in the State of Illinois. It is unconscionable to think that Illinois taxpayers should be forever entirely financially liable for every contaminated square inch on or near any piece of land that may once have been close in proximity to a six or twelve month long IDOT roadway project decades in the past. If the Illinois state legislature had wanted to open IDOT to liability for environmental contamination caused by another person while IDOT conducted its road building activities, then such an explicit law should have been enacted by the state legislature. The impact of the Board holding IDOT liable for JM's dumping and mishandling of ACM in the area where IDOT built its roadway would mean overwhelming liability to IDOT and Illinois taxpayers due to the enormous breadth and reach of IDOT's jurisdiction over highways and projects.

JM alleged and the Board found that that IDOT violated the Illinois Environmental Protection Act by open dumping when building an embankment for Greenwood Avenue, and by virtue of an easement for highway purposes only. In the December 15, 2016, Interim Opinion and Order of the Board ("*Interim Order*"), the Board found that IDOT violated the Illinois Environmental Protection Act ("Act"). It did not award a money judgment, nor order IDOT to take part in cleanup activities as JM initially requested. The Board simply and unambiguously ordered further evidence to determine "(t)he share of JM's costs attributable to IDOT". (*Interim Order*, p. 22).

As discussed in this brief, the Board should deny JM's request for a judgment against IDOT, and should not order IDOT to reimburse JM for its cleanup costs. For the reasons explained below, case law and other evidence demonstrates that the Board lacks the authority to order IDOT to pay JM for its cleanup costs. Consequently, the Board should find that JM is not entitled to any

reimbursement and that IDOT cannot be ordered to pay an adversarial party under the provisions of the Illinois Environmental Protection Act.

In the alternative, if the Board finds that it does have such authority under State law, and the Board orders what is "appropriate under the circumstances" *415 ILCS 5/33(a)*, then the Board should find that it is appropriate that IDOT not reimburse JM for any of its cleanup costs. Surely, the Board can discern that the ACM contamination was caused by JM alone, and JM contaminated the entire superfund area with ACM. IDOT did not bring ACM to the area. The Board should see that the sole culpable party is JM, and should consider JM's absurd arguments, that IDOT is the only party found by the Board to have violated the Act, within the larger context of this matter.

In the alternative, if the Board finds it has authority under State law, and decides that IDOT should reimburse JM for some its cleanup costs, then considering what is "appropriate under these circumstances", the Board should find that maximum amount allowable is $600,050. The Board should then apply equitable facts and adjust that amount down to reflect the culpability of JM versus IDOT, as further discussed below.

The Board simply and unambiguously ordered further evidence to determine "(t)he share of JM's costs attributable to IDOT". (*Interim Order*, p. 22). The second round of hearings lasted approximately four days and the Board and IDOT attempted to focus on details of allocation. As explained below, JM used the Board's direction for additional evidence on specific areas to create and present new theories of IDOT liability, not supported by law or common sense, and to relitigate many of the same arguments already rejected in the Board's *Interim Order*. Indeed, JM, with the help of its "expert" Mr. Dorgan (who has repeatedly shifted his opinions to suit JM's purpose of getting money from Illinois taxpayers), now argues that IDOT should pay either all of JM's costs

in the amount of $5,579,794, or should at least pay $3,274,917 of its costs. As explained below, there is no basis in law or fact for the Board to grant such a request.

## II. THE BOARD DOES NOT HAVE THE AUTHORITY TO GRANT THE REQUESTED RELIEF

In its *Interim Order*, the Board held that it had authority to order the relief sought by JM, including monetary relief (which is the only relief now sought). *Interim Order*, p.17. The Board based its holding on the inclusion of state agencies in the definition of "Person" in the Act, finding that this constituted a "clear and unequivocal" waiver of IDOT's sovereign immunity. *Id.*

However, this is a private cost recovery action against a State Agency, and IDOT now points the Board to contrary precedent showing that the Board lacks subject matter jurisdiction to hear this matter under principles of sovereign immunity.

The Illinois Supreme Court has held that the defense of sovereign immunity can be raised at any point, including for the first time on appeal, because "the issue of subject matter jurisdiction cannot be waived." *Currie v. Lao*, 148 Ill. 2d 151, 157 (1992); *see also Giovenco-Pappas v. Berauer*, 2020 IL App (1st) 190904, ¶47 ("Subject-matter jurisdictional questions like sovereign immunity will always predominate in court; if there is no subject-matter jurisdiction, the case is over".); *Christiansen v. Masse*, 279 Ill. App. 3d 162, 166 (1st Dist. 1996) (Trial court errantly held defendant waived defense of sovereign immunity, and court found "subject matter jurisdiction . . . cannot be waived."). "It has been repeatedly held that the Court of Claims has exclusive jurisdiction over claims against the State of Illinois and the circuit court does not have jurisdiction to hear such claims." *Christiansen*, 279 Ill. App. 3d at 166 citing *Currie*, 148 Ill. 2d at 158. "Likewise, the Seventh Circuit has held that Federal courts also lack jurisdiction to hear claims against the State of Illinois because exclusive jurisdiction rests in the Court of Claims." *Id.* citing *Benning v. Board of Regents of Northern Regency Universities*, 928

F.2d 775, 778 (7th Cir. 1991). "When a trial court lacks subject-matter jurisdiction, the only thing it has the power to do is dismiss the action, and [a]ny order entered without subject-matter jurisdiction is void." *Swope v. Northern Illinois Gas Co.*, 221 Ill. App. 3d 241, 243 (3rd Dist. 1991).

The doctrine of sovereign immunity was abolished in Illinois by the 1970 Constitution '[e]xcept as the General Assembly may provide by law.' *Leetaru v. Board of Trustees of the University of Illinois*, 2015 IL 117485, ¶ 42 citing Ill. Const. 1970, art. XIII, § 4. "As it was authorized to do under this provision, the General Assembly subsequently reinstituted the doctrine through enactment of the State Lawsuit Immunity Act." *Id.* citing 745 ILCS 5/0.01 *et seq.* "The statute provides that except as provided in the Court of Claims Act (705 ILCS 505/1 *et seq*.) and several other specified statutes, 'the State of Illinois shall not be made a defendant or party in any court.'" *Id.* citing 745 ILCS 5/1 and *Twp. of Jubilee v. State*, 2011 IL 111447, ¶ 22. "The Court of Claims Act, in turn, states that the Court of Claims shall have exclusive jurisdiction to hear and determine nine enumerated matters, including '[a]ll claims against the State founded upon any law of the State of Illinois or upon any regulation adopted thereunder by an executive or administrative officer or agency.'" *Id.* citing 705 ILCS 505/8(a).

The purpose of sovereign immunity is to protect the state from interference with the performance of governmental functions and to preserve and to protect state funds. *People ex rel. Manning v. Nickerson*, 184 Ill. 2d 245, 248 (1998). "The doctrine of sovereign immunity, however, is not about fairness." *Id.* at 249. "The legislature has conferred immunity upon the state, and the legislature-only the legislature-can determine when and where claims against the state will be allowed." *Id.*

"Under Illinois law, a defendant is protected by sovereign immunity where: (1) it is an arm of the State; (2) the claim against it is a present claim potentially exposing the State to liability; and (3) there is no applicable exception to undercut such immunity." *People ex rel. Madigan v. Excavating & Lowboy Services*, 388 Ill. App. 3d 554, 558 (1st Dist. 2009). "Present claims are distinguished from those claims seeking injunctive or declaratory relief, specifically prospective injunctive relief." *Id.*

As to the first factor, the IDOT is a state agency and is clearly an "arm of the State". *See, e.g., Excavating & Lowboy Services*, 388 Ill. App. 3d 554 (dismissing IDOT on sovereign immunity grounds); *C.J. v. Department of Human Services*, 331 Ill. App. 3d 871, 876 (1st Dist. 2002) ("the doctrine of sovereign immunity applies to lawsuits against agencies of the State, which are considered arms of the State, because these lawsuits could deplete state funds and interfere with governmental functions."). Regarding the second factor, JM's lawsuit is a "present claim" exposing the State of Illinois through IDOT to liability for damages for cost recovery in an as-yet-undetermined amount. Finally, the General Assembly did not waive State sovereign immunity in the Illinois Environmental Protection Act. The *Excavating and Lowboy* Court in examining this issue found that "although the Environmental [Protection] Act demonstrates a clear intent to hold those who allegedly damage the environment accountable for their actions, it does not contain an express consent by the State to be sued or otherwise waive sovereign immunity." *Id.* at 563.

Importantly, the *Excavating & Lowboy* court directly considered the issue on which the Board relies: the inclusion of State Agencies in the definition of "persons" liable under the Act, as well as the other language in the Act applicable to State Agencies. 388 Ill. App. 3d at 561. The court found that neither the inclusion of IDOT in the definition of "person" nor the other related provision met the "specific and unequivocal" language requirement of the State Lawsuit Immunity

Act, 745 ILCS 5/1 *et seq*. ("Immunity Act"), or the Court of Claims Act ("Claims Act"), 705 ILCS 505/1 *et seq., Id.* at 563. The Court held "[w]e further note that although the [Act] demonstrates a clear intent to hold those who allegedly damage the environment accountable for their actions, it does not contain an express consent by the State to be sued or otherwise waive sovereign immunity". *Id.*

The *Excavating & Lowboy* Court pointed to two statutes that do contain a "clear, unequivocal and affirmative" waiver, the Illinois Public Labor Relations Act, and the Illinois Education Labor Relations Act. Section 25 of the Illinois Public Relations Act, 5 ILCS 315/25 provides, as follows:

***315/25 Waiver of sovereign immunity***

*For purposes of this Act, the State of Illinois waives sovereign immunity*

The Illinois Education Labor Relations Act contains the Same Language in Section 19, 115 ILCS 5/19:

***5/19 Sovereign Immunity***

*For purposes of this Act, the State of Illinois waives sovereign immunity.*

No provisions of the Act contain similar clear and unequivocal language expressing a waiver of sovereign immunity. As stated by the Appellate Court: "[a]s we perceive no applicable exception for cases brought pursuant to the Environmental [Protection] Act, in turn, we find neither an express consent on the part of the State to be sued nor a waiver of sovereign immunity enacted by the legislature vesting the circuit court with jurisdiction over such alleged violations. *Id.* at 563-64.

The *Excavating & Lowboy* Court noted that the issue of sovereign immunity under the Act was a matter of first impression. 388 Ill. App. 3d 554, 558. IDOT is unaware of any subsequent

rulings on the issue. [1] Accordingly, the *Excavating & Lowboy* decision is authoritative. While the plain language of Section 1 of the State Lawsuit Immunity Act, states that the "State of Illinois shall not be made a defendant or party in any court" (745 ILCS 5/1 (2020)), this could not mean that the General Assembly intended to bar sovereign immunity when the State was made a party before an administrative tribunal, especially, where there was no intent for the State to waive sovereign immunity, as in the Environmental Protection Act. *See Excavating & Lowboy Services*, 388 Ill. App. 3d at 563-64. To find otherwise would lead to absurd results not intended by the General Assembly.

"The primary objective of statutory construction is to ascertain and give effect to the legislature's intent. *Evans v. Cook County State's Atty.*, 2021 IL 125513, ¶ 35. "All other rules of statutory construction are subordinate to this principle, and when a plain or literal reading of the statute leads to absurd results or results that the legislature could not have intended, courts are not bound to that construction, and the literal reading should yield." *Id*.

Indeed, the U.S. Supreme Court has squarely held that sovereign immunity applies equally to both court and administrative adjudicative bodies. *FMC*[2] *v. South Carolina State Ports Authority*, 535 U.S. 743, 760 (2002) (agency asserted state sovereign immunity, but the commission contended that such immunity from judicial actions did not apply to its administrative proceedings). In *FMC*, the U.S. Supreme Court explained the rationale for applying State

[1] IDOT acknowledges the Board's decision in *People v. Boyd Brothers Inc*., PCB 94-275/PCB 94-311 (consolidated) (February 16, 1995), issued prior to *Excavating v. Lowboy*. Though not cited in the Board's *Interim Order*, the Board's holding was consistent with its holding in *Boyd Brothers*. In *Boyd Brothers*, the Board found that the inclusion of State Agencies as "person[s]", as well as the provisions of Section 47 of the Act indicated that State Agencies were proper parties in a citizen enforcement action. However, in its decision, the Board acknowledged that "…in the case of claims for monetary reimbursement", courts had found that the proper and exclusive jurisdiction is before the Court of Claims (Id., footnote 2.

[2] FMC is an acronym for the Federal Maritime Commission, which was acting a federal administrative tribunal.

sovereign immunity to both trial courts and administrative tribunals, like the Board. The Court stated that the "interest in protecting States' dignity and the strong similarities between FMC proceedings and civil litigation, we hold that state sovereign immunity bars the FMC from adjudicating complaints filed by a private party against a nonconsenting State." The Supreme Court cogently explained its rationale, which fits the situation in this case perfectly.

> Simply put, if the Framers thought it an impermissible affront to a State's dignity to be required to answer the complaints of private parties in federal courts, we cannot imagine that they would have found it acceptable to compel a State to do exactly the same thing before the administrative tribunal of an agency, such as the FMC. The affront to a State's dignity does not lessen when an adjudication takes place in an administrative tribunal as opposed to an Article III court.

*Id.* at 760-61 (citations omitted). Any contrary view prohibiting the invocation of sovereign immunity before an administrative trial leads to absurd results. [3]

Here, the Board has been delegated adjudicatory functions under section 5(d) of the Act, *Meadowlark Farms, Inc. v. Illinois Pollution Control Board*, 17 Ill. App. 3d 851, 856 (5th Dist. 1974) citing 415 ILCS 5/5(d), which includes presiding over enforcement actions. These functions are concurrent with the circuit courts. *See People v. NL Indus.*, 152 Ill. 2d 82, 103 (1992), *opinion modified on denial of reh'g* (Nov. 30, 1992); *see also Janson v. Illinois Pollution Control Bd.*, 69 Ill. App. 3d 324, 327–28 (3d Dist. 1979). The Appellate Court has held that IDOT could not be sued in circuit court for violations of the Environmental Protection Act in a third party action, because sovereign immunity barred the claim. *See Excavating and Lowboy,* 388 Ill. App. 3d at

[3] *See also Lynch v. DOT*, 2012 IL App (4th) 111040, ¶ 27, 979 N.E.2d 113 (In reviewing two consolidated cases (one IDOT the other ISP), the appellate court found that the legislature had not shown that it clearly and unequivocally intended to waive sovereign immunity for cases filed pursuant to the Rights Act. "Because both the Department and the Commission are administrative agencies, not courts, the legislature would have had no reason to waive the State's sovereign immunity because sovereign immunity does not apply to administrative agencies. See 745 ILCS 5/1 (West 2010) ("State of Illinois shall not be made a defendant or party in any court").")

563-64. This same principle must hold true before the Board and JM must seek its relief before the Court of Claims. The absurdity of any contrary ruling is further borne out, where if the Board were to issue an order pursuant to Section 33 of the Act, 415 ILCS 5/33 (2020), JM could be in a position, where it had to file a "civil action" to enforce it. 415 ILCS 5/45(e) (2020). In that action in circuit court to enforce the Board Order pursuant to Section 45(e) of the Act, IDOT would clearly be able to invoke the defense of sovereign immunity, because that would be a proceeding in "court" that is a present claim potentially exposing the State to liability, where there is no applicable exception to undercut sovereign immunity. *See Excavating & Lowboy Services*, 388 Ill. App. 3d at 558.

The U.S. Supreme Court's rationale in *FMC*, 535 U.S. at 760-61, is the only one that General Assembly could have intended. Any other construction of Section 1 of the State Lawsuit Immunity Act, (745 ILCS 5/1 2020), "leads to absurd results or results that the legislature could not have intended." *Evans*, 2021 IL 125513, ¶ 35.

In accordance with the decision of the Appellate Court in *Excavating & Lowboy*, under the principles of sovereign immunity, the Board lacks subject matter jurisdiction of this case and the Board must dismiss the case, as any order it could enter on the relief sought by JM would be void for lack of subject matter jurisdiction.

## III. JOINT AND SEVERAL LIABILITY CANNOT APPLY IN THIS CASE

JM makes an extraordinary and legally unsustainable claim that the Board, despite the specific findings in the Board's explicit *Interim Order*, should order IDOT to pay all of the costs of ACM removal and remediation for Site's 3 and 6 required by the USEPA in the JM superfund case. This claim is completely unsupportable.

Joint and Several liability is:

> "Liability that may be apportioned either among two or more parties or to only one or of a select member of the group, at the adversary's discretion"

*Black's Law Dictionary*, Seventh edition (1999).

In this matter, only IDOT is a respondent/defendant. JM is the *adversary*. IDOT cannot be held to be 'jointly liable' with its adversary. There are *no* other parties among which to allocate responsibility besides IDOT. There can be no "joint and several liability" between IDOT and JM.

The Illinois Code of Civil Procedure provides additional guidance. Sections 2-117 and 2-118 of the Code of Civil Procedure, 735 ILCS 5/2-1117 and 5/2-1118, provide, in pertinent part as follows:

> Sec. 2-1117. Joint liability. Except as provided in Section 2-1118, in actions on account of bodily injury or death or physical damage to property, based on negligence, or product liability based on strict tort liability, all defendants found liable are jointly and severally liable for plaintiff's past and future medical and medically related expenses.
>
> * * *
>
> Sec. 2-1118. Exceptions. Notwithstanding the provisions of Section 2-1117, in any action in which the trier of fact determines that the injury or damage for which recovery is sought was caused by an act involving the discharge into the environment of any pollutant, including any waste, hazardous substance, irritant or contaminant, including, but not limited to smoke, vapor, soot, fumes, acids, alkalis, asbestos, toxic or corrosive chemicals, radioactive waste or mine tailings, and including any such material intended to be recycled, reconditioned or reclaimed, any defendants found liable shall be jointly and severally liable for such damage….
>
> (Emphasis supplied)

These provisions only may apply in "actions" in which multiple parties are found liable. In this case, where IDOT is the only defendant/respondent, joint and several liability is inapplicable.

The cases cited by JM are therefore unpersuasive. *JM's Post-Hearing Brief, pgs. 5-8.* In Illinois *EPA v. Larry Bittle et al*, PCB 83-163 (June 10, 1987), movant J. Max Mitchell, the owner of the land where coal recovery operations had created pollution, was one of four respondents who

were held liable by the Board. *See*: PCB 83-163, April 16, 1987, slip op. at pp. 35-36. Similarly, *Michel Grain*, PCB 96-143 and *J&T recycling*, AC 01-12 both involved multiple respondents. Moreover, as stated in *J&T Recycling*, joint and several liability is presumed in administrative citations. PCB 01-12, January 18, 2001, *slip op*. at 2. This is because the specific language in the Act applicable to administrative citations, 415 ILCS 42(4), directs that "any person found to have violated…shall pay a civil penalty of $500 for each violation…plus any hearing costs incurred by the Board and the Agency." This mandatory civil penalty provision is not applicable to citizen enforcement cases, but justifies joint and several liability in administrative citation proceedings.

## IV. JM IS NOT ENTITLED TO SEEK CONTRIBUTION FROM IDOT

JM claims to have expended $5,579,794 to remediate Sites 3 and 6 in the John's Manville Southwest Site Superfund area. JM did not expend these funds voluntarily. Rather it was required to do so under the 2007 Administrative Order on Consent ("AOC") entered between JM and Commonwealth Edison Company and USEPA to clean up the asbestos-containing waste that JM had dumped. IDOT neither was a party to the AOC nor ever made a party to the Superfund case, and JM was barred from doing so prior to filing this action by the applicable statute of limitations *See* 42 USC 9713(f)(3) (three years to file a contribution claim). Now, well after the statute of limitations has run in the superfund case, JM improperly attempts to shift all of it costs to IDOT and the State of Illinois taxpayers.

In the superfund action with USEPA, JM could have sought allocation of costs as contribution for its liability. Section 113(f) of the Comprehensive Environmental Response and Liability Act, 42 USC 9713 provides, in pertinent part, as follows:

**(f) CONTRIBUTION**

**(1) CONTRIBUTION**

> Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607 of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title section or section 9607 of this title.
>
> * * *
>
> **(3) CONTRIBUTION**
>
> No action for contribution for any response costs or damages may be commenced more than 3 years after—
>
> **(A)** the date of judgment in any action under this chapter for recovery of such costs or damages, or
>
> **(B)** the date of an administrative order under section 9622(g) of this title (relating to *de minimis* settlements) or 9622(h) of this title (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

The AOC in the JM superfund case was effective on June 14, 2007. Accordingly, if after the USEPA declined to include IDOT in the AOC, JM had reasonably believed that it had a valid contribution action against IDOT, it could have, and should have, filed an action against IDOT by 2010. However, JM never took any action against IDOT for contribution against its agreed remediation pursuant to 42 USC 9613. Accordingly, the Board should dismiss this case.

## V. ALTERNATIVELY, THE BOARD HAS ALREADY DETERMINED IDOT's SPECIFIC AREA OF RESPONSIBILITY

JM's request for a determination of "joint and several liability" completely ignores the Board's findings in its *Interim Order*. After five days of hearing, thousands of pages of documents, and taking months to evaluate the evidence, the Board found that IDOT was not responsible for much of the subject property. *Interim Order, p. 13.* Specifically, the Board limited IDOT's

responsibility to the portions of Site 6 between points 1S and 4S, and the areas of borings B3-25, B3-15, B3-16, B3-50 and, potentially, portions of B3-45. *Id.*

JM's claim that the case *State Oil v. People*, 822 N.E.2d 876 (2nd Dist. 2004), stands for the proposition that joint and several liability applies in cases, such as this one, where the proportionate share liability provisions of 415 ILCS 5/58.9 do not apply, is completely unfounded. *JM's Post-Hearing Brief, pgs. 5-6.* In *State Oil*, the Appellate Court merely found that the exclusion provisions of Section 58.1(a)(1) were unambiguous and upheld the Board's earlier finding of joint and several liability against the Respondents. Notably, the Court's discussion of joint and several liability was excluded from the published opinion. *State Oil*, 822 N.E.2d at 881. However, JM fails to note the Board's findings in the underlying case, which were affirmed by the Court. In *People v. State Oil,* PB 97-193 (March 20, 2003), the Board found that the two relevant statutory Section, 57.12 (underground storage tanks: enforcement; liability) and 22.2(f), both expressly provided for joint and several liability. *Slip op at 25*. The Board also found that the subject Respondents, Charles and Josephine Abraham, and Millstream Service Inc., had failed to prove "by a preponderance of the evidence that there is a reasonable basis for division of liability" *Id.*

Neither Section 57.12 nor 22.2(f) of the Act are involved in this case. 415 ILCS 5/57.12 and 22.2(f). Moreover, Sections 21(a), 21(d), and 21(e) do not provide for joint and several liability. 415 ILCS 5/21(a), 21(d) and 21(e). Further, the Board had a reasonable basis for allocating the specific geographic locations for which IDOT was responsible. IDOT's road construction activities only involved a very limited area of Sites 3 and 6. Joint and several liability in this case is neither provided for in the Act nor appropriate, and the Board should reject JM's arguments on this issue.

## VI. JM CAUSED ALL OF THE ACM CONTAMINATION AT THE SITE

Before the Board assesses any obligation on IDOT and the State of Illinois taxpayers to pay any sum to JM, the Board must review the facts surrounding the presence of ACM on sites 3 and 6. Despite nine days of hearing and tens of thousands of pages of documents there is not one speck of evidence that IDOT ever brought any ACM to the sites during its road construction activities. Not one asbestos brake shoe, not one piece of asbestos-containing Transite, not one piece of asbestos-containing roofing material or process sludge. Sites 3 and 6, which are part of the Southwest Sites National Priorities List ("NPL") Site, were added to the NPL because of the imminent threat of release of asbestos fibers to the environment. Administrative Order on Consent, *Exh. 62-7*. There is no evidence that IDOT brought even a single asbestos fiber to the Site.

However, the circumstantial evidence suggests that all of the ACM at and surrounding the JM manufacturing facility, including the Southwest Sites, was caused and allowed by the mishandling and outright dumping of ACM containing products by JM. There is nothing in the record to suggest any other source.

All of the ACM containing product found in the extensive investigation of the Southwestern Site locations (enumerated Site 3, Site 4, Site 5, and Site 6) were the type of material manufactured at the JM facility over the years. This includes shingles, roofing materials, Transite pipe, piping insulation, gaskets and similar materials. *Exh. 57-15*.

The two sites relevant to this case are Site 3 and Site 6. The ACM found on these Sites was the same as manufactured at the JM facility, principally Transite pipe and roofing materials on Site 3. *Exh. 57-115*. On Site 6, the ACM found included Transite pipe, roofing materials, fibrous process waste, and brake liners. *Exh. 63-22*.

Moreover, significant ACM contamination was also found in areas close to Sites 3 and 6 where IDOT had no involvement whatsoever. Sites 4 and 5 (treated at hearing as one Site: 4/5) are just outside of the JM plant boundary, north of the area where IDOT did its road work, and are included in the Southwest Sites NPL area. Sampling in Sites 4/5 found ACM in the form of Transite, roofing materials, fibrous process waste, wallboard, brake liners and flex-board. *Exh. 63-18*. In fact, Sites 4/5, again where IDOT had no involvement, were significantly more contaminated than Sites 3 and 6. At Sites 4/5, 55 out of 57 test rows (93%) contained ACM. *Id*. On Site 3, only 2 out of 8 test pits (25%) were positive for visual ACM. *Exhibit 63-15*. On Site 6, 28 out of 88 test pits (32%) were positive for ACM. *Exh. 63-22*. Dr. Tat Ebihara, who prepared the Engineering Evaluation/Cost Analysis submitted to USEPA and who testified on behalf of JM admitted at hearing that Sites 4/5 were "much more contaminated" than Site 6. *Oct. 26 Tr., p. 110*.

Areas adjacent to the JM facility were more heavily contaminated with ACM. Site 2 is a parcel immediately east of Site 3, where IDOT again had no involvement whatsoever. Testing of Site 2 found significant ACM contamination, including Transite pipe, roofing material, tar paper, tubing, and insulation. *Exh. 57-112 to 57-116*. Site 2 was eventually remediated by JM, along with the Illinois Beach State Park and its former manufacturing facility (the latter through the Illinois EPA Site Remediation Program).

No other ACM product manufacturer was identified near the Site, and all of the ACM found at the numerous sites was of exactly the type of product manufactured by JM at its facility. The circumstantial evidence is overwhelming. JM mishandled and dumped significant amounts of ACM inside and outside of its facility, including Site 2, Site 3, Site 4/5, and Site 6.

JM has repeatedly cited Section 2 of the Act, and the directive to "…assure that adverse effects upon the environment are fully considered and borne by those who cause them". 415 ILCS

4/2(b). Despite the Board's finding that IDOT caused and allowed open dumping on limited portions of Sites 3 and 6, it is plain that JM, not IDOT, caused the adverse effects on the environment by mishandling and dumping ACM in Site's 3 and 6, as well as areas in the vicinity of Sites 3 and 6. USEPA ordered JM to remediate all of the contaminated property. It would directly contradict Section 2 to make IDOT and the State of Illinois taxpayers reimburse JM, the responsible party, for the cleanup of adverse effects caused by JM's dumping of the ACM.

Therefore, the Board should deny JM's requested relief.

## VII. THE ACT DOES NOT AUTHORIZE THE BOARD TO ISSUE AN ORDER REQUIRING THAT IDOT PAY JM

The Board stated that the "Act does not expressly allow the Board to order a violator to reimburse cleanup costs to a private party. Compare 415 ILCS 5/22.2(f) (2014) (State or local government may obtain reimbursement of costs spent to address release of hazardous substance or pesticide)." *Interim Order, p. 20*. Yet, the Board held that it has the authority to order private cost recovery, based on the following provision: The Board shall issue and enter such final order, or make such final determination, as it shall deem appropriate under the circumstances. *415 ILCS 5/33(a)*. However, there is nothing in the Act that allows for private cost recovery in circumstances such as these. "Since an administrative agency is a creature of statute, any power or authority claimed by it must find its source within the provisions of the statute by which it is created." *Granite City Div. of Nat. Steel Co. v. Pollution Control Bd.,* 613 NE 2d 719, 155 Ill. 2d 149 (1993). Regardless of what the Board deems "appropriate", that authority must find its source in the Act. Moreover, JM did not plead cost recovery, and IDOT did not have the opportunity to plead and respond to demands for cost recovery.

Here, it cannot be considered appropriate under the circumstances to order IDOT to pay JM for cleanup costs. It is outside the authority of the Board under the Act to order IDOT to pay JM for its cleanup costs.

## VIII. THE BOARD SHOULD REJECT JOHNS MANVILLE'S ARGUMENTS ALREADY DECIDED BY AND OUTSIDE THE BOARD'S FINDINGS

JM used this narrowly proscribed additional hearing, to give air to new arguments outside of the Board's findings, and to relitigate some of the same issues. The Board should uniformly reject arguments and theories outside of the purpose of the Board directed additional hearing.

JM did not follow the Board's direction for an additional hearing on the share of JM's cleanup costs in the portions of Site 3 and Site 6 where the Board found IDOT responsible for ACM waste present in the soil. JM presented overall cleanup costs for all of Sites 3 and 6, but not the portions where the Board found IDOT responsible for ACM waste present in soil. JM instead used that directive for an additional hearing to craft new theories of liability and to make the same arguments as it did in the first hearing. Much of the second hearing was spent listening to the same arguments that JM made in the first hearing or arguments that IDOT's liability should be expanded beyond the Board's *Interim Order*. This is completely improper. If JM wanted the Board to reconsider its arguments, or to appeal the Board findings, it should have done so.

JM's attempts to hold IDOT responsible for these additional areas should be seen for what they are – an attempt to avoid its responsibility for asbestos contamination. JM should not be allowed to again try again to convince the Board of the same arguments the Board has already rejected. IDOT asks the Board to ignore and deny these renewed arguments regarding expanded liability beyond the Board's *Interim Order*, and deny JM's arguments regarding waste outside the areas where the "Board found IDOT responsible for ACM waste present in soil." *Interim Order*, p. 22.

## A. IDOT IS NOT LIABLE FOR CONTAMINATION EAST OF 4S

In the first round of hearings, the Board reviewed and analyzed evidence and arguments covering five days of hearing, including the IDOT work plans (*Exh. 21A*), evidence on contamination and sampling, *(e.g. ELM Report, Exh. 57; LFR Report, Ex. 63; 2013 AECOM report, Exh. 66)* considered the testimony and arguments of JM's expert and IDOT's expert, listened or read five days of hearing, reviewed JM's pleadings and arguments and IDOT's pleadings arguments, and then wrote an opinion and order. The Board found IDOT liable for cleanup costs for areas along the south side of Greenwood Avenue within Site 6 and adjacent areas along the north side of Site 3. The Board specifically identified the areas where IDOT placed fill along the south of Greenwood Avenue, 1S to 4S, and found that IDOT did not place fill in areas to the east of 4S. *Interim Order.* p. 22.

Here, JM again argues that IDOT should be responsible for contamination east of 4S, and for contamination from 5S to 8S. *JM's Post-Hearing Brief, pgs. 14-17.* The Board should not consider JM's arguments that IDOT should be liable for contamination in the area of 5S to 8S because they go beyond the purpose of this second hearing and should be rejected and ignored on that basis alone. Alternatively, the Board should reject those arguments, as it did before, because they are not supported by the work plans or evidence.

The Board found that IDOT placed asbestos waste in fill material when reconstructing Greenwood Avenue. *Interim Order*, p. 1. The western portion of Site 6 where the Board found IDOT placed ACM containing fill was from station 9+22 to the west to station 7 to the east. *Interim Order*, p. 9, and *Exh. 21A*. IDOT reconstruction ended at Station 7+00 which also corresponds to the eastern edge of parcel 0393. The area between Station 7+00 and 7+60 was not part of the embankment but the road was reconstructed and/or resurfaced for a smooth tie in to Greenwood

Avenue.[4] In the first hearing and briefing, JM argued that IDOT placed fill in areas east of Station 7. *JM's 11/14/2016 Reply brief, pgs. 10-12*.

Then, the Board named the associated area, 1S to 4S, which matches up with Stations on Greenwood avenue that were part of the embankment. Based on evidence and argument before it, the Board found that IDOT is responsible for ACM material found in samples 1S, 2S, 3S and 4S. *Interim Order*, p. 9. The Board also named the associated borings where contamination was found in that Greenwood Avenue ramp area, 1S to 4S, and held IDOT responsible for ACM at sample locations B3-25, B3-16 and B3-15. *Interim Order*, p. 10.

As it did in the first hearing, JM again argued that fill was needed east of Station 7, to support its argument that IDOT should be responsible for contamination east of Station 4S. *IDOT's post-hearing brief, pgs.16-18, and e.g. Mr. Dorgan testimony June 28, 2016 Tr pgs. 188:9:-189:2, 189:12-190:3*. JM is still wrong, as shown through the work plans, and Mr. Gobelman's testimony. The embankment began at 7+60 and pavement was resurfaced back to 7+00, and IDOT's work on Greenwood Avenue began slightly west of 4S. *Oct. 29, Tr. 50:13-55:13, Exh. 21A-72.* JM desperately tries to argue that the work plans show something they do not, and they do not show that fill was needed east of Section 4S. *Oct. 29, Tr. 77:12-78:12, 82:1-22, Exh. 21A-26*.

Contrary to JM's arguments, the evidence of contamination presented in the second round of hearings is consistent with the evidence of contamination in the first round and consistent with the reports and evidence that the Board considered when issuing its *Interim Order*. For instance, in the first hearing, JM presented cross sections that showed the sample results and contamination on Site 6, including the areas 1S to 6S. *Exh. 84*. This figure created by Mr. Dorgan shows

[4] *See also* IDOT's 10/21/2016 brief following the first hearing, pgs 11-12, 17

contamination at 5S and 6S. *Id.* and *June 24, 2016, Tr pgs. 191:29-192:14 and 197:15-198:23*. Mr. Gobelman also created a cross section figure which included more magnification of the asbestos contamination and included 7S and 8S. *Exh. 90*. *June 23, 2016, Tr. 178:10-17.* As is evident in these figures which were presented to the Board, and cited in the *Interim Order*, there was asbestos contamination in the areas of 5S to 8S. It could not be more plain. *Id*. The record already establishes these areas were contaminated, and the Board had this contamination information in the first hearing. There is nothing new here.

Mr. Gobelman also discussed Site 6 and concluded there is no new evidence to increase the area defined by Board. *Exh. 205-8 to 9*. The final report shows excavation samples and asbestos contamination below what IDOT construction plans indicated in building Greenwood Avenue. *Id*. There was Transite material found throughout the area. *Oct. 28, 2020 Tr. p. 10:4-7*.

JM presented pictures in the second hearing and tried to argue that the contamination was from IDOT, but as the Board found, and as the work plans show, IDOT did not place fill east of 4S. Mr. Dorgan says he relied on conversations with David Peterson, who testified there was asbestos and described it, which is again, consistent with sampling presented in the first hearing. *Exh. 90 and Oct. 26, Tr. pgs.178:6 to 180:10*. Moreover, Dr. Ebihara confirmed that Sites 4/5 were more contaminated (*Oct. 26 Tr., p 110:4-10*), and Mr. Peterson confirmed that the same asbestos material is in Sites 4/5, (*Oct. 26, Tr. 191:7-19*). Mr. Peterson testified he did not know how the asbestos contamination got there. *Oct. 26 Tr., p.203:24 to 204:3*. Moreover, a photograph along the north side of Site 6 shows multiple resurfacing along Greenwood Ave., (*Final Report*, *JM45304*), which shows there was much construction work after IDOTs work.

Contamination extends below where IDOT stated fill was needed in the first hearing, and extended further east of 4S. If anything, the presence of contamination suggests it got there some

other way than through IDOT's construction of Greenwood Ave. After all, asbestos contamination was present throughout the entire area near the JM manufacturing facility that operated for approximately 75 years, and where IDOT built a road for a short time. The record is void of any facts of what happened when IDOT did not construct a road, and that asbestos was surely disposed of by JM. In any event, as the Board found, IDOT is not responsible or liable for any ACM contamination east of 4S.

JM cherry picked this contamination to craft a theory of expanded liability. JM is just trying to confuse this issue, and the Board should continue to reject JM's unsupported claims.

### B. IDOT IS NOT LIABLE FOR CONTAMINATION RELATED TO DETOUR ROAD A

The Board specifically stated, "the Board finds that ACM in the area where the former detour road connected to Greenwood is not attributable to IDOT's activities." *Interim Order*, p. 8. The Board should not consider these arguments again.

JM makes the same arguments regarding Detour Road A as it did in the first hearing. *JM's brief, p. 18,* and *see Interim Order* pgs. 6-7. Those arguments should also be ignored because they go beyond the scope of the second hearing, and the Board already considered and rejected those arguments. *Interim Order* pgs. 6-8. The Board found that JM did not prove that asbestos waste is present along the detour road in fill IDOT placed.

Site 6 1S to 4S has nothing to do with the detour road. Even though 4S, 5S and 6S lay next to the detour road A, the Board found that IDOT was not liable for the detour road.

Also, JM is still wrong, and "JM has not proven that ACM found along the former detour road is present in material IDOT placed." *Interim Order*, p. 8. In the first hearing JM argued that construction work surrounding Detour Road A required fill, including where it met Greenwood Avenue. *Exh. 1-17 to 18, JM's post hearing brief, filed 8/12/2019, pgs. 16-17*, *Interim Order*, pgs.

8 to 10. JM again argues that Detour Road A where it meets Greenwood avenue required fill and IDOT placed ACM contamination. *JM's Post-Hearing Brief, pgs. 17-18*. Mr. Gobelman, who has looked at thousands of IDOT work plans, already explained this to the Board in the first hearing. *May 25, 2016 Tr., 110:9 to 111:12, June 23, 2016 Tr., 173:9 to 177:4, 180:13 to 184:14*. The Board reviewed the work plans, the stationing, the fill required as well as arguments by both JM and IDOT, and found that IDOT did not place fill where Detour Road A met Greenwood Avenue. *Interim Order*, pgs. 8 to 10.

### C. IDOT IS NOT LIABLE FOR CONTAMINATION ON CERTAIN AREAS OF SITE 3

JM had also argued that ACM contamination found along the former detour road near Site 6 was caused by IDOT. The Board reviewed testimony, expert reports and reports, and rejected that argument. and the Board did not find "IDOT liable for ACM waste found elsewhere on Site 3." *Interim Order* at p.10. JM should not argue that IDOT is responsible for contamination in these areas again, and the Board should reject them.

### D. IDOT'S RESPONSBILITY FOR CLEANUP COSTS FOR PARCEL 0393, IF ANY IS *DE MINIMIS*

Site 3 is owned by Commonwealth Edison, and a portion of the Site, was a JM former parking lot and historical photos indicate that Transite pipes were used in the parking area. *ELM report, Exh. 57-15-16, and see also Administrative Order on Consent, Exh. 62-6*. The Board found that JM did not prove that IDOT is responsible for ACM waste along the former detour road on Site 3. *Interim Order*, pgs. 6-8. Obviously, JM caused the asbestos contamination on Site 3, and Commonwealth Edison is the fee simple owner. IDOT has an easement "for highway purposes only" in a small area of Site 3, Parcel 0393.

The Board also found that based on IDOT's property easement "for highway purposes only" for Parcel 0393, that it had liability for Parcel 0393. *Interim Order*, pgs. 11-13. There was no finding that IDOT placed fill that contained asbestos in this area. *Id.* Liability stems solely from IDOT's property interest. It is worth noting that others have property interests on Parcel 0393, like Commonwealth Edison, who actually owns the property, and of course JM contaminated the property. IDOT's interest would be limited to highway purposes only, and the Board can find, what proportion of cleanup costs, if any, is proper for such a limited interest, given the circumstances here.

The Board found that based on IDOT's right of way easement in Parcel 0393, IDOT allowed open dumping on that parcel. *Id.* The Board found the areas on Parcel 0393 had asbestos contamination but the Board did not find that IDOT was responsible for contamination outside of those areas. The Board then looked to the ELM report, Exhibit 57, for areas where ACM waste was present, and identified those areas, namely B3-25, B3-16, B3-15, B3-50, and B3-45. *Id*. at p. 12. The ELM report objective included defining the aerial and vertical extent of ACM on the surface and top three feet of Site 3, accomplished through a site surface inspection and a grid defined subsurface sampling plan. *Exh. 57.* These borings were the borings on Parcel 0393 where ACM was found as presented by the ELM report. *Exh. 57-97 to 57-100*. The Board found that IDOT allowed the opening dumping of ACM at these sample locations.

In determining what order is appropriate under these circumstances, it is also valuable to know, if the actual owner of the property, Commonwealth Edison, paid any cleanup costs, and if so in what amount. Because if an owner of a right of way is liable by virtue of its ownership, then the owner of property is also definitely liable, more so, as the fee simple owner. *See, e.g., Gonzalez v. Pollution Control Bd.,* 2011 IL App (1st) 093021, ¶¶33-35 (owner liable for allowing open

dumping on his property where defendant failed to remove waste that was deposited prior to becoming the site's owner); *see also People v. Lincoln Ltd.*, 2016 IL App (1st) 143487, ¶48 ("[I]t is illegal to fail to remedy pollution on one's land, even if someone else, even unknown others, created the problem."). The Board, however, decided to not allow IDOT to pursue discovery of these crucial and important facts. *December 21, 2017, Board Order.*

To further add color to who actually has control over Parcel 0393, AECOM when performing remediation work, did not seek nor obtain an easement from IDOT for access to Parcel 0393. Rather, it sought easements from others who held property interests in the southwestern sites, but not IDOT. *Oct. 27, Tr. 88:15-23.*

For Parcel 0393 JM and Dorgan did not focus on the where ACM contamination was found as indicated by the Board, and again impermissibly tries to expand IDOT liability. Moreover, the Board did not discuss the location of the Waukegan Water line in its Opinion. Dorgan argues that $61,037 of the water line costs should be attributed to IDOT. However, the Water Line is outside of the boring locations identified by the Board where ACM was found. Mr. Dorgan opined that the Board would have included the Waukegan water line had its location been known by the Board. However, that was irrelevant to the Board because it based its findings on where the contamination was found, and not where the water line was located.

**E. CAUSATION THEORY**

JM, through Mr. Dorgan, has crafted a so-called causation argument to try to avoid its responsibility for cleanup of asbestos contamination. It argues that contamination in the areas where the Board found IDOT liable drove the remedy, and therefore, IDOT should be responsible for the entire remedy. *JM's Post-Hearing Brief, p. 14.* The Board should reject this argument.

This argument ignores that IDOT did not place or use fill containing ACM in these other areas. IDOT is not responsible for ACM contamination in this expanded area. In short, JM styles its so-called causation argument in a nonsensical way, attempting to seek a remedy where there is no liability.

Now, JM has shifted and argues that it is the visible ACM, which was found within IDOT areas of liability. *Exh. 204-39*. However, this is just another unsupported theory that the Board should reject. First, the Board designated boring numbers where ACM contamination was found, not clean borings, so by definition, those borings contained ACM. Second visual ACM was found outside of IDOT areas of liability; thus JM's argument does not make sense under their own questionable theory. *Exh. 204-39*. The ELM report provides, "(a) total of 158 separate locations, encompassing both Sites 2 and 3, were found to contain surface ACM fragments or fragment clusters. A total of 84 separate locations contained ACM at Site 2, and a total of 74 separate locations contained ACM at Site 3." *ELM report, Exh. 57-8*. Dorgan argued the opposite in the first hearing.[5] Third, there is no evidence that USEPA required cleanup based on visual ACM. Fourth, it ignores the obvious, that IDOT built roads and covered the area with a roadway. The whole argument should be rejected, and seen for what it is - JM's attempt to avoid responsibility for polluting the area with ACM, and causing the area to become a Superfund site.

Mr. Dorgan manipulated the demonstration of ACM contamination by creating figures that purported to display visual ACM. Compare Mr. Dorgan's figure that shows ACM contamination from his first report prior to the first hearing, (*Exh. 01-26*), with his figure in his second report,

[5] During the first hearing, JM and Mr. Dorgan also argued IDOT disbursed and buried ACM, (*Interim Order* p.5), and that IDOT "used, spread, buried, placed and disposed of ACM waste, including Transite pipe, throughout Sites 3 and portions of Site 6..." *Exh. 1-14*, causing a more extensive cleanup had IDOT not built a road. *Interim Order*, p. 5. JM failed to prove that theory.

prior to the second hearing. (*Exh. 204-39*). He cherry picks what he wants to display, based not on a clear presentation of the record, but on arguments that suit his purpose at the moment.

If there is contamination elsewhere, that is not IDOT's responsibility and would have been caused by some other entity or entities. Any contaminated fill placed by IDOT in 1S to 4S could not have driven the remedy because IDOT did not place fill east of 4S. Remediation was needed in areas east of 4S because it was contaminated with ACM, not because contamination in 1S to 4S caused the need for remediation elsewhere. This argument that by placing fill in one area, IDOT drove the remedy where there was other contamination is just an apparent way to try to get IDOT and the State of Illinois taxpayers to pay for JM's asbestos contamination.

## IX. THE MAXIMUM SHARE OF JM'S COSTS ATTRIBUTATE TO IDOT

The Board directed further hearings to determine the portions of Site 3 and Site 6 where the Board found IDOT responsible for ACM waste present in soil. In addition to the arguments above, IDOT argues in the alternative, that if the Board decides to order IDOT to pay JM for some of its cleanup costs, the Board would have to consider what is "appropriate under the circumstances". *415 ILCS 5/33(a).* Here, as discussed above, it is appropriate under these circumstances to order IDOT to pay none of the cleanup costs because JM caused all of the contamination on site. If the Board decides to award a money judgment, then again in the alternative, the maximum allowable is $600,050, which should then be adjusted downward to reflect the culpability of the parties and equitable factors.[6]

[6] When allocating costs among the parties courts can apply equitable factors as it determines are appropriate. *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 613-614 (2009); *Kerr-McGee Chem. Corp. v. Lefton Iron & Metal Co.*, 14 F.3d 321, 326 (7th Cir. 1994) (citing § 113(f)(1)). Those factors include "the relative fault of the parties…" See also *Env't Transp. Sys., Inc. v. ENSCO, Inc*., 969 F.2d 503, 508-509 (7th Cir. 1992)("courts should equitably allocate costs of cleanup according to the relative culpability of the parties…") and *Alcan-Toyo America, Inc. v. N. Ill. Gas Co.*, 881 F.Supp. 342, 345 (N.D. Ill. 1995) ("[a] primary consideration in allocating costs is the concept of relative fault.")

Mr. Gobelman responded to the "Expert Report of Douglas G. Dorgan, Jr. on Damages Attributable to IDOT", June 13, 2018, *Exh. 204*. If the Board decides that IDOT should pay for some cleanup costs, and it should not, then Mr. Gobelman's calculations and analysis must be followed. He calculated the maximum cleanup costs that could be attributed to IDOT, based on the Board's *Interim Order*. He concluded and opined that $600,050 of the $5,579,794 that was paid in cleanup costs is the amount for the areas where the Board found IDOT liable. *Exh. 207*

In responding to Mr. Dorgan's report, Mr. Gobelman used the same division of JM costs into task buckets presented by JM and used by Mr. Dorgan. Mr. Gobelman calculated the portions of Site 3 and Site 6 where the Board found IDOT liable and then determined the percentage of area or feet for IDOT's portion. He then applied that percentage to JM's overall costs as divided into task buckets. *Id.*

Mr. Gobelman's allocation adhered to the areas where the Board found IDOT responsible, including by boring, where the Board found ACM contamination. Mr. Gobelman created figures for each utility to better demonstrate the proper allocation. The Board can see visually in Gobelman Figure 8, the portions of Sites 3 and 6 where the Board found IDOT responsible, except the eastern edge of Site 6, which extends far to the east and is not shown. *Exh. 207-20*.

Based on the Board's *Interim Order* and in response to JM's report issued by Douglas Dorgan, IDOT's expert Steven Gobelman issued reports that quantify the remediation costs associated with the areas identified by the Board. That is, he went through the total remediation costs for Sites 3 and 6, put forth by JM, and detailed the proportional amounts that are associated with the specific areas that the Board identified as areas where IDOT had some liability. Mr. Gobelman did not proportion those costs among other responsible parties, or polluters, *i.e.* JM. His reports merely identify remediation costs for the specific areas identified by the Board. It is up to

the Board here, without waiving any of IDOT's arguments regarding the authority or jurisdiction of the Board to do so, to determine the culpability of at least JM, Commonwealth Edison, the owner of the property, and even the City of Waukegan, who owns Greenwood Ave, (*see Exh. 65-5*) and IDOT and determine what costs, if any, IDOT should be held responsible for.

According to Mr. Gobelman's reports, the remediation costs for the portions of Site 3 and Site 6 identified by the Board is $600,050 of the $5,579,794 spent overall for remediation of Sites 3 and 6. *Exh. 207.*

The approach of dividing all of the remediation costs into task buckets is presented in JM's reports and was the subject of testimony and explanation during the four days of hearing in October of 2020. IDOT has no basis to dispute the division of tasks into the buckets and does not contest it here.

JM requested that Dr. Ebihara and David Peterson assign all the remediation costs for Sites 3 and 6 into task buckets. JM could have had Dr. Ebihara and Mr. Peterson allocate costs to IDOT's portion, as they did when separating out costs for Sites 4 and 5, which were invoiced together with Sites 3 and 6. They often divided them equally between Sites 3/6 and 4/5, or made other reasonable divisions. JM could have made that request of Dr. Ebihara and Mr. Peterson, but it did not. Certainly, they are more qualified than Mr. Dorgan. Instead, it asked Mr. Dorgan, who then crafted expansive theories of liability. that went well beyond the Board's findings in the *Interim Order.*

Mr. Gobelman's expert reports were in response to Mr. Dorgan's report. Mr. Gobelman used Mr. Dorgan's approach and task attribution to determine what costs were attributed to the IDOT area of liability. However, Mr. Gobelman based his attributions on the portions of Site 3 and Site 6, where the Board said IDOT was responsible, whereas, Mr. Dorgan expanded liability beyond the Board's findings.

## A. BASE MAP CREATION

Mr. Gobelman, in order to calculate the remediation costs needed an appropriate base map. He wanted to show the areas of the south side of Greenwood Avenue within Site 6 and adjacent areas along Site 3, the area specified by the Board where IDOT would have placed fill to build a slope for Greenwood Avenue.

The maps and figures in Mr. Dorgan's report contain numerous utility lines and information, and everything is jumbled together and the maps do not clearly show the area specified by the Board, nor the utilities or other pertinent information. *Exh. 204-38 to 39*. Moreover, Mr. Dorgan did not explain in his report how he developed his Figure 1. *Exh. 205-7, Oct. 27 Tr., 198:17-199:2*. Consequently, as described in the Gobelman report and as explained during the hearing he created his base map. *Exh. 205-6 to 205-8, Oct. 27 Tr., 185:6-190:16, 196:24-200:17*. When creating the base map, he observed that the various figures showing the location of Sites 3 and 6 were inconsistent, and thus had to create a site map utilizing existing conditions, available reports and available surveys. *Exh. 205-6 to 205-7*. Soil sampling locations were placed in the base map using the ELM report that provided the sampling for Site 3, the ELM Figure 15. *Exh. 57-536*.

As discussed earlier, the ELM report was the investigation of Site 3 and was cited throughout the Board's *Interim Order*, and also cited by Mr. Dorgan, *e.g. Exh. 1-34.* The Board referred to boring contamination and sample results from this ELM Report in setting forth the borings where IDOT was responsible. *Interim Order*, e.g. pgs. 3 to 4, 10. The ELM report was relied upon by USEPA. *Exh. 65-2 to 3*. Any attempt by JM to distinguish it as a draft and inherently unreliable at hearing should be soundly rejected. The ELM Report has been relied upon throughout any analysis of Site 3.

Since JM had sorted remediation costs into task buckets, Mr. Gobelman wanted to show those task buckets on his base map*, e.g.* the utility lines, North Shore Gas line, City of Waukegan water line. Mr. Gobelman also placed soils borings from the ELM Report in his base map. *Oct. 27 Tr., pgs. 199:3-200:12*.

Mr. Gobelman also depicted Parcel 0393 on his initial base map, but then later realized he had made an error in its placement and issued his Supplemental Report to correct the location of Parcel 0393 and correct the corresponding calculations. *Exh. 207-4*. The Supplemental Report only includes corrected information, and thus both reports are to be read in conjunction with each other to determine the remediation costs for the areas identified by the Board in the *Interim Order*. *Oct. 27 Tr., pgs 204:15 to 205:5.*

IDOT later learned that JM used an AutoCAD program supplied by AECOM. JM did not produce this electronic AutoCAD file to IDOT until very late, June 2019, after all the expert reports had been issued and during the last deposition of Mr. Dorgan. *Oct. 29 Tr., 142:18-144:13, Oct. 27, Tr., 206:23-207:14*. JM should not be rewarded for its failure to produce the AutoCAD file as a weapon against IDOT and Mr. Gobelman. JM's oversight is both glaring and inappropriate. *Id.*

JM made so many arguments, spent days of testimony and objected voluminously to Gobelman's base map, but it is a merely diligent and honest attempt to get it right. Difference in borders are virtually meaningless. Mr. Dorgan created maps showing the boundary layouts, and any difference is negligible to calculations made by Mr. Gobelman, and certainly as to considerations of what order is appropriate under the circumstances. *Exhibit 208-9 to 208-11*. Everything that Mr. Gobelman did was straightforward. JM makes much of nothing, especially since it did nothing to verify its map.

No doubt in its reply brief, JM will continue its campaign to vilify Mr. Gobelman. JM has done this from day one, and will likely continue. None of which has been successful. However, JM relies on maps where Mr. Dorgan did nothing to verify its accuracy, and did not explain anything, and it should not criticize Mr. Gobelman's map. *Oct. 27 Tr., 206:23-207:14.* Especially when JM failed to produce important evidence. The result is a lot of JM argument, that is devoid of meaningful analysis of how to assess cleanup costs, if any, to IDOT.

## B. TASK BUCKET ATTRIBUTION APPROACH

Mr. Dorgan created a Cost Allocation and IDOT Attribution Table presented in Exhibit F of his report. *Exh. 204.* Mr. Gobelman used the same division into task buckets but then determined IDOT's allocation based on the portions of Sites 3 and 6 as defined by the Board.

### 1. Nicor Gas

Mr. Gobelman concurs with Mr. Dorgan that the costs to create a clean corridor around the Nicor Gas line is outside the portion of Site 3 where the Board found IDOT responsible. Therefore, no share of JM's costs is attributable to IDOT. *Exh. 205-9, Gobelman Figure 2, 205-23*.

### 2. City of Waukegan Water Line

The Waukegan water line is west of the areas identified by the Board where contamination was found on Parcel 0393 and where the Board found IDOT liable. Even if the water line is located within Parcel 0393, because the Board did not identify contaminated borings in the area where the water line was located, it is still outside of IDOT's area of responsibility. *See Ex. 57-97 to 100*. The point is, in Parcel 0393, there is no ACM waste outside of the areas identified by the Board, and therefore, IDOT should not be allocated costs where there was no ACM contamination. The water line being in a different location is irrelevant. The Board identified borings showing

contamination in 0393, and it did not identify the area of the Waukegan water line. *Ex. 205-10, Gobelman Figure 3, 207-15*.

Mr. Dorgan argues that all of the Waukegan Water line costs should be attributed to IDOT. *JM's Post-Hearing Brief, pgs. 20-21*. Accordingly, the Board should reject JM's argument regarding any costs in this area concerning the Waukegan Water line.

### 3. AT&T Lines

As discussed above, Mr. Gobelman needed to create a supplemental report to create calculations given the correction of Parcel 0393's placement, and the AT&T attribution, increased with the correction of Parcel 0393's location. This information is in the Supplemental Report, *Exh. 207-4 to 5*.

#### a. Site 3

Mr. Gobelman looked at the overall length of the AT&T telephone lines in Site 3, which is 1060 linear feet, and calculated that 199 of the linear feet were in the IDOT portion of Site 3, or 18.8 percent. *Ex. 207-4 to 5, Figure 4, Exh. 207-16*. Mr. Gobelman applies the 18.8 percent to the $108,651 in costs for Site 3, to arrive at $20,426.

Mr. Dorgan said two of the three AT&T lines touched an IDOT portion, therefore two thirds of these costs are attributable to IDOT. He outrageously, but not surprisingly, says this even though most of the AT&T lines are outside of IDOT's portion. Mr. Dorgan did not even bother to calculate the actual percentage of line that was in his expanded area for 0393, which would have been a much smaller percentage allocated to IDOT. Mr. Dorgan purposefully increased the portion to IDOT. *Exh. 204-19 to 20*. If a line touches an IDOT portion, Mr. Dorgan said IDOT was 100% liable for those costs. And this over inclusive, including all of two of the three lines, carries forward when he makes calculations for costs that apply to both Sites 3 and 6, and for costs that apply to

the entire Site 3 and/or Site 6. *JM's Post-Hearing Brief, p. 21*. Therefore, the Board should reject JM's argument regarding costs in this area relating to AT&T's lines

**b. Site 6**

Mr. Gobelman calculated the linear feet for the AT&T lines for the portion of Site 6 where IDOT was liable. The linear feet for all of Site 6, north and south of Greenwood Avenue was approximately 5,470, and the entry of the telephone line to IDOT area was 90 linear feet and thus IDOT's portion was 1.6 percent. Mr. Gobelman then applied the 1.6 percent to the overall costs to get $4,648. *Ex. 207-4 to 5, Gobelman Figure 4, 207-6*.

Mr. Dorgan again did not actually calculate area for IDOT's portion, just said one of the three lines in Site 6 was south of Greenwood Avenue, and attributed one third to IDOT. He again did not actually calculate the feet, even under his expanded area, as that would have reduced IDOT's portion. *JM's Post-Hearing Brief, p. 21*. Again, the Board should reject JM's argument regarding any costs in this area relating to AT&T's lines.

**c. Sites 3 and 6**

Mr. Gobelman then determined the overall percentages for Site 3 and Site 6, based on the percentages above, and calculated it to be 6.4 percent and applied it to task bucket costs only attributable to both Sites for AT&T work, to arrive at $6,329. *Exh. 207-5*.

Mr. Dorgan also applied the overall percentages, but since his percentages were (incorrectly) larger for Site 3 and Site 6, a larger percentage applied under Mr. Dorgan's approach. Therefore, the Board should reject JM's approach for these sites relating to AT&T's lines.

**4. UTILITY/ACM SOILS EXCAVATION**

Soils contaminated with ACM were required to be excavated and removed from the north and south sides of Site 6 around utilities.

Mr. Gobelman calculated costs attributable to IDOT's portion. Mr. Gobelman determined the total length of Site 6, approximately 5,470 linear feet, and then calculated IDOT's portion, the length from the western edge of Site 6, to halfway between 4S and 5S, which is 197 linear feet. IDOT's portion of Site 6 is 3.6 percent, and costs are $5,591. *Exh. 205-11*.

Mr. Dorgan, could have calculated IDOT's portion, even his expanded area (5S to 8S), but instead he found a way to attribute more costs to IDOT. He said four of the eight utility lines were on the south side of Site 6 and four on the north, and therefore 50% of the costs should be assessed to IDOT. If a line touches an IDOT portion, Dorgan said IDOT was 100% liable for those costs. *JM's Post-Hearing Brief, p.24*. JM's argument should be rejected by the Board relating to ACM soil excavation in this area.

**5. NORTH SHORE GAS**

**a. Site 3**

For the North Shore Gas line, Mr. Gobelman determined the square feet of the clean corridor area needed for the North Shore gas line for Site 3, which is 10,866 square feet. *Exh. 207-5*. The area that involves the contaminated areas for Parcel 0393 where IDOT allowed open dumping per the Board's *Interim Order*, is 4,271 square feet or 39.3 percent. *Id.* Applying that percentage to the total costs for Site 3 for this task bucket, comes to $130,682 for IDOT's portion and is demonstrated on Gobelman Figure 5. *Ex. 207-5, Gobelman Figure 5, 207-17*.

Mr. Dorgan applied all of the costs for North Shore Gas in Site 3 to IDOT, even though most of it lies outside of IDOT's portion, and also outside of Parcel 0393. *See Gobelman Figure 5, Ex. 207-17,* and *JM's Post-Hearing Brief, p.22*. He did this supposedly based on contamination which he says is in 0393, which is of course is the opposite of what he said in the first hearing – that IDOT buried and spread ACM throughout Site 3. *Exh. 1, JM's 8/12/2016 post hearing brief,*

*pgs. 13-14.* As a result, the Board should give no credence to JM's approach for Site 3 relating to the North Shore gas line.

**b. Site 6.**

Mr. Gobelman calculated the portion of the North Shore gas line corridor located in IDOT's portion. The gas line was near sampling location 4S and overall 72 linear feet was in IDOT's portion, of the approximately 2,005 linear feet of the length for the gas line on the south side of Site 6. *Dorgan, Exh. 204-24.* That is 3.6 percent of the gas line, making IDOT's share of the cost $8,455. *Exh. 207-5 to 6, Gobelman Figure 5, Ex. 207-17*.

Mr. Dorgan applied costs based on his expanded liability to 8S, and said it was $65,597. *JM's Post-Hearing Brief, pgs. 22-23, and Ex. 204-24*. The Board should disregard JM's flawed approach for Site 3 relating to the North Shore gas line.

**c. Sites 3 and 6**

For the costs for the North Shore Gas line costs applying to both Sites 3 and 6, both Mr. Gobelman and Mr. Dorgan used their calculations for Site 3 and for Site 6, and then determined the overall percentage for both Sites 3 and 6. Mr. Gobelman properly calculated IDOT's portion to be 24.5 percent of the costs, making IDOT's portion to be $14,248. *Exh. 207-5 to 207-6*. Because Mr. Dorgan was overly expansive, as discussed above, his percentage for IDOT's portion was 70.2 percent. *JM's Post-Hearing Brief, pgs. 22-23*. The Board should reject JM's suspect rationale for Sites 3 and 6 relating to the North Shore gas line

**6. NORTHEAST EXCAVATION**

The Northeast Excavation is 150 feet by 50 feet or 7,500 square feet. Mr. Gobelman calculated what portion was in IDOT's area of liability, and it comes out to be 25.2 percent or $12,583. *Exh. 207-6, Gobelman Figure 6, 207-18*.

It is worth noting that the concept of "next cleanest boring" does not apply here, as there is contamination everywhere, including to the next boring which was in evidence when the Board, held that IDOT did not openly dump in those contaminated areas east of 4S. JM again tries to confuse the issues.

Mr. Dorgan and JM argue 100%. *JM's Post-Hearing Brief, p.23*). Therefore, the Board should reject JM's questionable approach regarding the Northeast Excavation.

## 7. DEWATERING

### a. Site 3

According to Dr. Ebihara and Mr. Peterson, dewatering was needed in order to create clean corridors for certain utilities and tasks. Mr. Dorgan determined that dewatering was needed for the Nicor line, the North Shore Gas line, the City of Waukegan Water line, and the Northeast Excavation. Thus, in analyzing what portion of dewatering should be allocated to IDOT, Mr. Dorgan looked to previously calculated percentages for IDOT's portion for these utilities to determine the dewatering allocation. *Ex. 204-26*.

Mr. Gobelman followed the same approach and found the overall percentage of IDOT's portion for all of these utilities and tasks, discussed above and in his reports. *Exh. 207-7*. Mr. Gobelman determined that IDOT's allocation was 21.7 percent, which is $143,265 for dewatering for Site 3 allocated to IDOT. *Exh. 207-6 to 7*.

### b. Site 6

Mr. Dorgan said dewatering was needed for the north and south side of Site 6, and the south side it was required between 1S and 9S. Using that information, Mr. Gobelman calculated the portion for IDOT to be 23.5 percent or $37,738 of the dewatering costs for Site 6. *Exh. 207-7*.

### c. Sites 3 and 6

Mr. Gobelman used the same approach as Mr. Dorgan to determine the percentage to be applied to dewatering costs that could not be segregated to Site 3 or Site 6 alone. He used the IDOT portion he calculated for Site 3 and for Site 6, and determined the proportion of IDOT's share (22.4%) and then applied that to the Sites 3 and 6 dewatering costs to come up with IDOT's portion for this ($8,775). The calculations are in Table 1 of Mr. Gobelman's supplemental report. *Exh. 207-21 to 207-26*).

Because Mr. Gobelman's base calculations are correct, so is his calculations for dewatering, and Mr. Dorgan's are wrong.

## 8. GENERAL SITE PREPARATION

For the remaining task buckets, according to JM, AECOM and David Peterson were not able to segregate costs into a particular utility task bucket, like the task buckets discussed above but involved more than one utility. Mr. Dorgan determined IDOT's portion where more than one utility was involved by determining what task buckets applied to a category, and then applying those utility task buckets to the general category. Mr. Gobelman used the same approach.

JM prepared an exhibit to help explain what utility task buckets were used when arriving at an overall percentage to a general category of activities. *Exh. 245*. Both Mr. Dorgan and Mr. Gobelman used the same underling task buckets, but because Mr. Dorgan and Mr. Gobelman had different percentages for the underlying utility work task buckets, their respective percentages and portions are different when applied to a general category. Mr. Gobelman showed his calculations in Table 1 to Mr. Gobelman's report, *Exh. 207-21 to 25*.

According to Mr. Dorgan, the General Site/Site Preparation included general project management and support and could not be allocated to a specific utility task bucket. He broke them down into categories and again determined which utilities were involved. Mr. Gobelman,

following the same approach, then used the percentage of IDOT's portion to determine what percentage should be applied to the general categories. This is all explained in Mr. Gobelman's report *Exh. 207-8 to 10,* and at the hearing. *Oct. 28 Tr., pgs. 50:12-57:6, 57:18-59:7.* The same approach was used for other general categories of expenses that either applied to more than one utility task bucket, or covered all of Sites 3 and 6.

A large portion of the cleanup costs for Sites 3 and 6, approximately 1.85 million, applied to most or all of Sites 3 and 6.

| | |
|---|---|
| General Site/Site Preparation | $932,730 |
| Dewatering | $259,084 |
| Health and Safety | $233,895 |
| EPA Oversight Costs | $233,805 |
| Legal Services | $190,281 |

JM's calculations, by being overly broad, for instance with the AT&T telephone lines which largely fell outside of IDOT's portion, even under Dorgan's expanded area, showed an outsize effect on its cost analysis as it carried through to costs applying to most or all of the Sites.

JM's arguments and rationale are flawed, and inconsistent with facts and law presented, and that the Board should accept IDOT's view of the costs.

### C. SUMMARY OF MAXIMUM COSTS ATTRIBUTABLE TO IDOT

The maximum amount of cleanup costs for the portions of Site 3 and Site 6 where the Board found IDOT responsible for waste is $600,500. Then, if the Board decides to issue an award of money to JM, it must decide, "the share of the JM's costs attributable to IDOT". *Interim Order, p. 22*. The Board should apply equitable factors, considering that JM caused the contamination and is most culpable, and that others have property ownership, and adjust the maximum amount down from $600,500.

## X. CONCLUSION

For the reasons set forth herein, Respondent, ILLINOIS DEPARTMENT OF TRANSPORTATION, respectfully asks that the Board find in favor of IDOT and against Complainant, JOHNS MANVILLE, and issue an order that includes the following:

1. The Illinois Pollution Control Board does not have the authority to order the relief requested by Johns Manville and dismiss this matter; or

2. In the alternative, IDOT shall not be required to reimburse Johns Manville for cleanup costs, based on the Board's consideration of the equities involved in this matter and its authority under Section 33 of the Act to enter an Order it deems appropriate; or

3. In the alternative, IDOT shall pay a sum equal to or less than $600,050 to Johns Manville for cleanup costs consistent with the Board's finding in the December 15, 2016 Interim Order and the evidence presented during the October 2020 hearings;

4. and for such other relief as the Illinois Pollution Control Board deems to be appropriate and just.

Respectfully Submitted,

ILLINOIS DEPARTMENT OF TRANSPORTATION

s/ *Ellen F. O'Laughlin*

ELLEN F. O'LAUGHLIN
CHRISTOPHER J. GRANT
Office of the Illinois Attorney General
69 West Washington Street, Suite 1800
Chicago, Illinois 60602
312.814.3094
312.814.5388
Ellen.OLaughlin@ilag.gov
Chris.Grant@ilag.gov
Maria.Caccacio@ilag.gov

MATTHEW J. DOUGHERTY
Assistant Chief Counsel
Illinois Department of Transportation
Office of the Chief Counsel, Room 313
2300 South Dirksen Parkway
Springfield, Illinois 62764
(217) 785-7524
matthew.dougherty@Illinois.gov