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, November 18, 2021, I have filed with the Clerk of the Pollution Control Board Respondent's Motion for Leave to File Sur-reply to be filed, 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*

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CERTIFICATE OF SERVICE

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

I, ELLEN F. O'LAUGHLIN, do hereby certify that, today, November 18, 2021, caused to be served on the individuals listed below, by electronic mail, a true and correct copy of "Respondent's Motion for Leave to File Sur-reply" on each of the parties listed below:

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

RESPONDENT'S MOTION FOR LEAVE TO FILE SUR-REPLY

NOW COMES RESPONDENT, the Illinois Department of Transportation ("IDOT"), through its attorney KWAME RAOUL, Attorney General of the State of Illinois, which moves the Pollution Control Board ("Board"), pursuant to Board Rule 101.500(e), 35 Ill. Adm. Code 101.500(e), for a leave to file the Sur-Reply to Complainant's October 28, 2021 Reply Brief ("Reply"), which is attached hereto as Exhibit A ("Sur-reply"), in order to address certain prejudicial and erroneous arguments contained in Johns Manville's 41 page Reply (with reduced right margins).

ARGUMENT

1. Although the Board Rules do not provide for the filing of a sur-reply, the Board will grant leave to file a sur-reply to avoid material prejudice. *People v. Atkinson Landfill Co*., PCB 13-28 (January 9, 2014). IDOT requests leave to file to address misstatements of fact in John Manville's Reply brief as well as incorrect and inflammatory arguments made by JM, which should be noted and considered by the Board.

2. IDOT's Motion should be granted because it will cause no prejudice to JM, and will amount to only a minimal amount of additional briefing which the Board would consider in this matter. With the filing of its Reply, in this phase of the matter, Johns Manville has filed a combined total of 74 pages in post-hearing written arguments. IDOT now seeks to file a 9 page Sur-Reply, which, if accepted by the Board, would bring IDOT's total number of pages in filed post-hearing brief documents in this phase to 50 pages. Given the nature and language in JM's Reply brief, it cannot argue prejudice to IDOT's filing of a 9 page Sur-Reply.

3. Finally, given the extensive record, the long duration of time since the hearing in October 2020, the length of time since entry of the Interim Opinion and Order in December 2016, the fact that there are numerous factual and legal issues, and that IDOT's Motion is timely, the Board should grant leave to file this Sur-reply.

WHEREFORE, Respondent, IDOT, respectfully requests that the hearing officer:

1. Grant IDOT's Motion and accept its sur-reply for filing with the Board; and,

2. Grant such other relief as the hearing officer deems to be appropriate and just.

Respectfully Submitted,

ILLINOIS DEPARTMENT OF TRANSPORTATION

s/ *Ellen F. O'Laughlin*

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EXHIBIT A

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

JOHNS MANVILLE, a Delaware corporation, Complainant,	)	
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ILLINOIS DEPARTMENT OF TRANSPORTATION, Respondent.	)	

ILLINOIS DEPARTMENT OF TRANSPORTATION'S SUR-REPLY TO JOHNS MANVILLE REPLY BRIEF

Now comes Respondent, ILLINOIS DEPARTMENT OF TRANSPORTATION ("IDOT"), who herewith sets forth its limited sur-reply to Complainant's, JOHNS MANVILLE, reply brief.[1]

1. Johns Manville is already legally responsible to remediate the Superfund site.

Johns Manville ("JM") repeats constantly, that IDOT is the only party found to have violated the Illinois Environmental Protection Act, 415 ILCS 5/1 *et seq*. (2020) ("Act"), and that the purpose of the Act is that "adverse effects upon the environment are fully considered and borne by those who cause them". *See, e.g.,* JM's Reply brief, p. 3. JM also argued that it is somehow significant that IDOT did not file a counterclaim against Johns Manville, and that Johns Manville was not found to have violated the Act by the Illinois Pollution Control Board ("Board"). *See, e.g.,* JM's Reply brief, p. 1, 3

[1] Through its sur-reply, IDOT does not seek to challenge each and every point set forth in Johns Manville's reply brief. Rather, it has sought to use the 9 pages of its sur-reply to address some of the most misleading arguments set forth in Johns Manville's reply. The fact that IDOT has not chosen to address the many issues or arguments raised by Johns Manville in its reply should not be construed as IDOT's acquiescence or acceptance of Johns Manville's position.

IDOT urges the Board to reject JM's outrageous and confusing arguments. Notably, JM ignores that it is already legally obligated to remediate the adverse effects caused by its massive pollution of asbestos containing material ("ACM") at and near its facility in Waukegan. *See* Exh. 62, United States Environmental Protection Agency ("USEPA") Administrative Order on Consent ("AOC") requiring JM to remediate the ACM contamination at and around its Waukegan facility. The purpose of the Act has been fully addressed before the filing of JM's complaint in this matter, where the USEPA AOC required JM to remediate the mess it caused with its decades-long ACM contamination of its facility and the surrounding area. 415 ILCS 5/2(b) (2020) (assuring that adverse effects upon the environment are fully considered and borne by those who cause them).

Accordingly, there would be no reason for IDOT to file a counterclaim or allege that JM violated the Act, because JM is already legally responsible for cleaning up its pollution. The Board should recognize that JM grossly skews the facts and record for this Superfund site. JM would prefer the Board to consider this suit in a bubble, but the Board cannot ignore that USEPA took action against JM, and JM is under the legal obligation to clean up its pollution.

Moreover, as argued in IDOT's reply brief and herein, the Board does not have the authority to grant the requested relief, and therefore an IDOT counterclaim would be contrary to that position.

JM argues that it is stepping into the shoes of the IEPA to hold IDOT accountable. JM's Reply brief, p. 14. This argument misrepresents environmental enforcement in the State of Illinois, as the polluters through the AOC are indeed held liable. JM's argument tests the boundaries of reality, as JM is the undisputed source and the responsible party for the pollution at the Superfund site, its former manufacturing facility. This is demonstrated by the fact that USEPA took the lead and IEPA participated in the AOC, to ensure the responsible party, JM, remediated the site. JM's

CERCLA submissions also went to IEPA. Further, JM entered its contaminated manufacturing facility into the site remediation program at IEPA to address the contamination at its former manufacturing facility location. *See* USEPA's website for the Johns-Manville Superfund site.[2] "It is generally accepted that a court may take judicial notice of the information on a government website." *Edward Sims Jr. Trust v. Henry County Board of Review*, 2020 IL App (3d) 190397, ¶ 40. As IEPA obtained complete relief under the AOC, JM is not stepping into IEPA's shoes here, and the Board should entirely discard JM's outrageous and unfounded claims.

2. IDOT's sovereign immunity prevents the Board from granting the requested relief.

JM makes incorrect arguments regarding *Lynch v. DOT*, 2012 IL App (4th) 111040. In that case, the Appellate Court addressed claims under the Illinois Human Rights Act, after being brought before the Illinois Department of Human Rights and Illinois Human Rights Commission. In that case, the Appellate Court held that the legislature did not waive sovereign immunity, and claims were barred against IDOT. ("The purpose of sovereign immunity is to protect the state from interference with the performance of governmental functions and to preserve and protect state funds." Citing *McFatridge v. Madigan*, 2011 IL App (4th) 100936, ¶ 46" *Lynch* at ¶ 21). The *Lynch* court made this finding in the context of claims first being brought before the administrative agencies, the Department of Human Rights and the Illinois Human Rights Commission.

There are two issues to be pointed out by the *Lynch* Court's language, "sovereign immunity does not apply to administrative agencies." *Id.* at ¶ 27. The Board should not read this as, "sovereign immunity does not apply before *any* administrative agency at *any* time." First, the

[2] The USEPA's webpage for the Johns Manville Corp. Waukegan, IL Superfund Sites is available at: https://cumulis.epa.gov/supercpad/SiteProfiles/index.cfm?fuseaction=second.Cleanup&id=0500197#bkground.

Lynch Court merely affirmed the decision of the trial court that sovereign immunity barred the Court Action. In affirming this dismissal, the Court stated that the Plaintiff's "…must seek that remedy with the commission, rather than circuit court. *We express no opinion on whether a remedy with the commission is still available* in these cases". 2012 Il App (4th) 111040, ¶ 44 (emphasis supplied). Moreover, the Court was addressing an issue regarding the Illinois Department of Human Rights and Illinois Human Rights Commission - these are the administrative issues pertinent to the *Lynch* language, not administrative agencies in general, as those administrative agencies had express statutory jurisdiction for the claims at issue in *Lynch*, unlike the present case. Secondly, if this language could be viewed as applying to administrative agencies beyond the Illinois Department of Human Rights and Illinois Human Rights Commission, it is obviously dicta, and not the material dispute at issue in the case. Other administrative agencies are not at issue in *Lynch*, and it is not authoritative or persuasive to other tribunals, including the Board.

However, *People ex rel. Madigan v. Excavating & Lowboy Services*, 388 Ill. App. 3d 554 (1st Dist. 2009) is persuasive and the Board lacks jurisdiction to grant JM's claims. As IDOT has argued, Illinois law states that the Illinois Court of Claims has exclusive jurisdiction over all "claims against [IDOT] founded upon any law of the State of Illinois or upon any regulation adopted thereunder by an executive or administrative officer or agency. . . . " 705 ILCS 505/8.

3. The Law of the Case Doctrine does not apply here.

This concept does not apply here and does not prevent the Board from making proper rulings of law. The law of the case doctrine merely expresses the practice of courts generally to refuse to reopen what has been decided; it is not a limit on their power. *People v. Patterson*, 154 Ill.2d 414, 468 (1992). Further, a finding of final judgment is required to sustain application of the doctrine. *Id*. at 469, *see also Combs v. Schmidt*, 2012 IL App (2d) 110517, ¶ 40 ("trial court

has the power to modify or revise an interlocutory order at any time prior to final judgment"). Moreover, even in the case cited by JM, the Board recognizes that the doctrine does not apply in the case of error. *Elmhurst Memorial Healthcare et al v. Chevron U.S.A. et al*, PCB 2009-066 (July 7, 2011); 2011 Ill. ENV LEXIS 245, at p. 76 (prior order was final absent any signs of error or change of facts).

In the instant case, the Board's 2016 ruling was an interim, not final, order. Further, as noted in IDOT's response, subject matter jurisdiction may be raised at any time, even for the first time on appeal. The Board has the authority to correct errors in the Interim Order. Specifically, in the prior order, the Board did not consider the binding ruling in the *Excavating & Lowboy* case cited by IDOT in its Response brief. The law of the case doctrine does not prevent the Board from revisiting the issue of sovereign immunity.

4. The Board lacks authority and is not the proper forum for JM to pursue its claims.

"Because an administrative agency is a creature of statute, it has no general or common-law powers." *Goral v. Dart*, 2020 IL 125085, ¶ 33 "An administrative agency's powers are limited to those granted by the legislature, and any action taken by an agency must be authorized by its enabling act." *Id.*

This case is an inappropriate attempt by JM to seek contribution for JM's purported damages. *See* 740 ILCS 100/0.01 *et seq.* JM was also free to attempt to seek common law relief in the form of nuisance, trespass, etc. before the Court of Claims, but chose not to. This is significant, because the Act does not provide for the awarding of damages or reimbursement of costs in private actions before the Board. The General Assembly only provided cost recovery for this sort of hazardous substance contamination to the "State of Illinois or any unit of local government". *See, e.g.*, 415 ILCS 5/22.2(f) (2020). "It is never proper for the courts to depart

from the plain language of the statute by reading into it exceptions, limitations or conditions which conflict with the intent of the legislature." *Midstate Siding & Window Co. v. Rogers*, 204 Ill. 2d 314, 320 (2003). "There is no rule of statutory construction which authorizes the courts to declare that the legislature did not mean what the plain language of the statute says." *Id.* at 21. Moreover, nowhere else in the Act did the Board explicitly provide for private cost recovery.

The General Assembly did explicitly provide relief for violations of the Act in Section 42(a), which provides for civil penalties, which are payable to the Environmental Protection Trust Fund. 415 ILCS 5/42(a) (2020). "The legislative declaration of the purpose of the Act (par. 1002) indicates that the principal reason for authorizing the imposition of civil penalties (par. 1042) was to provide a method to aid the enforcement of the Act and that the punitive considerations were secondary." *Monmouth v. Pollution Control Board*, 57 Ill. 2d 482, 490, 313 N.E.2d 161, 166 (1974). As JM has addressed its contamination there is no need for any civil penalty or monetary relief.

5. JM mischaracterizes the evidence

JM incorrectly argues there is no evidence that JM brought transite pipes to the area. JM's Reply brief, p. 16-17. During the first hearing in 2016, JM stated that it placed transite pipes on its parking lot on what is now Site 3. *See e.g.* JM's Post Hearing brief filed 8/12/2016, p. 2. Importantly, the Board did not find that IDOT crushed or buried pipes, and in fact, JM's espoused theory in the initial hearing on liability in 2016, which was carried forward by its paid expert, was not accepted by the Board. Exh. 1-14-15 and Interim Opinion and Order, pgs 9-10. Moreover, there is nothing in the record to suggest that IDOT created the ACM waste - it was present before IDOT ever accessed the Superfund site. JM's apparent contention that the extensive ACM contamination saturating this Superfund site got there other than through its decades long asbestos

manufacturing and operations is unfounded. As the USEPA AOC unequivocally demonstrates, the adverse effects upon the environment were fully considered and borne by those who cause them—JM.

6. JM's skews and misapplies applicable law when referring to its so-called, "Clean Corridor Rule", "Next Cleanest Boring Rule" and "Proximate Causation Standard".

JM takes a concept applicable to remediation plans, calls it a "rule" and then misapplies it. In the Interim Order, the Board determined the locations where IDOT placed fill, which could have contained JM's ACM, based on the IDOT construction plans, or had a right of way, and not by what areas were in need of remediation or where contamination existed. In its arguments, JM borrows USEPA remediation concepts and completely skews them. USEPA wanted clean corridors for utilities, but that does not change the IDOT areas defined by the Board. This is the same as the misapplication of the need to remediate to the next cleanest boring - that until a boring is clean, assume the area between the two borings needs remediation. JM also skews this USEPA remediation concept to try to expand IDOT's area. *See, e.g.*, JM's Reply brief, p. 21. However, it is clear that IDOT's area is based on where the Board found IDOT open dumped - not where contamination existed. Interim Opinion and Order, pgs. 6-10, 21.

Similarly, with its proximate causation argument, JM tries to argue that contamination in IDOT areas drove contamination and remediation in other areas. *e.g.*, JM's Reply brief, pgs. 19-21. Again, IDOT was found to open dump in a specific area, and causation of other contamination is therefore inapplicable. JM attempts to confuse the Board with its unfounded assertions that are unsupported by applicable law. The Board should reject these illogical, faulty and made up concepts and arguments.

7. **JM's pictures of ACM are consistent with the evidence in the first hearing.**

JM argues the pictures show new evidence, but what IDOT argues is that the pictures are consistent with evidence in the first hearing. JM's Reply brief, pgs. 27-28. Moreover, these pictures existed during the time of the first hearing and briefing, and JM could have presented the pictures before the Board issued the Interim Order. The pictures shed no new light on the extent of contamination, and the Board should not open additional paths of liability for IDOT based on this cumulative evidence.

8. The Board should order just results

In applying equitable factors and Act principles, including Section 33 of the Act, 415 ILCS 5/33 (2020), ("Section 33 factors"), the Board should focus on equity, knowing that the source of the waste is JM, who has already been the subject of government remediation mandates. JM argues that IDOT did not address Section 33 factors, but IDOT did address the equitable factors contained in Section 33(c) throughout its reply brief. IDOT built a road for public use where JM left its ACM waste. JM caused the injury and is the culpable party. Accordingly, the Board should order just results and assess no penalties or other unwarranted monetary relief as to IDOT.

IDOT respectfully asks that the Board order that IDOT shall pay no money to JM and in the alternative, applying equitable factors, order that IDOT shall pay a sum adjusted down from $600,050, and for such other relief as the Board deems appropriate and just.

Respectfully Submitted,

ILLINOIS DEPARTMENT OF TRANSPORTATION

/s/ *Ellen F. O'Laughlin*

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