BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

To: See Attached Service List

PLEASE TAKE NOTICE that on December 2, 2021, I caused to be filed with the Clerk of the Pollution Control Board of the State of Illinois, Johns Manville Opposition to Illinois Department of Transportations' Motion to File Sur-reply, a copy of which is attached hereto and herewith served upon you via e-mail.

JOHNS MANVILLE

By: /s/ Susan E. Brice

Dated: December 2, 2021

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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a true copy of the foregoing Johns Manville Opposition to Illinois Department of Transportations' Motion to File Sur-reply was filed on December 2, 2021 with the following:

Don Brown, Clerk
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and that true copies were emailed on December 2, 2021 to the parties listed on the foregoing Service List.

/s/ Susan E. Brice

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

JOHNS MANVILLE OPPOSITION TO ILLINOIS DEPARTMENT OF TRANSPORTATIONS' MOTION TO FILE SUR-REPLY

Pursuant to 35 Ill. Adm. Code 101.500(e) and 101.610,[1] Respondent, Johns Manville ("JM"), by its undersigned counsel, responds and objects to Illinois Department of Transportation's Motion for Leave to File Sur-Reply to JM's Reply Brief ("Motion"). The Hearing Officer's Order did not allow a sur-reply, and there is no section of the Illinois Pollution Control Board's ("Board") procedural rules that allows it. Even if the Board were to consider the sur-reply to somehow be a "reply" under the Board Rules, a reply memorandum is not allowed except to "prevent material prejudice," and IDOT has failed to meet that high bar. 35 Ill. Adm. Code 101.500(e). IDOT's request for leave to file a sur-reply claims prejudice due to "misstatements of fact" and "incorrect and erroneous arguments" contained in Johns Manville's Reply. Motion, p. 1. As detailed below, IDOT has failed to demonstrate any material prejudice. IDOT's attempt to employ a Surreply to re-argue points, discuss irrelevant topics, argue points not tied to any evidence in the record and have the last word should not be condoned by the Board.

[1] The Hearing Officer has a duty to "to conduct a fair hearing, … and to ensure development of a clear, complete, and concise record for timely transmission to the Board." 35 Ill. Adm. Code 101.610.

I. None of the Purported Reasons Set Forth in IDOT's Motion For Leave to File a Sur-Reply Justify the Filing of a Sur-Reply.

The Board has made it clear that when the issues are fully briefed, no reply is necessary. *Roger and Romana Young v. Gilster-Mary Lee Corp.* 2001 Ill. ENV LEXIS 290, PCB00-09 slip op at 1, (June 21, 2001). When the reply offers no assistance and the movant would suffer no material prejudice, a motion for leave to file a reply should be denied. *Commonwealth Edison v. Illinois Environmental Protection Agency*, 2007 WL 1266937, PCB04-215, slip op at 2 (April 26, 2007) (B. Halloran).

"A denial is in order 'when the movant has had the opportunity to thoroughly brief the issues.'" *Id. (*quoting *In re Dairy Farmers of Am., Inc*., 80 F.Supp.3d 838, 857 (N.D.Ill. 2015). This is because "[t]he purpose of a sur-reply is not to give a party the final word but to protect 'the aggrieved party's right to be heard and provide [] the court with the information necessary to make an informed decision.'" *Id.* (quoting *In re Sulfuric Acid Antitrust Litig.,* 231 F.R.D. 320, 329 (N.D.Ill. 2005).

A. The Inability to Re-Hash Old Arguments and Identify Disagreements on the Law is not Equivalent to Material Prejudice.

IDOT makes 8 points in its Motion. Seven of these boil down to a re-litigation or re-framing of prior arguments made in earlier briefs. Despite the fact IDOT faults JM for "improper[ly]" attempting to re-argue liability in its Opening Post-Hearing Brief and asserts that "JM should not be allowed to again try again to convince the Board of the same arguments the Board has already rejected," IDOT Response Br., p. 19, re-litigation of prior issues is, hypocritically, exactly IDOT's mission with this Motion and suggested Sur-Reply. The points that fall into this category include that: (1) Johns Manville is already legally responsible to remediate the Sites; (2) sovereign immunity forecloses the requested relief; (3) the law of the case doctrine does not apply; (4) the Board lacks the authority to grant JM's requested relief; (6) JM misapplies USEPA's cleanup rules

relating to these Sites and the proximate causation standard; (7) the photographs of ACM are consistent with those in the first Hearing, and (8) the Board should order just results. With respect to these points, rather than identifying new evidence or some other potential material prejudice, IDOT hides behind the concept that JM's Reply "grossly skews" the law and the facts in an obvious attempt to reiterate and repeat arguments already it has already asserted.

For instance, while IDOT argues about causation at length in its Post-Hearing Brief, pp. 14-15 and 26-30, it tries to re-argue it in its proposed Sur-Reply, claiming that JM "made up" the concept of proximate causation (Sur-Reply, p. 7). But the concept of proximate causation, in the context of cost recovery actions, is rooted in the Illinois Environmental Protection Act. 415 ILCS 5/58.9(a)(1); JM's Reply, p. 17. Similarly, the Sur-Reply tries to re-litigate the point the "Act does not provide for the awarding of damages or reimbursement of costs in private actions before the Board," a point that has been previously ruled on in this case and that contravenes Board precedent. IDOT Post-Hearing Brief, pp. 18-19; Sur-Reply, p. 5. Another example of IDOT attempting to rehash old arguments can be found in Point 2, IDOT's claim that sovereign immunity bars JM's claim. IDOT Post-Hearing Brief, pp. 5-11; Sur-Reply, pp. 3-4. To the contrary, sovereign immunity does not apply here and IDOT previously addressed the issue in its Post-Hearing Brief. The Board should not waste time analyzing IDOT's repetitive arguments.

Moreover, conclusory legal assertions made by IDOT─ such as IDOT had no need to file a Counterclaim in this independent State action, that IDOT's interpretation of *Lynch* and the law of the case doctrine are wrong and that JM cannot seek damages from IDOT ─ do not rise to the level of "material prejudice" just because IDOT disagrees with them and labels these opposing arguments as such. IDOT's efforts to show material prejudice in Points 1, 2, 3, 4, 6, 7, and 8 are unavailing.

B. The Inability to Re-Argue Irrelevant Points is not Material Prejudice.

In Points 1, 5 and 7, IDOT squanders time on irrelevant arguments or claims unsupported by any evidence. As to JM's liability (Point 1 and 5), the Board repeatedly found JM's liability irrelevant to this case. In a 2017 (non-interim) Order, the Board held that JM's liability was irrelevant and never at issue since no claim had been filed against JM; the "only one found to have violated the Act is IDOT. The December 2016 order did not find that 'JM, ComEd, or anyone else violated the Act. . . . Furthermore, no complaint has even been brought before the Board alleging that anyone else violated the Act.'" *See* Board Order dated December 21, 2017, p. 4. Thus, JM's liability is off the table.

In point 5, IDOT claims that JM mischaracterized how the Transite Pipes were brought to the area and asserts the Board did not find that IDOT crushed or buried pipes. Sur-Reply, pp. 6-7. But who brought the re-used pipe products to the Site and placed them on top of the ground to serve as car bumpers is immaterial to either Hearing. What was important in the First Hearing was who engaged in open dumping and who controlled/allowed open dumping on parts of the Sites. Interim Order, pp. 5-6; 12-13. The Board held IDOT, and IDOT alone, responsible for open dumping and held that IDOT, and IDOT alone, controlled and allowed open dumping on Parcel 0393. *Id*. As to the Second Hearing, as stated above, the focus was not on liability, but rather on a determination of damages.

IDOT also claims the Board "did not find that IDOT crushed or buried pipes." Sur-Reply, p. 6. But the Board found that IDOT open dumped ACM material at an unpermitted disposal site, including pieces of Transite pipe found within the fill material placed by IDOT. Interim Order, p. 5. Thus, IDOT's argument is not only wrong, but also a misplaced effort to re-argue liability. The Board ruled, in part, that IDOT is responsible for the "ACM waste [] located in material placed by

IDOT to reconstruct Greenwood Avenue" and held that "ACM is located in materials placed by IDOT during construction." Interim Order, pp. 9-10. The argument offers no aid to the Board.

As to point 7, IDOT's claim that the photos at the First Hearing are consistent with those introduced at the Second Hearing has no bearing on the issues at hand and lacks any evidentiary support, including *any testimony* that the photographs are the same. But even if IDOT's point were material and supported in some way, the record is clear that the photographs presented at the Second Hearing and Mr. Dorgan's discussions with Mr. Peterson about them occurred after the First Hearing, which took place in May and June of 2016, and thus cannot be the same as those presented at the First Hearing. Oct. 26 Tr., pp. 172:4-7 (Peterson stating he took these photos probably in August 2016); *id*. pp. 242:2-243:5. In short, IDOT has failed to show material prejudice with respect to Points 1, 5 and 7.

II. Conclusion

No material prejudice exists and, as a result, the Motion must be denied. Allowing IDOT to relitigate issues already briefed/decided or to try and confuse the Board by discussing irrelevant topics serves only to waste the Board's resources and should be viewed as setting bad precedent. Wherefore, Johns Manville request that the Board enter an Order denying IDOT's Motion to file a Sur-Reply.

JOHNS MANVILLE

By: /s/ Susan E. Brice

Dated: December 2, 2021
Respectfully submitted,
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