BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

To: See Attached Service List

PLEASE TAKE NOTICE that on June 17, 2016, I caused to be filed with the Clerk of the Pollution Control Board of the State of Illinois, *Complainant's Motion to Quash Subpoenas*, a copy of which is attached hereto and herewith served upon you via e-mail. Paper hardcopies of this filing will be made available upon request.

Dated: June 17, 2016

Respectfully submitted,

BRYAN CAVE LLP

Attorneys for Johns Manville

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COMPLAINANT'S MOTION TO QUASH SUBPOENAS

Complainant JOHNS MANVILLE ("JM") hereby moves to quash Respondent ILLINOIS DEPARTMENT OF TRANSPORTATION'S ("IDOT") Subpoenas to Tatsuji Ebihara and Douglas G. Dorgan pursuant to 35 Ill. Admin. Code 101.622(d). In support thereof, JM states as follows:

INTRODUCTION

On June 15, 2016, IDOT filed a Notice of Service of Subpoena(s) with respect to JM fact witness, Tatsuji Ebihara, and JM expert witness, Douglas Dorgan. Once again, IDOT does not believe the rules apply to it. Neither witness nor JM has been served with any subpoena and counsel for JM was never asked to and never did agree to accept service of any subpoenas for the appearance of witnesses on June 23-24, 2016. In fact, JM told IDOT it would oppose IDOT calling JM's expert witness, Mr. Dorgan, in IDOT's case-in-chief as Mr. Dorgan was never listed on IDOT's witness list. Moreover, IDOT's subpoenas are too late. The subpoenas were required to be served at least 10 days before the scheduled hearing date, but IDOT filed a "Notice of Service" after this deadline had expired and not enough in advance of the hearing date. For

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these reasons, and because IDOT's subpoenas are unreasonable and would cause undue delay, the subpoenas to Mr. Ebihara and Mr. Dorgan should be quashed.

ARGUMENT

The Hearing Officer is vested with the power, and should exercise it here to quash these subpoenas to Mr. Ebihara and Mr. Dorgan. The Pollution Control Board Rules provide the Hearing Officer with the ability to do so:

> The hearing officer, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance, may quash or modify the subpoena if it is unreasonable or irrelevant.

35 Ill. Admin. Code 101.622(d).

1. IDOT's Subpoenas Should Be Quashed Because They Are Improperly Served And Untimely.

Counsel for JM never agreed to accept service of trial subpoenas for the upcoming hearing in this case on June 23 and June 24, 2016. Nor was counsel for JM ever asked to do so. Nevertheless, on June 15, 2016, IDOT emailed counsel for JM two subpoenas, one to Mr. Ebihara and one to Mr. Dorgan, as part of its "Notice of Service of Subpoenas" filed with the Board on June 15, 2016. IDOT apparently considers this to be proper service.[1] It is not. Because IDOT's subpoenas were served to JM's counsel (who has not agreed to accept service) and were not served upon the witnesses themselves, IDOT's subpoenas should be quashed for this reason alone.

Moreover, IDOT's subpoenas are served too late such that they should be quashed and the appearance at trial of Mr. Dorgan and Mr. Ebihara should not be required at 9:00 a.m. on

[1] Interestingly, not even IDOT's sworn statements of service are correct. While Evan McGinley swore and affirmed that the subpoena for Mr. Dorgan was served, this sworn statement is attached to the subpoena directed to Mr. Ebihara. Similarly, while Evan McGinley swore and affirmed that the subpoena for Mr. Ebihara was served, this sworn statement is attached to the subpoena directed to Mr. Dorgan.

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June 23, 2016. The Board Rules require that any subpoena for trial be served no less than ten days before appearance is required:

> Service of the subpoena on the witness **must** be completed **no later than** 10 days before the date of the required appearance.

35 Ill. Admin. Code 101.622(b) (emphasis added). Though IDOT's subpoenas require Mr. Ebihara and Mr. Dorgan to appear and give testimony on June 23, 2016, these subpoenas were only "served" on June 15, 2016—**less** than the ten days of advance notice required. This is improper. IDOT's subpoenas should be quashed.

2. IDOT's Subpoena To Mr. Dorgan Should Be Quashed Because Mr. Dorgan Was Not Identified By IDOT As A Potential Witness and Has Disclosed No Opinions For IDOT

IDOT should not be permitted to call a witness at trial that it has not disclosed as a witness in its Pre-Hearing Report. This is precisely what IDOT attempts to do here in subpoenaing Mr. Dorgan. Mr. Dorgan was not identified on IDOT's witness list contained in its May 17, 2016 Pre-Hearing Report. To allow IDOT to call Mr. Dorgan now would contravene the Hearing Officer's May 5, 2016 Order, which required timely disclosure of IDOT's trial witnesses by no later than May 17, 2016. IDOT should not be rewarded for its disregard for the Hearing Officer's Orders. *See In the Matter of George Blakemore & Starbucks Coffee Co*., No. 97-PA-60, 1999 WL 160525, *7 (Chi. Com. Hum. Rel. Feb. 24, 1999) (barring witness from testifying at hearing because of disregard for the Hearing Offer's orders, including one requiring producing a witness list before a certain date).

This situation is analogous to *S.P. v. A.S.P*., 2011 IL App (1st) 111407-U, ¶ 97. In that case, the court held that barring testimony of undisclosed witnesses was not abuse of discretion where the party knew the witnesses' identities well before the discovery deadline date, the party displayed a lack of due diligence, and where the other party would be prejudiced by not being

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able to adequately prepare for the witnesses' testimony. Here, like in *S.P.*, IDOT has not been diligent in identifying Mr. Dorgan as a witness for IDOT's case-in-chief. *See also Carlson v. Lyon*, 2012 IL App (3d) 110056-U, ¶ 79 (affirming quashing of subpoena and holding that "[a]n adverse party qualifies as a witness and must be identified in Rule 213(f) responses if the answering party intends to call the adverse party as a witness in its case-in-chief.") (internal citations omitted). IDOT had plenty of opportunity to, and did, cross-examine Mr. Dorgan at length during JM's case-in-chief. It is unclear exactly what testimony IDOT plans to elicit from Mr. Dorgan since he is JM's expert witness, who has not disclosed any opinions on behalf of IDOT. Thus, JM would be prejudiced as a result of IDOT's lack of diligence and continued failure to follow the rules. If Mr. Dorgan is called in JM's rebuttal case, which has not yet been decided, IDOT can cross examine him again within the scope of his rebuttal testimony.

3. IDOT Subpoenas Should Be Quashed Because They Will Unnecessarily Delay The Proceeding And Would Amount To Cumulative Testimony.

Allowing IDOT to call Mr. Dorgan and Mr. Ebihara in its case-in-chief would only delay the completion of the hearing. IDOT has already not only cross examined Mr. Dorgan in depth, but also has crossed examined Mr. Ebihara. IDOT's own expert witness, Mr. Gobelman, has already testified. It appears that IDOT wants to somehow co-opt Mr. Dorgan and Mr. Ebihara into serving as its experts. This is improper. Neither Mr. Dorgan nor Mr. Ebihara was disclosed as IDOT expert witnesses just as they have not disclosed opinions supporting IDOT. [2] Further, Mr. Ebihara is only serving as a fact witness in this case. Thus, any testimony IDOT plans to elicit from these two witnesses must be cumulative and would only delay the proceedings. The

[2] JM's effort to call Mr. Stoddard as a witness is different. JM has not been allowed the opportunity to cross examine him and IDOT stated on the record that it plans to rely simply upon his written testimony. (*See* Transcript of May 25: p. 280:2-22.) As set forth in JM's Objection to IDOT's Use of Exhibits As Evidence Without Accompanying Witness Testimony, this is improper. (*See* JM's Objections, pp. 14-15); 35 Ill. Admin. Code 101.626. Thus, JM will call Mr. Stoddard in its rebuttal case if it is not allowed to cross examine him in IDOT's case-in-chief.

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Hearing Officer has the power to "limit repetitive and cumulative testimony and questioning." 35 Ill. Admin. Code 101.610(e). That is precisely what should be done here.

Indeed, JM had not intended to re-call Mr. Ebihara in its rebuttal case. However, the Hearing Officer reversed his prior ruling with respect to JM's attempt to refresh Mr. Ebihara's recollection as to calculations he performed about costs incurred related to Site 3 since the filing of this lawsuit. Instead of being allowed to offer the numbers themselves, Mr. Ebihara only provided a percentage calculation. (*See* Transcript of May 23: pp. 78:1-79:5.) After further reflection, the Hearing Officer indicated that he would allow Mr. Ebihara to enter the numbers he had written down into evidence. (*See* Transcript of May 25: pp. 180:24-182:4.) With the exception of offering these numbers into evidence at some point during the two remaining hearing days, which would take about one minute, JM had not intended on requiring Mr. Ebihara to be present for another full day of trial. If permitted, JM would prefer to simply submit Mr. Ebihara's numbers in writing, which are consistent with the percentage testimony previously provided, in lieu of having Mr. Ebihara testify again simply to enter the numbers he was not permitted to state on direct examination on May 23, 2016.

CONCLUSION

WHEREFORE, Complainant JOHNS MANVILLE respectfully requests that the Hearing Officer quash the subpoenas issued to Tatsuji Ebihara and Douglas D. Dorgan, filed by IDOT on June 15, 2016.

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Dated: June 17, 2016

Respectfully submitted,

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