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, August 25, 2016, Respondent, Illinois Department of Transportation, filed and served its "Response to Complainant's Motion for Leave to File Third Amended Complaint to Conform Pleadings to Proofs" and its "Motion to Toll Filing of Post-Hearing Brief" with the Clerk of the Pollution Control Board, copies of which are hereby served upon you.

Respectfully Submitted,

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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.	)	

IDOT'S RESPONSE TO COMPLAINANT'S MOTION FOR LEAVE TO FILE THIRD AMENDED COMPLAINT TO CONFROM PLEADINGS TO PROOFS

NOW COMES RESPONDENT, the Illinois Department of Transportation ("IDOT"), through its attorney LISA MADIGAN, Attorney General of the State of Illinois, who herewith sets forth its response and objections ("Response") to Complainant's Motion for Leave to File Third Amended Complaint to Conform Pleadings to Proofs ("Motion"). IDOT states the following in support of its Response:

INTRODUCTION

Six weeks after the last day of hearing in this matter and in conjunction with the filings of its post-hearing brief, Johns Manville now moves to amend its complaint for yet a third time, so as to add new factual allegations and a new count to its existing complaint. Put simply, these new allegations and new claim were known to Johns Manville long before it filed its motion and it is therefore untimely. Johns Manville had numerous opportunities prior to May 23, 2016 - the first day of hearing in this matter - to have brought this motion. There is no valid reason for them to bring this motion now and the Board should deny it.

It is prejudicial to IDOT's ability to defend itself in this action to now be faced with Johns Manville's untimely motion. By bringing this motion now, rather than before this matter went to hearing, Johns Manville denies IDOT the opportunity to be able to fully and adequately

defend itself against Johns Manville's allegations. This is not the first time that Johns Manville has employed such tactics against IDOT. Indeed, Johns Manville previously sought to amend its complaint in February of this year, only weeks before this matter was initially set to go to hearing. The Board should not condone Johns Manville's gamesmanship.

STATEMENT OF FACTS

In November 2000, IDOT produced several hundred pages of documents to the United States Environmental Protection Agency ("USEPA"), in response to USEPA's 104(e) request. Among the documents which IDOT produced to USEPA at that time was a copy of a 1971 Grant for Public Highway. (This document was received into evidence at the Board's hearing of this matter as Exhibit 41.) Johns Manville possibly had knowledge of the existence of Exhibit 41 at some point in time before July 2, 2013, when it initiated this action before the Board.

In late October 2014, in response to Johns Manville's first set of requests for production of documents, IDOT produced a number of documents to Johns Manville, including the 1971 and 1974 Grant for Public Highway (i.e., Exhibits 41 and 42). Exhibit 41 lists 6 parcels of land which IDOT's predecessor obtained in a grant for public highway from Commonwealth Edison, including Parcel 392. Parcel 392, which includes the north side of Greenwood Avenue, just east of Sand Street/Pershing Road, in Waukegan, Illinois, is synonymous with the "North ROW" referenced in Paragraph 12 of Johns Manville's proposed Third Amended Complaint.

In June 2015, IDOT once again produced copies of Exhibits 41 and 42 to Johns Manville, in response to Johns Manville's request for production of documents issued prior to Johns Manville's deposition of IDOT's expert witness, Steven Gobelman. IDOT also produced copies of the 1970 Environmental Protection Act (i.e., the "1970 Act" and Hearing Exhibit 81) to Johns Manville at that time, as well.

On February 16, 2016, Johns Manville filed its Motion for Leave to File its Second Amended Complaint with the Board. Two days later, on February 18, 2016, both IDOT and Johns Manville filed their respective exhibit lists for the hearing in this matter that was at that time scheduled to commence on March 15, 2016. The 1970 Act was identified as Exhibit Number 12 on IDOT's Exhibit List. The 1971 and 1974 Grant for Public Highway were included on Johns Manville's February 18th Exhibit List as Exhibits 34 and 35, respectively.

On April 12, 2016, IDOT filed its Answer and Affirmative Defenses in response to Johns Manville's Second Amended Complaint. IDOT's Seventh Affirmative Defense asserted that the activities it engaged in as part of the construction of the Amstutz Expressway were not a violation of state law at the time that those activities were conducted.

On April 20, 2016, Johns Manville filed its Partial Motion to Strike Affirmative Defenses, through this Motion, Johns Manville sought, among other things, to strike IDOT's Seventh Affirmative Defense.

The hearing in this matter took place over the course of five days in May and June 2016 (i.e., May 23-25 and June 23 and 24).

On August 12, 2016, Johns Manville filed the underlying Motion, seeking leave to file a third amended complaint that would add both new allegations regarding the Site, as well as a new count.

ARGUMENT

Illinois courts have noted that "[t]here is no absolute right to amend a pleading." *Butler v. Kent*, 275 Ill.App.3d 217, 229 (1st Dist. 1995). Illinois courts have also noted that "'Once the trial commenced leave to amend is properly denied where the facts upon which the proposed amendment are based were known to the party at the time of his original pleading and no good

reason is offered for their not having been filed at that time.'" *Arroyo v. Chicago Trans. Auth.*, 268 Ill.App.3d 317, 324 (1st Dist. 1994) (citing *Delzell v. Moore* (1992), 224 Ill.App.3d 808, 812. The sequence of events in this case make it clear that Johns Manville was aware of the purported new allegations and the basis for its proposed new count at the time that it filed its motion for leave to file a second amended complaint in this action.

As a general matter, trial courts have "broad discretion in ruling upon motions to amend pleadings." *Id.* (Citations omitted.) In deciding how to employ this discretion, trial courts should employ the four factors identified in *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill.2d 263, 273 (1992). The four factors to be considered are:

> (1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleadings could be identified.
>
> *Id.*

As explained in more detail below, none of these factors favors the granting of Johns Manville's Motion.

Although Johns Manville also identifies *Loyola Academy* in its Motion as providing the relevant factors that need to be considered by the Board in ruling on its Motion, Johns Manville does not identify any defect in its underlying complaint which would be cured through the Board's granting of its Motion. (*See generally*, Mot., pp.6-8.) But under any circumstances, its efforts to add a new count to its proposed third amended complaint after the close of the hearing are properly denied. *Taylor v. County of Cook*, 2011 IL App (1st) 093085, ¶56 (noting that amendment of a complaint to add a new count after trial does not qualify as curing a defective pleading).

As for the second factor – the presence or absence of prejudice – IDOT is prejudiced by Johns Manville's Motion, as it comes about six weeks after the end of the hearing in this matter and long after Johns Manville knew about the existence of the underlying facts and law giving rise to the facts and law that it now seeks to include in its proposed Third Amended Complaint. Johns Manville has been on notice for at least approximately 21 months – and likely quite a bit longer than that - about the existence of Parcel 392 and the Grant for Public Highway. It had ample time and seemingly multiple opportunities to amend its operative complaint to add allegations about the North ROW prior to August 12th, including six months earlier, when it filed its motion for leave to file its then-proposed second amended complaint.

Johns Manville also had prior opportunities to amend its complaint to add its now-proposed second count. Through its April 20th filing of its Motion to Strike Affirmative Defenses, Johns Manville demonstrated that claims related to the prior version of the Act and its applicability to this case were potentially in play. Yet only now, some six weeks after the end of the hearing in this matter, does it seek to add a new count alleging that IDOT violated older version of the Act, as well as the current version of the Act. It is typical of the gamesmanship that Johns Manville has engaged in throughout the litigation of this case that now, at this late date, they seek to amend their pleadings "to conform the complaint to the proof adduced at trial." IDOT is also prejudiced by Johns Manville's Motion because it cannot file its post-hearing brief until the Board first resolves Johns Manville's Motion, because it now must be determined just what issues will need to addressed in IDOT's post-hearing brief.[1]

[1] Concurrently with the filing of its response to Johns Manville's Motion, IDOT has filed a Motion to Toll Filing of its Post-Hearing Brief, so that the Board may first determine whether to grant or deny the Motion , so that and all of the issues which need to be addressed in IDOT's post-hearing brief are first identified.

As for the third *Loyola* factor – i.e., the timeliness of the proposed amendment - Johns Manville's attempt to file a third amended complaint in this action adding a new count based upon IDOT's alleged violations of the original version of the Act, is also untimely. There is simply no valid basis for JM bringing its Motion some six weeks after the completion of the hearing in this matter, four months after IDOT filed its Answer and Affirmative Defenses to Johns Manville's Second Amended Complaint, six months after IDOT listed the former Act as one of its hearing exhibits, and approximately 15 months after IDOT produced copies of emails and prior versions of the Act in response to Johns Manville's discovery requests.

Finally, with respect to the fourth *Loyola* factor, based upon when the Grant for Public Highway was produced to Johns Manville, it could easily have made the new allegations about the North ROW part of its previously filed Second Amended Complaint. Instead, it chose to wait until six weeks after the conclusion of the hearing in this matter to add new allegations about the North ROW. Given the timeline of events surrounding Johns Manville's latest motion seeking leave to amend its complaint, the Motion is properly denied by this Board. *Arroyo v. Chicago Trans. Auth*., 268 Ill.App.3d at 324; *See also, Hartzog v. Martinez*, 372 Ill.App.3d 515, 524 (1st Dist. 2007) ("[S]ince plaintiffs had sufficient previous opportunity to make an amendment, the circuit court was well within the latitude of its discretion to deny their belated motion for leave to amend.")

Simply put, Johns Manville could have easily sought to amend its complaint with its proposed second count earlier this year and well before the first day of hearing. This is because the underlying legal basis for this second count (i.e., the 1970 and other earlier version of the Act) were known to Johns Manville at the latest when IDOT filed its Answer and Affirmative Defenses on April 12, 2016 and almost certainly even earlier than that. Like the plaintiff in

Hartzog, Johns Manville had opportunities at several points prior to the commencement of hearing in this matter to have sought to amend its complaint to add its now-proposed second count, but failed to raise the claim. Because it failed to make timely use of these opportunities to so amend, and fails to meet any of the criteria of *Loyola*, its Motion is properly denied by the Board. *Id.*

CONCLUSION

Unquestionably, Johns Manville had several opportunities to amend its operative complaint, so as to add allegations about the North ROW and a new count alleging that IDOT violated an earlier version of the Act. It has failed to offer any cogent explanation for why it did not seek to amend its underlying complaint until August 12th. Although claiming that IDOT had "ample opportunity to examine and cross examine all witness at trial" (Motion, ¶14), this claim rings false because it presumes that IDOT should have sought testimony and to have introduced evidence at hearing regarding both Johns Manville's known, as well as unknown, claims. For these reasons, as well as the other ones cited above in this response, the Board should deny Johns Manville's Motion.

Respectfully Submitted,

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	)	(Citizen Suit)
ILLINOIS DEPARTMENT OF TRANSPORTATION, Respondent.	)	

RESPONDENT'S MOTION TO TOLL BRIEFING

NOW COMES RESPONDENT, the Illinois Department of Transportation ("IDOT"), through its attorney LISA MADIGAN, Attorney General of the State of Illinois, which moves the Pollution Control Board ("Board"), pursuant to Board Rule 101.502, 35 Ill. Adm. Code 101.502, to toll the date for IDOT to file its post-hearing brief until a date after the Board has first ruled on Complainant's August 12, 2016 Motion for Leave to File Third Amended Complaint to Conform Pleadings to Proofs. IDOT states as follows in support of this motion:

1. IDOT is presently scheduled to file its post-hearing brief on or before September 16, 2016.

2. On August 12, 2016, Complainant, Johns Manville filed its post hearing brief, as well as a Motion for Leave to File a Third Amended Complaint to Conform Pleadings to Proofs ("Motion to Amend"). Johns Manville's proposed Third Amended Complaint contains new facts (*See e.g.,* Paragraph 12 of proposed Third Amended Complaint), as well as a new count (e.g., Count II).

3. On August 24, 2016, simultaneously with the filing of this motion to toll, IDOT filed its response to Johns Manville's Motion to Amend, wherein it objects to the motion and asks the Board to deny the Motion to Amend.

4. As with Johns Manville's February 16, 2016 Motion for Leave to File its Second Amended Complaint, the Board as a whole, and not the Hearing Officer, will have to rule on Johns Manville's pending Motion to Amend.

5. The Board's ruling on Johns Manville's Motion to Amend will have a direct bearing on the scope of the issues which IDOT will have to address in its post-hearing brief. As such, IDOT believes that the current September 16th deadline for the filing of IDOT's post-hearing brief should be tolled until after the Board issues an Opinion and Order on the Motion to Amend, such that IDOT has a full and complete understanding of the issues which it must be prepared to address in its post-hearing brief.

WHEREFORE, Respondent ILLINOIS DEPARTMENT OF TRANSPORTATION, moves the Hearing Officer to:

1. Toll the filing deadline for the filing of IDOT's post-hearing brief until a date after the Board issues its Opinion and Order on Johns Manville's pending Motion to Amend;
2. Set this matter for a status date at the Hearing Officer's earliest opportunity; and,
3. Granting such other relief as the Hearing Officer believes to be appropriate and just.

Respectfully Submitted,

ILLINOIS DEPARTMENT OF TRANSPORTATION

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CERTIFICATE OF SERVICE

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

I, EVAN J. McGINLEY, do hereby certify that, today, August 25, 2016, I caused to be served on the individuals listed below, by electronic mail, true and correct copies of Respondent IDOT's "Response to Complainant's Motion for Leave to File Third Amended Complaint to Conform Pleadings to Proofs" and IDOT's "Motion to Toll Filing of Post-Hearing Brief."

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