

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 November 13, 2017, I caused to be filed with the Clerk of the Pollution Control Board of the State of Illinois, *COMPLAINANT'S RESPONSE TO IDOT'S BRIEF REGARDING RELEVANCE OF CERTAIN DISCOVERY*, a copy of which is hereby served upon you via electronic mail.

Dated: November 13, 2017

Respectfully submitted,

BRYAN CAVE LLP

Attorneys for Johns Manville

By: /s/ Lauren J. Caisman
Susan Brice, ARDC No. 6228903
Lauren J. Caisman, ARDC No. 6312465
161 North Clark Street, Suite 4300
Chicago, Illinois 60601
(312) 602-5079
Email: susan.brice@bryancave.com
lauren.caisman@bryancave.com

SERVICE LIST

Evan J. McGinley
Office of the Illinois Attorney General
69 West Washington Street, Suite 1800
Chicago, IL 60602
E-mail: emcginley@atg.state.il.us

Matthew D. Dougherty
Assistant Chief Counsel
Illinois Department of Transportation
Office of the Chief Counsel, Room 313
2300 South Dirksen Parkway
Springfield, IL 62764
E-mail: Matthew.Dougherty@illinois.gov

Ellen O'Laughlin
Office of Illinois Attorney General
69 West Washington Street, Suite 1800
Chicago, IL 60602
E-mail: eolaughlin@atg.state.il.us

Illinois Pollution Control Board
Brad Halloran, Hearing Officer
James R. Thompson Center
100 W. Randolph, Suite 11-500
Chicago, IL 60601
E-mail: Brad.Halloran@illinois.gov

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

Gabrielle Sigel
Jenner & Block LLP
353 N. Clark
Chicago, IL 60653
E-mail: GSigel@jenner.com

Alexander Bandza
Jenner & Block LLP
353 N. Clark
Chicago, IL 60653
E-mail: ABandza@jenner.com

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COMPLAINANT’S RESPONSE TO IDOT’S BRIEF REGARDING RELEVANCE OF CERTAIN DISCOVERY

Complainant JOHNS MANVILLE (“JM”), responds to IDOT’s Response to Hearing Officer’s October 5, 2017 Order (“IDOT Response”) as follows:

INTRODUCTION

IDOT manages to file a seven page brief about relevance without ever explaining how the information it seeks is relevant or material to the issues in this proceeding. More specifically, IDOT speculates that the information it seeks might shed light on various topics, but then fails to explain *how* those topics have anything to do with the narrow issues the Board has ordered to be addressed at a second hearing. Without any tie between the information IDOT seeks and the three issues set forth in the Board’s December 15, 2016 Order, the Hearing Officer and/or the Board should find IDOT’s discovery requests to be irrelevant.

I. IDOT Fails To Connect The Dots Between The Information Sought And The Relevant Issues.

“Relevant evidence” is evidence “having a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ILL. EVID. R. 401. This definition encompasses “the materiality

of evidence as well as its probative value.” *Spencer v. Wandolowski*, 264 Ill. App. 3d 611, 617 (1st Dist. 1994). “Materiality, or ‘fact of consequence’ . . . refers to the relationship a particular proposition bears to the ultimate determination of the action . . . Probative value, on the other hand, refers to the tendency of the evidence to render a particular proposition more or less probable than it would be without the evidence, and is determined by testing the proffered fact against ‘the light of logic, experience and accepted assumptions of human behavior.’” *Id.* In Illinois, “[t]o establish the relevance of a piece of evidence the proponent must: (1) identify the fact that it is seeking to prove with the evidence; (2) explain how that fact is of consequence; and (3) show how the evidence tends to make the existence of this fact more or less probable than it would be without the evidence.” *People v. Gregory*, 2016 IL App (2d) 140294, ¶ 21. IDOT fails to establish any of these three essential elements.

IDOT’s argument immediately derails when IDOT cannot identify *any fact* it is seeking to prove (or disprove) with the information it requests through the Subpoenas and Motion to Produce. For this reason alone, IDOT fails to meet its threshold burden to establish relevance. But IDOT’s shortcomings do not stop there. In part because it fails to pinpoint a fact, IDOT does not and cannot meet the second and third elements necessary to establish relevance. IDOT fails to show how any fact (let alone the unidentified fact) is “of consequence” or how the evidence tends to prove or disprove any consequential fact. Instead of identifying such a fact, IDOT speculates about what any purported agreement between JM and ComEd might show. IDOT hypothesizes that any such agreement: “would *likely* define their respective rights and responsibilities” in meeting their obligations under the Administrative Order on Consent (“AOC”); “*may* speak to the question” of whether ComEd “is required to reimburse” JM for any costs that have been incurred in responding to the AOC; “*may* delineate how” JM and ComEd

“*may* have allocated or proportioned liability between themselves”; and/or “*may* shed light on understandings” reached between the parties and on whether JM’s litigation positions “are consistent with” such understandings. (IDOT Response, pp. 3-4 (emphasis added).) But these are not facts, or even issues, of consequence. They are more akin to general topics of inquiry.

Critically, IDOT does not pinpoint any fact or issue “of consequence” that might be impacted by the evidence it seeks. IDOT merely asserts that any supposed agreements or payments between the parties are “relevant” without explaining which issue the information informs. (IDOT Response, pp. 4-5 (contending that: “[s]uch an agreement could therefore be highly relevant to at least *some of the issues* that IDOT will be called upon to address during the next round of hearings in this matter”; “[q]uestions pertaining to relationship between Johns Manville and Commonwealth Edison are directly relevant to *some of the issues* which the Board has directed the parties to address during future hearing in this matter”; and “the Board will also be deprived of critical information that would allow it to fully determine *the issues* which its prior December 15th Order have directed further hearings on”) (emphasis added).) In other words, IDOT never connects the dots identifying *which issue or fact* the information impacts or how the evidence it seeks “tends to make the existence of this fact more or less probable than it would be without the evidence.” This failure dooms IDOT’s relevancy arguments. *See e.g., M. Loeb Corp. v. Brychek*, 98 Ill. App. 3d 1122 (1st Dist. 1981) (holding that discovery was irrelevant to the issues and that the trial court did not err in striking the pleadings without the discovery).

II. IDOT Wrongly Focuses On ComEd’s Liability.

IDOT’s Response centers around its assertion that ComEd is “jointly and severally liable” for carrying out AOC activities and thus IDOT must presumably be allowed to “learn

about the nature and scope of any relationship between these two parties, as it pertains to their mutual obligations to conduct the work specified by the AOC.” (IDOT Response, pp. 1, 5; *see also id.*, p. 2 (arguing that USEPA has dealt with both JM and ComEd as being “jointly responsible”); *id.*, p. 3 (“[I]n order to meet their joint and several obligations under the AOC, it is reasonable to assume that the Respondents have entered into at least one agreement regarding how they would go about meeting these obligations.”).) Yet, as noted above, IDOT does not explain how ComEd’s obligations under the AOC are “of consequence” to the three issues to be determined at hearing.

IDOT even attaches unauthenticated documents not admitted into evidence during the initial hearing¹ seemingly in an effort to show that ComEd is jointly and severally liable, a point that is both legally incorrect and immaterial to this case. (IDOT Response, pp. 2-3.) As JM explained in its Brief Regarding Relevance of Discovery Sought by IDOT, filed October 27, 2017 (“JM Brief”), the AOC expressly states that “the actions undertaken by the Respondents [both JM and ComEd] in accordance with this Settlement Agreement [the AOC] do not constitute an admission of liability.” (Hearing Exhibit 62-3, ¶¶ 1, 4; JM Brief, p. 7.) But more importantly, evidence of ComEd’s liability and/or of obligations ComEd has undertaken under the CERCLA AOC are not “of consequence” to the issues before the Board—JM’s costs, their reasonableness, and the portion thereof attributable to IDOT’s violation of the Illinois Environmental Protection Act. In fact, IDOT itself has conceded that ComEd’s liability is not at issue and that its Subpoenas were not issued to litigate ComEd’s liability. (*See* IDOT Response to ComEd Motion to Quash, filed June 22, 2017, p. 5 (IDOT stating that its Subpoena is not an

¹ IDOT says that “all ‘Exhibit’ references in its Response refer to those documents that were received into evidence by the Board during the initial hearing.” (IDOT Response, n. 1.) But on page 2 of the Response, for example, IDOT cites Exhibits A-C, without identifying hearing exhibit numbers as there is no record of these documents being admitted into evidence at hearing.

attempt to litigate ComEd's "potential or actual liability").) IDOT's liability alone is at issue here. (*See* JM Brief, pp. 5-7.) IDOT's efforts to distract the Hearing Officer and Board from this singular issue should be quashed.

III. IDOT Fails To Address The Collateral Source Rule.

In its objections to IDOT's Notice of Deposition and Document Rider to Scott Myers served June 28, 2017, JM objected on the basis that "the requests are irrelevant for various reasons," including that they "are not limited to the three specific issues identified in the Board's December 2016 Interim Opinion and Order and are immaterial under the collateral source rule." (*See* JM's Objections, attached as **Exhibit 1.**) While IDOT's Response acknowledges that there are only three issues to be addressed at the second hearing, IDOT fails to identify how the information it seeks is relevant to any of the three issues. Moreover, notwithstanding JM's objection, IDOT failed to address JM's collateral source rule argument in its Response. Under the collateral source rule, any amounts paid to JM by ComEd are irrelevant and inadmissible. (*See* JM Brief, § B.) IDOT cannot escape this reality.

IV. IDOT Fails To Meaningfully Address The Relevancy Of Its Motion To Produce.

IDOT argues that its "Motion to Produce also continues to be relevant, as it was brought for the purpose of retaking the deposition of Scott Myers, Johns Manville's Director of Environmental Programs." (IDOT Response, p. 6.) But the Hearing Officer's question was not whether IDOT's Motion is relevant to the procedural stage of these proceedings, but whether the information IDOT seeks to obtain through the second deposition is relevant to the damages issues to be heard by the Board. As a result, IDOT's arguments about the Motion to Produce are nothing more than a side show.

Instead of addressing the topics it wants to explore with Mr. Myers and articulating how those topics are relevant to this case, IDOT argues about whether it was appropriate for JM to instruct Mr. Myers not to answer on the basis of privilege (*see* IDOT Response, p. 6), issues that the Hearing Officer did not ask to be addressed at this time and for which JM has reserved its right to address at a later date. (*See* JM Brief, p. 3.) Even then, IDOT only takes issue with the mere posing of the objection. Nowhere in IDOT's Response does IDOT argue the merits of the privileges asserted or seek specific rulings on the objections.

To make matters worse, IDOT misrepresents the deposition transcript and omits references therein where Mr. Myers answered IDOT's questions *in full*. For example, contrary to IDOT's suggestion, Mr. Myers answered whether he had ever met with anyone from ComEd regarding the Site. (*Compare* Transcript (Motion to Produce, Ex. A), pp. 93:17-94:1; 95:4-12; 96:4-11; 113:5-116:21 *with* IDOT Response, p. 6 (claiming that Mr. Myers was instructed not to answer the same question).) Further, while IDOT claims that Mr. Myers possibly possesses unidentified information regarding JM and ComEd's obligations under the AOC (*see* IDOT Response, pp. 6-7), Mr. Myers already testified that he is not familiar with the AOC. (*See* Transcript, pp. 7:3-10; 7:16-21; 9:2-6.) Since IDOT cannot explain why the information sought in its Motion to Produce is relevant, the Motion to Produce should be denied.

V. The June 23rd Subpoena Is Void.

While the Hearing Officer's October 5, 2017 Order requested that the parties address IDOT's June 23, 2017 Subpoena for the deposition of a ComEd corporate representative, that subpoena is null and void per Board regulations. IDOT never filed and served a copy of that subpoena with the Board or upon the Hearing Officer as required by 35 Ill. Admin. Code. 101.622(b) ("A copy of the subpoena must be filed with Clerk and served upon the hearing

officer with 7 days after service upon the witness. Failure to serve both the Clerk and the hearing officer will render the subpoena null and void.”). (*See generally* docket). Consequently, the relevance of the June 23rd subpoena should not be at issue. In any event, the deposition topics listed in the June 23rd subpoena largely mirror the document requests in IDOT’s earlier subpoena to ComEd; IDOT seeks to question ComEd on ComEd’s performance of its obligations under the AOC and agreements “with respect to the allocation, reimbursement, or payment of any and all costs” at the “Southwestern Site Area.” For the same reasons that the subpoenaed documents are not relevant (as set forth above and in JM’s Brief), a deposition of a ComEd corporate representative on the same subject matter is also not relevant.

CONCLUSION

IDOT is unable to articulate any reason why the information it seeks is relevant or calculated to lead to relevant evidence. This abject failure not only underscores JM’s argument that IDOT’s Subpoenas and Motion to Produce are nothing more than a baseless fishing expedition, but also illuminates the absurdity and improvidence of IDOT’s discovery requests. The Board should put an end to this aimless discovery expedition not only because the information IDOT seeks is irrelevant, but also because it is privileged and confidential.

Dated: November 13, 2017

Respectfully submitted,

BRYAN CAVE LLP

Attorneys for Complainant Johns Manville

By: /s/ Lauren J. Caisman
Susan E. Brice, ARDC No. 6228903
Lauren J. Caisman, ARDC No. 6312465
161 North Clark Street, Suite 4300
Chicago, Illinois 60601

(312) 602-5124

Email: susan.brice@bryancave.com

Lauren.caisman@bryancave.com

CERTIFICATE OF SERVICE

I, the undersigned, certify that on November 13, 2017, I caused to be served a true and correct copy of *COMPLAINANT'S RESPONSE TO IDOT'S BRIEF REGARDING RELEVANCE OF CERTAIN DISCOVERY* upon all parties listed on the Service List by sending the documents via e-mail to all persons listed on the Service List, addressed to each person's e-mail address.

/s/ Lauren J. Caisman
Lauren J. Caisman

SERVICE LIST

Evan J. McGinley
Office of the Illinois Attorney General
69 West Washington Street, Suite 1800
Chicago, IL 60602
E-mail: emcginley@atg.state.il.us

Matthew D. Dougherty
Assistant Chief Counsel
Illinois Department of Transportation
Office of the Chief Counsel, Room 313
2300 South Dirksen Parkway
Springfield, IL 62764
E-mail: Matthew.Dougherty@illinois.gov

Ellen O'Laughlin
Office of Illinois Attorney General
69 West Washington Street, Suite 1800
Chicago, IL 60602
E-mail: eolaughlin@atg.state.il.us

Illinois Pollution Control Board
Brad Halloran, Hearing Officer
James R. Thompson Center
100 W. Randolph, Suite 11-500
Chicago, IL 60601
E-mail: Brad.Halloran@illinois.gov

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

Gabrielle Sigel
Jenner & Block LLP
353 N. Clark
Chicago, IL 60653
E-mail: GSigel@jenner.com

Alexander Bandza
Jenner & Block LLP
353 N. Clark
Chicago, IL 60653
E-mail: ABandza@jenner.com

EXHIBIT 1

Caisman, Lauren

From: Caisman, Lauren
Sent: Wednesday, June 28, 2017 2:39 PM
To: 'McGinley, Evan'; O'Laughlin, Ellen; 'Dougherty, Matthew D.'
Cc: Brice, Susan
Subject: RE: Johns Manville v. IDOT, PCB 14-3 - Notice of Deposition for Scott Myers
Attachments: JM Objections to Myers Notice of Deposition.pdf

Evan, Ellen, and Matthew-

Attached please find JM's Objections and Responses to Notice of Deposition to Scott Myers. Much of this reiterates the objections we raised during our phone call with you on Monday, June 26.

Thank you,
Lauren

Lauren Caisman
Associate
BRYAN CAVE LLP
T: +1 312 602 5079
lauren.caisman@bryancave.com

-----Original Message-----

From: McGinley, Evan [<mailto:emcginley@atg.state.il.us>]
Sent: Monday, June 26, 2017 9:35 AM
To: Brice, Susan; Caisman, Lauren
Cc: O'Laughlin, Ellen; 'Dougherty, Matthew D.'
Subject: Johns Manville v. IDOT, PCB 14-3 - Notice of Deposition for Scott Myers

Susan and Lauren:

Attached to this email is a notice for Scott Myers' deposition this Thursday in your offices.

Evan J. McGinley
Assistant Attorney General
Environmental Bureau
69 West Washington Street, Suite 1800
Chicago, IL 60602
312.814.3153 (phone)
312.814.2347 (fax)
emcginley@atg.state.il.us

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

**COMPLAINANT’S OBJECTIONS AND RESPONSES TO
NOTICE OF DEPOSITION TO SCOTT MYERS**

Complainant Johns Manville (“JM”), by and through its attorneys, Bryan Cave LLP, hereby submits the following objections and responses to Respondent Illinois Department of Transportation (“IDOT”)’s Notice of Deposition (“Notice”) to JM employee Scott Myers (“Mr. Myers”).

PRELIMINARY STATEMENT AND GENERAL OBJECTIONS

1. The responses herein are made solely for the purpose of the Notice. JM reserves the right to object to the use of any response. By providing information in response to any request in the Notice, JM does not intend to authorize the use of such information in any action, nor does it waive any right it may have to object to the further use of the information provided, and thus reserves any and all rights he may have to use. JM also reserves the right to raise or assert any additional objections during deposition questioning.

2. No incidental or implied omissions are intended by the responses herein. JM’s responses or objections to any request or part thereof are not intended as an admission that JM accepts or admits the existence of any facts set forth or assumed by such request, or that such response or objection constitutes admissible evidence.

3. JM objects to the Notice to the extent it attempts to impose obligations extending beyond those imposed or authorized by the IPCB Regulations, Illinois Supreme Court Rules, Illinois Rules of Civil Procedure, and any applicable case law. The IPCB Regulations do not provide that a notice of deposition to a party or its employee can be accompanied by a request for documents. The Notice and Rider improperly ask Mr. Myers to respond on behalf of Johns Manville when the Notice is sent to him personally. *See* Definitions of “you” and “your” to be Johns Manville.

4. JM objects to the Notice and the Rider to the Notice (“Rider”) on the grounds that they are untimely. IDOT did not serve its Notice on JM until June 26, 2017, a mere three days before the scheduled deposition and requested document production. Further, IDOT had never indicated that it intended to seek the production of documents from Mr. Myers. This is insufficient notice under Illinois Supreme Court Rule 214 and 35 Ill. Admin. Code 101.622.

5. JM objects to the Notice and Rider because the IPCB Regulations do not provide that a notice of deposition to a party or its employee can be accompanied by a request for documents.

6. JM further objects to the Notice and Rider because the requests contained therein are duplicative of prior requests sent to JM and therefore seek documents already in IDOT’s possession and because the requests are overbroad, unduly burdensome and not reasonably calculated to the discovery of admissible evidence. The requests are irrelevant for various reasons, including but not limited to, the fact that the document requests are unlimited in temporal scope, are not limited to Sites 3 or 6 or the costs JM is seeking to recover from IDOT in this action, are not limited to the three specific issues identified in the Board’s December 2016 Interim Opinion and Order and are immaterial under the collateral source rule.

7. JM objects that the Notice and Rider are nothing more than an attempt to subvert the July 10, 2017 discovery cut-off date set by the Hearing Officer. *See Canal Barge Co. v. Commonwealth Edison Co.*, No. 98-cv-0509, 2001 WL 817853, *5 (N.D. Ill. July 19, 2001); *Tome Engenharia E. Transportes, Ltda v. Malki*, No. 94-cv-7427, 1999 WL 1024543, **2-3 (N.D. Ill. Nov. 5, 1999). The document requests contained therein are intended to be substitutes for document requests to JM and are not merely complements to Mr. Myers' deposition. *See* Definitions of "you" and "your" to be Johns Manville. JM objects to the Notice and Rider on the grounds that the document requests contained therein are not "few and simple" and are not "closely related to the oral examination sought."

8. JM objects to the Notice and Rider to the extent they seek information and/or documents that are protected by privileges or protections, including but not limited to, the attorney-client privilege, work product privilege, common interest privilege, witness statement privilege, party communications privilege, consulting expert privilege, and joint-defense privilege contained in the Illinois Code of Civil Procedure, Supreme Court Rules, IPCB Regulations and the common law. JM, Scott Myers and Bryan Cave LLP hereby assert all applicable privileges.

9. The foregoing Preliminary Statement and General Objections are incorporated by reference into each of the responses provided below.

OBJECTIONS TO REQUESTS FOR DOCUMENTS

1. Copies of all emails, including any and all attachments thereto, which you either sent to or received from David Peterson.

RESPONSE: Pursuant to the telephone conference between counsel for JM and counsel for IDOT on June 26, 2017, JM understands that IDOT has agreed to withdraw this Request.

2. Copies of all emails, including any and all attachments thereto, which you either sent to or received from Tatsuji Ebihara.

RESPONSE: Pursuant to the telephone conference between counsel for JM and counsel for IDOT on June 26, 2017, JM understands that IDOT has agreed to withdraw this Request.

3. Copies of all emails, including any and all attachments thereto, which you either sent to or received from William Bow.

RESPONSE: Pursuant to the telephone conference between counsel for JM and counsel for IDOT on June 26, 2017, JM understands that IDOT has agreed to withdraw this Request.

4. Copies of all emails, including any and all attachments thereto, which you either sent to or received from Douglas Dorgan.

RESPONSE: Pursuant to the telephone conference between counsel for JM and counsel for IDOT on June 26, 2017, JM understands that IDOT has agreed to withdraw this Request.

5. Copies of all documents, including any and all attachments thereto, which you either sent to or received from any person at Commonwealth Edison.

RESPONSE: Pursuant to the telephone conference between counsel for JM and counsel for IDOT on June 26, 2017, JM understands that IDOT has agreed to withdraw this Request.

6. Copies of all documents which you either received or created regarding any issues concerning the costs associated with the work to be performed at the Southwestern Site Area.

RESPONSE: JM objects to this Request on the grounds that it is untimely and was not served with sufficient notice. JM objects to this Request as the IPCB Regulations do not provide that a notice of deposition to a party or its employee can be accompanied by a request for documents. JM objects because the Notice and Rider improperly ask Mr. Myers to respond on behalf of Johns Manville. JM further objects to this Request on the basis that it is an attempt to subvert the

July 10, 2017 discovery cut-off date set by the Hearing Officer, including because it is intended as a substitute for document requests to JM and is not merely a complement to, or closely related to, Mr. Myers' deposition. JM also objects to the Request as duplicative; as seeking documents already in IDOT's possession; and as overbroad, unduly burdensome and not reasonably calculated to the discovery of admissible evidence. JM also objects to this Request as calling for information or documents protected by the attorney-client privilege, work product privilege, common interest privilege, witness statement privilege, party communications privilege, consulting expert privilege, and/or work product doctrine. JM also objects to this Request as vague and ambiguous as to the meaning of "issues concerning the costs associated with the work to be performed." Subject to and without waiving these and the general objections, JM states that it informed IDOT in a conference call between counsel for JM and counsel for IDOT on June 26, 2017 that Mr. Myers would not be producing any documents pursuant to the Rider.

7. Copies of all documents which you either received or created regarding any issues related to the implementation of the work to be performed at the Southwestern Site Area.

RESPONSE: Pursuant to the telephone conference between counsel for JM and counsel for IDOT on June 26, 2017, JM understands that IDOT has agreed to withdraw this Request.

8. Copies of all documents which you either received or created regarding any issues related to USEPA's future response costs at the Southwestern Site Area.

RESPONSE: JM objects to this Request on the grounds that it is untimely and was not served with sufficient notice. JM objects to this Request as the IPCB Regulations do not provide that a notice of deposition to a party or its employee can be accompanied by a request for documents. JM objects because the Notice and Rider improperly ask Mr. Myers to respond on behalf of Johns Manville. JM further objects to this Request on the basis that it is an attempt to subvert the

July 10, 2017 discovery cut-off date set by the Hearing Officer, including because it is intended as a substitute for document requests to JM and is not merely a complement to, or closely related to, Mr. Myers' deposition. JM also objects to the Request as duplicative; as seeking documents already in IDOT's possession; and as overbroad, unduly burdensome and not reasonably calculated to the discovery of admissible evidence. JM also objects to this Request as calling for information or documents protected by the attorney-client privilege, work product privilege, common interest privilege, witness statement privilege, party communications privilege, consulting expert privilege, and/or work product doctrine. JM also objects to this Request as vague and ambiguous as to the meaning of "issues concerning the costs associated with the work to be performed" and the meaning of any "USEPA future response costs." Subject to and without waiving these and the general objections, JM states that while it informed IDOT in a conference call between counsel for JM and counsel for IDOT on June 26, 2017 that Mr. Myers would not be producing any documents pursuant to the Rider, it can now respond that Mr. Myers is unaware of having any documents in his possession "regarding any issues related to USEPA's future response costs at the Southwestern Site Area."

9. Copies of all communications between Johns Manville and USEPA since February 2016.

RESPONSE: Pursuant to the telephone conference between counsel for JM and counsel for IDOT on June 26, 2017, JM understands that IDOT has agreed to withdraw this Request.

June 28, 2017

Respectfully submitted,

BRYAN CAVE LLP

Attorneys for Johns Manville

By: /s/ Lauren J. Caisman
Susan Brice, ARDC No. 6228903
Lauren J. Caisman, ARDC No. 6312465
161 North Clark Street, Suite 4300
Chicago, Illinois 60601
(312) 602-5079
Email: lauren.caisman@bryancave.com

CERTIFICATE OF SERVICE

I, the undersigned, certify that on June 28, 2017, I caused to be served a true and correct copy of *Complainant's Objections and Responses to Notice of Deposition to Scott Myers* upon all parties listed on the Service List by sending the documents via e-mail to all persons listed on the Service List, addressed to each person's e-mail address. Paper hardcopies of this filing will be made available upon request.

/s/ Lauren J. Caisman
Lauren J. Caisman

SERVICE LIST

Evan J. McGinley
Office of the Illinois Attorney General
69 West Washington Street, Suite 1800
Chicago, IL 60602
E-mail: emcginley@atg.state.il.us

Matthew D. Dougherty
Assistant Chief Counsel
Illinois Department of Transportation
Office of the Chief Counsel, Room 313
2300 South Dirksen Parkway
Springfield, IL 62764
E-mail: Matthew.Dougherty@illinois.gov

Ellen O'Laughlin
Office of Illinois Attorney General
69 West Washington Street, Suite 1800
Chicago, IL 60602
E-mail: elaughlin@atg.state.il.us