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 February 9, 2018, I caused to be filed with the Clerk of the Pollution Control Board of the State of Illinois, *COMPLAINANT'S RESPONSE TO IDOT'S MOTION FOR RECONSIDERATION*, a copy of which is hereby served upon you via electronic mail.

Dated: February 9, 2018

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

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.	)	

COMPLAINANT'S RESPONSE TO IDOT'S MOTION FOR RECONSIDERATION

Complainant JOHNS MANVILLE ("JM"), responds to Respondent ILLINOIS DEPARTMENT OF TRANSPORTATION ("IDOT")'s Motion for Reconsideration of the Board's December 21, 2017 ruling ("Motion") as follows:

INTRODUCTION

IDOT does not present the Board with any new evidence, change in the law, or any other reason to conclude that the Board's December 21, 2017 Opinion and Order ("Order") was in error. As such, the Motion lacks any justification. It is the Board, not IDOT, who is in the best position to know and assess what information is relevant, or even likely to lead to information that is relevant, to the issues on which the Board has identified for a second hearing. The issues the Board did identify for hearing are, as the Board correctly stated, "narrow." (Order, p. 1.) Yet IDOT has unduly delayed the ability to reach a second hearing, and has caused the unnecessary expenditure of resources by the Board, JM, and third party Commonwealth Edison ("ComEd") in needlessly prolonging its quest for documents and information that are irrelevant.

ARGUMENT

I. Standard of Review

It is well-recognized that the purpose of a motion for reconsideration is to bring to the Board's attention new evidence, a change in the law,[1] or errors in the Board's previous application of existing law. 35 Ill. Admin. Code. 101.902; *People v. Packaging Personified, Inc.*, PCB 04-16, 2012 WL 707433, *8 (Mar. 1, 2012). As such, "a motion to reconsider should not be allowed in the absence of a reasonable explanation of why it was not available at the time of the original hearing." *Hartzog v. Martinez*, 372 Ill. App. 3d 515, 522 (Ill. App. Ct. 2007) (internal quotations omitted); *Packaging Personified, Inc.*, 2012 WL 707433, *11 (collecting Board and court cases where party moving for reconsideration was required to reasonably explain why issues were not raised originally).

Additionally, it is indisputable that a party cannot take a second bite at the apple through a motion for reconsideration that, as here, merely regurgitates the same arguments made in prior briefs. *See e.g., Hight v. Envt'l Protection Agency*, PCB 76-175, 1976 WL 8124, *1 (Oct. 14, 1976) (denying motion for reconsideration "containing no new information beyond what was contained in the original petition"). When a party simply recycles its prior arguments, it "[does] not point out newly discovered evidence, changes in the law, or errors in [] application of the law." *Williams v. Dorsey*, 273 Ill. App. 3d 893, 903 (Ill. App. Ct. 1995) (denying motion to reconsider because parties "merely reiterate[ed] the arguments they made in their response to the

[1] IDOT's Motion does not offer new evidence or argue that there has been a change in the law. While IDOT cites case law not previously included in any of its prior briefing (*see* Motion, pp. 5-7), these cases existed at the time IDOT originally briefed the issue and do not justify reconsideration. Even were the Board to consider, for example, *Elliot v. Bd. of Educ. of City of Chi.*, 31 Ill. App. 3d 355 (Ill. App. Ct. 1975), cited by IDOT (Motion, pp. 6-7), that case would not change the result. *Elliot* has no remote factual similarity to the one at hand and provides no support for IDOT's assumption that "the discovery which IDOT has attempted to take from Commonwealth Edison is within the scope." (Motion, p. 7.) IDOT also ignores that the *Elliot* court was able to specifically connect the relevance of the deposition questioning to a material issue in the case—the breadth of the plaintiffs' class. 31 Ill. App. 3d at 357. This is not something IDOT has done.

motion"); *Farley Metals, Inc. v. Barber Colman Co.*, 269 Ill. App. 3d 104, 116 (Ill. App. Ct. 1994) (denying motion to reconsider that "merely reiterated its earlier arguments"). In granting JM's and ComEd's applications for protective orders and denying IDOT's motion to require JM to produce Frederick Scott Myers for a second deposition, the Board necessarily and properly rejected all of IDOT's arguments. Accordingly, the Motion should be denied.

II. The Motion Should Be Denied Because It Is Baseless.

IDOT argues that the Board should reconsider its decision for two reasons: (1) because the Board's decision was in error; and (2) because the Board needs to be apprised of "facts which – in IDOT's view – [the Board] apparently failed to consider in issuing its December 21st Order." (Motion, p. 4.) In making this argument, IDOT contends that any sums ComEd paid to JM are relevant to the "narrow" issues to be determined at the second hearing. (*Compare* Motion, pp. 5-6 *with* Order, pp. 1, 4-5.) But IDOT is wrong. IDOT also oddly asserts that the Board's ruling does not consider the Administrative Order on Consent ("AOC") and the joint obligations of JM and ComEd set forth in that document, though the Order expressly references the AOC. (Order, p. 2.) Neither of IDOT's points serves as an appropriate reason for reconsideration. Arguing that a decision was wrong without identifying new information or exposing a misapplication of the law is insufficient grounds for a motion for reconsideration. *See e.g., People v. Community Landfill Co. et al*., PCB 03-191, 2009 WL 6506717, *1 (Sept. 17, 2009) (denying motion for reconsideration where respondents "produced no new evidence, citation to change in law, or convincing arguments that the Board misapplied exi[s]ting law that would lead the Board to conclude that [its] decision was in error"); *People v. Union Pac. R.R. Co*., PCB 08-07, 2009 WL 6506852, *2 (Dec. 3, 2009) (same). Additionally, even assuming that highlighting a fact that the

moving party believes the Board failed to consider is an appropriate justification for reconsideration, IDOT's Motion identifies no such facts. The Motion should be denied.

A. The Board did not err in barring IDOT from taking discovery on whether ComEd paid for any work at the Sites.

To support its claim that the Board erred, IDOT recycles its circular arguments from prior briefing that essentially contend that "whether Commonwealth Edison paid any money to Johns Manville to cover the costs of remediating Sites 3 and 6 is directly relevant" because it is relevant to the amounts JM is entitled to recover from IDOT in this action. (*Compare* Motion, p. 6, § III.B.1 *with* IDOT's Response to Hearing Officer's October 5, 2017 Order (filed October 27, 2017), pp. 2-3, § A.2 ("Such agreements may also speak to the question of whether Commonwealth Edison is required to reimburse Johns Manville for any of the costs that have been incurred in undertaking the investigation and cleanup work . . ."); IDOT's Response to JM's Brief Regarding Relevance of Discovery Sought by IDOT (filed November 13, 2017), pp. 2-3, § A (arguing that "such payments are highly material to future proceedings in this matter").) IDOT, however, cannot merely regurgitate the same arguments it has already asserted and, at the same time, sustain its burden to show reconsideration is warranted. (*See supra,* § I (collecting cases).)

Similarly, IDOT repeats its previously-made arguments about the breadth of discovery, claiming that IDOT should be given "great latitude" to engage in its requested fishing expedition. (*Compare* Motion, § III.A.2, III.B.2 *with* IDOT's Response to Hearing Officer's October 5, 2017 Order, pp. 4-5, § A.2.) In doing so, IDOT ignores that it is the Board itself which is "given great latitude in determining the scope of discovery" and that the scope of discovery is not unlimited. *See e.g., Y-Not Project, Ltd. v. Fox Waterway Agency*, 2016 IL App (2d) 150502, ¶ 43; 35 Ill. Admin. Code 101.616(b), (d). This is particularly so where the Board

identified only three issues it wants to consider at a second hearing and where the Board has correctly indicated that these issues are "narrow." (Order, p. 1.)

In finding that "the information IDOT seeks to discover is neither relevant nor calculated to lead to information relevant to the issues for the remedy hearing" (Order, p. 4), the Board already necessarily rejected IDOT's rehashed arguments. As articulated by the Board, "IDOT's arguments *erroneously presume* that any payments from ComEd to JM would necessarily reduce IDOT's liability under the Act to pay for the cleanup resulting from its violations." (Order, p. 4 (emphasis added).) The Board was correct in finding that it does not. Just as IDOT did during original briefing, "IDOT fails to explain how the answer to this question [whether ComEd reimbursed JM for work on the Sites] pertains to any fact that is of consequence to what cleanup work was performed, how much it cost, whether the cost was reasonable, or what share is attributable to IDOT." (Order, p. 4.) IDOT has failed to establish a legitimate basis for reconsideration of the Board's Order, let alone for overturning it.

In a last ditch attempt justify its Motion, IDOT comes up with a new argument that relies on the dictionary definition of "reimbursement." (Motion, p. 5, § III.B.1.) As noted above, new arguments, such as this one, are not grounds for reconsideration. (*Supra*, § 1.) Even if they were, this one is unavailing. IDOT uses this dictionary definition in an attempt to make the Board's December 2016 Interim Opinion and Order say something it does not — that any money JM has received from collateral sources impacts the amount of money JM can recover from IDOT in this case. (*See* Motion, p. 5, § III.B.1.) To the contrary, the Board's use of the term "reimbursement" in its December 2016 Order concerned only *IDOT's* reimbursement of money spent by JM *as a result of IDOT's violations of the Illinois Environmental Protection Act* (the "Act"), not *ComEd's* potential reimbursement of money spent by JM *as a result of ComEd's*

joint obligations under the AOC. (Order, p. 1; December 21, 2016 Interim Opinion and Order, pp. 19-22.) As noted by the Board, the December 2016 Order did not find that "JM, ComEd, or anyone else violated the Act." (Order, p. 4.) As a result, neither ComEd's liability nor JM's liability either in this case or under the AOC is at issue here. Only JM's costs, their reasonableness, and the portion thereof attributable to IDOT's violations of the Act are the subject of second hearing.

B. The Board did not overlook anything in the record.

IDOT is not entitled to a do-over with respect to its arguments regarding the relationship between JM and ComEd under the AOC. (C*ompare* Motion, § III.C *with* IDOT's Response to Hearing Officer's October 5, 2017 Order, §§ A.1, A.2.) IDOT previously contended (at length) that ComEd was jointly and severally liable for carrying out AOC activities and that, consequently, IDOT should have presumably been 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's Response to Hearing Officer's October 5, 2017 Order, pp. 1, 5.) The Board's rejection of IDOT's argument was direct – "the only one found to have violated the Act is IDOT" and whether ComEd made any payments to JM has nothing to do with IDOT's liability. (Order, pp. 4-5.)

IDOT now puts a different spin on the same argument, contending that the Board "ignore[d] the fact that Johns Manville and Commonwealth Edison are both jointly obligated under the AOC they entered into with USEPA for addressing the asbestos contamination at Sites 3 and 6" (Motion, p. 8, § III.C); these are not "facts" that the Board supposedly overlooked. The Order not only mentions the AOC (*see* p. 2), but also plainly considers that ComEd might have paid JM money with respect to joint obligations under the AOC when it found that "IDOT's

arguments erroneously presume that *any payments from ComEd* to JM necessarily reduce IDOT's liability under the Act to pay for the cleanup resulting from its violations." (Order, p. 4 (emphasis added).)

Additionally, IDOT's argument misses the point. The Board found that *even if* ComEd did in fact make payments to JM, such payments are not "of consequence to what cleanup work was performed, how much it costs, whether the cost was reasonable, or what share is attributable to IDOT." (Order, pp. 4-5). Thus, IDOT's hyper-focus on the AOC's "joint obligations," which might relate to the question of whether such payments were made, is moot. The Board assumed that fact for purposes of its decision.

C. IDOT does not seek reconsideration of the denial of its Motion to Require JM to Produce Scott Myers for a Second Deposition.

Notably, IDOT's Motion is silent with respect to the Board's Order denying IDOT's motion for a second deposition of JM witness, Scott Frederick Myers. (Order, p. 5, ¶ 2.) The Motion's "Statement of Facts" (§ II) does not include reference to IDOT's motion for a second deposition. The Motion's requested relief (§ IV) does not ask the Board to reconsider allowing IDOT to take a second deposition. Consequently, IDOT has waived the right to challenge this portion of the Board's Order. *See American Bottom Conservancy and Sierra Club v. City of Madison, Ill., and Waste Mgmt. of Ill., Inc.*, PCB 07-84, 2008 WL 555004, *4 (Feb. 21, 2008).

D. Even if the Board were to reconsider its Order, other bases exist to deny IDOT's discovery requests.

Assuming *arguendo* that the Board were to reconsider its Order and find any of the information IDOT sought to be relevant, which it should not, numerous other reasons exist to deny IDOT's discovery requests. Among these reasons are: (1) the collateral source rule bars discovery and admission of evidence on payments potentially received from third party sources

(*see generally* JM's Brief Regarding Relevance of Discovery Sought by IDOT (filed October 27, 2017); JM's Response to IDOT's Brief Regarding Relevance (filed November 13, 2017)); (2) the material IDOT seeks is both privileged and confidential (*see* JM's *In Camera*/*Ex Parte* Application for Non-Disclosure, Protective Order, and *In Camera* Inspection of Privileged and Confidential Material (filed August 4, 2017); ComEd's *In Camera* Application for Non-Disclosure and for Protective Order (filed August 7, 2017)); and (3) the void nature of IDOT's July 23, 2017 Subpoena to ComEd. (JM's Response to IDOT's Brief Regarding Relevance (filed November 13, 2017), § V.)

The Board did not need to reach these issues in its Order (*see* p. 5) and should not need to reach them in response to IDOT's Motion. They do, however, present the Board with additional grounds upon which to affirm its Order.

CONCLUSION

IDOT is unable to articulate any reason why reconsideration of the Board's December 21, 2017 Opinion and Order is warranted. WHEREFORE, JM respectfully requests that the Board deny the Motion to Reconsider, and order such other and further relief as is just and necessary.

Dated: February 9, 2018

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) 602-5079
Email: susan.brice@bryancave.com
Lauren.caisman@bryancave.com

CERTIFICATE OF SERVICE

I, the undersigned, certify that on February 9, 2018, I caused to be served a true and correct copy of *COMPLAINANT'S RESPONSE TO IDOT'S MOTION FOR RECONSIDERATION* 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