

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 20, 2018, I caused to be filed with the Clerk of the Pollution Control Board of the State of Illinois, *Complainant's Motion to Stay Prehearing Motion Deadlines and Status Report*, 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: November 20, 2018

Respectfully submitted,

BRYAN CAVE LEIGHTON PAISNER LLP

Attorneys for Johns Manville

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COMPLAINANT JOHNS MANVILLE’S MOTION TO STAY PREHEARING MOTION DEADLINES AND STATUS REPORT

Complainant JOHNS MANVILLE (“JM”), through undersigned counsel, moves the Board, pursuant to 35 Ill. Admin. Code 101.500 and 35 Ill. Admin. Code 101.514, to stay the remaining deadlines in the Hearing Officer’s April 19, 2018 Order pending the Board’s ruling on JM’s Motion for Sanctions against Respondent ILLINOIS DEPARTMENT OF TRANSPORTATION (“IDOT”). IDOT agreed to JM’s request for a stay during an Illinois Supreme Court Rule 201(k) conference held on November 20, 2018, based upon the fact JM is filing its Motion for Sanctions, which will necessarily impact the scheduling order moving forward. In support of its Motion, JM states as follows:

1. The Board has held IDOT liable for causing and allowing open dumping of ACM waste on property in Waukegan, Illinois that has been referred to in this action as Sites 3 and 6. (December 15, 2016 Interim Opinion and Order (“Interim Opinion”).) The Board directed that a second hearing be held on three narrow issues, including: “[t]he share of JM’s costs [to perform cleanup work in the portions of Site 3 and Site 6 where the Board found IDOT liable] attributable to IDOT.” (*Id.*, p. 22.) Since the Board issued its Interim Opinion, this issue has been the subject of extensive expert discovery.

2. By Order dated April 19, 2018, the Hearing Officer set various deadlines for conducting discovery and proceeding to hearing in the second phase of this matter. (**Exhibit A.**)

3. That Order set various deadlines for the completion of expert discovery, including: an August 22 deadline for IDOT submit expert reports; an October 17 deadline for JM to submit any rebuttal expert reports; and a November 12 deadline for IDOT to depose JM's rebuttal expert. (*Id.*)

4. JM worked diligently toward meeting the Hearing Officer's deadlines. JM served its Expert Report on June 14, 2018 (*see* Certificate of Service filed June 14, 2018), deposed IDOT's expert (*see* Notice filed September 11, 2018), and served its Expert Rebuttal Report on October 25, 2018 (*see* Certificate of Service filed October 25, 2018) (deadline extended by agreement and memorialized in September 27, 2018 Hearing Officer Order).

5. The only deadlines in the Hearing Officer's April 19, 2018 that have not yet passed concern prehearing motions and are as follows:

- Deadline for parties to file prehearing motions, including motions *in limine* – November 26, 2018;
- Deadline for parties to file responses to prehearing motions – December 5, 2018.

(*Id.*)

6. Nevertheless, despite the Hearing Officer's Order, on November 7, 2018—almost eighty days after IDOT's deadline to serve an expert report and just three business days before the close of discovery—IDOT untimely served what is basically a new expert report masquerading as a supplemental expert report (the "Supplemental Report"), which raises new and distinct, substantive issues and opinions that were unaddressed in IDOT's expert's initial report or deposition. (*See* Certificate of Service filed November 7, 2018.) The Hearing Officer's

Order never contemplated that IDOT would be permitted to serve such a report, let alone at the late juncture at which it was served or without leave or a demonstration of good cause.

7. As such, JM has filed a Motion for Sanctions concurrently herewith.

8. Section 101.514 of the Board's rules requires that motions to stay a proceeding be accompanied by sufficient information detailing why a stay is needed, a waiver of the decision deadline, and a status report. 35 Ill. Admin. Code 101.514(a). A stay is needed in this proceeding because the Board's ruling on JM's Motion for Sanctions will significantly impact how proceedings should continue in this matter, particularly with respect to whether the Supplemental Report will be allowed, whether discovery must be re-opened to address it, and whether it will be the subject of a pre-trial motion in *limine*.

9. The Board has discretion to grant a motion for stay. *See Commonwealth Edison Co. v. IEPA*, PCB 04-215, 2007 WL 4132885, *3 (Nov. 15, 2007).

10. This motion is made based on good cause shown, in good faith, and is not being brought for purposes of delay. JM is not seeking a lengthy or unlimited stay and though the parties have discussed witness and room availability for hearing, no hearing date has officially been set yet. Further, only two remaining deadlines are impacted by this Motion. IDOT will not be prejudiced by the stay requested and there would be no harm to the public.

11. Counsel for IDOT agreed that remaining deadlines should be stayed pending resolution of JM's Motion for Sanctions.

12. JM agrees to waive any decision deadlines.

Accordingly, Complainant Johns Manville respectfully requests that the deadlines for filing prehearing motions and responses thereto, as set forth in the April 19, 2018 Hearing Officer Order, be stayed pending the Board's ruling on JM's Motion for Sanctions.

Dated: November 20, 2018

Respectfully submitted,

BRYAN CAVE LEIGHTON PAISNER LLP

Attorneys for Complainant Johns Manville

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EXHIBIT A

ILLINOIS POLLUTION CONTROL BOARD
April 19, 2018

JOHNS MANVILLE, a Delaware corporation,)
)
Complainant,)
)
v.) PCB 14-3
) (Citizens Enforcement)
ILLINOIS DEPARTMENT OF)
TRANSPORTATION,)
)
Respondent.)

HEARING OFFICER ORDER

On April 19, 2018, all parties participated in a telephonic status conference with the hearing officer. Counsel for respondent stated that he has two depositions scheduled for April 30, 2018 and May 4, 2018. Counsel also stated that he has been in contact with a third potential deponent and attempting to schedule a third deposition. Counsel stated that he has had difficulty scheduling a deposition but hopes to schedule it by May 10, 2018. To that end, counsel made an oral motion to extend the discovery schedule for 15 days.

Over objection, counsel's motion was granted but was told that no further extensions will be granted without good cause. The revised discovery schedule is as follows:

Deadline to complete all fact witness depositions- May 15, 2018

Deadline for JM to submit its expert report(s) – June 14, 2018

Deadline for IDOT to depose JM expert(s) – July 25, 2018

Deadline for IDOT to submit its expert report(s) – August 22, 2018

Deadline for JM to depose IDOT expert(s) – September 24, 2018

Deadline for JM to submit any rebuttal reports – October 17, 2018

Deadline for completion of deposition(s) of JM's rebuttal expert(s) – November 12, 2018

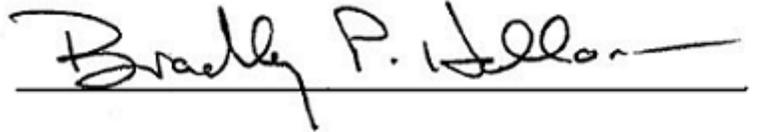
Deadline for parties to file prehearing motions, including motions *in limine* – November 26, 2018

Deadline for parties to file responses to prehearing motions – December 5, 2018

Hearing tentatively scheduled for the week of January 14, 2019

The parties or their legal representatives are directed to participate in a telephonic status conference with the hearing officer on June 14, 2018, at 11:30 a.m. The telephonic status conference must be initiated by the complainant, but each party is nonetheless responsible for its own appearance.

IT IS SO ORDERED.

A handwritten signature in black ink that reads "Bradley P. Halloran". The signature is written in a cursive style and is positioned above a solid horizontal line.

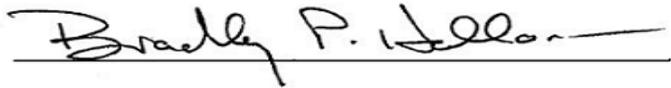
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CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing order were e-mailed on April 19, 2018, to each of the persons on the attached service list.

It is hereby certified that a true copy of the foregoing order was e-mailed to the following on April 19, 2018:

Don Brown
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A handwritten signature in black ink, reading "Bradley P. Halloran", is written over a horizontal line.

Bradley P. Halloran
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