

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, October 15, 2019, I have filed with the Clerk of the Pollution Control Board IDOT's "Complainant's Motion to File a Reply Instanter (sic) to IDOT's Response Complainant's Motion to Exclude Base Maps and Related Figures and Testimony at Hearing" and have served each person listed on the attached service list with a copy of the same.

Respectfully Submitted,

By: *s/ Evan J. McGinley*
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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, October 15, 2019, I caused to be served on the individuals listed below, by electronic mail, a true and correct copy of the attached IDOT's "Complainant's Motion to File a Reply Instanter (sic) to IDOT's Response Complainant's Motion to Exclude Base Maps and Related Figures and Testimony at Hearing" on each of the parties listed below:

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s/ Evan J. McGinley
Evan J. McGinley

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IDOT'S RESPONSE TO COMPLAINANT'S MOTION FOR LEAVE TO FILE A REPLY INSTANTER TO IDOT'S RESPONSE TO COMPLAINANT'S MOTION TO EXCLUDE BASE MAPS, RELATED FIGURES AND TESTIMONY AT HEARING

NOW COMES RESPONDENT, the Illinois Department of Transportation ("IDOT"), through its attorney KWAME RAOUL, Attorney General of the State of Illinois, who herewith files its response to "Complainant's Motion to File a Reply Instanter (sic) to IDOT's Response Complainant's Motion to Exclude Base Maps and Related Figures and Testimony at Hearing" ("Motion for Leave to Reply"). For the reasons set forth below, Johns Manville's Motion for Leave to Reply is unwarranted, as Johns Manville cannot show that they have suffered any material prejudice through IDOT's filing of its Response to Complainant's Motion to Exclude Base Maps and Related Figures and Testimony at Hearing ("Motion to Exclude").

ARGUMENT

A. Board Legal Standard for Filing a Reply

Section 101.500(e) of the Board's procedural regulations provide that:

- e) The moving person will not have the right to reply, except as the Board or the hearing officer permits to prevent material prejudice. A motion for permission to file a reply must be filed with the Board within 14 days after service of the response.

(Emphasis added.)

It is clear from the Board's opinions that in order to satisfy the "material prejudice" standard such that a party will be allowed to file a reply in support of an underlying pleading requires more than simply claiming material prejudice. *People v. Skokie Valley Asphalt, Co.*, PCB 96-98 (June 5, 2003), slip op. at 2 (stating that more than "bald assertion of material prejudice" are required in order to be granted leave to file a reply). Furthermore, a party will not be granted leave to file a reply, where the reply will not aid the Board in its resolution of a question presented. *Commonwealth Edison v. Illinois Environmental Protection Agency*, PCB 04-215 (Apr. 26, 2007), slip op. at 2. The Board will also not grant a party leave to reply, when doing so will not be administratively efficient. *State v. Prof'l. Swine Mngmt., Co.*, PCB10-84 (May 2, 2013), slip op at 2. Nor will the Board grant leave to file a reply where the reply simply presents another opportunity for the moving party to restate arguments which they have already made to the Board. *Sierra Club v. City Water, Light and Power*, PCB 18-11 (Dec. 15, 2017), slip op. *2.

B. The Arguments Advanced by IDOT in its Response to Johns Manville's Motion to Exclude do not Materially Prejudice Johns Manville

In its Response to Johns Manville's Motion to Exclude, IDOT took issue with Johns Manville's contentions that there was a "USEPA-approved figure" of Site 3. (Response, p. 15.) IDOT also argued in its response that it was reasonable for Steven Gobelman to rely on a figure (i.e., Figure 15 in the ELM Report, Exhibit 57) contained in a report that has been relied upon by a multitude of parties, including the Board and USEPA. (Response, pp.17-19.) Johns Manville argues that these positions advanced by IDOT in its Response constitute misrepresentations of fact or are otherwise "untrue." (Motion for Leave, p.2, ¶4.) But what Johns Manville complains about are not misrepresentations of fact or untrue statements. Instead, they are disagreements between

the parties as to how they view certain facts that will be at issue in the upcoming hearing and how the Board should view them. Such disagreements, in turn, do not satisfy the “material prejudice” standard. “Material prejudice” is properly understood as being a level of prejudice that will “affect[] the substantial rights of the defendant to such a degree that it justifies the equitable relief of barring” a party from presenting a witness or evidence at trial. *Koerber v. Journey’s End, Inc.*, No. 99 C 1822 (N.D. Ill. Mar. 31, 20014), 2004 WL 723850, *9; *See also, Lumbermens Mut. Cas. Co. v. RGIS Inventory Specialists, Inc.*, No. 08 Civ. 1316(HB) (S.D.N.Y. Jan. 21, 2009), 2009 WL 137055, *8 (“[p]rejudice will be found where the delay ‘materially’ impairs” a party’s ability to prepare their case.) Johns Manville’s Motion for Leave does not come close to articulating a basis for finding any sort of “material prejudice” and accordingly, the Hearing Officer should deny their motion.

C. IDOT has not Attacked the Trustworthiness of Johns Manville’s Witness

Without any basis in fact, Johns Manville claims that IDOT has attacked the trustworthiness of Riah Dunton, the CAD operator who created some of the figures used by Douglas Dorgan in his reports. (Motion for Leave, ¶15.) Simply put, this claim is at laughable and provides no support for Johns Manville’s Motion for Leave.

In its Response, IDOT neither attacked nor questioned the trustworthiness of Ms. Dunton. (Response, p. 20.) Rather, IDOT simply sought to compare her work practices with those of Mike Nguyen, the CAD operator who assisted Steven Gobelman in the creation of the figures which he used in his reports, in response to Johns Manville’s questioning Mr. Nguyen’s work practices. (Id.) Such comparisons do not begin to support a claim of material prejudice nor do they impair Johns Manville’s ability to prepare its case for hearing. *Lumbermens Mut. Cas. Co.*, *8. In short, Johns Manville should not be allowed to file a reply simply to take issue with IDOT’s making an entirely

reasonable comparison between the parties' respective CAD technicians and IDOT requests that the Hearing Officer deny Johns Manville leave to file its reply.

D. Johns Manville's Motion for Leave Introduces Unnecessary Delay at a Critical Moment Prior to the Upcoming Hearing

In its Response to Johns Manville's Motion to Exclude, IDOT simply sought to rebut claims advanced by Johns Manville in support of barring IDOT from present certain testimony or introducing certain things into evidence at the upcoming hearing in this matter. By filing its Motion for Leave, Johns Manville introduces unnecessary delay and diverts both the Board's and IDOT's resources from preparing for the upcoming hearing. If Johns Manville's Motion for Leave is granted, IDOT will, in turn, request the Hearing Officer's leave to file a sur-reply. The better approach is for the parties to raise these issues at hearing. Ultimately, all Johns Manville's proposed reply does is rehash the same issues raised in its underlying Motion to Exclude. As such, the Hearing Officer should simply deny Johns Manville's Motion for Leave.

WHEREFORE, Respondent, the Illinois Department of Transportation, requests that the Hearing Officer:

1. Deny Johns Manville's Motion for Leave to File a Reply in its entirety;
2. Alternatively, should the Hearing Officer decide to grant Johns Manville's Motion for Leave to File a Reply, that he grant IDOT leave to file a sur-reply within fourteen (14) days following the date of the Hearing Officer ruling; and
3. To grant such other relief as the Hearing Officer shall deem appropriate and just.

Respectfully Submitted,

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