

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 1, 2019, I caused to be filed with the Clerk of the Pollution Control Board of the State of Illinois, *Complainant's Motion to Cancel and Reschedule Hearing*, 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 1, 2019

Respectfully submitted,

BRYAN CAVE LEIGHTON PAISNER LLP

Attorneys for Johns Manville

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The hearing officer may grant a motion filed after the prescribed time only if the movant demonstrates that the movant will suffer material prejudice if the hearing is not canceled.” 35 Ill. Admin. Code 101.510(a).

2. The Hearing is currently scheduled to begin November 19, 2019—18 days from the date of this filing. (*See* Notice of Hearing, filed September 24, 2019.) Thus, the Hearing Officer has the power to grant this Motion without agreement of all parties.

3. JM is unaware of any statutory decision deadline at issue in this case. Under such circumstances, “[t]he hearing officer will grant the motion . . . if the movant demonstrates that the request to cancel is not due to the movant's lack of diligence.” 35 Ill. Admin. Code 101.510(b); *Fox Moraine, LLC v. United City of Yorkville*, PCB 07-146, 2008 WL 5054996, *1 (Nov. 24, 2008).

4. As explained below, this request to cancel is not due to JM’s lack of diligence.

5. 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 impacting the remedy, 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. As reflected in the record, five expert reports have been served addressing this issue.

Interlocutory Appeal

6. On September 13, 2019, consistent with the Hearing Officer’s operative scheduling Order of August 20, 2019, JM timely filed a Motion to Exclude Base Maps and

Related Figures and Testimony at Hearing (“Motion to Exclude”). Specifically, JM requested that maps and figures presented in the Expert Reports of IDOT’s expert, Mr. Steven Gobelman, and any testimony concerning these maps and figures, be excluded for various reasons. These reasons included that Mr. Gobelman lacked the requisite expertise to create the maps and figures and because the maps and figures lacked adequate foundation as they were not the product of well-established scientific standards and/or information or sources of the type reasonably relied upon by experts in his field.

7. The Hearing Officer denied JM’s Motion to Exclude in his MIL Ruling on October 31, 2019. (Hearing Officer Order, pp. 6-7.) JM plans to file an interlocutory appeal to the Board within the requisite time frame seeking to reverse the Hearing Officer’s MIL Ruling on its Motion to Exclude. (Affidavit of Susan Brice (“Brice Aff.”), attached hereto as **Exhibit A**, ¶ 3.) This Motion is being filed just one day after receiving the Hearing Officer’s MIL Ruling and thus is more than timely and diligent.

8. In fact, during the briefing on the parties’ respective motions in *limine*, JM filed its Motion for Leave to File Reply *Instante* early, on October 9, 2019 in an effort to expedite a determination on the motion. JM did the same when responding to the Motion to Strike Affidavit of Douglas G. Dorgan that IDOT filed on October 4, 2019; JM filed its response within six days. Furthermore, JM raised the issue of a potential interlocutory appeal with the Hearing Officer and opposing counsel on at least two occasions during status calls. (*See e.g.*, October 17, 2019 Hearing Officer Order; Brice Aff., ¶ 4.) In fact, IDOT signaled that it might also seek interlocutory appeal, depending upon the outcome of the Hearing Officer’s decisions on the Motions *in Limine*. (Brice Aff., ¶ 4.) Thus, no one should be surprised by this Motion.

9. A reversal by the Board on JM's interlocutory appeal would significantly impact the evidence presented at the Hearing as well as the Hearing's length. Testimony by IDOT witnesses, Mr. Gobelman and Mr. Nguyen, would be circumscribed and thus rebuttal testimony by JM's expert, Douglas Dorgan, would be similarly limited in scope. JM believes that it would be a waste of the Board's, the Hearing Officer's, and the parties' resources to allow the Hearing to proceed on November 19, 2019 without a decision by the Board on JM's interlocutory appeal of the Motion to Exclude. (Brice Aff., ¶ 5.) Indeed, if the Hearing were to proceed and the Board were to reverse the Hearing Officer's decision on JM's Motion to Exclude, the record also would be compromised. Portions of testimony from at least three witnesses (Mr. Gobelman, Mr. Nguyen (who created the Base Maps and Figures), and Mr. Dorgan) would need to be stricken; the Base Maps and Figures themselves would need to be stricken; and any testimony concerning the Base Maps and Figures from any other witness would need to be stricken. This would complicate what is already a complicated matter for the Board to decide.

Dr. Ebihara

10. Dr. Tatsuji Ebihara, has been identified on both parties' respective witness lists (filed October 4, 2019), and also on their Joint Witness List filed on October 25, 2019. Dr. Ebihara is the Project Manager at AECOM Technical Services ("AECOM") and has been the project manager for the JM Southwestern Sites since 2007. (See Exhibit L to JM Motion to Exclude, Declaration of Dr. Tatsuji Ebihara, ¶ 4.)

11. Today, November 1, 2019, Dr. Ebihara emailed counsel for JM and told her that he will be unavailable for at least three out of the four days currently scheduled for Hearing because his attendance at an environmental audit in Brazil is being required by the Brazilian state prosecutor (the only date he said he might be available is the last day of the scheduled Hearing).

(Brice Aff., ¶ 6 and Exhibit 1 thereto.) Because of Dr. Ebihara's lengthy history with the Sites, JM believes his presence at Hearing is necessary for more than just one day as JM would anticipate calling Dr. Ebihara as a witness in JM's case-in-chief and potentially in JM's rebuttal case. (Brice Aff., ¶ 6.) JM anticipates that IDOT would want to call Dr. Ebihara as well.

12. JM will work with Dr. Ebihara to see if this Brazilian commitment can be changed, but JM wanted to bring this issue to the attention of the Hearing Officer and IDOT immediately. (Brice Aff., ¶ 7.) The Board has previously permitted the cancellation of a hearing when witnesses became unavailable. *See e.g., People v. Community Landfill Co.*, PCB 03-191, 2006 WL 3074035, *2 (Oct. 19, 2006) (affirming Hearing Officer's decision to grant Motion to Cancel Hearing due to unavailability of key witness). In that case, the Board noted that, like here, there is no "existing or immediate threat of harm to human health or the environment" and that "the issue left to be determined is remedy." *Id.*

13. The following status report is provided pursuant to 35 Ill. Admin. Code 101.510(b): Completing Hearing (and likely post-Hearing briefing) is all that remains to be completed in this case. (Brice Aff., ¶ 8.) The parties have already complied with all pre-trial deadlines set in the Hearing Officer's August 20, 2019 Order, including by filing stipulations, pre-hearing statements, a joint exhibit list, and a joint witness list. (*Id.*)

14. JM's anticipated interlocutory appeal of the MIL Ruling and Dr. Ebihara's unanticipated out-of-country obligations warrants cancelling the Hearing currently scheduled for November 19, 2019 and re-scheduling.

15. The Hearing Officer has the authority to grant motions to cancel and reschedule hearings. 35 Ill. Admin. Code 101.510(a), (d).

16. Pursuant to the Board Rules (35 Ill. Admin. Code 101.510(b)), JM proposes rescheduling the Hearing to a date in January 2020 mutually agreeable to the parties and the Hearing Officer. JM recognizes, though, that setting an appropriate new Hearing date will depend upon the Board's timing in deciding whether to hear JM's anticipated motion for interlocutory appeal of the MIL Ruling, and that sufficient time will need to be allotted to provide the Board enough time to reschedule the Hearing and provide the required notice.

17. This Motion is also made based on good cause shown, in good faith, and is not being brought for purposes of delay. JM is not seeking to forever cancel the Hearing and has proposed a tentative Hearing timeframe for just two months away. There are no other remaining deadlines impacted by this Motion. IDOT will not be prejudiced by the re-scheduling requested and there would be no harm to the public.

18. In accordance with 35 Ill. Admin Code. 101.510(b), JM states that no prior cancellation requests have been sought or granted. (Brice Aff., ¶ 10.)

19. While JM does not believe that any exist, JM agrees to waive any decision deadlines. (Brice Aff., ¶ 11.)

Accordingly, Complainant Johns Manville respectfully requests that November 19, 2019 Hearing be cancelled and rescheduled to January 2020 pending the Board's ruling on JM's to-be-filed motion for interlocutory appeal and to accommodate Dr. Ebihara.

Dated: November 1, 2019

Respectfully submitted,

BRYAN CAVE LEIGHTON PAISNER LLP

Attorneys for Complainant Johns Manville

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CERTIFICATE OF SERVICE

I, the undersigned, certify that on November 1, 2019, I caused to be served a true and correct copy of *Complainant's Motion to Cancel and Reschedule Hearing* 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

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EXHIBIT A

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter Of:)	
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JOHNS MANVILLE, a Delaware corporation,)	
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Complainant,)	PCB No. 14-3
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v.)	
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ILLINOIS DEPARTMENT OF TRANSPORTATION,)	
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Respondent.)	

AFFIDAVIT OF SUSAN BRICE

I, Susan Brice, hereby declare and state as follows:

1. I am over the age of twenty-one, of sound mind, and am capable of making this declaration.

2. I am employed as an attorney with Bryan Cave Leighton Paisner LLP appearing on behalf of Johns Manville (“JM”) in this matter and have personal knowledge of the facts set forth herein and state that they are true and correct to the best of my knowledge. I submit this Affidavit in support of JM’s Motion to Cancel and Reschedule Hearing (the “Motion”).

3. JM plans to file an interlocutory appeal to the Board within the requisite time frame seeking to reverse the Hearing Officer’s October 31, 2019 Order denying JM’s Motion to Exclude Base Maps and Related Figures and Testimony at Hearing (“Motion to Exclude”).

4. I understand from my co-counsel Lauren Caisman, that during a telephonic status conference with IDOT and the Hearing Officer on September 19, 2019, the possibility of interlocutory appeals of the Hearing Officer’s eventual motion *in limine* ruling was discussed. This issue was again raised during the last telephonic status conference with the Hearing Officer

on October 17, 2019; the parties discussed the possibility of interlocutory appeal to the Board, depending on the Hearing Officer's rulings on the parties' respective motions *in limine*. During that call, IDOT indicated it would be considering the filing of an interlocutory appeal.

5. A reversal by the Board on JM's expected interlocutory appeal would significantly impact the evidence presented at the Hearing as well as the Hearing's length. Testimony by IDOT witnesses, Mr. Steven Gobelman and Mr. Michael Nguyen, would be circumscribed and thus rebuttal testimony by JM's expert, Douglas Dorgan, would be similarly limited in scope. JM believes that it would be a waste of the Board's, the Hearing Officer's, and the parties' resources to allow the Hearing to proceed on November 19, 2019 without a decision by the Board on JM's interlocutory appeal of the Motion to Exclude.

6. Today, November 1, 2019, Dr. Ebihara emailed me that he will be unavailable for at least three out of the four days currently scheduled for Hearing because his attendance at an environmental audit in Brazil is being required by the Brazilian state prosecutor. A true and correct copy of the email correspondence that Dr. Ebihara sent me is attached hereto as **Exhibit 1**. Dr. Ebihara had previously indicated he would be available on the Hearing dates. Because of Dr. Ebihara's lengthy history with the Sites at issue in this case, JM believes Dr. Ebihara's presence at Hearing is necessary for more than just one day. JM anticipates calling Dr. Ebihara as a witness in JM's case-in-chief and potentially in JM's rebuttal case.

7. JM will work with Dr. Ebihara to see if this Brazilian commitment can be changed, but JM wanted to bring this issue to the attention of the Hearing Officer and IDOT immediately.

8. Completing Hearing (and likely post-Hearing briefing) is all that remains to be completed in this case. The parties have already complied with all pre-trial deadlines set in the

Hearing Officer's August 20, 2019 Order, including by filing stipulations, pre-hearing statements, a joint exhibit list, and a joint witness list.

9. JM proposes rescheduling the Hearing to a date in January 2020 mutually agreeable to the parties, witnesses, and the Hearing Officer. JM recognizes, though, that setting an appropriate new Hearing date will depend upon the Board's timing in deciding whether to hear JM's anticipated motion for interlocutory appeal of the MIL Ruling, and that sufficient time will need to be allotted to provide the Board enough time to reschedule the Hearing and provide the required notice.

10. No prior cancellation requests have been sought or granted in this case.

11. JM does not believe there are any statutory decisions in deadlines in this case, but nevertheless agrees to waive any decision deadlines.

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that she verily believes the same to be true.



Dated: November 1, 2019

Susan Brice

EXHIBIT 1

From: Ebihara, Tat [<mailto:Tat.Ebihara@aecom.com>]
Sent: Friday, November 01, 2019 9:17 AM
To: Brice, Susan
Subject: Nov 18-22

Susan: I'm required to be in Brazil for an audit trip for the state prosecutor down there, I'm the lead environmental auditor for that team. I might be able to make my schedule work to be in Chicago for either Monday, Nov. 18, or Friday, Nov. 22 - One or the other – Not both. Which date should I push for?

Tat

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