

ILLINOIS POLLUTION CONTROL BOARD
May 2, 2016

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STATE OF ILLINOIS
Pollution Control Board

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



ORIGINAL

HEARING OFFICER ORDER

On April 14, 2016, the Illinois Department of Transportation (“IDOT”) filed a motion to reschedule the May 10, 2016 hearing (Mot.). IDOT requested that the hearing be moved to a date at least six weeks after May 10, 2016. On April 20, 2016, Johns Manville (“JM”) filed its response (Resp.). On April 22, 2016, IDOT filed a reply to JM’s response (Reply).

This order first summarizes the filings regarding the motion and then provides my ruling.

IDOT’s Motion to Reschedule Hearing

Summary of IDOT’s Motion

IDOT seeks an order rescheduling the May 10, 2016, hearing for a date at least six weeks later. Mot. at 6. IDOT argues that due to recent and forthcoming discovery proceedings, it will not have sufficient time to prepare and evaluate its case before the May 10, 2016, hearing date. *Id.* at 5-6. For support, IDOT points to the fact that its expert witness will not be deposed until April 28, 2016, and JM will not disclose its expert witness until the following week—the week before the hearing is scheduled to begin. *Id.* at 4-5. IDOT argues that it would suffer substantial prejudice and be unable to adequately defend itself if required to prepare for the deposition of JM’s expert witness, review all documents produced during recent discovery, review all deposition testimony, and prepare its witnesses for hearing before May 10, 2016. *Id.* IDOT maintains that rescheduling the hearing would be just, and that do so would not prejudice JM. *Id.*

Summary of JM’s Response

JM argues that the May 10, 2016, hearing date is appropriate and that rescheduling the hearing for six weeks later would be unreasonable. Resp. at 7. JM asserts that any hardship IDOT faces because of discovery deadlines and demands is of its own making. *Id.* at 5. JM claims that IDOT chose to reopen discovery after JM was granted leave to file the second amended complaint, sought to depose more expert witnesses, and could have chosen an earlier date for the additional depositions to occur. *Id.* at 4-6. Additionally, JM states that it would be

prejudiced by further delay in this case because the “active” remedial work on Sites 3 and 6 ordered by USEPA has already begun. *Id.* at 6-7.

Summary of IDOT’s Reply

In its reply, IDOT reiterates that it will experience significant prejudice if the hearing is not rescheduled because it will be denied the opportunity to “adequately defend itself.” Reply at 2-3. IDOT claims that the May 10, 2016, hearing date is unreasonable because IDOT will not be able to adequately prepare for hearing since it has several documents to review associated with discovery and recent filings, and must prepare for multiple depositions in the days leading up to the hearing. *Id.* at 1-3. IDOT also contends that JM will not suffer any prejudice from rescheduling the hearing, as doing so would not delay remediation of the sites and would not significantly delay the Board’s resolution of this case—which, IDOT adds, likely will not occur for “some time” and be followed by an appeal. *Id.* at 3-4. In addition, IDOT attached to its reply a supporting affidavit of Evan J. McGinley summarizing the progress of discovery and related matters in this case. *Id.* at Attachment.

Conclusion and Ruling

I agree with JM that although not styled as such, IDOT’s request to reschedule the hearing is in effect a motion to cancel the hearing beginning on May 10 and postpone its start for at least six weeks. Under Section 101.510 of the Board’s procedural rules, such motions to cancel must generally be filed no fewer than 10 days before the scheduled hearing date. 35 Ill. Adm. Code 101.510(a). IDOT’s motion, filed on April 18, 2016, was therefore timely. Motions to cancel a hearing must also be supported by an affidavit; Mr. McGinley’s affidavit, while submitted for the first time on reply, satisfies this requirement. I may grant a timely and adequately supported motion only if the movant demonstrates that the request to cancel is not the result of the movant’s “lack of diligence.” *Id.* at 101.510(b).

I find that IDOT would be materially prejudiced if the hearing commenced on May 10, 2016 as currently scheduled. Specifically, because of the compressed discovery schedule relating to the second amended complaint, JM will not be in a position to disclose its expert’s report until May 3, 2016—a week before the scheduled first day of hearing—and IDOT will have to review the disclosure and depose JM’s expert before the hearing, and, if it decides a Rule 206(a)(1) deposition of JM is warranted, undertake that discovery as well. Four business days to accomplish all of this while simultaneously preparing for hearing and responding to JM’s motion to strike IDOT’s newly asserted affirmative defenses is simply not enough time. Accordingly, relief from the current hearing schedule is in order.

Nor am I persuaded that any of the circumstances warranting hearing rescheduling is the result of a lack of due diligence on IDOT’s part, or, for that matter, JM’s. Rather, they are in part the predictable result of a highly contested and complicated proceeding that is likely to require more than a day of hearing. Further, the timing of the filing of the second amended complaint, pursuant to leave granted by the Board, also contributed pressure and necessarily called for additional discovery.

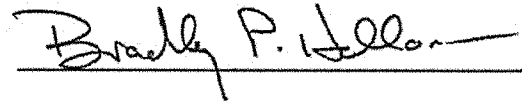
I further find that JM has not shown it will be prejudiced if the hearing is rescheduled for a short period. While JM points to the ongoing remediation of Sites 3 and 6, that effort must

continue whatever the outcome of this case, and JM has not shown that it will be denied a remedy if the hearing is postponed briefly.

Nonetheless, given the limited scope of additional discovery that I established and reinforced in denying JM's motion to compel, as well as the prior rescheduling of the hearing (*i.e.*, from March to May 2016), I find that the full postponement of *at least* six weeks requested by IDOT is excessive. Rather, rescheduling the hearing for two weeks should accommodate IDOT's need for sufficient time to prepare for hearing after concluding discovery while at the same time avoiding a lengthier delay that could ultimately protract unnecessarily the final resolution of this matter.

To that end, IDOT's motion is granted in part and denied in part, as follows. The hearing record will open on May 10, 2016, but the hearing will immediately be suspended and continued on the record until 9:00 a.m. May 23, 2016. I will secure rooms for May 23, 2016, May 24, 2016, and May 24, 2016, and will notify the parties by hearing officer order in a timely manner.

IT IS SO ORDERED.

A handwritten signature in black ink that reads "Bradley P. Halloran" with a horizontal line underneath.

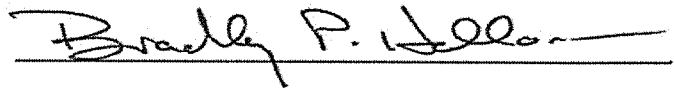
Bradley P. Halloran
Hearing Officer
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CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing order were e-mailed and mailed, first class, on May 2, 2016, to each of the persons on the attached service list.

It is hereby certified that a true copy of the foregoing order was hand delivered to the following on May 2, 2016:

John T. Therriault
Illinois Pollution Control Board
James R. Thompson Center
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Chicago, Illinois 60601

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

Bradley P. Halloran
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@ Consents to electronic service

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