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 July 22, 2020, I caused to be filed with the Clerk of the Pollution Control Board of the State of Illinois, Objection to Respondent's Motion for Leave to File a Response to Johns Manville's Motion to Exclude Witnesses from the Hearing Room and Motion to Strike Exhibit, a copy of which is attached hereto and herewith served upon you via e-mail.

JOHNS MANVILLE

By: /s/ Susan E. Brice

Dated: July 22, 2020

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OBJECTION TO RESPONDENT'S MOTION FOR LEAVE TO FILE A RESPONSE TO JOHNS MANVILLE'S MOTION TO EXCLUDE WITNESSES FROM THE HEARING ROOM AND MOTION TO STRIKE EXHIBIT

Complainant JOHNS MANVILLE ("JM"), through undersigned counsel, objects to Respondent ILLINOIS DEPARTMENT OF TRANSPORTATION's ("IDOT") Motion For Leave to File a Response to JM's Motion to Exclude Witnesses from the Hearing Room ("Motion for Leave") because IDOT waived its right to object to JM's Motion to Exclude Witnesses From the Hearing Room ("JM Motion") and has failed to provide any explanation for missing the 14-day deadline for filing a response by eight months, let alone the "good cause" required by the applicable Pollution Control Board ("Board") rules. To make matters worse, without leave, IDOT inserted a Response to the JM Motion ("Response") as an exhibit to its Motion for Leave. JM moves to strike this improper Exhibit from the record. In support of its Objection to IDOT's Motion for Leave and its Motion to Strike IDOT's Response, JM states the following:

I. Brief Background

On August 20, 2019, the Hearing Officer scheduled a Hearing in this matter for November 19-22, 2019 and provided deadlines for completion of the record prior to Hearing.

Hearing Officer Order (Aug. 20, 2019). On October 25, 2019, the parties finalized their witness lists in accordance with this schedule and JM subsequently filed the JM Motion, which requests an Order excluding witnesses, other than a party representative, from being present in the Hearing room except when testifying and an instruction that witnesses are not to discuss their testimony with other witnesses. JM Mtn., p. 3. JM properly served the JM Motion upon IDOT the same day.

On November 1, 2019, JM filed its *unopposed* Motion to Cancel Hearing and Reschedule Hearing ("JM Motion to Reschedule") because it intended to file an interlocutory appeal related to the Hearing Officer's October 31st Order and because one of JM's witnesses had been required to be in attendance "at an environmental audit in Brazil … by the Brazilian state prosecutor." JM Motion to Reschedule; *see also* Exhibit A, Hearing Officer Order (Nov. 5, 2019). The Hearing Officer granted JM's unopposed Motion to Reschedule and the Hearing was eventually rescheduled to February 3, 2019. On December 24, 2019, IDOT filed its own Motion to Reschedule the February Hearing because its expert, Mr. Gobelman, had ankle surgery on November 21, 2019 (during the time the first hearing had been set to occur) and that it "may take three months to recover." Hearing Officer Order (Jan. 8, 2020). Despite still going to work in downstate Illinois, Mr. Gobelman was "very concerned" about the possibility of ice and snow in Chicago in February and did not want to risk re-injury. *Id*. IDOT's Motion was granted and the Hearing was again rescheduled to April 20-23, 2020. *Id*. Shortly thereafter, IDOT announced that its lead counsel was changing jobs within the government. The Hearing was canceled a third time due to Covid-19 concerns. The Hearing is now set to commence on September 21, 2020. Hearing Officer Order (Apr. 6, 2020).

II. IDOT waived its right to object to the JM Motion by failing to meet the deadline to respond set by the Board's procedural rules.

The Board's procedural rules permit a party to submit a response to any filed motion within 14 days. 35 Ill. Adm. Code 101.500(d). This deadline is automatic and binding, and if a party fails to file a response within the allotted timeframe, "the party will be deemed to have waived objection to the granting of the motion." *Id.*; *see also People v. Moske d/b/a U.S. Scrap*, PCB 11-42, 2014 Ill. ENV LEXIS 80 *15-16 (Feb. 6, 2014) (the Board strictly applied the waiver to object to a summary judgment motion where Moske did not respond or request an extension within 14 days). While the waiver is automatic by the rule ("the party **will be** deemed…"), the Hearing Officer has the discretion to enforce it. The Hearing Officer has elected to strictly enforce this rule in many instances. *See e.g.*, *People v. Ill. Fuel Co., LLC*, PCB 10-86, 2019 Ill. ENV LEXIS 137 *18 (July 25, 2019); *People v. Demolition Excavating Grp., Inc.*, PCB 14-2, 2015 Ill. ENV LEXIS 115 *19-20 (Mar. 19, 2015); *People v. AET Envtl., Inc.*, PCB 07-95, 2012 Ill. ENV LEXIS 287 *29-30 (Sept. 6, 2012); *People v. Carter*, PCB 13-1, 2013 Ill. ENV LEXIS 75 *3 (Mar. 7, 2013). In fact, the Hearing Officer has enforced the rule in this exact situation. In *KCBX Terminals Co. v. Ill. Envtl. Protection Agency*, PCB 14-110 *1 (Apr. 28, 2014) (B. Halloran), the Hearing Officer found that the party waived its right to respond to a Motion to Exclude Witnesses from the Hearing Room when it did not respond by the established deadline. Similarly, here, IDOT has waived the same right.

III. The Hearing Officer can decide this issue without a response because Ill. R. of Evid. 615 clearly permits sequestering witnesses from the hearing room.

Where a hearing officer or the Board has no reason to dispute the information provided to it in a motion, it should find that the non-moving party has waived its right to object. *People v. Simmons*, PCB 06-159, 2009 Ill. ENV LEXIS 391 *20 (Nov. 5 2009). In *People v. Simmons*, the Board strictly enforced the waiver of the right to object under Rule 101.500(d) where Mr.

Simmons had failed to respond to the People's motion for attorneys' fees within the allotted time period. The Board stated that Mr. Simmons had "waived [any] objection to the reasonableness of the requested fees" and found that a strict application of the waiver rule was especially appropriate because the Board had "no reason to dispute the People's reasoning or calculation of the fees." *Id*.

The same situation exists here. JM's Motion establishes that the Hearing Officer has the authority to exclude both lay and expert witnesses from the courtroom and to prevent them from conferring. JM Motion, ¶¶2, 3. In fact, Illinois Rule of Evidence 615 states that upon the request of a party, the "court *shall* order witnesses excluded so that they cannot hear the testimony of other witnesses." Ill. R. of Evid. 615; *Ironhustler Excavating, Inc. v. Pollution Control Bd.*, 2015 IL App (3d) 130801-U, ¶ 31 (Ill. App. Ct. 2015) (stating that "the use of the word 'shall' states the imposition of a mandatory obligation").

JM has also established that there is no need for hearing witnesses to be present in the Hearing room before they testify in this case (other than a party representative). *See* JM Motion, ¶4. Sequestration is especially important when the expert's testimony should be limited to what was already disclosed in his or her Expert Reports. Indeed, "it has long been recognized that trial judges have the discretion to exclude witnesses in a civil trial. . . . The court's power to enter such an order is derived from its inherent power to afford a fair trial to all parties." *Smith v. City of Chicago*, 299 Ill. App. 3d 1048, 1053 (Ill. App. Ct. 1998) (citations omitted).

Here, as set forth in Mr. Gobelman's Supplemental Report (changing his Base Map), JM's Motion for Interlocutory Appeal (pp. 7-8, 13-15) and JM's Post-Hearing Brief filed on August 12, 2016, Exhibit A (Inconsistency Chart documenting Gobelman's inconsistent statements, attached hereto as Exhibit B), Mr. Gobelman tends to change his opinion often,

making for a complicated record and prejudicing JM. JM believes that it would expedite the Hearing and streamline the testimony if the experts were sequestered and separated from other witnesses in order to prevent them from inserting new opinions, shaping their opinions or departing from the testimony set forth in their previously exchanged Expert Reports. In short, not only has IDOT waived its right to object, but also JM has shown there is no reason to dispute the assertions contained in its Motion. Accordingly, the Board should hold that IDOT waived its right to file a response.

IV. IDOT has failed to show good cause for its failure to comply with the Board's procedural rules.

Despite the fact that IDOT waived its right to object, in order to obtain leave to file an untimely submission, IDOT must demonstrate "good cause" for its noncompliance with the rules. 35 Ill. Adm. Code 101.522; *Ironhustler Excavating*, 2015 IL App (3d) 130801-U *P30-31 (affirming the Board's rejection of an untimely summary judgment response pursuant to 35 Ill. Adm. Code 101.522; "the record reflects that the petitioners had ample opportunity to file a response of some kind to the State's motion for summary judgment – almost one year – but failed to do so"). The Illinois Supreme Court has held that "good cause" exists when the party moving for the extension "submit[s] to the court clear, objective reasons why it was unable to meet the original deadline and why an extension of time should be granted." *Vision Point of Sale, Inc. v. Haas*, 226 Ill. 2d 334, 347-348 (2007).[1] Showing good cause requires more than inadvertence, mistake or lack of prejudice to the opposing party. *See People v. Envt'l Health & Safety, Inc.*, 05-51 2006 Ill. ENV LEXIS 198 * 6-7 (Apr. 6, 2006); *Bright v. Dicke*, 260 Ill. App. 3d 768, 771 (3d Dist. 1994). The fact that an attorney wants an expert present to assist her or him

[1] The Board has recognized that Rule 183 applies an equivalent "good cause" standard in considering whether to grant an extension. *See e.g., People v. Michael Grain Co., Inc.,* PCB No. 96-143 1996 Ill. ENV LEXIS 584 *13 (Aug. 1, 1996).

with "complicated and highly technical issues" has nothing to do with IDOT's delay. Indeed, IDOT has offered no reason for its eight-month tardiness other than to somehow blame JM and to claim JM's Motion was premature and moot. But it is not JM's fault that IDOT missed the deadline to respond. Motion to Exclude, ¶9. That blame belongs completely to IDOT. JM followed all the rules and merely assumed IDOT did not object to the JM Motion.[2]

JM's Motion was neither premature nor moot. At the time of the Motion, the Hearing was less than a month away and filed within the operative Case Management Order. It is unclear how such a filing could now be considered premature. While the rules limit how late such a motion can be filed ("by the outset of the trial/hearing"), there is no limitation on how early one can be submitted. Further, the fact that the Hearing Officer granted an *unopposed* Motion to Reschedule the Hearing Date for *two months later* is irrelevant. Based upon IDOT's logic, all 2019 filings were premature. IDOT's argument cannot withstand judicial scrutiny.

In the same vein, the Hearing Officer's decision to grant JM's Motion to Reschedule the Hearing did not moot any deadlines. Rather, it changed only the Hearing Date.[3] The Motion to Reschedule notes that all pre-trial deadlines had been met, including the filing of "stipulations, pre-hearing statements, a joint exhibit list and a joint witness list." JM had also already filed its Motions *in Limine* and the JM Motion, the subject matter of this Opposition. Like with IDOT's premature argument, if IDOT's logic were followed here, the rescheduled Hearing date would have mooted all pre-hearing filings. Moreover, the parties would have had to re-file all pre-trial submissions each time the Hearing date changed, which obviously makes no sense. JM's Motion is not distinguishable simply because IDOT failed to respond to it.

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[2] This standard does not consider whether the parties will be prejudiced. *Compare* 35 Ill. Admin. Code 101.522 *with* 35 Ill. Admin Code. 101.500(e) (stating that the standard for non-moving party submitting a reply is showing that the reply is required "to prevent material prejudice")

[3] Claims that an issue is moot relate to whether an "actual controversy" exists. *National Marine, Inc. v. Ill. Envtl. Protection Agency*, 159 Ill. 2d 381, 390 (1994). Here, there is no question that an actual controversy remains.

Indeed, the Board Rules provide that "[u]nless the Board orders otherwise, *neither the filing of a motion,* nor any appeal to the Board of a hearing officer order will stay the proceeding *or extend the time to perform any act*." 35 Ill. Adm. Code 101.502(c) (emphasis added). Here, nothing in the Order granting the Motion to Reschedule changes or extends IDOT's time to respond to the JM Motion. *See* Exhibit A, Hearing Officer Order (Nov. 5, 2019).[4] IDOT's mootness argument is simply misguided.

V. Conclusion

JM's Motion has remained relevant since it was filed on October 25, 2019 and the Hearing Offer could have decided it any time after IDOT failed to timely respond. The fact that he did not does not give IDOT an opening to violate the Board's procedural rules.

Johns Manville respectfully requests that the Hearing Officer deny IDOT's Motion for Leave to File a Response and Strike IDOT's Exhibit to its Motion for Leave. Alternatively, if IDOT's Motion for Leave is granted, JM requests that it be permitted leave to file a reply pursuant to Rule 101.500(e).

Respectfully submitted,

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Dated: July 22, 2020

[4] The November 5th Order was issued pursuant to Section 101.510 of the Board's procedural rules which, consistent with Section 101.502(c), does not provide for any automatic stay or extension of deadlines as a result of granting a motion to cancel a hearing. 35 Ill. Adm. Code 101.510. This Section only entitles the Hearing Officer to issue a revised schedule to complete the record if the hearing date is canceled, however no such revised schedule was ever issued. *Id.*

EXHIBIT A

ILLINOIS POLLUTION CONTROL BOARD
November 5, 2019

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

HEARING OFFICER ORDER

On November 1, 2019, Johns Manville (JM) filed a Motion to Cancel Hearing and Reschedule Hearing (Mot.). On November 4, 2019, a telephonic conference call was scheduled to discuss JM's motion.

In the motion, JM states that it is requesting the cancellation of the hearing commencing on November 19, 2019 for two reasons. First, JM intends to file an interlocutory appeal challenging my Order of October 31, 2019. Motion at 2. Second, one of their expert witnesses, Dr. Ebihara, is required to be in "attendance at an environmental audit in Brazil [as] required by the Brazilian state prosecutor" and will be unavailable on the dates of the hearing, November 19-22, 2019. Mot. at 4. JM suggested that the hearing could be rescheduled in January of 2020. Mot. at 6.

During the conference call, JM reiterated its request to cancel the hearing and reschedule. The Illinois Department of Transportation (IDOT) surmised that cancelling the hearing appears to be the only means to ensure a clear record. IDOT stated that it is unopposed to JM's motion.

JM stated that it will file its interlocutory appeal on or before November 14, 2019. The parties were directed to inquire as to the availability of their respective witnesses for a January or February 2020 hearing.

JM's has demonstrated that its request to cancel the hearing is not the result of a lack of due diligence. *See* Section 101.510 of the Board's procedural rules. JM's motion to cancel the hearing is granted.

The parties or their legal representatives are directed to participate in a telephonic status conference with the hearing officer on November 13, 2019, at 10:00 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.

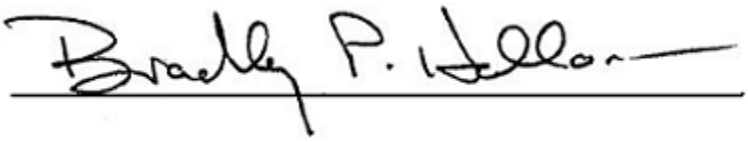

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EXHIBIT B

EXHIBIT A

INCONSISTENCY CHART

*This chart does not point out where Mr. Gobelman was impeached or new opinions he offered for the first time at trial (which were objected to at that time); rather, it only points out the wholly inconsistent positions he took over the course of the case on various topics.

Issue	Report	Deposition	Hearing Testimony
Use of Concrete Transite Pipe During Project	The contractor would have "cleared" materials on the surface of Parking Lot and therefore would have taken the concrete Transite pipes off the Project Site. (Ex. 08-8, § 4)	"[I]t's very unlikely" that the contractor would have used concrete Transite pipes in the Embankments. (Ex. 04C-77 lines 5-12)	The contractor would have used concrete Transite pipes in Embankments, just not the Embankments where JM has found the ACM. (Tr. June 23, pp. 145:21-146:2; Tr. June 24, p. 10:10-16; Tr. May 25, pp. 161:7-162:16) *But see later contradictory testimony…* The contractor placed concrete Transite pipes/ACM in the Sites 3 and 6 Embankments. (Tr. June 23, pp. 205:17-22; Tr. June 24, p. 10:10-16)
Value of Pipes	The contractor had to remove the pipes at "their own expense." (Ex. 08-10, 08-11, § 8) "The contractor had no financial	Contractor was getting paid to haul the concrete Transite pipes offsite. (Ex. 04C-85 lines 2-21)	Concrete Transite pipes have "value" to the contractor and "the contractor isn't going to want to remove these pipes and take them offsite someplace and to discard them." (Tr. May 25, p. 162:4-22)

	incentive to crush and use the Transite pipes as part of their fill." (Ex. 08-13, § 12)		The contractor would have used pipes in lieu of additional borrow material. (Tr. May 25, pp. 163:10-164:8; 165:2-10)
Cut and Fill	No materials from Site 3 would have been used in the Embankments. It would have been used in in detour roads and there was no excess cut from the roads. (Ex. 08- 13, § 12)	No materials from Site 3 would have been used in Embankments because there was no excess cut from construction of detour roads. (Ex. 04C-74 line 19-04C-75 line 17) *But see later contradictory deposition testimony…* "They would use that material [excess cut from the detour roads] to build embankment." (Ex. 04C-146 line 2-04C-147 line 24)	There was no excess cut from detour roads. (Tr. May 24, pp. 292:1-12) *But see admission that he offered two opposing positions in his deposition* (Tr. June 23, pp. 96:24-102:8) Based upon sequencing in the record, there was 3,165 yards of excess cut from detour roads that could have been used in the Embankments. (Tr. June 23, pp. 100:4-102:8; 103:22-104:24)
Parking Lot Removal	JM's Parking Lot was never removed in order to construct Detour Road A based solely on his belief that there was a typo in Exhibit 32.	Same as Report	He misinterpreted Exhibit 32, but maintains his position. He concedes that he has absolutely no evidentiary support for his position. (Tr. June 23, pp. 112:4-16; 116:17-21; 117:3-119:8)

	(Ex. 08-7, 08-8, § 3)		
Asphalt on top of Parking Lot	The contractor would not have crushed pipes on top of the Parking Lot because he did not want to damage its stability. (Ex. 08-8, § 4)	Same as Report, but explains that Parking Lot was covered with asphalt, which could be damaged by crushing. (Ex. 04C-76 line 10-04C-77 line 1, 04C-150 lines 2-8, 04C-159 lines 10-18)	Says he has no opinion on whether Parking Lot had asphaltic cover. (Tr. June 23, pp. 112:4-16; 117:3-119:8)
Condition of Site 3 in 1960	Topographic maps indicate Site was "no longer depicted as a wet area," i.e. it was depicted as a dry area, in 1960. (Ex. 08-10, § 7)	Same as Report	Maps indicate Site is "still wet. It showed marshy areas," i.e. wet areas, in 1960. (Tr. May 25, p. 136:2-7) *But see testimony moments later denying earlier testimony…* "Q: So you're saying here that the area is still wet in 1960, right? That's what you said --- a moment ago? A: No." Rather, what he had said earlier was that purportedly that the area is "no longer depicted as wet" in 1960. (Tr. May 25, pp. 137:1-138:24)
Scope of Opinion on Utilities	Utility installation and maintenance work "would have disturbed	His opinion in his report is <u>not</u> an opinion on how ACM became buried in the first place by	There is a "strong indication that the asbestos-containing materials follows a lot of the utility lines" and such

	the existing conditions and potential asbestos material could have been buried when these underground utility lines were installed or during maintenance." (Ex. 08-9, § 6)	utilities, rather opinion on how work could have redistributed already buried ACM. (Ex. 04C-65 line 13-04C-67 line 9, 04C-175 lines 5-18)	work is "a process by which ACM on the surface could cause to be buried." (Tr. May 25, pp. 200:14-19; 201:5-202:19) His opinion in his report is an opinion on how ACM became buried in the first place by utilities. (Tr. June 23, pp. 29:16-30:3) But see testimony moments later… "I don't believe I was making any opinion on the origin of the asbestos-containing material that was on Sites 3 and 6." (Tr. June 23, p. 32:9-19)