

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

To: See Attached Service List

PLEASE TAKE NOTICE that on May 5, 2016, I caused to be filed with the Clerk of the Pollution Control Board of the State of Illinois, *Complainant's Reply in Support of Partial Motion to Strike Respondent's Affirmative Defenses*, 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: May 5, 2016

Respectfully submitted,

BRYAN CAVE LLP

Attorneys for JM Johns Manville

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CERTIFICATE OF SERVICE

I, the undersigned, certify that on May 5, 2016, I caused to be served a true and correct copy of the attached *Notice of Filing of Complainant's Reply in Support of Partial Motion to Strike Respondent's Affirmative Defenses* 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. Paper hardcopies of this filing will be made available upon request.

/s/ Lauren J. Caisman

Lauren J. Caisman

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COMPLAINANT’S REPLY IN SUPPORT OF ITS PARTIAL MOTION TO STRIKE RESPONDENT’S AFFIRMATIVE DEFENSES

Complainant JOHNS MANVILLE (“JM”) hereby submits its Reply in Support of its Partial Motion to Strike Respondent’s Affirmative Defenses, only in order to correct certain misrepresentations made by Respondent ILLINOIS DEPARTMENT OF TRANSPORTATION (“IDOT”) in its Response to JM’s Motion. In support of its Motion, JM states as follows:

In an effort to support its argument that its Fifth, Sixth and Seventh Affirmative Defense are consistent with this Board’s March 3 Order, the discovery permitted on JM’s Second Amended Complaint and the law, IDOT misrepresents the Board’s March 3 Order and the proceedings in this case. IDOT’s erroneous assertions, however, should not be permitted to stand uncorrected.

On March 3, 2016, the Board entered an Order granting JM’s Motion for Leave to File Second Amended Complaint and allowing IDOT to “file an answer to the second amended complaint by April 12, 2016.” On March 14, 2016, the Hearing Officer entered a discovery schedule, ordering discovery on the limited topic of JM’s new allegations regarding the Right of Way parcel that JM alleges IDOT owns, holds an interest in and/or controls.

On April 12, 2016, after the deadlines imposed by the Hearing Officer for propounding and responding to written discovery had passed, IDOT filed its Answer to JM's Second Amended Complaint, asserting, for the first time, at least three brand new Affirmative Defenses (IDOT's Fifth, Sixth, and Seventh), that had never been raised previously by IDOT in more than two years of litigation and which IDOT had made no mention of when discovery was reopened and deadlines were scheduled.

IDOT's Response to JM's Motion repeatedly alleges that IDOT's Affirmative Defenses are timely and not prejudicial to JM because purportedly because discovery in this matter is open and is now set to remain open until May 9, 2016. (*See* Response, pp. 4-7.) IDOT, however, fails to elucidate that while discovery is open (for only a few more days, merely to allow IDOT to take the deposition of JM's expert witness), discovery was not allowed with respect to IDOT's Affirmative Defenses, and could not possibly have been as IDOT's Affirmative Defenses were not filed until April 12, 2016, after the deadlines for service and completion of written discovery had passed. (*See* March 14, 2016 Hearing Officer Order.) Instead, discovery only addressed the limited allegations in JM's Second Amended Complaint, as IDOT repeatedly emphasized and pointed out to JM and the Hearing Officer when seeking to avoid having to respond to the totality of JM's discovery requests. (*See* IDOT's Motion for Protective Order; IDOT's Response to Motion to Compel.) IDOT's representations that JM is not prejudiced because discovery is still open is false. IDOT is well aware that discovery on its Affirmative Defenses has not been allowed.

IDOT claims that "the Board's March 3rd Order placed no limits on the scope or nature of response that IDOT could file in response to the SAC" (Response, p. 3), though the Board's March 3 Order plainly allows IDOT to only file an "Answer" and not any other form of

responsive pleading. JM had requested that IDOT's response be so limited. The language used by the Board, however, is key, where IDOT now seeks to contravene that March 3 Order by masking dismissal-type objections to JM's Second Amended Complaint as belated Affirmative Defenses. (*See e.g.*, Motion, at ¶ 18.) If the Board had intended to allow IDOT to file a pleading that attacked the merits of the entire case, it would have said so or at least ordered that IDOT be allowed to file a "responsive pleading." The Board did not and it is improper for IDOT to introduce such sweeping affirmative defenses into the case at this late date.

It is entirely preposterous for IDOT to claim that its new Affirmative Defenses, are timely and not prejudicial to JM. They were filed at the eleventh hour after discovery on all topics other than the new allegations in the Second Amended Complaint were closed and, as to the new allegations, after written discovery was closed. As such, with this late filing, IDOT has tied JM's hands in terms of how JM can present its case-in-chief and rebut IDOT's Affirmative Defenses.

IDOT has put JM in an untenable situation. JM's Second Amended Complaint does not argue, in the alternative, that IDOT violated prior versions of the Illinois Environmental Protection Act (the "Act") and, up until now, JM was never put on notice that this was issue to be litigated. As noted below, JM would be prejudiced if the hearing were delayed and JM would be prejudiced should IDOT be allowed to throw in this curve ball at the last minute, forcing JM to prepare a case that addresses multiple versions of the Act.

Further, the new Affirmative Defenses were filed at a time when the Board, the Hearing Officer and JM were pushing to set a hearing date as soon as possible. IDOT was well aware that by filing the new Affirmative Defenses, it was pushing JM up against a wall. As JM had argued in its Motion for Leave to File its Second Amended Complaint, work on the remedy has

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/s/ Lauren J. Caisman

Lauren J. Caisman

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