**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, June 20, 2016, Respondent, Illinois Department of Transportation, filed and served its "Response to Johns Manville Motion to Quash" with the Clerk of the Pollution Control Board, a copy of which are hereby served upon you.

Respectfully Submitted,

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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, June 20, 2016, I caused to be served on the individuals listed below, by electronic mail, a true and correct copy of Respondent, Illinois Department of Transportation's "Response to Johns Manville Motion to Quash."

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Evan J. McGinley

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

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| JOHNS MANVILLE, a Delaware corporation, Complainant, | ) | |
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| | ) | (Citizen Suit) |
| ILLINOIS DEPARTMENT OF TRANSPORTATION, Respondent. | ) | |

**ILLINOIS DEPARTMENT OF TRANSPORTATION RESPONSE TO COMPLAINANT'S MOTION TO QUASH SUBPOENAS**

Respondent, ILLINOIS DEPARTMENT OF TRANSPORTATION ("IDOT"), herewith responds to Complainant, JOHNS MANVILLE's ("Johns Manville") June 17, 2016 Motion to Quash Subpoenas. In support thereof, IDOT states as follows:

**RESPONSE**

IDOT's decision to issue subpoenas to Dr. Tatsuji Ebihara and Douglas G. Dorgan came in response to Johns Manville's reneging on certain mutual stipulations which it entered into with IDOT prior to the first day of hearing. The scope of these stipulations is set forth in a May 17, 2016 email thread between IDOT's and JM's respective counsel.[1] Pursuant to the terms of the agreed upon stipulations, IDOT and JM each agreed to the authenticity and admissibility of many (but not all) of the opposing party's respective exhibits. No other limits were placed on the manner by which exhibits could be used at hearing or post-hearing.

[1] The text of this email thread is attached to IDOT's recently filed "Respondent's Motion to Strike Complainant's Objections to KDOT's use of Exhibits as Evidence without Accompanying Witness Testimony."

IDOT expected that by entering into these stipulations, it would allow for a more streamlined admission of evidence into the record. IDOT assumed that JM shared this desire, as well as what it perceived to be the parties' mutual interest in decreasing the length of time needed for conducting the hearing in this matter. However, through its recent actions, JM has made it apparent that it is not interested in streamlining the making of the record in this case, as least not insofar as IDOT's ability to make the necessary record is concerned.

JM made repeated reliance on the parties' mutual stipulations on May 23, 2016, the first day of the hearing in this matter. IDOT, consistent with its understanding of the nature and scope of the agreed-upon stipulations, made no objection to JM's use of the stipulated exhibits. More significantly, though, JM's counsel repeatedly noted that exhibits had been stipulated to as to "admissibility", for "admission" and "for many other purposes" during direct examination of its witnesses. (*See, e.g.*, May 23rd Transcript, p. 38:3-6, p.40:3-8 ["This document is also admitted, Mr. Halloran."], p.55:22-53:6 ["This document is admitted for authenticity and for many purposes, except JM is not stipulating some of the hearsay statement in offer for the truth of the matter asserted in this document by IDOT." (Emphasis added], and p.119:5-9 ["And this exhibit is admitted."].)

On June 9, 2016, JM filed a brief ("Complainant's Objections to IDOT's Use of Exhibits as Evidence without Accompanying Witness Testimony"), where it reneged on its prior stipulations to the authenticity and admissibility of certain IDOT exhibits. In its brief, it unilaterally seeks to impose new limits on just what authenticity and admissibility will mean for purposes of this hearing. Specifically, JM now seeks to have IDOT satisfy additional requirements, in order for it to make use of stipulated to exhibits at hearing or in any post-

hearing brief, namely, that in order to make such use of a stipulated exhibit, IDOT must also elicit testimony about the exhibit at hearing.

JM's newly articulated demands regarding the parties' stipulations are ludicrous and border on bad faith. JM would now require IDOT to seek testimony on documents for which no such testimony should be required. A case in point: notwithstanding any stipulations between the parties, JM now objects to IDOT making any use of IDOT's Exhibit 62 (the 2007 Administrative Order on Consent between USEPA, JM and Commonwealth Edison), unless IDOT first elicits some sort of testimony regarding this document. (See, "Complainant's Objections to IDOT's Use of Exhibits as Evidence Without Accompanying Witness Testimony ["Objections"]," pp. 12-13.) To claim that IDOT should have to elicit testimony about the very document giving rise to JM's claims against it – when the Board could simply take judicial notice of the document and where JM is a signatory to it - is beyond absurd.

Similarly absurd is JM's insistence that IDOT must also elicit testimony about various IDOT documents that were generated during the course of the underlying construction project. (*See, e.g.*, Objections, p.12.) Worse still, JM now also objects to IDOT relying on the very documents which its expert, Douglas Dorgan, relied upon and cited to in the bibliography to his own expert report. (Id., regarding IDOT Exhibit 80 (Illinois Beach State Park Final Report of Findings, Item 14 in Mr. Dorgan's expert report), as well as Exhibit 102 (USEPA's Second Five Year Report for Johns Manville NPL Site, Item 10 in Mr. Dorgan's expert report).) Small wonder, then, that IDOT has found it necessary to subpoena Mr. Dorgan.

As for Dr. Ebihara, Johns Manville would now seek to have IDOT elicit testimony from Ebihara in order to establish the foundation for certain environmental reports which Dr. Ebihara prepared on behalf Johns Manville.

Johns Manville argues that IDOT should not be allowed to subpoena Mr. Dorgan and Dr. Ebihara because doing so will "unnecessarily delay the proceedings and would amount to cumulative testimony." (Mot. p.4.) IDOT has no wish to delay these proceedings. If, as Johns Manville suggests, it is genuinely concerned about lengthening these proceedings, its actions are in conflict with its stated intentions. Had Johns Manville simply abided by its previous stipulations with IDOT, there would be no need for IDOT to seek to call Mr. Dorgan or Dr. Ebihara as witnesses. Under any circumstances, there is nothing "cumulative" about the testimony that IDOT would be seeking, if it has to call Mr. Dorgan and Dr. Ebihara as witnesses. If called, they

IDOT is entitled to make its record in this case, so that it can fully and completely assert its defenses against Johns Manville's claims. As such, it is entitled to rely on the agreement which it previously reached with Johns Manville regarding the authenticity and admissibility of certain exhibits. If, however, Johns Manville wishes to go forward with its renouncement of this agreement, then IDOT is left with no choice but to present such additional witnesses as it may need to call, in order to make the necessary record in this case.

WHEREFORE, Respondent IDOT requests that the Hearing Officer:

1) Deny Johns Manville's Motion to Quash and permit IDOT to call Douglas Dorgan and Dr. Tatsuji Ebihara as witnesses in its case-in-chief; or, alternatively,
2) Hold Johns Manville to its prior stipulated agreements with IDOT regarding the authenticity and admissibility of certain exhibits; and
3) Grant such other relief as the Hearing Officer believes to be proper and just.

Respectfully Submitted,

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