

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

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

**COMPLAINANT’S REPLY IN SUPPORT OF ITS MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT TO CONFORM PLEADINGS TO NEWLY DISCOVERED FACTS WITHOUT HEARING DELAY**

Complainant JOHNS MANVILLE (“JM”) hereby submits its Reply in Support of its Motion for Leave to File Second Amended Complaint to Conform Pleadings to Newly Discovered Facts Without Hearing Delay (“Motion”), 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:

Nowhere in response to JM’s Motion does IDOT deny that “since at least 1971, the State of Illinois, acting by and through IDOT (or its predecessor agency, has owned, held an interest in, and/or controlled portions of Site 6, including a right of way on the southern side of Greenwood Avenue” (the “Right of Way”) as set forth in the allegation JM seeks to conform in paragraph 12 of its proposed Second Amended Complaint. Nor does IDOT deny that it led JM to believe that IDOT did not own or hold an interest in the Right of Way. Instead, IDOT attempts to fault JM for not having prior knowledge of IDOT’s interest in the Right of Way on

Site 6, though IDOT itself “lack[ed] sufficient information to either admit or deny” who owned Site 6 in answering JM’s Amended Complaint.

In doing so, IDOT misconstrues the record in this case. While IDOT claims that JM’s Motion is not “based upon new evidence not previously available to [JM]” because IDOT produced a 1984 “Grant Document” (showing IDOT’s right to use Site 6), in discovery (Response, p. 3), the newly discovered evidence in this case is actually the Report from Property Insight, which directly rebutted IDOT’s express testimony in this case (*see* Deposition of Steven Gobelman, excerpts attached to JM’s Motion as Exhibit A; Report of Steven Gobelman, at pp. 6-7, attached to JM’s Motion as Exhibit B), and JM’s understanding, that the Right of Way was transferred to the City of Waukegan. Instead, the Report from Property Insight shed light that IDOT has retained the Right of Way on Site 6 until the present. At no time has IDOT sought to correct those representations, but instead, given its lack of forthrightness on the ownership/control/possessory interest of the Site 6 Right of Way, forced JM to try and figure this out on its own after Mr. Gobelman first raised the issue.

Contrary to IDOT’s intimation, the Grant Document, attached to IDOT’s Response as Exhibit A, is not a representation of who currently holds an interest in the Right of Way. Rather, it only shows that the Right of Way was granted to IDOT in the 1970s. The Property Insight Report was the first document received indicating the ownership status of the Right of Way after the initial grant.

IDOT cannot reasonably claim that it had no prior knowledge JM might be seeking to amend the pleadings to conform the newly discovered ownership of the Right of Way on Site 6 when, on January 20, 2016, a mere six days after JM received the title report, JM informed IDOT and the Hearing Officer that JM felt the need to supplement its production with “additional

information concerning the ownership of the right of way” (and JM, in fact, did so shortly thereafter). JM also noted the ownership issue in its Motion to Limit the Testimony of Steven Gobelman filed on February 8, 2016. Both JM and IDOT prepared their witness lists with that additional information in mind.

At no time during this litigation has JM sought to delay proceedings in this matter nor does JM seek to do so now. This case does not “arise out of obligations that JM incurred in 2007” as IDOT contends (Response, p. 4), but rather, as set forth in JM’s complaints, arises out the USEPA’s expansion of JM’s obligations in late 2012 to include requiring JM to remediate asbestos containing material buried by IDOT. (*See generally*, Complaint, Amended Complaint, and Dorgan Expert Report.) Before that time, JM was only required to deal with ACM impacts at or very near the surface of Sites 3 and 6, which were clearly tied to its initial placement of the concrete Transite pipes on Site 3. JM filed this action on July 8, 2013. As such, JM filed this lawsuit just over six months, not six years, after it learned that it was going to be penalized for IDOT’s actions in burying asbestos containing material on Sites 3 and 6.

Further, it was not JM, but IDOT, that sought to delay hearing of this matter. IDOT claims that it suggested earlier hearing dates in this case, but JM has no record of any such effort. In reality, it was IDOT that prolonged this matter, by issuing deposition notices on the day expert discovery was set to conclude and moved to reopen discovery several weeks later. As IDOT failed to adhere to the discovery deadlines in this case, JM was unable to make a determination regarding whether to file summary judgment motions until discovery was completed and all facts were in the record. Undoubtedly, no hearing could be held until discovery was finished. Nevertheless, as soon as expert discovery was completed, JM decided to dispense with

dispositive motions and advocated for an early hearing date, though IDOT wanted to delay until April or May 2016, as it does again now.

That JM's conformed allegations would "substantially expand the potential liability that IDOT faces in this case" (Response, p. 2), only serves to militate granting JM's Motion in order to avoid working an injustice of allowing IDOT to escape the consequences of its conduct on Site 6. To hold otherwise and deny JM's Motion would permit a culpable party, IDOT, to profit from withholding relevant and key factual information in this case.

WHEREFORE, Complainant JOHNS MANVILLE respectfully requests that the Board enter an Order granting its Motion without delaying the hearing in this case scheduled for March 15, 2016.

Respectfully submitted,

BRYAN CAVE LLP

Attorneys for Complainant Johns Manville

By:     /s/ Lauren J. Caisman      
Susan Brice, ARDC No. 6228903  
Lauren J. Caisman, ARDC No. 6312465  
161 North Clark Street, Suite 4300  
Chicago, Illinois 60601  
(312) 602-5124  
Email: susan.brice@bryancave.com

**CERTIFICATE OF SERVICE**

I, the undersigned, certify that on February 24, 2016, I caused to be served a true and correct copy of *Reply in Support of its Motion for Leave to File Second Amended Complaint to Conform Pleadings to Newly Discovered Facts Without Hearing Delay* 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