

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 Motion for Leave to File Reply in Support of Partial Motion to Strike Respondent's Affirmative Defenses Instanter*, 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 Motion for Leave to File Reply in Support of Partial Motion to Strike Respondent's Affirmative Defenses Instantly* 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 MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF ITS
PARTIAL MOTION TO STRIKE RESPONDENT’S AFFIRMATIVE DEFENSES
INSTANTER**

Complainant JOHNS MANVILLE (“JM”) hereby moves, pursuant to 35 Ill. Admin. Code 101.500, for leave to file its Reply in Support of its Partial Motion to Strike Respondent’s Affirmative Defenses (“Motion”) *instanter*, in order to prevent material prejudice from certain misrepresentations made by Respondent ILLINOIS DEPARTMENT TRANSPORTATION (“IDOT”) in its Response to JM’s Motion. In support, JM states as follows:

1. 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.” The Board also directed the Hearing Officer to set discovery deadlines and a new hearing date consistent with the Board’s March 3 Order. The hearing is now set for May 23, 2016.

2. 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 JM alleges that IDOT owns, holds an interest in and/or controls. (*See* Hearing Officer Order.)

IDOT has repeatedly stated in pleadings since the filing of JM's Second Amended Complaint that discovery was re-opened for only this limited purpose. (*See* IDOT's Motion for Protective Order, p. 4 (noting that "the Board intended that the parties only conduct limited discovery" (emphasis in original)); *see also* IDOT's Response to JM's Motion to Compel, p. 1 ("On March 16, 2016, the parties exchanged what was supposed to have been 'limited' written discovery in this case.")) Now, however, IDOT argues the opposite, wrongly claiming that JM is not prejudiced by IDOT's new Affirmative Defenses because discovery is still open. (*See* Response, pp. 4-7.) To the contrary, the discovery permitted by the Hearing Officer never contemplated discovery on IDOT's Affirmative Defenses. In fact, those Affirmative Defenses were only first asserted by IDOT after written discovery was closed on March 30, 2016¹, thirteen days before IDOT filed its Affirmative Defenses.

3. Similarly, IDOT misrepresents this Board's March 3 Order. IDOT claims that the Board did not limit the type of responsive pleading it could file. (*See* Response, pp. 2-3.) This is incorrect. The Board's March 3 Order was clear. It stated: "IDOT may file an answer to the second amended complaint by April 12, 2016 . . . The Board grants IDOT until April 12, 2016 to file an answer." (*See* pp. 1, 3.) It did not say that IDOT could file a responsive pleading. JM requested this limitation in its Motion for Leave to File Second Amended Complaint and the Board's March 3 Order is entirely consistent with JM's request. Yet, 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.)

4. Finally, IDOT mischaracterizes how permitting its Affirmative Defenses would impact JM. IDOT's new Affirmative Defenses, in particular IDOT's Seventh Affirmative

¹ The deadline for the completion by written discovery had been extended, from the original deadline, by only one day in the Hearing Officer's March 24, 2016 Order.

Defense, seek to upend JM's Complaint, arguing that all of its claims — not just ones recently added — are based upon the wrong law. IDOT is well aware of the fact that JM does not want to delay the hearing of this case thus has put JM in an untenable situation in terms of how JM can present its case-in-chief and rebut IDOT's Affirmative Defenses. 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 discussed in JM's Motion to Leave to File its Second Amended Complaint, JM would be prejudiced by further delay of this case. But JM would also 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.

5. But if this Board is inclined to deny JM's Motion, in order to avoid severe prejudice to JM, the Board should, in the very least, issue an order providing that JM's Second Amended Complaint shall be viewed as conforming to the evidence to be presented and incorporating allegations that, in the alternative, IDOT violated the prior versions of the Act and Board regulations.²

6. Given IDOT misrepresentations discussed above, all of which belie IDOT's arguments that the filing of its Fifth, Sixth, and Seventh Affirmative Defenses is within the scope of the Board's March 3 Order, is timely, and is not prejudicial, JM files the instant Motion for Leave in order to correct the record and to provide the Board with a full and fair account of the facts and history of this case prior to the Board's ruling on JM's Motion so that JM will not be further prejudiced.

² As a last resort, JM could file a Third Amended Complaint assuming the hearing would not be delayed. But JM does not believe this would be necessary and that the Second Amended Complaint could simply be viewed as incorporating the alternative allegations.

7. This Motion for Leave is timely as it is filed within fourteen days after service of IDOT's Response under 35 Ill. Admin Code Section 101.500(d).

8. The principles of substantial justice militate toward allowing JM filed to file its Reply in order to correct the misrepresentations made by IDOT in its Response. Material prejudice would result to JM if IDOT's Response is allowed to stand containing such misrepresentations as explained and if JM's Reply, which merely seeks to rectify IDOT's misstatements, is not considered in the Board's ruling on JM's Motion. It would work a substantial injustice on JM if IDOT were allowed to escape the consequences of its wrongful conduct and to profit from misrepresenting the record in this case to the Board. *See, e.g., Elmhurst Mem. Healthcare & Elmhurst Mem. Healthcare & Elmhurst Mem. Hosp.*, PCB 09-066, 2009 WL 6506666, **1-2 (Aug. 6, 2009) (allowing filing of reply where movant alleged that material prejudice would result if movant was not allowed to rectify the non-movant's misstatements of law and fact); *In the Matter of Ameren Ash Pond Closure Rules*, R09-21, 2009 WL 6650323, *2 (June 18, 2009) (granting motion for leave to file a reply in support of motion where the movant requested that the Board accept the reply "to prevent the material prejudice that would result if the Response was allowed to stand containing such misrepresentations."); *Indian Creek Devel. Co. v. Burlington Northern Santa Fe Railway Co.*, PCB 07-44, 2007 WL 928718, **4-5 (Mar. 15, 2007) (accepting reply brief and finding that acceptance would prevent material prejudice where the non-movant's response "paints a set of facts that are not true" and where "fairness dictates that [movant] be given the opportunity to respond and set the record straight"); *In the Matter of Petition of The Metropolitan Water Reclamation Dist. of Greater Chi.*, AS 95-4, 1995 WL 314608, *1 (May 18, 1995) (finding that a reply was "necessary to fully delineate the issues before the Board in this proceeding").

9. JM's Reply in Support of its Motion is filed concurrently herewith.

WHEREFORE, Complainant JOHNS MANVILLE respectfully requests that the Board enter an Order granting JM's Motion for Leave to File its Reply and consider JM's Reply *instanter* in order to avoid substantial prejudice.

Respectfully submitted,

BRYAN CAVE LLP

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/s/ Lauren J. Caisman

Lauren J. Caisman

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