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.	)	

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

Complainant JOHNS MANVILLE ("JM") hereby moves, pursuant to 35 Ill. Admin. Code 101.500, for leave to file 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"), in order to prevent material prejudice from certain misrepresentations made by Respondent ILLINOIS DEPARTMENT OF TRANSPORTATION ("IDOT") in its Response to JM's Motion. In support, JM states as follows:

1. On February 15, 2016, JM filed its Motion seeking to file a Second Amended Complaint to conform the allegations of JM's pleadings to the newly discovered evidence 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").

2. Because of the impending hearing date, the Hearing Officer ordered that IDOT file its Response to the Motion on or before February 23, 2016.

3. At 3:34 P.M. on February 23, 2016, IDOT served JM and the Hearing Officer with copies of its Response via electronic mail.

4. IDOT made certain representations in its Response that were either patently untrue or misrepresented the record in this case. For example, IDOT claimed that JM's Motion was not "based upon new evidence not previously available to [JM]" because IDOT produced a 1984 "Grant Document" in discovery. But the Grant Document is not newly discovered evidence and shows nothing more than the fact the IDOT was granted a Right of Way originally in 1971 (and was re-recorded and clarified in 1984). The newly discovered evidence, and what is important here, is the recently prepared Report from Property Insight, which explains what happened to the Right of Way after that conveyance. The Property Insight Report shows that, contrary to IDOT's testimony in this case and what JM had been led to believe by IDOT, there have been no conveyances of the Right of Way since the Grant Document and therefore IDOT still possesses its interest in the Right of Way on Site 6. IDOT had incorrectly testified that it had conveyed the Right of Way interest to the City of Waukegan.

5. IDOT also misrepresented in its Response that JM had delayed in filing this action and subsequently sought to delay proceedings in this matter. This case, however, does not "arise out of obligations that JM incurred in 2007" as IDOT contended, but rather 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. Thus, JM acted promptly in filing this case in 2013 after those additional obligations were incurred. And, while IDOT's Response claimed that IDOT suggested earlier hearing dates in this case, JM has no record of any such effort and in reality, it was IDOT that prolonged this matter by failing to adhere to the discovery deadlines in this case and seeking to reopen discovery in September 2015.

6. IDOT also misrepresented in its Response that it had no prior knowledge that JM might be seeking to amend the pleadings to conform the newly discovered ownership of the Right of Way on Site 6. But, on January 20, 2016, a mere six days after JM received the Report from Property Insight and as reflected in the Hearing Officer's Order of that date, 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).

7. The day after IDOT filed its Response to JM's Motion, on February 24, 2016, the Hearing Officer requested a conference call later that afternoon or the following morning. Due to scheduling conflicts, a conference call was set for 9:45 A.M. on February 25, 2016.

8. JM had anticipated that a decision on the Motion would be issued shortly, but felt that certain of IDOT's misrepresentations needed to be corrected for the record prior to that ruling in order to provide the Hearing Officer with a full and fair account of the facts and history in this case and so that JM would not be prejudiced.

9. Given JM"s belief that a decision was imminent,, JM hurriedly filed its Reply in Support of its Motion prior to the February 25 conference.

10. JM now seeks leave to file and have the Board accept and consider that Reply.

11. This motion for leave has now been timely filed with the Board within fourteen days after service of IDOT's Response under 35 Ill. Admin Code Section 101.500(d).

12. IDOT, seemingly in an effort to continue to disguise the true facts concerning its interest in the Right of Way, objects to JM's Reply brief because JM did not cite this section in its Reply and has made no showing of prejudice. On the contrary, 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. IDOT has conceded that JM's conformed allegations would "substantially expand the potential liability that IDOT faces in this case" (Response, p. 2). 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, 20009) (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 C*hi., 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").

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 in order to avoid substantial prejudice.

Respectfully submitted,

BRYAN CAVE LLP

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CERTIFICATE OF SERVICE

I, the undersigned, certify that on February 26, 2016, I caused to be served a true and correct copy of *Complainant's Motion for Leave to File 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