

**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 OBJECTION TO NOTICE OF DEPOSITION**

Complainant JOHNS MANVILLE (“JM”) hereby submits its written Objection to Respondent ILLINOIS DEPARTMENT OF TRANSPORTATION’S (“IDOT”) Notices of Deposition for Douglas A. Dorgan and Denny Clinton.<sup>1</sup> In support of its Objection, JM states as follows:

On March 16, 2015, JM timely served on IDOT an expert report prepared by Mr. Douglas A. Dorgan, pursuant to expert discovery proceedings in this matter. Affidavit of Susan Brice (“Brice Aff.”) ¶ 3. Mr. Dorgan was subsequently deposed by IDOT on May 6, 2015. Brice Aff. ¶ 3. On May 29, 2015, IDOT timely served on JM an expert report—styled as a rebuttal report—prepared by its own expert, Mr. Steven Gobelman (the “Gobelman Report”). Brice Aff. ¶ 4. JM deposed Mr. Gobelman on July 10, 2015. Brice Aff. ¶ 4. In response to Mr. Gobelman’s expert report and deposition, JM timely served on IDOT an expert rebuttal report prepared by Mr. Dorgan (the “Rebuttal Report”) on July 27, 2015. Brice Aff. ¶ 9.

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<sup>1</sup> JM is submitting this Objection pursuant to discussions with the Hearing Officer during the parties’ telephonic status conference on August 20, 2015. The Hearing Officer subsequently issued an Order on August 26, 2015 indicating that Respondent IDOT would file a Motion to Reopen Discovery within fourteen days of the date of the Order. In the event Respondent files such a motion, Complainant will file an appropriate response at that time.

In his report, Mr. Gobelman stated that the parking lot constructed on Site 3, which is central to this case, “was constructed with materials containing asbestos containing materials (ACM),” an assertion he based on an isolated statement excerpted from a report prepared for JM in 1999 by an outside environmental consultant, ELM Consulting, L.L.C. (the “ELM Report”). Gobelman Report at 8; Brice Aff. ¶ 5. Further, Mr. Gobelman stated that “[b]ased upon the materials found in the test pits and the fact that Johns Manville used Transite pipes to create curb bumpers and they used ACM to build the parking lot, economics would suggest that Johns Manville would have used all types of ACM material including Transite pipes to build the employee parking lot.” Gobelman Report at 7; Brice Aff. ¶ 6. In preparing his Rebuttal Report to address Mr. Gobelman’s statements, Mr. Dorgan reached out to Denny Clinton, who was the JM technical contact at the time the ELM Report was prepared. Brice Aff. ¶ 7. In his Rebuttal Report, Mr. Dorgan states that Mr. Clinton indicated that Mr. Gobelman misinterpreted the ELM Report. Brice Aff. ¶ 8. As stated in Mr. Dorgan’s Rebuttal Report, “Mr. Clinton indicated that the sentence in ELM’s 1999 Report regarding the parking lot being ‘constructed with materials containing asbestos containing materials’ was referring only to the concrete Transite pipes used as parking bumpers on the surface of the parking lot. It is his [Mr. Clinton’s] understanding that the only ACM associated with the construction of the parking lot is the aforementioned concrete Transite pipe. He [Mr. Clinton] never told ELM that the parking lot was constructed with ACM other than the concrete Transite pipe on the surface of the parking lot. He [Mr. Clinton] said that he has no evidence that prior to IDOT’s construction work, ACM existed below the parking lot.” Rebuttal Report at 7; Brice Aff. ¶ 8.

On August 14, 2015—which was the deadline for the close of expert discovery pursuant to the Board’s discovery scheduling order, and nearly three weeks after JM served IDOT with

the Rebuttal Report—counsel for JM received e-mail correspondence from counsel for IDOT indicating that, based on the statements in Mr. Dorgan’s Rebuttal Report, IDOT would like to re-depose Mr. Dorgan “for the limited purpose of examining him regarding the efforts he took to educate himself about the construction of the parking lot.” Brice Aff. ¶ 10. Counsel for IDOT also indicated that it would like to depose Mr. Clinton, “regarding his discussion with Mr. Dorgan which Mr. Dorgan makes reference to in his rebuttal report.” Brice Aff. ¶ 10. On August 18, 2015, IDOT subsequently served JM with notices of deposition—styled as subpoenas—for both Mr. Dorgan and Mr. Clinton. Brice Aff. ¶ 11. In the transmittal e-mail, counsel for IDOT indicated that the re-deposition of Mr. Dorgan is “necessitated by the inclusion of certain statements in his rebuttal report that amount to newly articulated opinions.” Brice Aff. ¶ 11. Counsel for IDOT further stated that the purpose of taking Mr. Clinton’s deposition “would be to better understand what information he provided to Mr. Dorgan and which Mr. Dorgan, in turn, relied upon in part in formulating his newly disclosed opinions.” Brice Aff. ¶ 11.

JM objects to IDOT’s deposition requests. As an initial matter, fact discovery closed several months ago, on April 6, 2015, and expert discovery closed on August 14, 2015. This case has already been delayed by approximately eight months. Pursuant to the initial discovery schedule entered in this case, fact discovery in this case was originally set to close on August 1, 2014 and expert discovery was originally set to close on January 5, 2015. JM has agreed to several extensions of these original deadlines to accommodate IDOT’s schedule, including (most recently) extensions of the deposition deadlines for both Mr. Dorgan and Mr. Gobelman. Brice Aff. ¶ 16. JM cannot agree to any further delay of this matter, particularly in light of the fact

that JM's requested relief in this case is an order requiring IDOT to participate in the remediation work that is the subject of this action, and that work is currently underway.

**I. JM Objects to the Deposition of Mr. Clinton.**

JM specifically objects to IDOT's request to depose Mr. Clinton. Mr. Clinton resides in Denver, Colorado, and is currently out of state on an extended vacation through mid-October. Brice Aff. ¶ 15. The resolution of this matter would therefore need to be delayed by at least an additional six weeks in order to accommodate a deposition of Mr. Clinton. Moreover, IDOT has known about Mr. Clinton, a fact witness in this case, and the fact he knew about the parking lot and the cleanup of Sites 3 and 6 (which included work done by ELM) for many months, but did not elect to depose him.

On October 31, 2014, IDOT served JM with written interrogatories requesting that JM "identify the names and addresses of all persons at Johns Manville who have knowledge of the facts relating to the allegations in the Amended Complaint" along with a summary of each person's relevant knowledge. IDOT First Set of Interrogatories, Request #1; Brice Aff. ¶ 12. In its response dated December 12, 2014, JM identified Mr. Clinton in response to this interrogatory and indicated that he, along with the other identified JM employees, has knowledge of the allegations in the Amended Complaint "including JM's historical ownership and operation at its Waukegan facility (*including facts regarding the JM parking lot on ComEd property*); *the discovery and presence of asbestos on Sites 3 and 6*; the CERCLA actions at the JM facility; the Amstutz Project generally as well as its detour roads; IDOT's 104(e) response; the AOC and negotiations relating to the AOC; *Site 3 and 6 investigations*; the location and history of utilities relating to the SW Sites; and the cleanup being required by EPA." JM's Response to IDOT's First Set of Interrogatories, Request #1; Brice Aff. ¶ 12.

JM's response to this interrogatory indicated that Mr. Clinton could be contacted through JM's counsel. Brice Aff. ¶ 12. However, IDOT did not choose to depose Mr. Clinton prior to the expiration of fact discovery and, in fact, never indicated to counsel for JM that it had any intention of deposing or otherwise contacting Mr. Clinton. Brice Aff. ¶ 14. In response to a 201(k) request from IDOT, JM also served revised responses to Interrogatory #1 on May 13, 2015, in which IDOT provided further clarification of the scope of knowledge for each of the JM employees identified in response to Interrogatory #1. Brice Aff. ¶ 13. With respect to Mr. Clinton, JM indicated that he has "specific knowledge of: JM's historical ownership and operation at its Waukegan facility (*including facts regarding the JM parking lot on ComEd property*) and *the discovery and presence of asbestos on Sites 3 and 6*, but also has knowledge of the CERCLA actions at the JM facility; the Amstutz Project generally as well as its detour roads; IDOT's 104(e) response; the AOC and negotiations relating to the AOC; *Site 3 and 6 investigations*; the location and history of utilities relating to the SW Sites; and the cleanup being required by EPA." JM's Amended Response to IDOT's First Set of Interrogatories, Request #1; Brice Aff. ¶ 13. From this, it was clear that Mr. Clinton had knowledge about the JM parking lot as well as the investigations and clean up of Sites 3 and 6 (which necessarily included working with ELM).

Again, IDOT did not indicate any interest in deposing or otherwise contacting Mr. Clinton in response to JM's revised interrogatory responses. Accordingly, as the deadline for fact discovery has long passed and IDOT declined to depose Mr. Clinton before the expiration of discovery, JM objects to producing Mr. Clinton for deposition now.

**II. JM Objects to the Re-deposition of Mr. Dorgan.**

JM also objects to producing Mr. Dorgan for a second deposition. At IDOT's request, JM e-mailed IDOT Mr. Dorgan's Rebuttal Report on July 27, 2015, the day it was due. Brice Aff. ¶ 9. A hard copy of report was also mailed to counsel's office on the same date, and a second copy of the report was provided to IDOT via hand delivery on August 3, 2015. Brice Aff. ¶ 9. Although IDOT had a copy of Mr. Dorgan's report for 15 days, it waited until 4:00 p.m. on the date expert discovery closed to request to take his deposition. This is simply too late. This deposition should have been scheduled to take place prior to the expiration of expert discovery.

Further, JM disagrees with IDOT's assessment that Mr. Dorgan has provided some sort of affirmative new opinion. The Board's discovery scheduling order in this case allowed JM to provide a rebuttal report. Mr. Dorgan's statements are plainly a rebuttal to Mr. Gobelman's erroneous assertion that JM used ACM to build the parking lot at Site 3. Mr. Dorgan consulted with Mr. Clinton to clarify the origin and intent of statements made in the ELM Report. All of the information provided by Mr. Clinton is information that IDOT could have asked in a fact deposition and is merely factual support for Mr. Dorgan's rebuttal. The fact that the parking lot is not constructed of ACM is just that—a fact—and not some kind of new opinion offered by Mr. Dorgan in his Rebuttal Report. For this reason as well, IDOT should not be allowed to re-depose Mr. Dorgan.

**III. IDOT's Subpoenas Were Not Properly Served and Are Null and Void.**

Although the deposition notices served on JM by IDOT are identified as "subpoenas" and cite to the Board's procedural rules applicable to subpoenas at 35 Ill. Adm. Code § 101.622, these subpoenas have not been issued in accordance with the procedures set forth in the Board's

rules, which provide that “[u]pon request by any party . . . the Clerk will issue subpoenas for the attendance of witnesses at a hearing or deposition” using subpoena forms provided by the Board’s Chicago office. 35 Ill. Adm. Code § 101.622(a). The so-called subpoenas served on JM by e-mail were not issued under the Clerk’s authority but were signed by counsel for IDOT. Brice Aff. ¶ 11. Further, a copy of the subpoena must be filed with the Clerk and served upon the hearing officer within seven (7) days after service upon the witness. 35 Ill. Adm. Code § 101.622(b). Failure to serve both the Clerk and the hearing officer will render the subpoena null and void. 35 Ill. Adm. Code § 101.622(b). As of August 31, 2015, which is more than seven days from the date the so-called “subpoenas” were sent to JM by e-mail, there is no indication on the docket for this matter that a copy of these subpoenas has been served on either the Clerk or the hearing officer. Accordingly, to the extent these subpoenas were properly served, they are now null and void pursuant to the Board’s rules, and JM has no obligation to produce either Mr. Dorgan or Mr. Clinton for deposition.

**IV. JM Will Be Materially Prejudiced By Further Delay of This Case.**

If IDOT is allowed to depose Mr. Clinton and Mr. Dorgan, this case will be further delayed by several additional weeks, if not months. This action was originally filed over two years ago, on July 9, 2013, and, despite JM’s continued insistence that this case should proceed quickly, IDOT now refuses to acknowledge the close of discovery. Any further delay in this case might materially prejudice JM’s ability to secure the relief it has requested in this case.

JM has specifically requested that the Board issue an order “requiring Respondent to participate in the future response action on Sites 3 and 6—implementing the remedy approved or ultimately approved by EPA—to the extent attributable to IDOT’s violations of the Act, pursuant to the Board’s broad authority to award equitable relief under Section 33 of the Act, 415 ILCS

5/33.” Amended Complaint at 16. However, JM is already in the process of implementing an EPA-approved remedy on the Southwest Sites. Brice Aff. ¶ 16. If IDOT cannot depose Mr. Clinton until he is back from vacation in mid-October, it is unclear whether this case will be resolved until remediation of Sites 3 and 6 are well underway or potentially completed. Brice Aff. ¶ 15. In light of the fact that IDOT waited until after the close of both fact and expert discovery to seek to depose Mr. Clinton and Mr. Dorgan, it should not now be allowed to depose these witnesses to the detriment of JM.


WHEREFORE, for the foregoing reasons, Complainant objects to producing Doug Dorgan and Denny Clinton for deposition and respectfully requests that the Board issue an order stating neither Doug Dorgan nor Denny Clinton is required to appear for a deposition in this matter.

Dated: August 31, 2015

Respectfully submitted,

BRYAN CAVE LLP

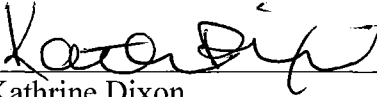
Attorneys for Complainant Johns Manville

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**CERTIFICATE OF SERVICE**

I, the undersigned, certify that on August 31, 2015, I caused to be served a true and correct copy of Complainant's Objection to Depositions 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.

  
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Kathrine Dixon

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prepared for JM in 1999 by an outside environmental consultant, ELM Consulting, L.L.C. (the "ELM Report").

6. Further, Mr. Gobelman stated that "[b]ased upon the materials found in the test pits and the fact that Johns Manville used Transite pipes to create curb bumpers and they used ACM to build the parking lot, economics would suggest that Johns Manville would have used all types of ACM material including Transite pipes to build the employee parking lot."
7. In preparing a rebuttal report to address Mr. Gobelman's statements, Mr. Dorgan reached out to Denny Clinton, a JM employee who was the JM technical contact at the time the ELM Report was prepared.
8. In his Rebuttal Report, Mr. Dorgan states that Mr. Clinton indicated that Mr. Gobelman misinterpreted the ELM Report. As stated in Mr. Dorgan's Rebuttal Report, "Mr. Clinton indicated that the sentence in ELM's 1999 Report regarding the parking lot being 'constructed with materials containing asbestos containing materials' was referring only to the concrete Transite pipes used as parking bumpers on the surface of the parking lot. It is his [Mr. Clinton's] understanding that the only ACM associated with the construction of the parking lot is the aforementioned concrete Transite pipe. He [Mr. Clinton] never told ELM that the parking lot was constructed with ACM other than the concrete Transite pipe on the surface of the parking lot. He [Mr. Clinton] said that he has no evidence that prior to IDOT's construction work, ACM existed below the parking lot."
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2015. At IDOT's request, JM e-mailed IDOT Mr. Dorgan's Rebuttal Report on July 27, 2015, the day it was due. A hard copy of report was also mailed to counsel's office on the same date, and a second copy of the report was provided to IDOT via hand delivery on August 3, 2015. Expert discovery closed in this case on August 14, 2015.

10. At 4:00 p.m. on August 14, 2015, counsel for JM received e-mail correspondence from counsel for IDOT indicating that, based on the statements in Mr. Dorgan's Rebuttal Report, IDOT would like to re-depose Mr. Dorgan "for the limited purpose of examining him regarding the efforts he took to educate himself about the construction of the parking lot." Counsel for IDOT also indicated that it would like to depose Mr. Clinton, "regarding his discussion with Mr. Dorgan which Mr. Dorgan makes reference to in his rebuttal report."

11. On August 18, 2015, IDOT subsequently served JM with notices of deposition—styled as subpoenas—for both Mr. Dorgan and Mr. Clinton. These subpoenas were signed by counsel for IDOT and were not issued under the authority of the Clerk. In the transmittal e-mail, counsel for IDOT indicated that the re-deposition of Mr. Dorgan is "necessitated by the inclusion of certain statements in his rebuttal report that amount to newly articulated opinions." Counsel for IDOT further stated that the purpose of taking Mr. Clinton's deposition "would be to better understand what information he provided to Mr. Dorgan and which Mr. Dorgan, in turn, relied upon in part in formulating his newly disclosed opinions."

12. IDOT has long been aware that Mr. Clinton may have knowledge relevant to this case. On October 31, 2014, IDOT served JM with written interrogatories requesting that JM "identify the names and addresses of all persons at Johns Manville who have knowledge

of the facts relating to the allegations in the Amended Complaint” along with a summary of each person’s relevant knowledge. In its response dated December 12, 2014, JM identified Mr. Clinton in response to this interrogatory and indicated that he, along with the other identified JM employees, has knowledge of the allegations in the Amended Complaint “including JM’s historical ownership and operation at its Waukegan facility (*including facts regarding the JM parking lot on ComEd property*); *the discovery and presence of asbestos on Sites 3 and 6*; the CERCLA actions at the JM facility; the Amstutz Project generally as well as its detour roads; IDOT’s 104(e) response; the AOC and negotiations relating to the AOC; *Site 3 and 6 investigations*; the location and history of utilities relating to the SW Sites; and the cleanup being required by EPA.” JM’s response to this interrogatory indicated that Mr. Clinton could be contacted through JM’s counsel.

13. In response to a 201(k) request from IDOT, JM also served revised responses to Interrogatory #1 on May 13, 2015, in which IDOT provided further clarification of the scope of knowledge for each of the JM employees identified in response to Interrogatory #1. With respect to Mr. Clinton, JM indicated that he has “specific knowledge of: JM’s historical ownership and operation at its Waukegan facility (*including facts regarding the JM parking lot on ComEd property*) and *the discovery and presence of asbestos on Sites 3 and 6*, but also has knowledge of the CERCLA actions at the JM facility; the Amstutz Project generally as well as its detour roads; IDOT’s 104(e) response; the AOC and negotiations relating to the AOC; *Site 3 and 6 investigations*; the location and history of utilities relating to the SW Sites; and the cleanup being required by EPA.”

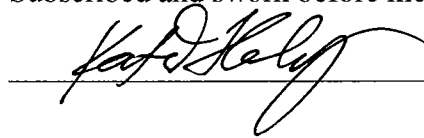
14. IDOT did not choose to depose Mr. Clinton prior to the expiration of fact discovery and, in fact, never indicated to counsel for JM that it had any intention of deposing or otherwise contacting Mr. Clinton.
15. Mr. Clinton resides in Denver, Colorado, and is currently out of state on an extended vacation through mid-October.
16. JM has agreed to several extensions of discovery deadlines in this case to accommodate IDOT's schedule, including extensions of the deposition deadlines for both Mr. Dorgan and Mr. Gobelman. I understand that JM has begun the process of implementing an EPA-approved remedy on the Southwest Sites.

Further, affiant sayeth not.



Susan Brice

Subscribed and sworn before me this 31<sup>st</sup> day of August, 2015.



Notary Public

