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

To: ALL PERSONS ON THE ATTACHED CERTIFICATE OF SERVICE

Please take note that today, March 1, 2016, I filed Respondent, Illinois Department of Transportation's Illinois Department of Transportation's, "Response to Complainant's Motion for Leave to File a Reply in Support of Its Motion for Leave to File a Second Amended Complaint to Conform Pleadings to Newly Discovered Facts without Hearing Delay" with the Clerk of the Pollution Control Board, a copy of which are hereby served upon you.

Respectfully Submitted,

By: _____

EVAN J. McGINLEY
ELLEN O'LAUGHLIN
Assistant Attorneys General
Environmental Bureau
69 W. Washington, 18th Floor
Chicago, Illinois 60602
(312) 814-3153
emcginley@atg.state.il.us
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THIS FILING IS SUBMITTED ON RECYCLED PAPER

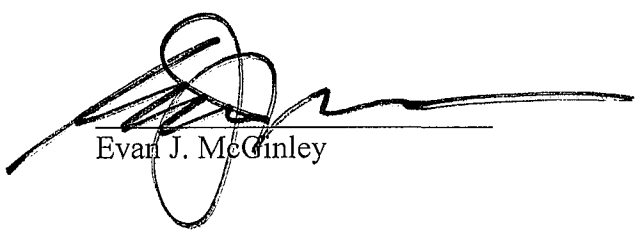
MATTHEW J. DOUGHERTY
Assistant Chief Counsel
Illinois Department of Transportation
Office of the Chief Counsel, Room 313
2300 South Dirksen Parkway
Springfield, Illinois 62764
(217) 785-7524
Matthew.Dougherty@Illinois.gov

CERTIFICATE OF SERVICE

***Johns Manville v. Illinois Department of Transportation*, PCB 14-3 (Citizens)**

I, EVAN J. McGINLEY, do hereby certify that, today, March 1, 2016, I caused to be served on the individuals listed below, by first class mail and electronic mail, a true and correct copy of the attached Notice of Filing, as well Respondent, Illinois Department of Transportation's, "Response to Complainant's Motion for Leave to File a Reply in Support of Its Motion for Leave to File a Second Amended Complaint to Conform Pleadings to Newly Discovered Facts without Hearing Delay."

John Therriault, Assistant Clerk Illinois Pollution Control Board James R. Thompson Center 100 West Randolph, Suite 11-500 Chicago, Illinois 60601 John.Therriault@illinois.gov	Bradley Halloran Hearing Officer Illinois Pollution Control Board James R. Thompson Center 100 West Randolph, Suite 11-500 Chicago, Illinois 60601 Brad.Halloran@illinois.gov
Susan Brice Lauren Caisman Bryan Cave LLP 161 North Clark Street, Suite 4300 Chicago, Illinois 60601 Susan.Brice@bryancave.com Lauren.Caisman@bryancave.com	Matthew J. Dougherty Assistant Chief Counsel Illinois Department of Transportation Office of the Chief Counsel, Room 313 2300 South Dirksen Parkway Springfield, Illinois 62764 Matthew.Dougherty@Illinois.gov



Evan J. McGinley

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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Complainant,	)	
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ILLINOIS DEPARTMENT OF TRANSPORTATION,	)	
	)	
	)	
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ILLINOIS DEPARTMENT OF TRANSPORTATION'S RESPONSE TO JOHNS MANVILLE'S MOTION FOR LEAVE TO FILE A REPLY IN SUPPORT OF ITS MOTION FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT TO CONFORM PLEADINGS TO NEWLY DISCOVERED FACTS WITHOUT HEARING DELAY

Now comes Respondent, the Illinois Department of Transportation ("IDOT"), which herewith files its "Response to Complainant's Motion for Leave to File a Reply in Support of Its Motion for Leave to File a Second Amended Complaint to Conform Pleadings to Newly Discovered Facts without Hearing Delay". IDOT states the following in support of its Motion.

1. On February 16, 2016, Complainant Johns Manville ("JM") filed its Motion for Leave to File a Second Amended Complaint to Conform Pleadings to Newly Discovered Facts without Hearing Delay ("Motion").

2. On February 23, 2016, IDOT filed its response to the Motion ("Response"). In its Response, IDOT noted that "on at least three occasions in the late Summer and early Fall of 2015, IDOT suggested setting an earlier hearing date for this case." (Response, at 3.)

3. On February 25, 2016, Johns Manville ("JM") filed a reply in support of their previously filed Motion for Leave to File a Second Amended Complaint to Conform Pleadings to Newly Discovered Facts without Hearing Delay ("Reply"). JM's Reply was filed without first

moving to so file, pursuant to Section 100.500 of the Board's procedural rules.

4. After having had this failing brought to its attention, on February 26, 2016, JM filed a Motion for Leave to File a Reply in Support of Its Motion for Leave to File a Second Amended Complaint to Conform Pleadings to Newly Discovered Facts without Hearing Delay ("Motion for Leave to Reply").

5. In its Reply, JM alleged that "IDOT claims that it suggested earlier hearing dates in this case, but JM has no record of any such effort." (Reply, at 3.) A similar statement is contained in paragraph five of JM's Motion for Leave to Reply.

6. These statements are at odds with the course of dealings between the parties' counsel.

7. ON February 29, 2016, JM filed a "Notice of Correction", which only partially rectifies the records in this matter. While acknowledging that an August 18, 2015 email from IDOT's counsel to JM's counsel broached the subject of setting a hearing date in this matter, JM's Notice of Correction fails to acknowledge a second email making this same point which was sent on August 19, 2015. Copies of emails from August 18 and 19, 2015 are attached hereto as Exhibits A and B to the Affidavit of Evan J. McGinley ("McGinley Aff.").

8. As further set forth in the McGinley Affidavit, during the August 20, 2015 status hearing between the parties, IDOT's counsel raised the issue of setting the matter for hearing again.

9. Ultimately, JM's counsel persisted in reserving decision on a whether it wanted to forgo motions for summary judgment during status hearings during September and October 2015. (McGinley Aff. ¶6.)

10. The matter was finally set for hearing beginning on March 15, 2016, at the

November 10, 2015 status hearing.

11. The inclusion of inaccurate factual statements in JM's Motion for Leave to Reply and its Reply, should not be given any consideration by the Board in ruling on that Motion, as they represent a significant misrepresentation of what has transpired in this case. Nor should the Board give any consideration to JM's Notice of Correction, as far from simply correcting demonstrably erroneous statements in its Motion for Leave to Reply and its Reply, the Notice of Correction contains unnecessary and inflammatory arguments which do nothing to advance the framing of issues in JM's underlying Motion or IDOT's Response thereto.

WHEREFORE, Respondent, Illinois Department of Transportation, requests that the Board:

1) Deny JM's Motion for Leave to Reply;

2) Give no consideration to the Reply;

3) Consider only JM's underlying Motion and IDOT's Response; and,

4) Granting such other relief as the Board deems just and appropriate.

Respectfully Submitted,

By: _____

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ILLINOIS DEPARTMENT OF TRANSPORTATION,	)	
	)	
	)	
Respondent.	)	

AFFIDAVIT OF EVAN J. McGINLEY IN SUPPORT OF ILLINOIS DEPARTMENT OF TRANSPORTATION'S OPPOSITION TO JOHNS MANVILLE'S MOTION FOR LEAVE TO FILE A REPLY IN SUPPORT IOF ITS MOTION FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT TO CONFORM PLEADINGS TO NEWLY DISCOVERED FACTS WITHOUT HEARING DELAY

I, EVAN J. McGINLEY, counsel for Respondent, Illinois Department of Transportation ("IDOT"), herewith provide the following affidavit in support of IDOT's Response to Complainant's Motion for Leave to File Reply in Support its Motion for Leave to File Second Mended Complaint to Conform Pleadings to Newly Discovery (sic) Facts Without hearing Delay," state as follows:

1. My affidavit is based entirely upon my personal knowledge.

2. On several occasions between August and October, 2015, during discussions with opposing counsel, as well as during status hearings in this matter, I expressed my belief that this case was not amenable to resolution by summary judgment and that it would be necessary to take the case to hearing.

3. On August 18th of last year, I sent an email to Johns Manville's counsel stating as follows:

> [i]n anticipation of Thursday's status hearing with Mr. Halloran, I would like to propose that we dispense with dispositive motions in this case and instead request

> that Mr. Halloran set this matter for hearing. Given the centrality of expert opinions to our respective cases and the fundamentally different opinions which our respective experts hold regarding critical issues in this case, this case would not seem to lend itself to resolution by summary judgment. Even assuming for the sake of argument that this case could be decided by summary judgment, the Board would still have to have a hearing on what relief, if any, to grant. In my opinion, we could bring the case more expeditiously to a resolution by simply going to hearing. I would like to hear your thoughts on this matter and see if we could agree on simply going straight to hearing.

(Emphasis added.) (A true and correct copy of my August 18, 2015 email to Johns Manville's attorneys is attached hereto as Exhibit A.)

4. The next day, on August 19, 2015, I wrote another email to JM's attorneys, stating in relevant part:

> Regarding our desire to go to hearing on this case, we would suggest that the hearing take place at some point in mid-November, just prior to Thanksgiving. We would estimate that the hearing would probably take 2 or 3 days, at most. Thought this might be relevant to your discussion with your client.

(Emphasis added.) (A true and correct copy of my August 19, 2015 email to Johns Manville's attorneys is attached hereto as Exhibit B.)

5. During the August 20, 2015 status hearing in this matter, I advised the hearing officer that IDOT felt that summary judgment in this matter would not be feasible and that the better course of action for resolving this case would be to set this matter for hearing. There was no resolution of this issue at the August 20th status hearing in the case.

6. It is my recollection that during subsequent status hearings during September and October, 2015, Johns Manville indicated that it had not yet reached a decision as to whether to forego filing a dispositive motion in this case.

7. Final hearing dates for this case were agreed to by Johns Manville and IDOT at the November 10, 2015 status hearing in this matter.

8. The factual matters set forth in my Affidavit are true in substance and in fact, to the best of my knowledge, information and belief.

FURTHER AFFIANT SAYETH NOT.

EVAN J. McGINLEY

SUBSCRIBED AND SWORN to before me
this 29th day of February, 2016

NOTARY PUBLIC

OFFICIAL SEAL
ARLENE MARYANSKI
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 6-6-2016

McGinley, Evan

From: McGinley, Evan
Sent: Tuesday, August 18, 2015 12:43 PM
To: 'Brice, Susan'; Dixon, Kathrine Brooke (kathrine.dixon@bryancave.com)
Subject: Johns Manville v. IDOT - Deposition Notices for Douglas Dorgan and Denny Clinton and other matters
Attachments: 081815 Clinton Deposition Notice.pdf; 081815 Dorgan Deposition Notice.pdf

Susan and Kathrine:

Attached to this email are copies of deposition notices for Douglas Dorgan and Denny Clinton. I have not set a date and time for these depositions as yet, and would like to set them for a mutually agreeable date and time. It is IDOT's position that the deposition of Mr. Dorgan is necessitated by the inclusion of certain statements in his rebuttal report that amount to newly articulated opinions. As for the deposition of Mr. Clinton, the purpose of taking this 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.

Also, in anticipation of Thursday's status hearing with Mr. Halloran, I would like to propose that we dispense with dispositive motions in this case and instead request that Mr. Halloran set this matter for hearing. Given the centrality of expert opinions to our respective cases and the fundamentally different opinions which our respective experts hold regarding critical issues in this case, this case would not seem to lend itself to resolution by summary judgment. Even assuming for the sake of argument that this case could be decided by summary judgment, the Board would still have to have a hearing on what relief, if any, to grant. In my opinion, we could bring the case more expeditiously to a resolution by simply going to hearing. I would like to hear your thoughts on this matter and see if we could agree on simply going straight to hearing.

Unfortunately, I am tied up in meetings the rest of the day, but am available to speak with you about this matter tomorrow, as your schedules permit. I should be available between 10:30 a.m. and noon and then again between 1:30 and 4:00 p.m. Please let me know at your earliest opportunity when we can speak.

Regards,

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Assistant Attorney General
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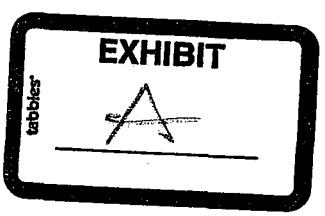
312.814.2347 (fax)
emcginley@atg.state.il.us



McGinley, Evan

From: McGinley, Evan
Sent: Wednesday, August 19, 2015 3:35 PM
To: 'Dixon, Kathrine Brooke'
Cc: Brice, Susan
Subject: RE: JM v. IDOT - IPCB No. 04-3 - Deposition Request

Kathrine:

Thank you for your email. Our position on the issue of taking Mr. Dorgan and Mr. Clinton's depositions has not changed.

Regarding our desire to go to hearing on this case, we would suggest that the hearing take place at some point in mid-November, just prior to Thanksgiving. We would estimate that the hearing would probably take 2 or 3 days, at most. Thought this might be relevant to your discussion with your client.

Regards,

Evan J. McGinley
Assistant Attorney General
Environmental Bureau
69 West Washington Street, Suite 1800
Chicago, IL 60602
312.814.3153 (phone)
312.814.2347 (fax)
emcginley@atg.state.il.us

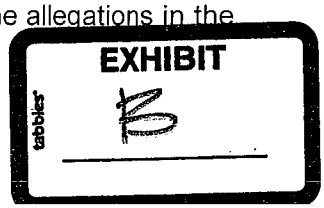
From: Dixon, Kathrine Brooke [mailto:kathrine.dixon@bryancave.com]
Sent: Wednesday, August 19, 2015 2:33 PM
To: McGinley, Evan
Cc: Brice, Susan
Subject: JM v. IDOT - IPCB No. 04-3 - Deposition Request

Evan –

We are in receipt of your August 14, 2015 email and your email from yesterday with attached notices of deposition for Doug Dorgan and Denny Clinton. At this stage, Johns Manville ("JM") objects to producing Mr. Dorgan and Mr. Clinton for additional depositions. Please consider this email as a 201(k) letter.

As you are aware, expert discovery closed on August 14, 2015, and fact discovery closed several months ago, on April 6, 2015. This case has already been delayed by approximately eight months, as fact discovery in this case was originally scheduled to close on August 1, 2014 and expert discovery was originally scheduled to close on January 5, 2015. JM has agreed to several extensions of these original deadlines to accommodate IDOT and the Attorney General's office. During this time, IDOT has had ample time in which to depose Mr. Clinton. We cannot agree to further delay this matter, particularly in light of the fact that JM has already begun the remediation work that is the subject of this action.

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 Interrogatory #1). 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." (emphasis added)

JM's response indicated that Mr. Clinton could be contacted through JM's counsel. 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. 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." (emphasis added). 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 will not agree to produce Mr. Clinton for deposition.

Further, JM does not believe it is required to produce Mr. Dorgan for a second deposition. At IDOT's request, JM emailed IDOT Mr. Dorgan's rebuttal report on July 27, 2015, the day it was due. The 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. 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. Under the Illinois Pollution Control Board rules and by agreement of the parties, this deposition should have been scheduled to take place prior to the expiration of expert discovery. JM has gone to great lengths in the past to accommodate IDOT and the AG's schedule in this case, but we cannot agree to further delay this matter by producing Mr. Dorgan and Mr. Clinton for depositions that are outside the time frame established by the Board.

We disagree that Mr. Dorgan has provided some sort of affirmative new opinion. The scheduling order provided that JM could provide a rebuttal report. Mr. Dorgan's discussions regarding the parking lot and the ELM Report are plainly rebuttal to Mr. Gobelman's opinion that JM "used ACM to build the parking lot." (Gobelman Report, p. 7-8). In fact, Mr. Gobelman states that based upon topo maps and aerial photographs, JM had to create a level and dry parking area and "would have added fill material to bring up the parking area to a similar elevation as Greenwood Avenue..." Mr. Gobelman also misinterpreted an ELM Report prepared for Johns Manville. He said that the ELM report stated that "according to Johns Manville, the parking lot was constructed with materials containing asbestos containing materials (ACM)." He interpreted this to mean that JM built the parking lot out of ACM fill material. See deposition.

Mr. Dorgan reached out to Mr. Clinton, who was the JM technical contact for ELM at the time of the relevant ELM report (the one Gobelman quoted as saying "*according to Johns Manville*, the parking lot was constructed" with ACM). In his report, Mr. Dorgan states that Mr. Clinton indicated that Mr. Gobelman misinterpreted the sentence in the ELM report and that the sentence was "referring only to the concrete Transite pipes used as parking bumpers on the surface of the parking lot" and that it was 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" and that he [Mr. Clinton] has "no evidence that prior to IDOT's construction work, ACM existed below the parking lot." This is all factual information that IDOT could have asked Mr. Clinton in a fact deposition and is merely factual support for Mr. Dorgan's rebuttal.

Further, although the deposition notices you provided as attachments to your email from yesterday are identified as subpoenas and include a reference to the Board's rules at 35 IAC 101.622, JM does not believe these subpoenas have been issued in accordance with the procedures set forth in the Board's rules. We plan to raise this issue with the Hearing Officer tomorrow and will take further action to quash the subpoenas, if necessary. Finally, as to your proposal to dispense with the dispositive motion deadline, we cannot at this time agree to do so. We need to consult with our client and likely will not have the opportunity to discuss it with them in detail prior to the call with the Hearing Officer. However, once we discuss it with the client, we will let you know.

With respect to your note about dialing in Matt and Phil to tomorrow's call with the Hearing Officer, we're happy to do so but our phone system will not handle more than three total lines. It may be easiest for us to all call in to a conference line and then I can join in Mr. Halloran from my phone. If you agree with that approach, please have your team dial in at 10:30 tomorrow to the following conference call number: 800-900-5552; passcode 3126025161. Thank you.

Best,
Kathrine

Kathrine Dixon
Associate

T: +1 312 602 5161 F: +1 312 698 7561 M: +1 773 953 4867
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