

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
SECOND AMENDED COMPLAINT TO CONFORM PLEADINGS TO NEWLY
DISCOVERED FACTS WITHOUT HEARING DELAY**

Complainant, JOHNS MANVILLE (“JM”), through undersigned counsel, pursuant to 735 ILCS § 5/2-616, moves for leave to file a Second Amended Complaint against Respondent ILLINOIS DEPARTMENT OF TRANSPORTATION (“IDOT”) to conform the pleadings to the proof. This Motion is based upon newly discovered information. JM had been told by IDOT and others that IDOT did not own or possess any interest in the right of way associated with Site 6. Nevertheless, JM has recently learned, based upon new evidence not previously available to JM, that this assertion is incorrect. As such, JM moves to amend its pleadings to conform to the proofs. Such amendment should not delay hearing of this matter set for March 15, 2016 and should not be a surprise to IDOT. JM states as follows:

INTRODUCTION

JM moves to amend the pleadings to conform to the proofs, pursuant to 735 ILCS § 5/2-616, to the extent that such amendment shall not delay the hearing of this matter that is set for

March 15, 2016. JM seeks leave to amend the pleadings to allege that IDOT, as an agent of the State of Illinois (“State”): (1) has, since 1971, owned, held an interest in, and/or controlled a right of way portion of Site 6; (2) has operated, since approximately late 1970, and continues to operate a waste storage, waste treatment and/or waste disposal operation involving the right of way part of Site 6 (“ROW”) without a permit issued by IEPA and not in accordance with regulations adopted by the Board in violation of 415 ILCS §5/21(d); and (3) has “caused or allowed” not only the continued violation of 415 ILCS § 5/21(a) and (e), but also has and continues to violate Section 5/21(d). The fact that IDOT holds an interest in and controls the ROW and lacks any attendant permit demonstrates that IDOT continues to violate the Act and that IDOT has violated Section 21(d) of the Illinois Environmental Protection Act, as well as Sections 21(a) and (e).

RELEVANT FACTS

1. In order for IDOT to construct the Amstutz Expressway (the “Project”), it was required to obtain easements and right of ways from the then current owners of the affected properties.

2. In 1966, the State and the City of Waukegan (the “City”) entered into an agreement (the “1966 Agreement”) regarding the construction of the Amstutz Expressway with IDOT’s predecessor, the Department of Public Works. In that 1966 Agreement, the City agreed to “negotiate, pay for and acquire in the name of the City all rights of way east of the Chicago and North Western Railway necessary to reconstruct the at grade intersection of Greenwood Avenue and Sand Street,” which includes a right of way that is part of Site 6 and currently is contaminated with asbestos-containing material. The right of way at issue is shown on **Exhibit A** (“ROW”), attached hereto.

3. Consistent with this 1966 Agreement, JM has been under the impression that the City owned the ROW and IDOT knew JM was under this impression. (See Amended Complaint, ¶ 12.) IDOT has failed to take any action or provide any information either contradicting or correcting that impression.

4. In fact, in its Amended Complaint, JM alleged that "Site 6 is currently owned by the City, which is not a party to the AOC." (Amended Complaint, ¶ 12.)

5. In its Answer to the Amended Complaint, IDOT said, "IDOT lacks sufficient information to either admit or deny the allegations in Paragraph 12."

6. IDOT's expert, Steven Gobelman, raised the issue of Site 6 ownership in his Expert Report. Mr. Gobelman, citing the 1966 Agreement, stated that, "based upon the record, the City of Waukegan ... paid 100 percent of the improvement to Greenwood Avenue and Sand Street...", implying that the City purchased the ROW and still owned the ROW. See Report, at pp. 6-7, attached hereto as **Exhibit B**.

7. In his deposition, Mr. Gobelman was asked about the ownership of Site 6.

8. He testified that:

A. From my -- the information that I have that I found that Wauk- -- City of Waukegan owns the right of way and jurisdiction of the road. (Gobelman Dep. at 39:14-19.) (A copy of excerpts of the Gobelman Deposition is attached as **Exhibit C**.)

9. But he also conceded that, contrary to his Report, the City did not actually purchase the ROW. Rather, he said, the State did:

A. I believe in 1970, at the beginning of this project, there were resolutions that were created by the City of Waukegan and Lake County that they were going to purchase all right of way east of -- in essence, east of the railroad tracks.

Q. Did they do that?

A. No, they did not.

Q. And so did IDOT own it prior to that time?

A. IDOT purchased the right of way and the easements.

Q. And when did IDOT purchase the right of way and easements?

A. I believe it was sometime prior to construction, like 1970 or so.
(Gobelman Dep., 38:16-20; 39:1-6.)

10. When asked to explain when the City acquired the ROW from IDOT, Mr. Gobelman said that he did not know, but that the City did, in fact, own it now:

Q. And for how long did IDOT own the right of way and the easements?

A. I am not sure when IDOT gave up the right of way, but the easements in association with Site 3 were reverted back once construction is complete.

Q. Right. How about the right of ways, though? I mean, does IDOT still own those right of ways associated with Site 3 and Site 6?

A. From my -- the information that I have that I found that Wauk- -- City of Waukegan owns the right of way and jurisdiction of the road. The right of way of Sands and Greenwood Avenue.

Q. Which right of way?

A. The right of way of Sands and Greenwood Avenue.

Q. And when did Waukegan take over that right of way from IDOT?

A. I did not investigate that aspect.

(Gobelman Dep. at 39:7-40:1).

11. From the above, it is clear that IDOT had adopted Mr. Gobelman's deposition position that the City owns the ROW.

12. However, the title records tell a different story. The title records show that ComEd granted the ROW to IDOT in 1971. The same document was recorded again in 1974. In 1984, the grant was re-recorded and amended to "correct the intent and legal description of a Grant for Public Highway." After Mr. Gobelman's deposition, JM began to question the ownership of the ROW. After some initial inquiries were unfruitful, JM commissioned a title search with respect to the ROW from Chicago Title. It took many months to get an answer from Chicago Title, who had to hire another entity, Property Insight, to do the search.

13. Property Insight's findings are illuminating. Property Insight found that since the 1984 re-recording of the conveyance between ComEd and the State, "no other deed conveyances or dedications found of record" between that 1984 recording and December 31, 2015. A copy of the Property Insight document is attached hereto as **Exhibit D**. It was not provided to JM until

January 14, 2015. *Id.* This new information indicates that, contrary to IDOT's assertions, the State still owns, holds an interest in and controls the ROW.

14. On January 20, 2016, JM told IDOT and the Hearing Officer that it was going to supplement its production with "additional information concerning the ownership of the right of way" and the Hearing Officer gave JM seven days to complete the supplemental production. Consistent with the Order, on January 27, 2016, JM produced the Property Insight Report to IDOT.

15. JM also filed Motions in *Limine* on February 8, 2016 that raised this discrepancy regarding the ROW.

16. JM now appears to have sufficient information upon which to make new allegations regarding the ownership of the ROW and seeks to amend the Complaint to conform to this new evidence. A copy of JM's proposed Second Amended Complaint is attached hereto as **Exhibit E**.

LEGAL STANDARD

17. "Section 2-616(a) of the Code provides that at any time before final judgment, the court may permit amendments on just and reasonable terms to enable the plaintiff to sustain the claim brought in the suit." *Ahmed v. Pickwick Place Owners' Ass'n*, 385 Ill. App. 3d 874, 881 (1st Dist. 2008). "A pleading may be amended at any time, before or after judgment, to conform the pleadings to the proofs, upon terms as to costs and continuance that may be just." 735 ILCS § 5/2-616(c). "Amendments to pleadings should be permitted if they further the ends of justice." *Kern v. DaimlerChrysler Corp.*, 364 Ill. App. 3d 708, 712 (5th Dist. 2006).

18. The Court possesses broad discretion to allow an amendment and in exercising this discretion, the Court should consider: "(1) whether the proposed amendment would cure the

defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleading could be identified.” *Loyola Academy v. S&S Roof Maint., Inc.*, 146 Ill. 2d 263, 273 (1992); *In re Estate of Hoover*, 155 Ill. 2d 402, 416 (1993).

ARGUMENT

19. The proposed Second Amended Complaint would cure the incorrect recitation that the City owns all parts of Site 6, as currently set forth in paragraph 12 of JM’s Amended Complaint.

20. The proposed amendment would not cause prejudice or surprise to IDOT. IDOT is an agency of the State, and the State must know that it still owns the ROW. Communications between IDOT’s expert witness, Mr. Gobelman, and Keith Stoddard from the State suggest as much. In those communications, Mr. Stoddard explains to Mr. Gobelman that the 1984 re-recording of the title document “separates out the ROW parcels from the easement parcels” and “based on this information IDOT is not the owner of any of the temporary construction easement properties,” implying that it is the owner of the ROW parcels. **Exhibit F**. Thus, any new allegations relating to the ownership of the ROW shall in no way prejudice IDOT and its preparation of the case.

21. The amendment is timely because it was only on January 14, 2016 that JM was provided the Property Insight report verifying that the State never conveyed the ROW to the City or anyone else. Shortly thereafter, JM produced the new evidence and raised the issue in its Motion in *Limine* filed on February 8, 2016.

22. JM believes it will be able to demonstrate at the hearing that the State/IDOT still owns, holds an interest in and/or controls the ROW. However, JM is unwilling to further delay these proceedings.

23. The hearing is set to begin on March 15, 2016. This case was initially filed in July, 2013. IDOT has repeatedly asked for, and obtained, extensions of time to the point of jeopardizing JM's ability to obtain all of its requested relief.

24. In its Amended Complaint (and in its proposed Second Amended Complaint), JM has requested, among other things, that IDOT participate in the remedial actions required for Sites 3 and 6. Based upon the time frames agreed to with USEPA, the bulk of the active work on Sites 3 and 6 is scheduled to begin in early April 2016.

25. Over the course of this litigation, IDOT has sought repeatedly to delay the matter. For instance, IDOT sought additional time to respond to the initial Complaint, additional time to file an Answer and additional time to respond to the Amended Complaint. Further, when IDOT's lead counsel needed to be replaced due to an unfortunate and unexpected death, it took IDOT over two months to replace him. On May 27, 2014, the Hearing Officer granted IDOT another request for extension to respond, but made it clear that there would be "no more extensions."

26. A discovery schedule was entered on September 25, 2014. It was amended several times to accommodate IDOT. On March 5, 2015, fact discovery was extended because IDOT had not yet produced archived emails; on March 30, 2015, expert discovery was extended six weeks to accommodate IDOT's counsels' schedule; and on July 1, 2015, expert discovery was again extended two weeks to accommodate the availability of IDOT's expert for deposition.

27. On August 16, 2015, the day expert discovery finally closed, IDOT's counsel requested to re-depose JM's expert, Doug Dorgan, and to depose one of JM's fact witnesses, Denny Clinton. JM objected. JM pointed out that "this case has already been delayed by approximately eight months . . . 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." Ultimately, on September 29, 2015, IDOT's Motion to Reopen Discovery in order to take the two depositions was granted, but only for limited purposes.

28. A status hearing was held on November 10, 2015. Prior to the hearing, counsel for JM and IDOT had agreed to conduct the Board hearing in February 2016, due to JM's concerns about further delay and the detrimental impact any delay would have upon the relief requested by JM. However, on the status call, IDOT's attorney asked to push the hearing to April or May 2016. JM objected again, and it was ordered that the hearing would begin on March 15, 2016.

29. JM cannot afford to delay the hearing of this matter, and should not be required to do so because IDOT has failed to disclose the fact that the State owns/controls a critical portion of Site 6. Under the procedural rules, JM could wait and bring this Motion following hearing, but the better, and more efficient course, is to bring this Motion now if it can be granted without further delay of the hearing date. 735 ILCS § 5/1-616(c). Under the circumstances, JM believes that IDOT could easily file an Answer, admitting or denying the few new allegations in the proposed Second Amended Complaint prior to March 15, 2015. However, JM does not believe that IDOT should be allowed to file a responsive pleading that would delay these proceedings, such as any type of motion. Indeed, JM cannot even fathom how a responsive pleading other

than an Answer would be warranted, but to the extent IDOT believes there are any legal issues, such issues can be dealt with at hearing or in any pre-trial conference. If the Board is inclined to allow IDOT to file a pleading other than an Answer or to delay the matter, JM wishes to enter and continue this Motion.

30. The Board has granted numerous amendments in other actions, under similar and more stringent time constraints. *See, e.g., People of the State of Illinois v. Community Landfill Company*, PCB 97-193, 2000 WL 297583, at *5 (Mar. 16, 2000) (permitting complainant to file second amended complaint and setting the matter to hearing without requiring respondent to file an answer or response); *People of the State of Illinois v. The Highlands*, PCB 00-104, 2004 WL 1090236, at *3 (May 6, 2004) (granting complainant's motion for leave and accepting the second amended complaint for hearing); *People of the State of Illinois v. ESG Watts, Inc.*, PCB 96-107, 1998 WL 54020, at *3 (Feb. 5, 1998) (granting complainant's motion to amend complaint after hearing); *Environmental Protection Agency v. D & N Trucking*, PCB 74-390, 1975 WL 6754, at *1 (June 13, 1975) (granting motion to amend complaint in order to have the pleadings conform with evidence and testimony presented at hearing).

31. As long as a respondent is "amply aware of the issues put in dispute," a respondent does not have to be awarded an opportunity to answer the amended complaint, and a trial may be had shortly after the amended complaint is filed. *McDermott v. Metro. Sanitary Dist.*, 240 Ill. App. 3d 1, 41 (1st Dist. 1992) (allowing amended complaint changing allegations of land ownership, control and maintenance seven days before trial, without permitting defendant to file an answer).

32. In fact, it would be unfair and prejudicial to JM to let IDOT further delay this matter and avoid participating in JM's remedial efforts when IDOT either knew, or should have known, the true ownership status of the ROW and neglected to tell JM.

33. JM only wishes to amend the pleadings to allege that the State, acting by and through IDOT: (1) has, since 1971, owned, held an interest in, and controlled a right of way portion of Site 6; (2) has operated, since approximately late 1970, and continues to operate a waste storage, waste treatment and/or waste disposal operation involving the right of way part of Site 6 without a permit issued by IEPA and not in accordance with regulations adopted by the Board in violation of 415 ILCS 5/21(d); and (3) has "caused or allowed" not only the continued violation of 415 ILCS 5/21(a) and (e), but also has and continues to violate Section 5/21(d).

WHEREFORE, for the foregoing reasons, Complainant respectfully requests that the Board grant it leave to file its Second Amended Complaint *instanter* without delaying the March 15, 2016 hearing or, in the alternative, enter and continue this Motion if the Board believes a delay is required; and that the Board grant all other just and appropriate relief.

Dated: February 12, 2016

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, the undersigned, certify that on February 12, 2016 I caused to be served a true and correct copy of Complainant's Motion for Leave to File Second Amended Complaint 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/ Susan E. Brice
