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.	)	

NOTICE OF FILING

To: See Attached Service List

PLEASE TAKE NOTICE that on April 20, 2016, I caused to be filed with the Clerk of the Pollution Control Board of the State of Illinois, Complainant's Response to Respondent's Motion to Reschedule Hearing Date, copies of which are attached hereto and herewith served upon you via e-mail. Paper hardcopies of this filing will be made available upon request.

Dated: April 20, 2016

Respectfully submitted,

BRYAN CAVE LLP

Attorneys for Complainant Johns Manville

By: /s/ Lauren J. Caisman

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CERTIFICATE OF SERVICE

I, the undersigned, certify that on April 20, 2016, I caused to be served a true and correct copy of the attached *Notice of Filing of Complainant's Response to Respondent's Motion to Reschedule Hearing Date* 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 RESPONSE TO RESPONDENT'S MOTION TO RESCHEDULE HEARING

Complainant JOHNS MANVILLE ("JM") hereby submits its response to Respondent ILLINOIS DEPARTMENT OF TRANSPORTATION ("IDOT")'s Motion to Reschedule Hearing (the "Motion") as follows:

ARGUMENT

While IDOT's Motion is styled as one to "Reschedule Hearing," IDOT's Motion is, in actuality, akin to one brought under 35 Ill. Admin. Code 101.510, essentially asking the Hearing Officer to cancel the hearing in this matter currently scheduled for May 10-12, 2016, and proposing a date to reschedule the hearing of six weeks from May 10, 2016. Nevertheless, IDOT's Motion is filed without, for example, the requisite affidavit swearing to the factual basis for the request to cancel or to the number of cancellation requests previously filed. *See* 35 Ill. Admin. Code 101.510(b). Even then, IDOT fails to establish that its instant Motion is not the result of IDOT's lack of diligence and IDOT's Motion should be denied for this reason. *See id*.

This case has been pending for almost three years. IDOT has prolonged this matter and sought to delay hearing on more than one occasion. Over the course of this litigation, IDOT has sought multiple extensions to respond to or answer the different iterations of JM's Complaint and moved to extend discovery many times. (*See* JM's Motion For Leave to File Second Amended Complaint, at ¶¶ 25-28, attached hereto as **Exhibit A**.) In the fall of 2015, the parties ultimately mutually decided to dispense with dispositive motions and proceed to hearing, but while JM advocated for an early hearing date, IDOT wanted to delay until April or May 2016. As early as November 10, 2015, as reflected in the Hearing Officer's Order of that date, IDOT was on notice that hearing in this matter would likely proceed on March 15-17, 2016. Though IDOT's trial preparation theoretically could have begun and continued at any time in this litigation, as JM's has, IDOT now complains that it cannot "resume the preparations it was making for hearing in this case" because it has needed to fulfill other obligations in this case, such as adequately responding to discovery. (*See* Motion, p. 4.)

IDOT erroneously attempts to place the blame for its lack of preparedness for hearing at JM's feet, arguing that "just over two weeks prior to the then-currently scheduled start of March 15, 2016 hearing date in this matter, Johns Manville filed its Motion for Leave to File a Second Amended Complaint." (Motion, p. 1.) Contrary to IDOT's representation, however, JM filed its Motion for Leave to File a Second Amended Complaint ("Motion for Leave") on February 16, not February 26, one month before hearing, not a couple weeks before hearing. Even then, in response to that Motion for Leave, IDOT <u>again</u> sought to reschedule hearing in this matter, and successfully did. (*See* Response to Motion for Leave, at p. 10.)

IDOT cannot complain that it has been precluded from preparing for hearing because it has been required to respond to and engage in discovery when it was IDOT, not JM, who sought

to reopen discovery in this matter (for the second time). In doing so, IDOT rehashes its grievances (for at least the third time) that IDOT has had to conduct and respond to "a substantial amount of discovery." (Motion, p. 4.) Yet, all of the "circumstances" that IDOT claims make proceeding with hearing on May 10 prejudicial were brought by IDOT upon itself. For example, while IDOT claims that it has had to engage in attempts to resolve discovery disputes and in motion practice related to discovery (Motion, p. 4), had IDOT adequately and fully responded to JM's discovery requests in the first place, none of that would have been necessary. Further, IDOT takes issue with the current hearing date because of the need to conduct further expert discovery, though it was IDOT who expanded the scope of discovery by introducing an expert at this late stage and over JM's objection.

IDOT also seeks to postpone hearing in this matter on the basis that depositions still need to be taken. At all times, JM represented that it wanted to depose IDOT's proffered expert, Mr. Stoddard, a Rule 206 designee, and certain individuals IDOT had identified on its witness list as fact witnesses, Mr. Stoddard and Mr. Warren. It was IDOT, however, that identified at least eight potential Rule 206 designees to testify on various topics and identified four different employees as verifying its interrogatory and request for admission responses (only two of which overlapped with IDOT's Rule 206 representatives). It is as if IDOT just wants to needlessly complicate the case. Indeed, in answering JM's Second Amended Complaint, IDOT injects new theories and affirmative defenses into the matter, including that JM is relying on the wrong law. Nonetheless, to expedite matters, JM has agreed to forego taking the depositions of certain IDOT witnesses, including Mr. Warren.

JM is filing a Motion to Strike to deal with these improper new arguments that are not "narrowly" tailored to JM's new allegations and has agreed to limit and streamline the

depositions requested of IDOT as much as possible so that the case can be heard on May 10. (*See* correspondence attached hereto as **Exhibits B and C**.) JM is willing to disclose its expert by the end of the day on May 3 (just three working days after IDOT's expert deposition is taken) and have his deposition taken later that week. This is completely doable.

IDOT, however, appears to be dragging its feet in an effort to justify delaying the hearing. The parties provided the Hearing Officer with a Proposed Discovery Schedule on March 10, 2016, but IDOT has not yet sent JM any notices for deposition. IDOT disclosed for the first time on April 6, 2016 that it might want to take a Rule 206 deposition of JM employees. JM has received no related notice, yet IDOT says this is still "a matter which is currently under consideration." (Motion, p. 3.) IDOT should have made this decision long ago.

In the same vein, while JM requested the availability of IDOT's witnesses the week of April 18, IDOT has chosen not to make all but one of its witnesses available for deposition until the week of April 25, which then necessarily pushes back the deposition of IDOT's expert to the end of that week. It is, therefore, improper for IDOT to complain that JM's expert cannot be disclosed until the beginning of the following week. Nevertheless, it is JM who needs to prepare for and take multiple depositions in the next week, while IDOT is only taking a single deposition of JM's expert witness, who JM is only calling as a witness because of IDOT's insistence on expert discovery on the new issues in the Second Amended Complaint.

IDOT's claim that there will be little prejudice to JM in rescheduling the hearing is false. In its 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 the USEPA, the active work on Sites 3 and 6 has already begun. Though IDOT argues that "[i]n the greater scheme of things, delaying the start of the hearing in this case by a few weeks will not

unduly prolong the time it will take to reach an outcome in this case" (Motion, pp. 4-5), the extent of the post-hearing activities that will need to occur, such as post-hearing briefing and review by the Board, militates and only further underscores the need to proceed with the hearing as planned on May 10. IDOT's request for a six-week extension is highly unreasonable and IDOT makes no effort to justify why such a long delay is necessary. Based on the foregoing, IDOT should be held to the current scheduling order and hearing in this case should proceed as previously planned. JM has been under the same pressures as IDOT, yet JM is fully prepared to go to trial. IDOT's Motion should be denied.

CONCLUSION

For the reasons set forth above, JM requests that the Board deny Respondent IDOT's Motion to Reschedule Hearing in its entirety.

Dated: April 20, 2016

Respectfully submitted,

BRYAN CAVE LLP

Attorneys for Complainant Johns Manville

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CERTIFICATE OF SERVICE

I, the undersigned, certify that on April 20, 2016, I caused to be served a true and correct copy of *Complainant's Response to Respondent's Motion to Reschedule Hearing Date* 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

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EXHIBIT A

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter Of:	)	
	)	
JOHNS MANVILLE, a Delaware corporation,	)	
	)	
Complainant,	)	**PCB No. 14-3**
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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 being 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,
BRYAN CAVE LLP
Attorneys for Complainant Johns Manville

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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

EXHIBIT B

Caisman, Lauren

From: Brice, Susan
Sent: Wednesday, April 13, 2016 6:35 PM
To: 'O'Laughlin, Ellen'; Caisman, Lauren
Cc: McGinley, Evan; Dougherty, Matthew D.
Subject: RE: Johns Manville v. IDOT (PCB No. 2014-003)

Ellen: IDOT insisted on re-opening discovery. We told the Hearing Officer that we wanted a 206, an expert deposition and likely individual IDOT employee depositions because you had identified individuals as witnesses. This is no different from what we represented. While it is true that the individual depositions might overlap with the 206 issues, we have no way of knowing that at this point. I hope that is true, but we must emphasize that an employee in a 206 deposition speaks for the agency as a whole, but when noticed up individually, speaks based only upon their individual knowledge.

We disagree that our requests are beyond the scope of the new allegations. We alleged that IDOT holds an interest in and controls the right of way. You denied this in your written discovery and claim that IDOT has somehow lost its previous interest in the right of way. I arrive at a different conclusion when I review of the law, the documents and your own guidance. Thus, in order to figure this out, we need oral discovery. If your discovery had been more responsive, much of this would not be necessary. Further, if you can explain to me how any of our topics go beyond the new allegations, I would be happy to reconsider your point.

Some of the issues you raise stem from the fact that you have identified an employee as an expert. If you had hired an independent expert, we would still be entitled to a 206 and/or other depositions on these topics from IDOT employees. Thus, we are entitled to hear what Mr. Stoddard believes as an expert as well as what IDOT as an agency says in a 206 capacity. I think we can make this easier if we use Ms. Broviak instead of Mr. Stoddard as your 206 designee on topics 1-3.

For topic 4, we would like to take Mr. Warren's deposition. We would begin the deposition with his 206 testimony and then move into his individual testimony. Since he is noticed individually, we are entitled to three hours with him. However, I highly doubt it would take so long. We could possibly substitute Ms. Broviak here but, before we agree to do so, we want to know why you originally identified Mr. Warren and we would like to know Ms. Broviak's position within the agency. I also do not believe that you produced any correspondence with Mr. Warren (except IDOT 002797-98) despite the fact that you identified him as a witness. If I am wrong, please let me know. It seems odd to us that he would have no communications on this case if he is being used as a fact witness. Further, you previously told us that Mr. Gobelman was not going to be a witness (and thus we did not take his deposition) and then you identified him as your expert.

For numbers 5 and 6, what are the roles of these two individuals? If they can both speak equally to the topics, then please select one of them.

For numbers 7 and 8, we will use Mr. Stumpfner. We will take his deposition on the two topics and then move into the three hour individual deposition testimony.

To the extent we could do the 206's on one day in Shaumburg, that would be great. We can make that work. I truly do not see most of these depositions going for more than an hour, but do not want to give up my rights to the allotted times.

As for Stoddard, we would like to take his deposition in his individual capacity and then his expert capacity after the 206's are complete. We will send a notice shortly. In that case, we would get 3 hours for each capacity.

We do not think it is impossible to keep the hearing date. I agree that we will need to push the discovery dates out a week or so but this is imminently doable. Please note that we are not filing frivolous motions. As is clear from our 201K letters and the Motion, your discovery responses were lacking and, in some instances, inaccurate. It does not help that you tell us documents or topics are irrelevant, but when we review them, they are key to the case. As I believe Mrs. Caisman noted in an email, we do not understand why IDOT has not produced any documents showing how this property is treated in its various databases or maps. For instance, IDOT 008202 refers to IDOT D-1 Maintenance Maps. Has Parcel 0393 ever showed up on those maps and, if so, is it still on the maps and/or when did it cease to be on the maps? This is obviously important to your assertion that you have no interest in 0393, despite that fact that you identify it as an existing right of way in numerous documents.

Sincerely,

Susan

BRYAN CAVE
Susan Brice
Partner
susan.brice@bryancave.com T: +1 312 602 5124

From: O'Laughlin, Ellen [mailto:EOLaughlin@atg.state.il.us]
Sent: Wednesday, April 13, 2016 5:09 PM
To: Caisman, Lauren; Brice, Susan
Cc: McGinley, Evan; Dougherty, Matthew D.
Subject: RE: Johns Manville v. IDOT (PCB No. 2014-003)

Susan and Lauren:

IDOT has now just received the additional notices of deposition for Stumpner and Warren. Based on Susan Brice's clarification and lack of notices of depositions for Warren and Stumpner, we were under the impression that JM had only wanted the 206(a)(1) deposition. Now we see that it wants two additional depositions, and perhaps of Keith Stoddard as well. Initially, we query whether all these depositions are needed and warranted here and whether this goes beyond the limited scope of discovery? It seems there is much overlap with JM's Rule 206(a)(1) Notice of Deposition.

Regarding the Rule 206(a)(1) Notice of Deposition served yesterday, JM has identified eight subject matters of examination, some of which go beyond the allegations newly made in the second amended complaint and beyond the scope of the limited issue of interest in the right of way. Additionally, due to the number of subject matters, and as you have correctly identified, not a single IDOT representative could testify to all subject matters. The 206(a) deposition which may include a number of IDOT representatives, should not exceed a total of three hours. Further, some of these subject matters could be covered in the deposition of Keith Stoddard as they overlap with the subject matter of testimony identified in IDOT's 213(f)(3) Disclosure Statement of Keith W. Stoddard.

IDOT identifies the following IDOT representatives for each subject matter:
1. Pam Broviak or Keith Stoddard
2. Pam Broviak
3. Pam Broviak or Keith Stoddard
4. Pam Broviak or Steve Warren
5. John Baczek or Carlos Feliciano
6. Same as 5.

7. Steve Hookirk, or James Stumpner. Although we note that questions regarding "Jurisdiction Guidelines" may have to be answered by another Bureau within IDOT, the Bureau of Local Roads and Streets.
8. Same as 7.

We are currently determining the availability of these IDOT representatives for deposition next week (week of April 18, 2016) All of these individuals are located in the IDOT Schaumburg office except Mr. Warren, who is located in Springfield, Illinois. It is preferable for the deposition to occur where the respective IDOT employees are located. When we have their availability and schedule for deposition, we will let you know.

We will also be in contact with Mr. Stumpner and Mr. Warren regarding the notices of deposition just served. However, we are not sure there's any reason to take Mr. Warren's deposition. IDOT named him in its exhibit/witness list, but at this point we do not plan to call him as a witness. Should that change, we will let you know. Given that, do you still want to depose Warren? Should we also determine the availability of Keith Stoddard for an expert opinion deposition? We ask that you serve the notice of deposition if you would like to depose Mr. Stoddard. (A deposition of Mr. Stoddard would not exceed three hours, nor duplicate matters already testified to, and could likely be completed in much less than three hours.)

Finally, the amount of written and now oral discovery has far exceeded what JM had represented it would do when the abbreviated discovery schedule was ordered by the hearing officer. If JM truly wants to have this many depositions and proceed with its motions to compel and seek documents (which it should by now know has nothing to do with this matter), then there is absolutely no way all this discovery is possible given the abbreviated time for the limited scope of discovery.

We would ask that JM chose what it would prefer: to seek all this oral and written discovery OR keep the hearing date. As is, it is unfair and impossible to answer this oral and written discovery, follow up requests, motions, etc. AND keep the hearing date, (as it was previously unfair to IDOT to allow the filing of the second amended complaint and keep the earlier March hearing date.)

Regards,

Ellen F. O'Laughlin
Assistant Attorney General
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From: Caisman, Lauren [mailto:lauren.caisman@bryancave.com]
Sent: Wednesday, April 13, 2016 4:04 PM
To: McGinley, Evan; O'Laughlin, Ellen; Dougherty, Matthew D. (Matthew.Dougherty@Illinois.gov)
Cc: Brice, Susan; Therriault, John (John.Therriault@illinois.gov) (John.Therriault@illinois.gov); 'Halloran, Brad'
Subject: RE: Johns Manville v. IDOT (PCB No. 2014-003)

Good afternoon,

Attached please find notices of deposition of Mr. Warren and Mr. Stumpner, filed today on behalf of Complainant.

Thank you,
Lauren

Lauren Caisman
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From: Caisman, Lauren
Sent: Tuesday, April 12, 2016 2:38 PM
To: 'emcginley@atg.state.il.us' (emcginley@atg.state.il.us); O'Laughlin, Ellen (EOLaughlin@atg.state.il.us); Dougherty, Matthew D. (Matthew.Dougherty@Illinois.gov)
Cc: Brice, Susan; Therriault, John (John.Therriault@illinois.gov) (John.Therriault@illinois.gov); 'Halloran, Brad'
Subject: Johns Manville v. IDOT (PCB No. 2014-003)

Good afternoon,

Please see the attached two documents filed today. The first is a Notice of Service of Subpoena to Illinois State Geological Survey.

The second is a Rule 206 Notice of Deposition to Respondent, which we have set for Tuesday, April 19. In addition to IDOT's Rule 206 designee(s), we would also like to depose Steven Warren and James Stumpner, ideally on Monday, April 18, and Keith Stoddard to follow. Please let us know if Mr. Warren and Mr. Stumpner are available on Monday. To the extent they will be designated as IDOT's representative(s) for any of the topics listed in Complainant's Rule 206 deposition notice, please let us know that as well.

Thank you,
Lauren

Lauren Caisman
Associate

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EXHIBIT C

Caisman, Lauren

From: Brice, Susan
Sent: Thursday, April 14, 2016 12:38 PM
To: 'McGinley, Evan'; 'Halloran, Brad'
Cc: O'Laughlin, Ellen; Caisman, Lauren; 'Dougherty, Matthew D.'
Subject: RE: Johns Manville v. IDOT - PCB 14-3: Status Hearing

Mr. Holloran: That was not the response I expected from Mr. McGinley and, frankly, it is misleading. IDOT failed to provide reasonable responses to our written discovery, necessitating oral discovery. As we previously disclosed to you and IDOT, we planned a 206 deposition, an expert deposition and a deposition of IDOT fact witnesses, because it had disclosed previously as witnesses on this topic. We have not wavered from that position.

IDOT identified numerous people responsible for answering our 206 deposition and insisted that we take the deposition of Mr. Warren in Springfield and the others in Schaumburg. We are willing to do that. We cannot help it that IDOT has identified numerous people instead of one person on this topic.

We explained that we doubt that each of the 206 depositions will take more than 30 minutes, but we do not know what these people will say. We agreed to do them all in one or two days back to back. We also said we are willing to take someone else instead of Mr. Warren if IDOT explains Mr. Warren's role in the case and produces all of his correspondence relating to the matter. We need to understand the scope of his involvement.

The two individual depositions are Mr. Warren, who was identified as a testifying witness previously, and Mr. Stumpfner, who verified many of the discovery responses.

We had previously disclosed that we would obtain an expert. We cannot disclose the expert's opinions until we take the deposition of IDOT's expert, which we discussed occurring the week after next. When we discussed this with IDOT on the phone call after we were unable to reach you, they seemed amenable.

IDOT has indicated it believes this is "unfair." But it is not JM that failed to disclose the fact that IDOT held an interest in the right of way and then demanded discovery. IDOT did.

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From: McGinley, Evan [mailto:emcginley@atg.state.il.us]
Sent: Thursday, April 14, 2016 12:22 PM
To: 'Halloran, Brad'
Cc: O'Laughlin, Ellen; Caisman, Lauren; Brice, Susan; 'Dougherty, Matthew D.'
Subject: RE: Johns Manville v. IDOT - PCB 14-3: Status Hearing

Mr. Halloran:

In response to your email, IDOT would note that JM has now identified 15 hours of deposition covering 5 different people that it wishes to take as soon as possible, and hopefully next week. They have issued 8 subject matters for its 206(a)(1) deposition. These will occur mostly in Schaumburg and perhaps a bit in Springfield. We are working on

scheduling the depositions. (We note that to date that on all the other issues of the Complaint filed in 2014, and where fact and expert discovery was ultimately open for about eight months, that JM took only 1 deposition.)

Additionally, IDOT will likely issue a deposition notice of JM, and we were told that it may have to take place in Denver, Colorado.

Finally, JM has now just told IDOT that it does indeed plan to provide an expert disclosure, but not until the first week of May - more than four weeks after we have disclosed our expert. Following their disclosure in early May, IDOT can take their expert's deposition.

There are also additional pretrial requirements.

Obviously, all this discovery cannot occur and keep the hearing date. IDOT has identified this to JM but they disagree. If JM wishes to pursue this extensive discovery, late in the game, and now provide an expert, it cannot do all this and keep its hearing date. Such a situation would deny IDOT the time to adequately defend its defenses to JM's claims. JM chose to file a second amended complaint, pursue discovery, additional experts and has now created a false sense of urgency. It's scheduling is of its own doing, and frankly, it is ridiculous that IDOT should have to point this out to them. JM has to withdraw some of its discovery and not present a late expert disclosure OR change the hearing date. It cannot have it both ways.

Thank you Mr. Halloran and yes, we are available on those dates for status next week as obviously, we need to discuss these matters with you.

Regards,

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From: Brice, Susan [mailto:Susan.Brice@bryancave.com]
Sent: Thursday, April 14, 2016 11:36 AM
To: 'Halloran, Brad'; Caisman, Lauren
Cc: McGinley, Evan; O'Laughlin, Ellen
Subject: RE: Johns Manville v. IDOT - PCB 14-3: Status Hearing

We had a phone call after we spoke and I think we have a plan, but Mr. McGinley or Ms. O'Laughlin should certainly chime in here. I think we need to move the oral discovery deadline in order to accommodate fact deposition and expert disclosure/depositions. We hope to take fact depositions next week and IDOT's expert deposition the following week with our expert disclosure and deposition the first week in May. Mr. McGinley/ Ms. O'Laughlin please correct me if this is inaccurate. JM believes that we can make this work and stick with the scheduled Hearing Date. I am unsure of IDOT's position on this. IDOT said it hopes to serve a 206 on us tomorrow.

We can certainly make either myself or Ms. Caisman available for a call on the 19th or the 20th. However, I imagine some of us will be in deposition on this matter.

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From: Halloran, Brad [mailto:Brad.Halloran@illinois.gov]
Sent: Thursday, April 14, 2016 11:27 AM
To: Caisman, Lauren
Cc: 'emcginley@atg.state.il.us' (emcginley@atg.state.il.us); O'Laughlin, Ellen (EOLaughlin@atg.state.il.us); Brice, Susan
Subject: RE: Johns Manville v. IDOT - PCB 14-3: Status Hearing

I apologize. I was on another call with another case. We can meet next week on April 19 or 20 at 11 if that is okay. Do we need to talk today? Thanks.

From: Caisman, Lauren [mailto:lauren.caisman@bryancave.com]
Sent: Thursday, April 14, 2016 11:19 AM
To: Halloran, Brad
Cc: 'emcginley@atg.state.il.us' (emcginley@atg.state.il.us); O'Laughlin, Ellen (EOLaughlin@atg.state.il.us); Brice, Susan
Subject: Johns Manville v. IDOT - PCB 14-3: Status Hearing

Mr. Halloran,

We wanted to let you know that we attempted to call in for a status conference at 11:00 this morning and were directed to your voicemail. We are not sure if we successfully left a message due to some teleconferencing difficulties. Please let us know if another time works for you.

Thank you,
Lauren

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Associate

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