

(“April 5th Production”). The April 5th Production consisted of approximately 15,000 pages of documents, produced in over 2,000 separate files, the majority of which were in PDF format, as well as almost 140 Excel spreadsheet files. Johns Manville did not serve a Rule 214 affidavit with its April 5th Production.

4. The April 5th Production consisted, in part, of the following documents, listed in the order in which they were produced¹:

Bates Range	Date	Document Type
JM 7217	11/02/07	LFR invoice
JM 7218	11/03/07-11/30/07	LFR invoice
JM 7219	12/28/07	LFR invoice
JM 7220-7234	08/02/16-08/08/16	Email thread regarding lab reports
JM 7235	08/03/16	Spreadsheet with sampling results
JM 7236-7252	08/02/16-08/10/16	Email thread regarding new Site 6 lab reports
JM 7254-7272	08/02/16 – 08/12/16	Email thread regarding new Site 6 lab reports
JM 7276-7317	01/22/09	LFR/Arcadis invoice and supporting documentation
JM 7318-7343	02/17/09	LFR/Arcadis Invoice and supporting documentation
JM 7344-7357	03/16/09	LFR/Arcadis Invoice and supporting documentation
JM 7358-7367	04/21/09	LFR/Arcadis Invoice and supporting documentation
JM 7368-7393	05/21/09	LFR/Arcadis Invoice and supporting documentation
JM 7394-7431	07/13/09	LFR/Arcadis Invoice and supporting documentation
JM 7432-7448	08/24/09	LFR/Arcadis Invoice and supporting documentation
JM 7449-7450	9/23/09	LFR/Arcadis Invoice and supporting documentation
JM 7451-7703	01/10/14-03/17/14	Monthly Invoicing Report
JM 7704	02/02/10	Arcadis invoice summary
JM 7705	02/08/12	Arcadis invoice summary

¹ The 22 documents listed in Paragraph 4 represent what IDOT believes is a representative sample taken from amongst the approximately 10,000 pages of documents contained on one flash drive which was produced by Johns Manville to IDOT on April 5th. IDOT could easily have provided many more examples of sequences of documents that were produced by Johns Manville that evidence no logical order, suggesting that such documents were not produced in the manner in which they are normally kept.

JM 7706-7733	10/22/09	LFR/Arcadis Invoice and supporting documentation
JM 7734-7886	03/08/14-04/11/14	Monthly Invoicing Report #7
JM 7887	03/10/10	Arcadis Invoice Summary
JM 7888	02/24/12	Arcadis Invoice Summary

5. On April 6, 2017, Johns Manville's counsel sent a IDOT's counsel an external hard which included copies of all documents from the April 5th Production, as well as more than 15,000 additional pages of new documents (the vast majority of which appear to be photographs), contained in over 10,0000 separate files. Johns Manville did not serve a Rule 214 affidavit with its April 5th Production.

6. Finally, on April 17, 2017, Johns Manville's counsel sent IDOT's counsel a flash drive which contained 644 pages of apparently new material contained within 59 separate files ("April 17th Production"). Johns Manville did not serve a Rule 214 affidavit with its April 17th Production².

7. On April 10, 2017, IDOT's counsel sent a Rule 201(k) letter to Johns Manville's counsel ("First Rule 201(k) Letter"). A copy of the First Rule 201(k) Letter is attached as Exhibit A to this Motion.

8. IDOT raised several issues with Johns Manville regarding the manner in which Johns Manville had produced documents in response to its Document Requests. The chief issue that IDOT raised about its April 5th and April 6th Productions was that they did not "appear to have been produced in the order in which they are kept 'in the usual course of business.' (Ill. Sup. Court Rule 214)." (First Rule 201(k) Letter, p.5.) IDOT's counsel went on to note that:

We highly doubt that this is the manner in which these documents are kept. We also do not see how producing documents in this fashion can be considered to comply with the requirements of Illinois Supreme Court Rule 214. More

² It should be noted that the approximately 30,000 pages of documents which Johns Manville has produced to IDOT in its April 5th, April 6th and April 17th Productions are four times the volume of documents which Johns Manville produced to IDOT during the initial/liability phase of this case.

importantly, however, by producing these documents to IDOT in this fashion, JM has imposed an extraordinary burden on IDOT, because it must now reorder these documents in a logical/chronological order, before it can begin to analyze these documents regarding JM's cost claims. We believe it is therefore incumbent upon JM to take all necessary steps to provide IDOT with all documents that are responsive to its Fourth Request for Production of Documents and to do so in a way which conforms to Rule 214's requirements.

9. IDOT also requested that Johns Manville produce the requisite Rule 214 affidavit for its April 5th and April 6th Document Productions. (First Rule 201(k) Letter, p. 6.)

10. On April 17, 2017, Johns Manville responded to IDOT's Rule 201(k) Letter. A true and correct copy of Johns Manville's 201(k) response ("Response") is attached hereto as Exhibit B.

11. In its Response, Johns Manville's counsel asserted that the documents which it had produced in its April 5th and April 6th Productions had been produced as "kept in the ordinary course of business." (Response, p.3.) Johns Manville's counsel also responded to IDOT's request that Johns Manville provide a Rule 214 affidavit for its document productions, stating that:

Given that JM is producing supplemental documents and may produce additional documents in the future in this conjunction with expert discovery, JM will not be providing an affidavit of completeness [for the documents that it had produced]." (Response, p.3.)

12. On April 21, 2017, IDOT's counsel sent Johns Manville's counsel a second 201(k) letter ("Second Rule 201(k) Letter"). A copy of IDOT's Second Rule 201(k) Letter is attached hereto as Exhibit C. Regarding Johns Manville's contention that it had produced documents in the manner in which they are kept, IDOT's counsel stated:

It is difficult to understand how documents – most especially, documents pertaining to the costs which have been incurred by your client – could be maintained in a fashion which first requires substantial reorganization before those documents can be used in any meaningful fashion. (Second 201(k) Letter, p.1.)

13. The Second Rule 201(k) Letter again requested that Johns Manville take “all necessary steps” to provide IDOT with all documents that are responsive to its Documents Requests “and to do so in a way which conforms to rule 214”s (sic) requirements.” (Id. p.2.)

14. IDOT’s Second 201(k) Letter also objected to Johns Manville’s continuing failure to provide Rule 214 affidavit for its document productions, stating, among other things, that Johns Manville counsel’s response “would potentially allow [Johns Manville] to ever provide any affidavit . . .” (Second 201(k) Letter, p.2.)

15. As of the date of the filing of this Motion, Johns Manville has not responded to this Second 201(k) Letter, has taken any steps to produce responsive documents to IDOT in the manner in which they are kept and has also failed to provide a Rule 214 affidavit to IDOT.

ARGUMENT

16. “The Illinois Supreme Court rules on discovery are mandatory rules of procedure subject to strict compliance by the parties.” *Seef v. Ingalls Memorial Hospital*, 311 Ill.App.3d 7, 21 (1999). The dual purposes of the Illinois Supreme Court’s discovery rules are to “avoid surprise and discourage tactical gamesmanship.” *Gee v. Treece*, 365 Ill. App.3d 1029, 1038 (5th Dist. 2006).

17. Illinois Supreme Court Rule 214 provides, in pertinent part, as follows:

Production of documents shall be as they are kept in the usual course of business or organized and labeled to correspond with the categories in the request, and all retrievable information in computer storage in printed form or (2) serve upon the party so requesting written objections on the ground that the request is improper in whole or in part.

* * *

The party producing party documents shall furnish an affidavit stating whether the production is complete in accordance with the request

18. As detailed above in Paragraph 4 (which represents only one small example of a much wider pattern). The documents which Johns Manville has produced to IDOT thus far are clearly related to costs which Johns Manville has incurred in investigating and remediating the Johns Manville sites, but has produced them in a highly irregular fashion. Johns Manville's April 5th and 6th Productions raise several serious questions as to whether it has made these productions in strict compliance with Supreme Court Rule 214's requirements.

19. First, it is highly doubtful that a large, sophisticated corporate entity such as Johns Manville (which, in turn, is owned by Berkshire Hathaway, a vastly larger corporate entity), would maintain records related to the costs it has incurred in conducting a USEPA-ordered site investigation and cleanup, in the manner in which Johns Manville has produced those apparently same documents to IDOT.

20. Second, pursuant to Section XI ("Record Retention") of the Administrative Order on Consent ("AOC"), Johns Manville is required to maintain copies of all non-identical records that are "related in any manner to the performance of the Work (i.e., site investigation and remedial work at Sites 3, 4, 5 and 6)." (AOC, Sec. XI, para. 30, p. 15.) Unquestionably, the invoices, cost records, and other documents which Johns Manville has produced to IDOT are also records which Johns Manville is required by Section XI of the AOC to preserve. While Section XI admittedly does not specify the manner in which Johns Manville is supposed to retain its records, presumably, it would make sense for them to be kept in an orderly fashion, so that Johns Manville could ensure that it was meeting its obligations under the AOC.

21. Finally, it also defies logic that Johns Manville would keep records in a haphazard fashion, where those records pertain to costs which are potentially tax deductible. There is a strong likelihood that Johns Manville could deduct some of the costs it has incurred

with respect to the investigation and cleanup of Sites 3 and 6. *See e.g., Dominion Resources Inc., v. United States*, 219 F.3d 359, 370-71 (4th Cir. 2000) (discussing the standard for treating environmental cleanup costs as deductible under the Internal Revenue Code). However, in order to be in a position to possibly deduct its investigation and cleanup costs, Johns Manville would have to know where the documents supporting such deductions could be found. Presumably that task would be made easier if those documents were kept in some sort of chronological order.

22. Given all these reasons why Johns Manville would want to kept its records in an orderly fashion, there is simply no good reason why it has produced documents in response to IDOT's Document Requests in a manner which can only be seen as the result of Johns Manville's gamesmanship.

23. Johns Manville has also failed to demonstrate strict compliance with the requirements of the Illinois Supreme Court's rules governing discovery by refusing to provide IDOT with the requisite Rule 214 affidavit. The plain language of this rule contemplates that an affidavit of completion will be provided by the party responding to a production request at or near the time that it responds.

24. Johns Manville contends that Rule 214's requirements do not need to be complied with now, because it may produce additional documents to IDOT in the future, in conjunction with as-yet-to-be conducted expert discovery. (Response Letter, p.2.) Johns Manville's position is not supported by the law. In *Knudsen v. Liberty Mut. Ins. Co.*, 2004 WL 625679, *5 (Ill. Cir. Ct. – Cook Cty.) (Mar. 6, 2004), for example, the trial court noted that a party had engaged in a “deliberate attempt to stall the completion of discovery . . . [by failing] to provide an appropriate Rule 214 Affidavit after it had produced some documents.” *Knudsen*

stands for the proposition that a responding party's failure to provide the requisite Rule 214 affidavit in conjunction with the production of at least some documents is potentially sanctionable, where that party fails to provide a Rule 214 affidavit each and every time it produces documents. Accordingly, the Hearing Officer should order Johns Manville to provide such an affidavit to IDOT by a date certain.

25. Because of the seemingly non-compliant manner in which Johns Manville has produced documents, IDOT believes it will be necessary to revise the scheduling for this case to allow it sufficient time to complete written discovery before commencing with taking fact depositions in this case.

WHEREFORE, Respondent, the Illinois Department of Transportation, requests that the Hearing Officer issue an order requiring Complainant Johns Manville to:

- 1) Produce all documents that are responsive to IDOT's document requests, in the order in which they are ordinarily maintained within twenty-one (21) days from the date of the filing of this Motion;
- 2) Produce a Rule 214 affidavit to IDOT within seven (7) days from the date of the filing of this Motion;
- 3) Establish a revised schedule for this matter; and,
- 4) Grant such other relief as the Board may find to be appropriate.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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

I, EVAN J. MCGINLEY, do hereby certify that, today, April 25, 2017, I caused to be served on the individuals listed below, by electronic mail, a true and correct copy of "IDOT's First Motion to Compel" on each of the parties listed below:

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OFFICE OF THE ATTORNEY GENERAL
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Lisa Madigan
ATTORNEY GENERAL

April 10, 2017

Via Electronic Mail

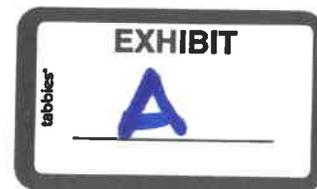
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Re: Illinois Supreme Court Rule 201(k) Letter Regarding Johns Manville's
Responses to IDOT's Fourth Set of Interrogatories and Requests for
Production of Documents

Dear Susan and Lauren:

I am writing to raise a number of issues regarding John Manville's ("JM") April 4, 2017 responses to the Illinois Department of Transportation's ("IDOT") Fourth Set of Interrogatories and Request for Production of Documents. As a general observation, IDOT believes that JM's responses to the aforementioned written discovery are incomplete, evasive, and appear to be intentionally designed to impede IDOT's ability to gain a meaningful understanding of what amounts JM now claims IDOT is liable for. Moreover, the absence of such information directly and fundamentally impacts IDOT's ability to defend itself in this matter. Finally, JM's nonresponsive and evasive responses to IDOT's written discovery impedes IDOT's ability to engage in any sort of meaningful settlement discussions with JM, as IDOT needs to have an understanding of its potential liability before it can meet with JM.

Our hope is that by raising these issues with you now, we will be able to come to a mutually acceptable resolution of this matter, in accordance with the requirements and spirit of Supreme Court Rule 201(k) and without the need for action by the Board or our Hearing Officer.



JM's Responses to IDOT's Fourth Set of Interrogatories

Interrogatory No. 1

This Interrogatory asks:

In your November 30, 2016 Status Report, you assert "JM's investigation and remediation costs 'incurred since the EAM [Enforcement Action Memorandum]' issued in November 2012," was \$685,000. What portion of this \$685,000 do you currently contend IDOT is responsible for?

Johns Manville's response to this Interrogatory is composed of a series of irrelevant objections. JM concludes by stating for the first time that "IDOT is liable for at least \$3,265,000, which includes investigation, removal, oversight and O&M costs." JM's response goes on to say that "JM is still determining the exact allocation, which will be the subject of expert testimony . . ."

JM advised the Board of the \$685,000.00 figure included in its "Case Status Report" over four months ago. Now, however, in response to this Interrogatory, and without citing any support whatsoever, JM asserts an entirely new amount that it claims IDOT is liable for. By failing to respond to this Interrogatory in any meaningful way, and, by making new, unsubstantiated claims regarding the amount purportedly owed by IDOT to JM, JM is essentially denying IDOT the ability to analyze JM's liability claims. This obfuscation, in turn, fundamentally impedes IDOT's ability to prepare for hearing and also impedes its ability to assess JM's claims for settlement purposes.

Accordingly, IDOT requests that JM revise its answer to this interrogatory and to provide more substantive and meaningful information, such that IDOT can have at least some insight into how much, if any, of the \$685,000.00 from IDOT, or the basis for its new \$3,265,000.00 claim against IDOT.

Interrogatory No. 3

This interrogatory asks:

In your November 30, 2016 Status Report, you assert that JM has incurred costs for the removal action "of which at least \$2,897,000 is for Site 3 and the east end of Site 3." What portion of this \$2,897,000 do you currently contend IDOT is responsible for?

As with its response to Interrogatory Number 1, Johns Manville's response to this interrogatory is composed of a series of irrelevant objections and ultimately concludes that "IDOT is liable for at least \$3,265,000, which includes investigation, removal, oversight and O&M costs." JM's response goes on to say that "JM is still determining the exact allocation, which will be the subject of expert testimony . . ."

JM advised the Board of the \$2,897,000.00 figure included in its "Case Status Report" over four months ago. As with its response to Interrogatory No. 1, it is difficult to understand why JM is presently unable to provide IDOT with some idea of just how much of this amount it believes IDOT is liable for. By failing to respond to this Interrogatory in any meaningful way, JM is denying IDOT the ability to analyze the claims which JM will be making against it at hearing. Accordingly, IDOT requests that JM revise its answer to this Interrogatory and to provide more substantive and meaningful information, such that IDOT can have at least some insight into how much, if any, of the \$2,897,000.00 (or, for that matter, the \$3,265,000.00 alternatively claimed by JM), that JM will seek to obtain from IDOT.

Interrogatory 5

Interrogatory 5 requests that JM: "Identify each and every cost, if any, that you contend IDOT is responsible for with respect to Site 6." In response to this interrogatory, JM states that it: "objects to this Interrogatory to the extent that it is duplicative of Interrogatories Nos. 1-4. Subject to and without waiving this objection or the General Objections, JM incorporates Objections and Response to Interrogatories Nos. 1-4."

None of the prior Interrogatories concerned any costs associated with Site 6. Accordingly, your response to this Interrogatory is completely non-responsive and evasive. Please revise your response so as to provide IDOT with a breakdown of all costs that are associated with Site 6 that JM contends IDOT is liable for.

Interrogatory 6

Interrogatory 6 requests that JM: "Identify each and every cost, if any, that you contend IDOT is responsible for with respect to Site 3." In response to this Interrogatory, JM states that it: "objects to this Interrogatory to the extent that it is duplicative of Interrogatories Nos. 1-4. Subject to and without waiving this objection or the General Objections, JM incorporates Objections and Response to Interrogatories Nos. 1-4 and further states that it does not contend that IDOT is liable for JM's costs that related solely to the Nicor Gas line."

While IDOT is pleased to learn that JM does not claim that it is responsible for any "costs related solely to the Nicor Gas line", JM's response to this Interrogatory does not inform IDOT of just what other Site 3 costs JM claims IDOT is liable for. Interrogatories 1-4 did not ask about Site 3. Accordingly, your response to this Interrogatory is completely non-responsive and evasive. Please revise it to provide IDOT with a breakdown of all costs that are associated with Site 3 that JM contends IDOT is liable for.

Interrogatory No. 8

This Interrogatory requested that JM "identify each and every person with knowledge of any costs you have incurred and for which you contend IDOT is responsible for." Although JM identified seven individuals, as well as USEPA, who have knowledge of JM's costs, based on our very preliminary review of the more than 30,000 pages of documents that you produced to us

last week, we believe that JM's response to this Interrogatory is incomplete. For instance, we note that JM failed to list Denny Clinton, JM's former project manager for the remediation of the Johns Manville sites. Additionally, JM did not identify William Bow, AECOM's former principal for this project. Both gentlemen, in their respective former roles, clearly would have had knowledge of the costs which JM has incurred at Sites 3 and 6. Their omission from JM's response to this Interrogatory is a glaring oversight.

We believe that there are likely other individuals who should have been identified in response to this Interrogatory, based on our very preliminary review of your client's document production.

Because JM's response to this Interrogatory is incomplete, we request that you provide us with a supplemental response to it, so that IDOT may have a complete understanding of all of the individuals who have knowledge about the costs which JM will be claiming in this matter.

Interrogatory No. 12

This Interrogatory asks JM to: "Identify all costs involved with investigating and removing soil at and in the vicinity of soil borings 1S-4S, B3-25, B3-16, B3-15, B3-50, and B3-45".

JM's response to this Interrogatory was:

JM objects to this Interrogatory to the extent that it is duplicative of Interrogatories Nos. 1-6. JM further objects to this Interrogatory to the extent it seeks information from persons and/or entities over whom JM has neither control nor duty to control, including IDOT. Subject to and without waiving these objections or the General Objections, JM incorporates in Objections and Responses to Interrogatories Nos. 1-6 as its Response to Interrogatory No. 12.

JM's response to Interrogatory No. 12 is evasive and non-responsive. IDOT notes that it is only in Interrogatory No. 12 that it has asked any questions concerning the aforementioned soil borings and the costs associated with the investigation and removal of soil from those borings. It is therefore disingenuous to state that JM that this Interrogatory is "duplicative of Interrogatories Nos. 1-6." It is also unclear how this Interrogatory could be construed to somehow require JM to obtain information from some third party over whom it has no control. JM to date is the only entity that IDOT is aware of that has conducted investigations and/or removal activities related to the soil borings identified by the Board in its December 15th order. Accordingly, IDOT requests that JM provide a supplementary answer that properly responds to the subject matter of this Interrogatory.

Interrogatory No. 13

In essence, this Interrogatory requested that if JM denied Request No. 1 in IDOT's First Set of Request for Admission of Facts, that JM would identify every basis, fact or assumption upon which this denial was made.

JM denied this Request apparently based on its new assertion that “during the implementation of the Removal Action Work Plan (e.g., “RAWP”), it was discovered that the location of the 25 foot clean corridor depicted in Exhibit 66-88 was inaccurate and that the line had been relocated during the Amstutz Project to fall wholly within Parcel No. 0393 . . .”

IDOT was extremely surprised that at this late date – more than nine months after the end of the initial hearing in this matter - JM has only now apprized IDOT of its assertion that the clean corridor was inaccurately depicted in the RAWP, Ex. 66-88. Moreover, JM has not identified any facts in support of this conclusory assertion. IDOT is therefore left in the dark regarding when and how JM first learned that the clean corridor had not properly been depicted in an exhibit which was previously accepted into evidence by the Board at hearing during the liability phase of this case. Accordingly, IDOT requests that JM provide a supplementary response to Interrogatory No. 13 that provides all relevant information that it possesses which supports its assertion regarding a possibly material change to this case.

Interrogatory No. 15

This Interrogatory sought “each and every basis, assumption and fact upon which your denial of Request No. 3 of IDOT’s First Set of Requests for Admission of Fact was based. This Request, which you denied, asked you to “Admit that soil boring B3-45 falls (sic) does not fall on Parcel 0393.

In summary, your response to this Interrogatory, asserts that this soil boring “falls on the border of Parcel No. 0393 . . .” However, other than this conclusion, you cite to no facts which support this conclusion. Please provide a supplementary response to this Interrogatory that sets forth each and every basis, assumption and fact that supports your assertion.

Issues with JM’s Response to IDOT’s Fourth Set of Document Production Requests

Last week, you produced over 30,000 pages of documents to us in response to IDOT’s Fourth Set of Requests for Production of Documents. For the record, we note that this is approximately four times the number of documents that your client produced to IDOT during the initial phase of litigation in this case. Moreover, these documents appear not to have been produced in the order in which they are kept “in the usual course of business.” (Ill. Sup. Court Rule 214.) We reach this conclusion because there is no apparent logical or chronological order to how these documents have been produced to IDOT.

It appears that JM’s production consists of a large number of invoices and associated billing records submitted by its various environmental consultants (i.e., Arcadis, LFR and AECOM). Based on a limited number of invoices that we have been able to review so far, we have noticed that there is no chronological order to how these invoices were produced. For example, within the Bates range starting at JM 7212 and continuing through JM 7733, dates go from February 10, 2006 through December 28, 2007, then to January 22, 2009 through September 23, 2009, then to a two month period in early 2014, followed by a February 2, 2010 invoice, then an invoice from February 8, 2012 and, ultimately, an invoice from October 22, 2009.

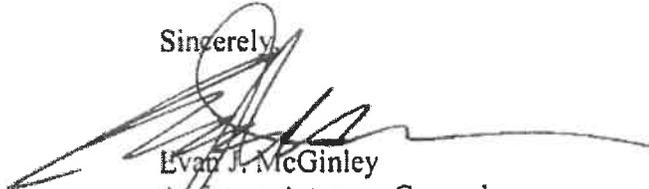
We highly doubt that this is the manner in which these documents are kept. We also do not see how producing documents in this fashion can be considered to comply with the requirements of Illinois Supreme Court Rule 214. More importantly, however, by producing these documents to IDOT in this fashion, JM has imposed an extraordinary burden on IDOT, because it must now reorder these documents in a logical/chronological order, before it can begin to analyze these documents regarding JM's cost claims. We believe it is therefore incumbent upon JM to take all necessary steps to provide IDOT with all documents that are responsive to its Fourth Request for Production of Documents and to do so in a way which conforms to Rule 214's requirements.

We also note that while you have apparently assigned Bates number to the Excel spreadsheets that you have produced to us in native form, none of the spreadsheets which we have seen appear to have any Bates number actually marked on them. The absence of Bates numbers will make working with these documents very difficult. We would therefore appreciate it if you could rectify this issue and ensure that all documents that you have produced to us in a native format contain Bates numbers on each of those documents.

Finally, we request that you immediately provide us with an affidavit of compliance for your document production, in accordance with the requirements of Supreme Court Rule 214.

Thank you in advance for your prompt attention to this matter. We look forward to your client's responses to the issues raised in this letter. Please note that IDOT reserves the right to raise other issues with your client regarding its responses to all written discovery which it has propounded to date, beyond those raised by this letter. IDOT specifically reserves this right with respect to its ongoing review of the 30,000 pages of documents that you have produced to us in response to IDOT's Fourth Set of Requests for Production of Documents.

Sincerely,



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April 17, 2017

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Re: *Johns Manville v. Illinois Department of Transportation*, PCB No. 14-3: Response to April 10, 2017 Rule 201(k) Letter

Dear Evan:

We are in receipt of your Rule 201(k) letter dated April 10, 2017. The Illinois Department of Transportation ("IDOT") claim that JM's responses to IDOT's Fourth Set of Interrogatories ("Interrogatories") and Request for Production of Documents are "incomplete, evasive, and appear to be intentionally designed to impede IDOT's ability to gain a meaningful understanding of what amounts JM now claims IDOT is liable for" is simply untrue.

As you are aware, the Board's December 15, 2016 Interim Opinion and Order found IDOT liable for violations of the Illinois Environmental Protection Act, considered JM's November 30, 2016 Status Report to be an amendment to JM's complaint, and found that JM could recover from IDOT costs that JM incurred for investigation, removal, and remediation. The Board did not limit its Interim Opinion to costs incurred only since the Enforcement Action Memorandum was issued in November 2012. The Board further directed that another evidentiary be held on: "1. The cleanup work performed by JM in the portions of Site 3 and Site 6 where the Board found IDOT responsible for ACM waste present in soil. 2. The amount and reasonableness of JM's costs for this work. 3. The share of JM's costs attributable to IDOT." (Interim Opinion, p. 22.) It bears reminding that it was IDOT, not JM, that demanded expert discovery on these issues. (*Compare* IDOT's January 20, 2017 Proposed Schedule for Conducting Further Proceedings in this Matter with JM's February 2, 2017 Proposed Discovery Schedule, ¶ 8.)

Though IDOT now complains regarding JM's responses to IDOT's Interrogatories, many of those Interrogatories are not a proper subject of fact discovery, and instead, relate to the issues on which JM has now retained an expert. For example, rather than asking for factual information, such as the amount of costs JM has incurred, IDOT instead asks for the portion of costs JM "contend[s] IDOT is liable [or responsible] for." (*See* IDOT's Interrogatories Nos. 1, 3, 5, 6, and 8.) The latter constitutes topics on which JM's expert will offer opinions. During the investigation and removal work on Sites 3 and 6, JM was not billed on a boring-by-boring basis. As a result, among other things, JM's expert is assessing all of the tasks, determining which ones relate to "the portions of Site 3 and Site 6 where the Board found IDOT responsible for ACM waste present in soil" and is



Evan McGinley
April 17, 2017
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determining the “share of JM’s costs [related to those areas] attributable to IDOT.” This is a time consuming task, but JM is confident that IDOT’s concerns about any lack of clarity in JM’s discovery responses will be alleviated when JM discloses its expert and accompanying report.

Nonetheless, JM is providing Supplemental Interrogatory Responses to provide more detail, where it can, related to the costs JM has incurred on Site 3 and Site 6. Though JM’s investigation of Site 3 goes as far back as 1999, JM will only be seeking recovery of costs incurred since 2007. (*See* JM’s Supplemental Responses to Interrogatories Nos. 1, 3.)

JM’s Supplemental Responses also endeavor to provide IDOT with the general categories of the tasks/projects for which JM incurred costs on Sites 3 and 6. (*See* JM’s Supplemental Responses to Interrogatories Nos. 5¹, 6.) Similarly, IDOT’s Interrogatory No. 12 asks for costs involved with investigating and removing soil at and in the vicinity of soil borings 1S-4S, B3-25, B3-16, B3-15, B3-50, and B3-45, which are part of Sites 3 and 6 and, thus, is encompassed by IDOT’s prior Interrogatories. Again, what task/project categories relate to the areas for which IDOT was found liable for violating the Act, exactly which of the costs incurred relate to those areas and are attributable to IDOT are still to be determined by JM’s expert. As such, JM cannot possibly respond more fully to IDOT’s Interrogatories with any meaningful accuracy.

With respect to IDOT’s Interrogatory No. 8, JM’s exclusion of Denny Clinton and William Bow from its response was inadvertent. Nevertheless, it would be unduly burdensome and unrealistic for IDOT to expect JM to individually name each and every person who might have knowledge of costs incurred on the Sites. It goes without saying that any individuals named on any invoices or bills produced would have such knowledge. JM has supplemented its response to Interrogatory No. 8 accordingly.

IDOT’s Interrogatories, Requests for Production, or Requests for Admission did not ask JM for information regarding the 25 foot clean corridor that falls within Parcel No. 0393. Nevertheless, JM noted that “during the implementation of the Removal Action Work Plan [which occurred after the hearing], it was discovered that the location of the 25 foot clean corridor depicted on Exhibit 66-88 was inaccurate and that the line had been relocated during the Amstutz Project to fall wholly within Parcel No. 0393, an area that the Board found IDOT to be liable for in its Interim Order, and that ACM had been placed above the relocated line.” This is not a “material change” to the case. The true location of the corridor was not known to JM until after the hearing and during the removal work. Indeed, it seems that IDOT, if anyone, should have known that the pipe was located within its right of way and should have disclosed this to JM during discovery before the previous hearing. JM is nonetheless supplementing its response on this point and will be prepared to provide testimony on the exact location of the pipe at hearing.

¹ Interrogatory No. 5 is duplicative of IDOT’s prior Interrogatories because JM’s investigation and removal costs incurred since the Enforcement Action Memorandum issued in November 2012, the subject of Interrogatories Nos. 1 and 2, related to Site 3 and Site 6. Regardless, JM did not withhold any responsive information based on this objection.

Evan McGinley
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IDOT's issue with JM's response to Interrogatory No. 15 is nonsensical. IDOT's Interrogatory asks for additional facts to support a denial of a simple, single fact - that soil boring B3-45 falls on Parcel No. 0393. JM's denial of Request for Admission No. 3 was based on the boring location itself and all documents depicting the location of the boring and/or the contamination found under the boring, as well as conversations with persons who performed the investigation/removal work. It is difficult to fathom what additional information IDOT thinks JM should have provided.

Finally, JM has produced documents as they are kept in the ordinary course of business. JM had to compile documents from several different sources and produced them in the form it received them. JM is under no obligation to put these documents in a logical or chronological order other than as they have already been produced to IDOT. IDOT exaggerates the amount of review in which it will need to engage by citing the number of pages produced, rather than the number of documents produced. Yet, to assist IDOT, JM notes that 12,829 of these documents are photographs (JM 0022096- JM 0037483), AECOM invoices with various cost categories demarcated are found at JM 0037499- JM 0037732 (reproduced in color as JM 0038525- JM 0038758), and documents relating to the bid package for the SW Sites are found at JM 0037733- JM 0038036.

Further, IDOT's demand that JM produce Excel spreadsheets in non-native PDF format is highly unusual. Producing them in any other fashion would lose all formatting and would likely render the spreadsheets illegible, which is why they were produced in native format in the first instance. There is no way for JM to Bates label those spreadsheets without modifying the data. This is why JM produced a corresponding PDF that IDOT can use when the Excel file needs to be identified and why each Excel file was named by Bates number. This is a frequently used method of producing Excel spreadsheets in litigation and, in fact, it is the industry's standard practice. Given that JM is producing supplemental documents and may produce additional documents in the future in the conjunction with expert discovery, JM will not be providing an affidavit of completeness.

We enclose herewith Supplemental Responses to IDOT's Fourth Set of Interrogatories and additional documents, beginning at Bates label number JM 0038114. Please feel free to give us a call to discuss after you have had an opportunity to review.

Very truly yours,



Susan E. Brice

SEB

cc: Ellen O'Laughlin
Matthew D. Dougherty



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

April 21, 2017

VIA ELECTRONIC MAIL

Ms. Susan Brice
Bryan Cave, LLP
161 North Clark Street, Suite 4300
Chicago, Illinois 60601-3315

Re: IDOT's Second Illinois Supreme Court Rule 201(k) Letter Regarding
Johns Manville's Responses to IDOT's Fourth Set Requests for
Production of Documents

Dear Susan:

I am writing to raise IDOT's continuing concerns about the manner in which Johns Manville has produced documents in this matter, particularly in light of your April 17, 2017 response ("201(k) Response") to IDOT's April 10, 2017 Supreme Court Rule 201(k) letter ("201(k) Letter"). I also write in order to raise and, hopefully, resolve other issues which have come to our attention since we sent our initial 201(k) Letter.

As you are aware, IDOT's 201(k) Letter raised questions concerning whether the manner in which Johns Manville had produced documents in response to IDOT's Fourth Set of Request for Production of Documents was in compliance with the requirements of Supreme Court Rule 214, specifically, that documents be produced in the manner in which they have been kept.¹ In JM's 201(k) Response, you claim that JM has complied with this requirement. However, it is difficult to understand how documents – most especially, documents pertaining to the costs which have been incurred by your client – could be maintained in a fashion which first requires substantial reorganization before those documents can be used in any meaningful fashion. We therefore reiterate our request made in our 201(k) Letter that Johns Manville "take all necessary

¹ Based upon continuing, further review by our office, the question which we initially raised about the seemingly non-compliant manner of Johns Manville's document production appears limited to the first approximately 10,000 pages of documents you produced to us on April 5, 2017, which you again produced to us on April 6, 2017, on a hard drive.



steps to provide IDOT with all documents that are responsive to its (Request for Production) and to do so in a way which conforms to Rule 214's requirements."

We also wish to once again reiterate our request that you provide us with an affidavit of compliance for all three of your documents productions to date (i.e., April 5, 2017, April 6, 2017, and April 17, 2017).

In your 201(k) Response Letter, you state:

[T]hat JM is producing supplemental documents and may produce additional documents in the future in the (sic) conjunction with expert discovery, JM will not be providing an affidavit of completeness.

Your response to IDOT's request that Johns Manville provide the requisite affidavit is improper and is not supported by Rule 214. As you are aware, Rule 214, in pertinent part, states: "The party producing documents shall furnish an affidavit stating whether the production is complete in accordance with the request." Your interpretation of Rule 214's affidavit requirements seeks to evade the Rule's obvious requirements, e.g., that Johns Manville provides IDOT with an affidavit in conjunction with your client's production of documents, at the time those documents are produced.

Taken to its logical conclusion, your interpretation of Rule 214 would potentially allow your client to never provide any affidavit, based on its self-serving assertion that it is still looking for additional responsive documents. Moreover, your contention that your client somehow does not need to provide a Rule 214 affidavit until some indeterminate point in the future is undercut by the fact that your client has provided verifications in conjunction with their initial responses and subsequent supplemental responses to IDOT's Fourth Set of Interrogatories. Accordingly, we renew our demand that your client immediately provide a Rule 214 affidavit for the documents that it has thus far produced to IDOT.

We are also requesting that you produce a privilege log for any and all redacted documents which you have to date produced to us, including the document that you produced to us on April 17th.

Additionally, in the course of reviewing the documents which Johns Manville has produced to IDOT, it has come to IDOT's attention that there is a gap of over 1,000 pages between the last page of documents contained on the hard drive you produced to us on April 6 ("Hard Drive"), with the first page of documents contained on the flash drive you produced to us on April 17th ("Flash Drive"). Specifically, the last page on the Hard Drive is contained within the folder named "JM 003\JM 003\Images\001" and has Bates number JM 0037732. The first page of documents on the Flash Drive is contained in a folder marked "JM 005" and has Bates Number JM 0038114. Thus, there is a gap of 382 pages between the last page on the Hard Drive and the first page on the Flash Drive. (There is also an apparent gap in folders between the Hard

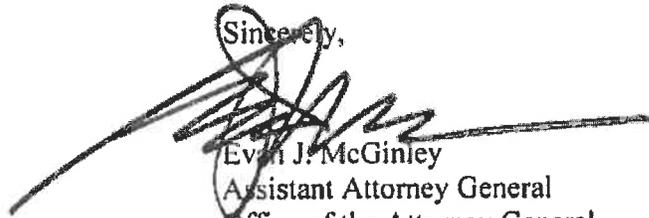
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Drive and the Flash Drive, in that there is no folder marked "JM 004"). Please advise as to whether this gap was intentional or an oversight on your part and whether you may have intended to produce other documents to us that you have yet to produce.

Please note that IDOT reserves the right to raise other issues with your client regarding its responses to all written discovery which it has propounded to date, beyond those raised by this letter. IDOT specifically reserves this right with respect to its ongoing review of the more than 30,000 pages of documents that you have now produced to us on three separate occasions, in response to IDOT's Fourth Set of Requests for Production of Documents.

Thank you in advance for your prompt attention to this matter. If possible, we would request a response to this matter before the end of the day this coming Monday, April 24, 2017.

Sincerely,



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