

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter Of:)	
)	
JOHNS MANVILLE, a Delaware corporation,)	
)	
)	
JM,)	PCB No. 14-3
)	
v.)	
)	
ILLINOIS DEPARTMENT OF TRANSPORTATION,)	
)	
)	
Respondent.)	

NOTICE OF FILING

To: See Attached Service List

PLEASE TAKE NOTICE that on June 14, 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 Brief Regarding JM's Objections*, a copy of which is attached hereto and herewith served upon you via e-mail. Paper hardcopies of this filing will be made available upon request.

Dated: June 14, 2016

Respectfully submitted,

BRYAN CAVE LLP

Attorneys for Johns Manville

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should be sustained. IDOT focuses only on Mr. Gobelman's opinions that: (1) as part of the Amstutz Project, IDOT did not do work east of Station 7 along Greenwood and did not remove unsuitable material and place fill east of Station 9 + 50 as called for in the As Built Drawings and therefore IDOT could not have buried the ACM; and (2) that Mr. Gobelman's stereoscopic review of aerial photographs showed particular features that one could not see otherwise. This surprisingly new testimony is addressed below:

A. **Mr. Gobelman's New Opinion On Removal Of Unsuitable Material And Use Of Fill Material On Site 6**

IDOT claims that Mr. Gobelman included "multiple references" to Site 6 and Greenwood Avenue, purportedly rendering JM's position both "entirely ridiculous" and "desperate." (Brief, p. 2.) IDOT, however, completely misses the point. The issue is not whether IDOT ever made a single reference to these locations, but is whether IDOT disclosed the opinion that Mr. Gobelman offered on direct examination—namely that, as part of the Amstutz Project, IDOT did not do work east of Station 7 along Greenwood and did not remove unsuitable material and place fill east of Station 9 + 50 as called for in the As Built Drawings and thus IDOT *could not* have buried the ACM. (See Transcript of May 24: pp. 299:10-300:22; Transcript of May 25: pp. 101:10-120:19 (testimony elicited, in part, within offer of proof); 145:6-155:21; 162:23-163:6; 168:19-180:18; 183:5-20; 185:9-186:7; 254:5-9.)

There is nothing in Mr. Gobelman's Report or deposition that comes anywhere close to this opinion and IDOT's statement that "[h]is testimony is entirely consistent with opinion he has provided in this matter" is false. (Brief, p. 5.) In fact, Mr. Gobelman trial testimony is exactly *the opposite* of his deposition testimony. At deposition, Mr. Gobelman testified that he did not dispute the accuracy of Mr. Dorgan's Figure 5 or "what he was presenting" (Trial Exhibit 04C: p. 44:9-15), which Mr. Dorgan's Report describes as showing that "when you compare the

engineering drawings used by IDOT for . . . Greenwood Avenue with the location of Transite and ACM, it is clear that the Transite and ACM is [are] located in areas that were excavated and filled by IDOT as part of the construction.” (Trial Exhibit 06-17.)

But Mr. Gobelman did not stop there in his deposition. He agreed with Mr. Dorgan that ACM was found “within the area that was filled by IDOT's contractor,” the area “between the unsuitable material and the final grade line.” (Trial Exhibit 04C: Dep. p. 187:2-9.) How IDOT can now, with a straight face, argue that Mr. Gobelman disclosed the reverse opinion is unfathomable. Mr. Gobelman was quite clear in his deposition about the scope of his “sort of” opinions. He said the only opinions provided in his report were those that were underlined:

Q. Okay. Let's look at your report. Where are the opinions found in this report? It seems like you have certain things that are underlined. Are those the opinions or are they somewhere else?

A. Yeah. I would say the underlined portions are sort of the opinions.

Q. Okay. Sort of or they are the opinions?

B. Well, yeah, okay. If you want to -- yeah. I don't necessarily look at them as opinions.

Q. So other than what is underlined, do you have other opinions in this report?

A. No.

(Trial Exhibit 04C: Dep. pp. 35:16-36:14.) None of those underlined opinions address whether and to what extent IDOT placed fill material in the embankment on Site 6. Indeed, the word “station” does not appear anywhere in the Report and the word “fill” does not appear anywhere in connection with Site 6.

Rather than citing to any actual opinion about the make-up of the embankment bordering Site 6, IDOT refers to the bibliography and background sections of Mr. Gobelman's Expert

Rebuttal Report, which do not in and of themselves set forth any opinions. (*Compare* Brief, pp. 2-3 *with* Trial Exhibit 08.) IDOT refers to an underlined opinion on page 8 of Report (*see* Brief, p. at 2), but breaks up the actual quote in an effort to disguise the true nature of the actual opinion—that IDOT’s contractor is responsible for any ACM found, not IDOT because “it was the Contractor’s responsibility to determine how materials will be managed.” (Trial Exhibit 08-10.) This opinion has absolutely nothing to do with fill material on Greenwood Avenue or Site 6. (*Id.*) While Mr. Gobelman mentions Site 6 on pages 11 and 13 of his Report (Trial Exhibit 08-13, 08-15), he only discusses Site 6 in the context of his opinion on the sequencing of the Project. Mr. Gobelman's new opinion—that IDOT did not do work east of Station 7 along Greenwood and did not remove unsuitable materials and use fill east of stations 9 + 50—has absolutely no connection to his sequencing opinion. To make matters worse, IDOT falsely claims that the Report discusses “fly ash embankment” pertaining to Site 6. (Brief, p. 3.) Mr. Gobelman’s Report contains a comment about fly ash being used as a source of borrow material in “embankments,” citing a 1972 Engineering Report (Trial Exhibit 08-12, 08-13), which says the contractor was placing “fly ash embankment” at grade separation structures, or bridges, west of Site 6. (*See* Trial Exhibit 29.) Finally, IDOT states, ***without any citation to the record***, that Mr. Gobelman discusses Site 6 fill in his Report and deposition. (*See* Brief, p. 4.) Assuming *arguendo* that he did, which he did not, this is insufficient.

“Rule 213 requires specifics. Providing the basis of a controlled expert’s opinion in a ‘catch-all’ provision does not comply with the disclosure requirements of this rule.” *Nedzvekas v. Fung*, 374 Ill. App. 3d 618, 621-622. But IDOT has no specifics. A passing reference to Site 6 and Greenwood Avenue does not amount to the level of full disclosure required of an expert opinion, or basis for an expert opinion under Illinois Supreme Court Rule 213. *Id.* (finding that

the disclosing party demonstrated a deliberate and unwarranted disregard of the court's authority, in part, by untimely serving an insufficient witness disclosure) (internal citations omitted).

In *Sullivan v. Edward Hospital*, the disclosing party argued, like IDOT does here, that the “gist” of the expert’s trial testimony was an “elaboration,” a “logical corollary of,” or “effectively implicated” the expert’s prior disclosure. 209 Ill. 2d 100, 108 (Ill. 2004). In rejecting those arguments, however, the Illinois Supreme Court held that “you have to drop down to specifics.” *Id.* at 109 (holding that trial court did not abuse its discretion in finding that plaintiff violated Rule 213(g) and excluding/striking the expert’s testimony); *see also Chapman v. Hubbard Woods Motors, Inc.*, 351 Ill. App. 3d 99, 110 (1st Dist. 2004) (affirming grant of motion *in limine* and agreeing with trial court that a “‘catch-all’ provision, unconnected with any specific witness or opinion, does not comply with the disclosure requirements of Rule 213.”); *Prairie v. Snow Valley Health Resources, Inc.*, 324 Ill. App. 3d 568, 576 (2d Dist. 2001) (holding that the defendant’s reliance on *Becht v. Paca*, 317 Ill. App. 3d 1026 (1st Dist. 2000) was misplaced where Rule 213 was violated and the defendant’s expert was not merely testifying in a more precise manner at trial).

IDOT cites *Wilbourn v. Cavalnes* (which cites *Becht*) for the proposition that “a witness may elaborate on a properly disclosed opinion.” (Brief, p. 2.) However, here, there has been no properly disclosed opinion in the first place. In fact, the appellate court’s decision in *Wilbourn* supports JM’s position, not IDOT’s position. In that case, the appellate court upheld the lower court’s decision to strike the expert’s testimony because it was undisclosed prior to trial and was not a logical corollary of a disclosed opinion. *See* 398 Ill. App. 3d 837, 849-853 (1st Dist. 2010). The Hearing Officer should do the same here.

Though IDOT waived any objections to the admission of Trial Exhibit 084 at trial by failing to lodge any objection (*see* Transcript of May 23: pp. 216:23-221:20) at any time, IDOT still attempts to distract the Hearing Officer from its own failure to comply with its disclosure obligations by referring to that Trial Exhibit. IDOT argues that it should be given a “fair opportunity” to counter Mr. Dorgan’s opinion (demonstrated in part in Trial Exhibit 084) that IDOT placed ACM-containing fill material within the embankment at Stations 6+50 to 9+22, making the incredulous argument that Mr. Dorgan somehow offered a new opinion about this in his trial testimony, in particular regarding the location of the baseline fill. (*See* Brief, p. 4.)

To the contrary, this opinion and the location of the baseline of fill line were covered extensively in Mr. Dorgan’s initial report. (*See* JM Objections, pp 2-3; Trial Exhibit 06-8 (“IDOT engineering drawings for the Amstutz show that IDOT needed to excavate and fill areas on the Site because the underlying material was unsuitable. Prior to IDOT's work on Sites 3 and 6, the elevation of . . . Site 6 was approximately 588 feet above mean sea level. Part of IDOT’s work involved . . . raising the grade of Greenwood Avenue substantially in some areas”); Trial Exhibit 06-8 (“the plan cross sections for Greenwood Ave within Site 6 (Sta 7+00 to 9+22) shown on sheets 71 and 72 of the plans indicate excavation was performed in the areas and fill material was needed”); Trial Exhibit 06-17 (“when you compare the engineering drawings used by IDOT for Bypass Road A and Greenwood Avenue with the location of Transite and ACM, it is clear that the Transite and ACM is [are] located in areas that were excavated and filled by IDOT as part of the construction. The Transite pipe is located within three to four feet of the ground surface. This is demonstrated most clearly on Figures 4 and 5, which demonstrate the occurrence of asbestos within soil samples collected from fill materials placed by IDOT. The Transite and ACM were found on Site 3 and Site 6 within fill materials placed by IDOT, above

the predominant Site 3 and Site 6 elevation prior to IDOT construction, or in areas where IDOT excavated and removed ‘unsuitable materials.’ The July 8, 2008 LFR states ‘it may be concluded that the Transite pipe was found within the soil placed as part of the Greenwood Avenue ramp construction.’”.)

Figure 5 of Mr. Dorgan’s Report plainly depicts: (1) the location of the unsuitable material to be removed (between 584 and 585, which is the same location as Trial Exhibit 084); (2) the original Greenwood grade at 588; (3) the proposed Greenwood grade; and (4) Transite pipe found above the unsuitable material noted on pages 71 and 72 of the As Built Plans (Trial Exhibits 21A-72, 21A-73) and below the proposed Greenwood profile. (*See also* Expert Rebuttal Report of Doran at Trial Exhibit 016-4, 016-8, 016-17.)

Given Mr. Dorgan’s full and repeated disclosure of this opinion in his Expert Reports and deposition, IDOT has plainly had many opportunities to rebut Mr. Dorgan’s opinion discussed in his two Reports, depicted in Figure 5 and demonstrated further in Trial Exhibit 084, but elected not to do so. As noted above, Mr. Gobelman agreed that Figure 5 showed that IDOT placed fill material above the unsuitable material that IDOT removed and never objected to JM’s use of Trial Exhibit 084.

B. Mr. Gobelman’s Undisclosed Stereoscopic Review Of Aerial Photographs

IDOT says very little about Mr. Gobelman’s review of aerial photographs using a stereoscopic technique for one reason—there is nothing to say or even stretch. Mr. Gobelman never discussed using such a technique in his Expert Report or in his deposition despite being asked about his opinions regarding the aerial photographs. (*See* JM’s Objections, p. 2.) Still, it does not matter what questions were asked of Mr. Gobelman at his deposition (particularly where IDOT had an opportunity to ask Mr. Gobelman additional questions at deposition, but did

not), whether a certain analytical technique is common, or whether “it should have been obvious” to JM that Mr. Gobelman used a technique JM’s counsel did not know existed. None of the aerial photographs that IDOT produced indicated that they were produced in some special format. It was IDOT’s burden to ensure all of Mr. Gobelman’s opinions, and bases therefor, were fully and explicitly disclosed between Mr. Gobelman’s Expert Rebuttal Report and deposition. *See Seef v. Ingalls Mem. Hosp.*, 311 Ill. App. 3d 7, 23-24 (1st Dist. 1999) (reversing allowance of undisclosed opinion testimony). IDOT has not met this burden. Because it cannot, instead of complying with the Illinois Rules and being forthcoming in its disclosures, IDOT suggests in conclusory fashion that these proceedings would be rendered “absurd” without any explanation as to why or how. JM’s Objections should be sustained and the admission of this trial testimony would be improper and would violate Illinois Supreme Court Rule 213. *See Lowney v. Arciom*, 232 Ill. App. 3d 715, 718 (3d Dist. 1992) (expert’s trial testimony was improperly admitted in violation of (less stringent) Supreme Court Rule 220(d), Rule 213’s predecessor).

II. IDOT Should Not Be Allowed To Selectively Misrepresent The Parties’ Stipulations And Move Exhibits Into Evidence Without Accompanying Witness Testimony.

IDOT’s claim that “JM has flipped its position regarding the authenticity and admissibility of exhibits” as JM had purportedly “previously so stipulated to both the authenticity and the admissibility to the majority of IDOT’s exhibits” (Brief, p. 1) again vastly misrepresents the record this case. While IDOT attaches limited correspondence—from *before* the filing of the parties’ respective Pre-Trial Reports on May 17, 2016—in which JM expressed its position with respect to stipulations on some of IDOT’s exhibits, IDOT brazenly fails to provide the Hearing Officer with the full extent of the parties’ communications.

Contrary to IDOT's position in its Brief, JM *did* object to many of the exhibits contained on IDOT's Exhibit List of May 17, 2016. IDOT had previously filed an Exhibit List on February 18, 2016. Counsel for JM and IDOT discussed stipulations regarding the authenticity and admissibility of exhibits on *that* list—for foundation purposes only¹—on May 16, 2016. IDOT's Exhibit List later filed on May 17, 2016, however, included additional exhibits that were either not included on IDOT's February 18 Exhibit List, were not ever produced during discovery, or both. Thus, those documents could not have been addressed in the parties' May 16 conversation regarding stipulations as JM was unaware of their existence or IDOT's intent to use them at trial.

Consistent with IDOT's past practices, IDOT's Pre-Trial Report did not accurately reflect the stipulations and exceptions to stipulations that had been reached between the parties on May 16, 2016. JM promptly informed IDOT of the true nature and extent of the stipulations on IDOT's exhibits, particularly with respect to those exhibits that JM had never before seen. (*See* May 18 Email Correspondence attached hereto as **Exhibit B**.) In addition to reiterating that it would not stipulate to Exhibits 04H, 025, 026, 027, 029, 030, 038, 050, 051, and 052 (which are now IDOT's Exhibits 038, 123, 124, 125, 133, 142, 143, 158, 159, and 160) (*see* May 16 Email Correspondence attached to IDOT's Brief), JM also informed IDOT that it did not and never did stipulate in any fashion to Exhibits 036, 038, 056, 057, 058, 059, or 060 (now IDOT's Exhibits 036, 038, 162-166). (*See* Exhibit A.) Further, at the time JM stipulated to Exhibit 102, JM believed this document had previously been produced during discovery, but subsequently discovered that it had not been when IDOT sent it to JM without bates numbers on June 9, 2016. JM had never seen the document before as it relates to the larger Superfund Site and not the Southwest Sites. Additionally, JM objected to Exhibit 167, which was also never produced to JM during discovery, at trial. For purposes of clarity, attached hereto as **Exhibit C** is a list of

¹ *See* February 2016 Email Correspondence attached hereto as **Exhibit A**.

Exhibits that JM never stipulated to in any fashion that are included on IDOT's June 3 list of "Exhibits for Admission Into Evidence." JM also repeatedly requested that IDOT amend its Pre-Trial Report to correct IDOT's erroneous report on the exhibit stipulations. (*See e.g., id.*) IDOT never did. Instead, IDOT continues to perpetuate its misstatements regarding the stipulations on exhibits reached between JM and IDOT. Particularly astonishing about IDOT's continued and selective misrepresentation of the record is that counsel for JM brought the erroneous nature of IDOT's "understanding" regarding the stipulations reached on exhibits to IDOT's attention on June 9, 2016,² *before* IDOT filed its Brief:

We plan to more fully address this issue in our brief in support of our trial objections, due today. Had you provided us with the list of exhibits IDOT wants admitted into evidence and this email earlier, we perhaps could have had a more meaningful discussion. However, since the day of hearing, we have attempted to discuss with you the exhibits IDOT wants admitted into evidence, but IDOT did not provide its list until it was filed on June 3.

Nevertheless, to address your email below, your prior understanding is incorrect. No, JM will not stipulate to the authenticity/admissibility of all of the exhibits included on your June 3 list.

Most notably, your email below patently ignores prior correspondence from May 18 (attached) in which we firmly indicated we would not stipulate to Former Exhibits 56-60, now Exhibits 162-166, which had not need even been produced at the time stipulations were discussed (and some of which have already been excluded at trial). Former Exhibit 52, now Exhibit 160, was stipulated to for demonstrative purposes only, but not as to authenticity/admissibility.

We also have the following issues with your "understanding" of the stipulations, email below, and June 3 exhibit list:

1. Former Exhibit 38 **is** still included on IDOT's June 3 list (as now Exhibit 133). We do not, and have never, have a stipulation on this exhibit.
2. There was no stipulation on Former Exhibit 50, now Exhibit 142. We do not, and have never, have a stipulation on this exhibit.

² Not to mention that JM actually objected (vigorously) to the admission of a number of IDOT's exhibits at trial on May 23-May 25, 2016, and that two of the exhibits on IDOT's Exhibit List (162 and 163) were already *excluded* from evidence. (*See e.g.,* Transcript of May 24: p. 180:12-17.)

3. There was no stipulation on Former Exhibit 4H, now Exhibit 38. We do not, and have never, have a stipulation on this exhibit.

4. Former Exhibit 51, now Exhibits 143, 158, 159, were never stipulated to. We do not, and have never, have a stipulation on these exhibits.

5. Exhibits 200 and 202 were not produced until at trial, so we never stipulated to those and objected on the record at hearing. We do not, and have never, have a stipulation on these exhibits.

Lastly, it is unclear to us what you mean when you say “Exhibits 25-27 (now IDOT Exhibits 123-125) will not be used at hearing.” Do you mean that you still intend to admit to these into evidence without accompanying witness testimony at trial? If so, JM objects. If you mean that IDOT will not ever seek to admit Exhibits 25-27 into evidence, your June 3 list should be revised and re-filed with these Exhibits removed.

JM will not stipulate to anything other than what was previously stipulated to, which was the admissibility and genuineness of certain, specified documents for foundation purposes only.

(See June 9 Email Correspondence attached hereto as **Exhibit D.**) Yet IDOT *still* chose to include false statements in its Brief by only citing and attaching the incomplete May 16 correspondence. IDOT should not be rewarded for such sanctionable conduct.

Further, IDOT’s argument that to exclude certain exhibits into evidence would “render these proceedings absurd and unnecessarily prolong the matter” (Brief, p. 6) is unfounded. To the contrary, sustaining JM’s objections to the use of the exhibits set forth in Exhibit 2 of JM’s Objections would have the effect of streamlining the Board’s review of this case. The Board (and JM) needs to have a clear understanding of how exhibits are to be interpreted and presented prior to ruling on this matter. This is precisely what Illinois law and the Board rules are designed to achieve, and IDOT does not argue otherwise.

As set forth more fully in JM’s Objections, IDOT’s unorthodox intended use of exhibits without accompanying witness testimony contravenes well-established rules of civil procedure and evidence. (See JM’s Objections, pp. 11-15.) JM requests that the Hearing Officer order

IDOT to introduce any exhibits it intends to rely upon in this case at trial with a witness and similarly, to exclude the admission of any exhibits not introduced with a witness at trial. To hold otherwise not only would serve as a basis for reversal, but also would unnecessarily confuse what is already a very complicated case.

CONCLUSION

WHEREFORE, Complainant JOHNS MANVILLE respectfully requests that the Hearing Officer sustain its objections to the testimony of Steven Gobelman and to the admission of exhibits without accompanying witness testimony.

Dated: June 14, 2016

Respectfully submitted,

BRYAN CAVE LLP

Attorneys for Complainant Johns Manville

By: /s/ Lauren J. Caisman
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EXHIBIT A

Caisman, Lauren

From: Brice, Susan
Sent: Friday, February 05, 2016 1:10 PM
To: 'McGinley, Evan'; Caisman, Lauren
Cc: O'Laughlin, Ellen
Subject: RE: Follow up

I think that makes sense. Thanks



Susan Brice

Partner

susan.brice@bryancave.com T: +1 312 602 5124

From: McGinley, Evan [<mailto:emcginley@atg.state.il.us>]
Sent: Friday, February 05, 2016 1:07 PM
To: Brice, Susan; Caisman, Lauren
Cc: O'Laughlin, Ellen
Subject: RE: Follow up

Susan:

We're okay with stipulating to the admissibility of documents on a document by document basis. The best way to move this forward would be for you to provide us with a list of the documents that you'd like IDOT to stipulate to. Once we have your list, we'll make every effort to let you know as soon as we possibly can which ones we are willing to stipulate to admitting. Please note that there's one state holiday next week (Friday, Lincoln's Birthday, 2/12) and a second one the following Monday (President's Day, 2/15) and you should plan accordingly.

We look forward to getting your list of documents that you'd like us to stipulate to the admissibility of; we will have a similar list for your review in the near future.

Regards,

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

From: Brice, Susan [<mailto:Susan.Brice@bryancave.com>]
Sent: Friday, February 05, 2016 10:49 AM
To: McGinley, Evan; Caisman, Lauren
Cc: O'Laughlin, Ellen
Subject: Follow up

Electronic Filing - Received, Clerk's Office : 06/14/2016

Evan: I just wanted to follow up and see if you have a decision on stipulating on admissibility for foundation purposes, at least as to certain documents. Please let us know your thoughts.



T: +1 312 602 5124 F: +1 312 698 7524

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susan.brice@bryancave.com

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EXHIBIT B

Caisman, Lauren

From: Caisman, Lauren
Sent: Wednesday, May 18, 2016 10:58 AM
To: McGinley, Evan (emcginley@atg.state.il.us); O'Laughlin, Ellen; Dougherty, Matthew D. (Matthew.Dougherty@Illinois.gov)
Cc: Brice, Susan
Subject: RE: Stips

Evan,

We have had an opportunity to review IDOT's Pre-Trial Report. We do not believe that it accurately reflects the stipulations/exceptions to stipulations reached between the parties on May 16, as Susan summarizes in her email below. We request that IDOT amend its Pre-Trial Report to correct the following:

1. JM stipulates to the authenticity and admissibility of IDOT Exhibit 4, with the exception of Exhibit 4(H) only.
2. JM did not stipulate to the authenticity and admissibility of IDOT Exhibit 36 (I believe this is just a typo in your report).
3. JM had not had an opportunity to review the exhibits that were not included on IDOT's original Exhibit list (i.e. IDOT Exhibits 56-60), and so did not stipulate to the authenticity/admissibility of these exhibits. JM will stipulate to IDOT Exhibit 58 for demonstrative purposes only as this document was produced after the close of discovery. Can you also please send us the bates ranges for Exhibits 56, 57, 59, and 60 so that we can better identify what you are referring to with respect to these Exhibits? Without more specificity, we are unable to identify what documents you are seeking to admit.

Please confirm that you will file an amended Pre-Trial Report to accurately reflect the stipulations reached. If you could also let us know as soon as possible whether you will stipulate to the authenticity/admissibility of the exhibits JM added to its list, specifically JM Exhibits 17, 18, 40, 44-51, 77, and 83-97, we would appreciate it.

Additionally, we inadvertently listed JM Exhibit 32 as "omitted" in our Pre-Hearing Statement, but did not mean to do so. JM Exhibit 32 is intended to be IDOT 318-319, which is also included on IDOT's list as IDOT Exhibit 4(E), to which JM stipulated. We assume you will also stipulate to the authenticity/admissibility of this exhibit as JM Exhibit 32. Please let us know if this is not the case or if you have any problem including IDOT 318-319 as JM Exhibit 32.

Lastly, we had previously requested that you provide page 25 of the IDOT 1971 Specifications. We have been doing housekeeping and it appears that page 61, not page 25, was produced as IDOT 2654. Can you please send us page 25 of the IDOT 1971 Specifications?

Thank you,
Lauren

 **Lauren Caisman**
Associate
lauren.caisman@bryancave.com T: +1 312 602 5079

From: Brice, Susan
Sent: Monday, May 16, 2016 4:51 PM
To: McGinley, Evan (emcginley@atg.state.il.us); Caisman, Lauren; O'Laughlin, Ellen
Subject: Stips

Evan: As I understood our conversation earlier, IDOT is willing to stipulate to the genuineness and admissibility of all of JM's exhibits on the prior list filed with the Board other than # 5, 31, 47, 54 and 55 (maybe). You are willing to stipulate to IDOT's 104(e) response with the exception of the statement attributed to Mr. Mapes. #46.

I am still going through your First Amended Exhibit List, but in order to save some time. I can tell you the following: we are likewise willing to stipulate to genuineness and admissibility of the documents on that First Amended Exhibit List with the exception of the following documents listed below. It is possible that we might change our mind on some of these over the next day or so. I just need to review them more carefully.

You mention the ELM 1999 reports several times and it is attached to various depositions. We will admit to its genuineness and admissibility except for certain statements made in the text of the report, including the statement Mr. Gobelman relies on in his Report.

4(H) because we cannot read it.

I cannot tell if all the documents in 9 and 10 have been produced. Please provide Bates numbers.

Please send a copy of #13. The Board regulations from 1973. They have not been produced and we do not currently have a copy.

#25

#26

#27

#29

#30

#36

#38

#50

#51

#52. It has never been produced.

While I think this is completely accurate, I reserve my right to change my mind after my final review. I will let you know tomorrow.

 **Susan Brice**
Partner

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Caisman, Lauren

From: Brice, Susan
Sent: Wednesday, May 18, 2016 11:18 AM
To: Caisman, Lauren; McGinley, Evan (emcginley@atg.state.il.us); O'Laughlin, Ellen; Dougherty, Matthew D. (Matthew.Dougherty@Illinois.gov)
Subject: RE: Stips

Evan: For purposes of absolute clarity, we are not stipulating to 56-60 at this point, with the exception of 58 for demonstrative purposes only. Thanks



Susan Brice

Partner

susan.brice@bryancave.com T: +1 312 602 5124

From: Caisman, Lauren
Sent: Wednesday, May 18, 2016 10:58 AM
To: McGinley, Evan (emcginley@atg.state.il.us); O'Laughlin, Ellen; Dougherty, Matthew D. (Matthew.Dougherty@Illinois.gov)
Cc: Brice, Susan
Subject: RE: Stips

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Thank you,
Lauren



Lauren Caisman

Associate

lauren.caisman@bryancave.com T: +1 312 602 5079

From: Brice, Susan
Sent: Monday, May 16, 2016 4:51 PM
To: McGinley, Evan (emcginley@atg.state.il.us); Caisman, Lauren; O'Laughlin, Ellen
Subject: Stips

Evan: As I understood our conversation earlier, IDOT is willing to stipulate to the genuineness and admissibility of all of JM's exhibits on the prior list filed with the Board other than # 5, 31, 47, 54 and 55 (maybe). You are willing to stipulate to IDOT's 104(e) response with the exception of the statement attributed to Mr. Mapes. #46.

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Susan Brice
Partner

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EXHIBIT C

Exhibits To Which JM Never Stipulated And That Are Included On IDOT's June 3 List of "Exhibits for Admission Into Evidence"

- 038
- 102* (at the time JM stipulated to this exhibit, JM believed this document had previously been produced during discovery, but subsequently discovered that it had not been when IDOT sent it to JM without bates numbers on June 9, 2016. JM had never seen the document before as it relates to the larger Superfund Site and not the Southwest Sites.)
- 123
- 124
- 125
- 133
- 142
- 143
- 158
- 159
- 160
- 162 (JM's objection already sustained)
- 163 (JM's objection already sustained)
- 164 (stipulated for demonstrative purposes only)
- 165
- 166
- 167 (JM objected at trial)
- 200
- 202 (JM objected at trial)

EXHIBIT D

Caisman, Lauren

From: Caisman, Lauren
Sent: Thursday, June 09, 2016 12:00 PM
To: 'McGinley, Evan'
Cc: O'Laughlin, Ellen; Dougherty, Matthew D. (Matthew.Dougherty@Illinois.gov); Brice, Susan
Subject: RE: Johns Manville v. IDOT, PCB 14-3: Stipulations as to Authenticity and Admissibility of Exhibits
Attachments: LC May 18 Email.pdf; SB May 18 Email.pdf

Evan,

Susan is out of the office today with a family issue. We plan to more fully address this issue in our brief in support of our trial objections, due today. Had you provided us with the list of exhibits IDOT wants admitted into evidence and this email earlier, we perhaps could have had a more meaningful discussion. However, since the day of hearing, we have attempted to discuss with you the exhibits IDOT wants admitted into evidence, but IDOT did not provide its list until it was filed on June 3.

Nevertheless, to address your email below, your prior understanding is incorrect. No, JM will not stipulate to the authenticity/admissibility of all of the exhibits included on your June 3 list.

Most notably, your email below patently ignores prior correspondence from May 18 (attached) in which we firmly indicated we would not stipulate to Former Exhibits 56-60, now Exhibits 162-166, which had not need even been produced at the time stipulations were discussed (and some of which have already been excluded at trial). Former Exhibit 52, now Exhibit 160, was stipulated to for demonstrative purposes only, but not as to authenticity/admissibility.

We also have the following issues with your "understanding" of the stipulations, email below, and June 3 exhibit list:

1. Former Exhibit 38 is still included on IDOT's June 3 list (as now Exhibit 133). We do not, and have never, have a stipulation on this exhibit.
2. There was no stipulation on Former Exhibit 50, now Exhibit 142. We do not, and have never, have a stipulation on this exhibit.
3. There was no stipulation on Former Exhibit 4H, now Exhibit 38. We do not, and have never, have a stipulation on this exhibit.
4. Former Exhibit 51, now Exhibits 143, 158, 159, were never stipulated to. We do not, and have never, have a stipulation on these exhibits.
5. Exhibits 200 and 202 were not produced until at trial, so we never stipulated to those and objected on the record at hearing. We do not, and have never, have a stipulation on these exhibits.

Lastly, it is unclear to us what you mean when you say "Exhibits 25-27 (now IDOT Exhibits 123-125) will not be used at hearing." Do you mean that you still intend to admit to these into evidence without accompanying witness testimony at trial? If so, JM objects. If you mean that IDOT will not ever seek to admit Exhibits 25-27 into evidence, your June 3 list should be revised and re-filed with these Exhibits removed.

JM will not stipulate to anything other than what was previously stipulated to, which was the admissibility and genuineness of certain, specified documents for foundation purposes only.



Lauren Caisman

Associate

lauren.caisman@bryancave.com T: +1 312 602 5079

From: McGinley, Evan [mailto:emcginley@atg.state.il.us]
Sent: Thursday, June 09, 2016 11:16 AM
To: Brice, Susan; Caisman, Lauren
Cc: O'Laughlin, Ellen; Dougherty, Matthew D. (Matthew.Dougherty@Illinois.gov)
Subject: Johns Manville v. IDOT, PCB 14-3: Stipulations as to Authenticity and Admissibility of Exhibits

Susan:

We wanted to follow up with you regarding the issue of Johns Manville agreeing to the genuineness and admissibility of IDOT's exhibits.

Prior to the start of hearing last month, it was our understanding that Johns Manville would stipulate to the genuineness and admissibility of all of IDOT's documents (as IDOT, in turn, agreed to stipulate to the documents that JM intended to seek to use at hearing). IDOT advised Johns Manville of certain documents that we would not stipulate to and, as noted in your May 17th email below, there were certain exhibits that you would not provide stipulations to regarding admissibility and authenticity. **(For the sake of clarity, IDOT reaffirms its prior stipulations regarding the authenticity and admissibility of certain Johns Manville exhibits.)**

Exhibits 25-27 (now IDOT Exhibits 123-125) will not be used at hearing and thus there is no need for Johns Manville to stipulate to the authenticity and admissibility of those documents. As for our original Exhibits 29, 30, 26, and 38, there is no corresponding exhibits in our June 3rd exhibit list and thus these do not need to be revised.

Former Exhibit 50 is now Exhibit 142.

We would appreciate it [Johns Manville](#) would confirm our prior understanding, based on your May 17th email, that Johns Manville will stipulate to the authenticity and admissibility of the documents listed on our revised June 3rd exhibit list. It is IDOT's belief that neither JM or IDOT could have any objections when the other party moves that an exhibit be admitted into evidence, as the authenticity and admissibility had previously been stipulated to by the other party.

Thank you for your attention to this matter.

Regards,

Evan J. McGinley
Assistant Attorney General
Environmental Bureau
69 West Washington Street, Suite 1800
Chicago, IL 60602
312.814.3153 (phone)

312.814.2347 (fax)

emcginley@atg.state.il.us

From: Brice, Susan [<mailto:Susan.Brice@bryancave.com>]
Sent: Monday, May 16, 2016 4:51 PM
To: McGinley, Evan; Caisman, Lauren; O'Laughlin, Ellen
Subject: Stips

Evan: As I understood our conversation earlier, IDOT is willing to stipulate to the genuineness and admissibility of all of JM's exhibits on the prior list filed with the Board other than # 5, 31, 47, 54 and 55 (maybe). You are willing to stipulate to IDOT's 104(e) response with the exception of the statement attributed to Mr. Mapes. #46.

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bcllp2016

Caisman, Lauren

From: Caisman, Lauren
Sent: Wednesday, May 18, 2016 10:58 AM
To: McGinley, Evan (emcginley@atg.state.il.us); O'Laughlin, Ellen; Dougherty, Matthew D. (Matthew.Dougherty@Illinois.gov)
Cc: Brice, Susan
Subject: RE: Stips

Evan,

We have had an opportunity to review IDOT's Pre-Trial Report. We do not believe that it accurately reflects the stipulations/exceptions to stipulations reached between the parties on May 16, as Susan summarizes in her email below. We request that IDOT amend its Pre-Trial Report to correct the following:

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Sent: Wednesday, May 18, 2016 11:18 AM
To: Caisman, Lauren; McGinley, Evan (emcginley@atg.state.il.us); O'Laughlin, Ellen; Dougherty, Matthew D. (Matthew.Dougherty@Illinois.gov)
Subject: RE: Stips

Evan: For purposes of absolute clarity, we are not stipulating to 56-60 at this point, with the exception of 58 for demonstrative purposes only. Thanks



Susan Brice

Partner

susan.brice@bryancave.com T: +1 312 602 5124

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Sent: Wednesday, May 18, 2016 10:58 AM
To: McGinley, Evan (emcginley@atg.state.il.us); O'Laughlin, Ellen; Dougherty, Matthew D. (Matthew.Dougherty@Illinois.gov)
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