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 9, 2016, I caused to be filed with the Clerk of the Pollution Control Board of the State of Illinois, *Complainant's Brief in Support of its Objections to IDOT's Use of Undisclosed Opinion Testimony and Bases* and *Complainant's Objections to IDOT's Use of Exhibits as Evidence Without Accompanying Witness Testimony*, 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 9, 2016

Respectfully submitted,

BRYAN CAVE LLP

Attorneys for Johns Manville

By: /s/ Lauren J. Caisman

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ILLINOIS DEPARTMENT OF TRANSPORTATION,	)	
	)	
Respondent.	)	

COMPLAINANT'S BRIEF IN SUPPORT OF ITS OBJECTIONS TO BAR IDOT'S USE OF UNDISCLOSED OPINION TESTIMONY AND BASES

Complainant JOHNS MANVILLE ("JM") hereby submits its Objections to Respondent ILLINOIS DEPARTMENT OF TRANSPORTATION'S ("IDOT") Use of Undisclosed Opinion Testimony and Bases as follows:

INTRODUCTION

During hearing of this matter on May 24 and 25, 2016, the testimony of IDOT's proffered expert in IDOT's construction practices in the 1970s, Steven Gobelman, represented a drastic departure from any of the opinions and bases for those opinions previously disclosed one year earlier in his Expert Rebuttal Report dated May 29, 2015 (Trial Exhibit 08) and from his testimony at deposition on July 10, 2015 (Trial Exhibit 04C). In fact, much of Mr. Gobelman's testimony at trial was brand new. JM objects to these new opinions and bases and moves that the opinions be excluded/stricken from evidence:

1) New Opinion: IDOT did not place fill material on Site 6 or in the embankment area that contains asbestos containing material ("ACM") as depicted in the construction drawings based upon three new sub-opinions that: 1) the embankment work ended at Station 7 along Greenwood; 2) a certain percentage of unsuitable material was not removed at certain locations based upon a review of certain construction drawings and a 1975 change order and 3) IDOT

would not have used other types of ACM, *e.g.*, roofing or insulation, as embankment material (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);

2) New Opinion: Trial Exhibit 052, which Mr. Gobelman admitted he did not see or rely upon prior to drafting his Expert Report (despite being produced months earlier) shows that the former JM parking lot was raised off the ground with fill material (Transcript of May 25: pp. 130:9-131:9);

3) Apparent New Opinion: Although unclear, it seems that Mr. Gobelman might be opining that ACM was initially buried on Sites 3 and 6 through utility work. (Transcript of May 25: pp. 200:14-203:17). Mr. Gobelman was adamant in his deposition that he was not offering any opinions on how the ACM initially became buried, but only that utility work might have disturbed or possible buried deeper the ACM that had been previously buried. (*See* Trial Exhibit 04C at pp. 66:6-67:9; 175:13-18);

4) New Basis for Opinion: That Mr. Gobelman stereoscopically reviewed aerial photographs in forming his opinions (Transcript of May 25: pp. 121:4-131:22 (testimony elicited, in part, within offer of proof); 188:4-198:12). The use of this technique was never disclosed in Mr. Gobelman's Expert Report Trial Exhibit 08) or deposition (Trial Exhibit 04C).

In addition to these new opinions discussed herein, IDOT also attempted to elicit undisclosed opinion testimony from Mr. Gobelman through use of two demonstrative figures (Trial Exhibits 164 and 202). (*See* Transcript of May 25: pp. 97:10-99:12; 145:6-164:8; 171:14-180:6; 200:10-201:4; 202:20-203:17; 264:19-268:10.) Though JM initially agreed that Trial Exhibit 164 could be used for demonstrative purposes only, JM did not know that Trial Exhibit 164 was intended to be used to craft a number of entirely new opinions until Mr. Gobelman stated them on the stand. (*See* Transcript of May 25: pp. 145:6-146:6.) And, though the Hearing Officer had stated that demonstrative figures were due on the day of trial, IDOT did not produce the *amended* Trial Exhibit 164 or Trial Exhibit 202, until mid-way through the direct examination of Mr. Gobelman on May 25, 2016 (the last day of hearing). In contrast, despite not having been required to do so, JM produced a figure created by Mr. Dorgan, JM's expert, before discovery even closed and weeks before trial of this matter (Trial Exhibit 084). IDOT did not

object to its production or its use as evidence at any point in these proceedings, including when JM introduced it during hearing.[1] (*See* Transcript of May 23: pp. 216:23-221:20.) Thus, to the extent there could have been any valid objection, which JM denies, it has been waived.

Unlike Mr. Gobelman's demonstrative figures (Trial Exhibits 164 and 202), Mr. Dorgan's Figure (Trial Exhibit 084) supports the opinion Mr. Dorgan offered in both his Initial Expert Report and his Rebuttal Report that IDOT buried ACM within the zone of fill material on Site 6 and northern portion of Site 3. Perhaps more importantly, all that Trial Exhibit 084 does is zoom in on the visual ACM noted in Figures 3 and 5 of Mr. Dorgan's Initial Report above the fill line *already* depicted in Figure 5. IDOT does not appear dispute this. Mr. Gobelman admits that he based his demonstrative Trial Exhibits 164 and 202 on Mr. Dorgan's Figures contained in his Reports. (*See* Transcript of May 25: pp. 148:19-149:4; 172:1-19). Further, in describing Figure 5 in his Initial Expert Report, Mr. Dorgan opined:

> 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. This is demonstrated most clearly on Figures 4 and 5, which demonstrates 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."

(Trial Ex. 06-17.)

Even though Mr. Gobelman said nothing about Mr. Dorgan's Figures, including Figures 3 and 5, in his Expert Rebuttal Report, he was still asked about them at his deposition. Mr. Gobelman stated: "I believe the figures were accurate in what he was presenting." (Trial Exhibit 04C at p. 44:9.) Later, Mr. Gobelman agreed that Figure 5 showed that ACM was found "within

[1]Further, while Mr. Dorgan did also produce a correction of his figure contained in Trial Exhibit 06-27 at trial, unlike Mr. Gobelman's testimony regarding Trial Exhibits 164 and 202, Mr. Dorgan's testimony and the information depicted in his demonstrative, amended Trial Exhibit 06-27, did not contain or represent any new opinions being offered by Mr. Dorgan. (*See* Transcript of May 23: p. 203:3-10.)

the area that was filled by IDOT's contractor," the area "between the unsuitable material and the final grade line." (*Id.* at p. 187:2-9.) Now, Mr. Gobelman is saying the exact opposite through a new opinion on the stand. This is exactly the type of unfair surprise the rules are supposed to prevent. Nowhere in his Expert Rebuttal Report did Mr. Gobelman reserve the right to supplement or modify his opinions or the bases therefor. Even if he had, however, trial is not the appropriate place to do so. To overrule JM's objections and permit this evidence would run afoul of well-established Illinois law.

ARGUMENT

"If an opinion is important to a case, it and the basis for it must be disclosed prior to trial." *Boehm v. Ramey*, 329 Ill. App. 3d 357, 363 (4th Dist. 2002). Because it is so vital that opinions be disclosed prior to trial, no exceptions to Illinois Supreme Court Rule 213, governing expert disclosures, are recognized. *Id.* As such, "[t]he information disclosed in answer to a Rule 213(f) interrogatory, or in a discovery deposition, limits the testimony that can be given by a witness on direct examination at trial." Illinois Supreme Court Rule 213(g).[2] In fact, it is an abuse of discretion "to allow parties to present opinions at trial without having disclosed those opinions in response to Rule 213(g) interrogatories." *Boehm*, 329 Ill. App. 3d at 363 (remanding for new trial where expert opined on subjects not disclosed); *Warrender v. Millsop*, 304 Ill. App. 3d 260 (2d Dist. 1999) (reversing and remanding for new trial where trial court abused its discretion in failing to exclude expert testimony that had not been timely disclosed).

Under these well-established rules and principles, the trial testimony given by Mr. Gobelman in support of IDOT should necessarily be limited to that which has already been disclosed in his Expert Rebuttal Report (essentially, an answer to a Rule 213(f) interrogatory)

[2]In contrast to IDOT's objection response at trial, compliance with Rule 213 is not dependent on what questions are asked in a discovery deposition. Rather, it is IDOT's onus to comply with the spirit of the Rule by being forthcoming in its expert disclosures.

and in his deposition. Mr. Gobelman's testimony on direct examination at trial, however, went far beyond the disclosures made by IDOT. For a controlled expert witness like Mr. Gobelman, IDOT was required to identify: "(i) the subject matter on which the witness will testify; (ii) the conclusions and opinions of the witness and the bases therefor; (iii) the qualifications of the witness; and (iv) any reports prepared by the witness about the case." Illinois Supreme Court Rule 213(f)(3) (emphasis added). Further, IDOT had a continuing duty to "seasonably supplement or amend any prior answer or response whenever new or additional information" became known to IDOT. Illinois Supreme Court Rule 213(i). IDOT never did. IDOT has failed to comport with these Illinois Rules and should not be permitted to evade them by eliciting undisclosed opinions, and the bases therefor, from its controlled expert witness.

These "supreme court rules on discovery are also *mandatory* rules of procedures that courts and counsel must follow." *Dep't of Transp. v. Crull*, 294 Ill. App. 3d 531, 537 (4th Dist. 1998) (emphasis in original) (agreeing with IDOT and rejecting argument that it was proper to include new opinion testimony where the expert was never asked about the expert's basis for his opinions at deposition). Rule 213's standard for disclosure are exacting (*see id*. at 538-539) because "[d]iscovery rules permit litigants to ascertain and rely upon opinions of experts retained by their adversaries . . . The committee comments to Rule 213 plainly state that one of the purposes of Rule 213 is to avoid surprise. To allow either side to ignore Rule 213's plain language defeats its purposes and encourages tactical gamesmanship." *Id*. at 537 (internal citations omitted); *see also Coleman v. Abella*, 322 Ill. App. 3d 792, 799 (1st Dist. 2002). This is precisely what IDOT attempted to do at trial in having Mr. Gobelman testify regarding the new, never-before-disclosed opinions and new, never-before-disclosed, bases for his opinions enumerated above. Not only is eliciting such testimony without prior disclosure prejudicial, but

also it is sanctionable. *See* Illinois Supreme Court Rule 219 (providing for sanctions for failure to comply with discovery, including barring a party from maintaining any particular defense, barring a witness from testifying, and striking a party's pleadings relating to that issue); *Sullivan v. Edward Hosp.*, 209 Ill. 2d 100, 110 ("Where a party fails to comply with the provisions of Rule 213, a court should not hesitate sanctioning the party, as Rule 213 demands strict compliance." (internal quotations omitted)); 35 Ill. Admin. Code 101.800; 35 Ill. Admin. Code 101.802.

Mr. Gobelman's opinions at trial exceeded the "fair scope of facts known and opinions disclosed before trial" and extended well past logical corollaries to the previously disclosed opinions contained in his Expert Rebuttal Report (Trial Exhibit 08). As such, the testimony should be barred. *See Sullivan*, 209 Ill. 2d at 110-111 (affirming striking of portion of expert testimony); *Seef v. Ingalls Mem. Hosp.*, 311 Ill. App. 3d 7, 23-24 (1st Dist. 1999) (reversing allowance of undisclosed opinion testimony); *Coleman*, 322 Ill. App. 3d 792 at 798, 800 (finding that striking of expert testimony in its entirety was too drastic a discovery sanctions, but finding that court could have limited the testimony to those matters disclosed); *Wilbourn v. Cavalenes*, 398 Ill. App. 3d 837, 849-852 (1st Dist. 2010) (holding trial court properly struck portion of expert's testimony where basis for opinion was not disclosed as required by evidentiary rules).

IDOT has previously argued against the exact practices in which it now engages. In *Crull*, IDOT argued (successfully) that the opposing party should not be permitted to elicit testimony that had not been disclosed prior to trial and were contained nowhere in the expert's report or deposition. *See* 294 Ill. App. 3d at 534 (reversing trial court's decision to overrule IDOT's objection to new opinion testimony). IDOT should not be permitted to reverse course now. To hold otherwise would severely prejudice JM, who has not had the opportunity to

investigate Mr. Gobelman's novel assertions, particularly when the effect of the admissions of these numerous, undisclosed opinions would be cumulative. *See Seef*, 311 App. 3d at 24 (finding that the cumulative effect of the erroneous admission of undisclosed opinions mandated reversal and remand for new trial). Therefore, pursuant to both the plain language and the spirit of Illinois Supreme Court Rule 213, Mr. Gobelman's new opinions and bases should be barred or stricken.

CONCLUSION

WHEREFORE, Complainant JOHNS MANVILLE respectfully requests that the Hearing Officer sustain its objections and further strike any testimony elicited[3] regarding previously undisclosed expert opinion testimony and of previously undisclosed bases for expert opinion testimony.

Dated: June 9, 2016

Respectfully submitted,

BRYAN CAVE LLP

Attorneys for Complainant Johns Manville

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[3]Attached hereto as **Exhibit 1** is a list of the transcript cites/testimony from the hearing that JM seeks to have excluded from the record and that JM moves to strike.

EXHIBIT 1

May 24 Transcript Cites JM Seeks To Have Excluded/Stricken

- Pages 299:10-300:22

May 25 Transcript Cites JM Seeks To Have Excluded/Stricken

- Pages 97:10-99:12
- Pages 101:10-120:19
- Pages 121:4-131:22
- Pages 145:6-164:8
- Pages 168:19-180:18
- Page 183:5-20
- Pages 185:9-186:7
- Pages 188:4-198:12
- Pages 200:10-203:17
- Page 254:5-9
- Pages 264:19-268:10

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ILLINOIS DEPARTMENT OF TRANSPORTATION,	)	
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COMPLAINANT'S OBJECTIONS TO IDOT'S USE OF EXHIBITS AS EVIDENCE WITHOUT ACCOMPANYING WITNESS TESTIMONY

Complainant JOHNS MANVILLE ("JM") hereby submits its Objections to IDOT's Use of Exhibits as Evidence Without Accompanying Witness Testimony.[4]

INTRODUCTION

During the hearing on this matter and in the middle of IDOT's presentation of evidence to defend against JM's claims and to purportedly prove some of its affirmative defenses, IDOT announced for the first time that it plans to move certain exhibits into evidence without any accompanying witness testimony. (*See* Transcript of May 25: pp. 276:12-277:6; 280:6-282:5.) IDOT argued that JM stipulated to the exhibits for purposes of authenticity and admissibility and thus no presentation of evidence is necessary at the hearing regarding these exhibits. IDOT apparently wants to use the exhibits in post hearing briefs to support its case without: 1) allowing JM the ability to know how the exhibit will be interpreted and presented to the Board; 2) without allowing JM to know which fact the exhibit will be used to prove or disprove; and 3) without

[4]Attached hereto as **Exhibit 2** is a list of the exhibits, the introduction of which JM objects to without accompanying witness testimony.

allowing JM to cross examine the evidence or offer evidence in rebuttal. This unorthodox use of exhibits was not stated in its pre-hearing report or otherwise raised beforehand and flies in the face of established rules of civil procedure and evidence. JM objects on three fundamental grounds: (1) the stipulation agreed to was the admissibility "for foundation purposes" only; (2) IDOT's proposed use of the exhibits would severely prejudice JM, would violate JM's due process rights and is not permitted under Illinois law; and (3) new evidence is not permitted in closing and/or post hearing briefs.

1. **The Stipulation Was Limited to Foundation**

First, as IDOT well knows, the intent of the stipulation was for foundation purposes only. As set forth in the email communication attached hereto as **Exhibit 3**, because of the voluminous records in this case, JM wanted to streamline the hearing and suggested that the parties stipulate to the "admissibility for foundation purposes" of certain exhibits. IDOT ultimately agreed. When the stipulations were included in JM's pre-hearing report, this was not specifically stated as JM believed it was implicit and understood by the parties. However, JM stated that it stipulated to the "genuineness and admissibility" of certain exhibits. According to Black's Law Dictionary, "admissible" means "*[c]apable* of being legally admitted; allowable; permissible; *[w]orthy* of gaining entry of being admitted." BLACK'S LAW DICTIONARY 52 (9th ed. 2009) (emphasis added). Agreeing that a document is capable of being admitted because it is genuine and meets the parameters of the hearsay exceptions (without needing to call records custodians for foundational purposes) is very different from agreeing that a document is actually admitted as evidence or as the truth itself, let alone admitted without any context.

When IDOT filed its pretrial report late and after JM's pre-trial report, it likewise stated only that JM had "stipulate[d] to the authenticity and admissibility" of documents on IDOT's

exhibit list, with certain exceptions. (*See* § II.a.) Neither the pretrial report filed by IDOT nor the one filed by JM stipulated that exhibits on the parties' respective lists would be "admitted" as evidence of or the truth of some fact. If the parties had stipulated to facts, those would have been in the pre-hearing reports. They are not.

During the hearing, the parties identified for the Hearing Officer the documents "stipulated to" as the matter proceeded. This procedure then allowed the parties to avoid having to call various witnesses to lay the foundation for all of the documents. This was the reason for the stipulation, as understood by all parties. It was never JM's intent to agree that IDOT would not have to use witnesses to introduce the exhibits and tie them to the facts in the case. This would make no sense and is not consistent with common practice and the law.

2. <u>IDOT's Approach Would Violate Illinois Law and Prejudice JM</u>

Administrative as well as judicial proceedings are governed by the fundamental principles and requirements of due process of law. *Scott v. Dep't of Commerce & Cmty. Affairs*, 84 Ill. 2d 42, 53 (Ill. 1981); *Brown v. Air Pollution Control Bd.*, 37 Ill. 2d 450, 454, (Ill. 1967). The Illinois Administrative Procedure Act, which applies to this case, ensures this due process when it provides:

> (a) The rules of evidence and privilege as applied in civil cases in the circuit courts of this State shall be followed. . . . Subject to these requirements, when a hearing will be expedited and the interests of the parties will not be prejudiced, any part of the evidence may be received in written form.
>
> (b) Subject to the evidentiary requirements of subsection (a) of this Section, a party may conduct cross-examination required for a full and fair disclosure of the facts.

5 ILCS 100/10-40(a)(b); *see also* 35 Ill. Adm. Code 101.626.

The Illinois Supreme Court has interpreted 5 ILCS 100/10-40(b) to require that there be witnesses and testimony presented to support the facts being offered at hearing. *Scott v. Dep't of*

Commerce & Cmty. Affairs, 84 Ill. 2d 42, 53 (Ill. 1981) (court finding that agency was required to call witnesses, who could then be cross-examined, to support allegations at hearing). In *Scott*, the Illinois Supreme Court stated that "implicit in the provision for cross-examination [set forth in 5 ILCS 100/1-40(b)] is the requirement that there be witnesses and testimony presented by the agency, for otherwise the right of cross-examination is meaningless."

The Pollution Control Board Rules, which address written *testimony*, are consistent. Rule 35 Ill. Adm. Code 101.626 provides that "[w]ritten testimony may be introduced by a party in a hearing only if provided to all other parties of record prior to the date of the hearing and only after the opposing parties have had an opportunity to object to the written testimony and to obtain a ruling on the objections prior to its introduction. Written testimony may be introduced by a party only if the persons whose written testimony is introduced *are available for cross-examination at hearing*." (emphasis added).

On June 3, 2016, IDOT filed a list of "Hearing Exhibits for admission into Evidence (Revised 6-3-16)." However, the following exhibits from that list, although stipulated to for "admissibility" foundation purposes only by JM, have not been introduced at trial by either party to date: 022, 023, 024, 025, 026, 027, 028, 030, 032, 036, 039, 044, 051, 062, 078, 080, 081, 086, 092, 093, 095, 102, 104, 105, 106, 108, 109, 110, 113, 114, 115, 116, 117, 118, 119, 120, 129, 132, 134, 139, 140 and 161. Notably, from this list, it appears that Exhibit 102 was never produced and is mislabeled on the IDOT Hearing Exhibit List as former Exhibit 21. Former Exhibit 21 is something entirely different.[5] IDOT's list also contains a number of exhibits to which JM did not stipulate in any fashion: 038, 123, 124, 125, 133, 142, 143, 158, 159, 160, 162, 163, 164, 165, 166 (stipulated for demonstrative purposes only), 200 and 202 (JM objected). To the extent these exhibits were contained in another exhibit, there is also no stipulation. As such,

[5] JM had previously asked IDOT to provide Bates Stamps for all of its Exhibits, but IDOT refused to do so.

JM objects to the admission of these exhibits without witness testimony, and for additional evidentiary reasons. Further, the Hearing Officer has already sustained JM's objection to the admission of Exhibits 162 and 163 into evidence (*see* Transcript of May 24: p. 180:12-17) and so their appearance on IDOT's list of "Hearing Exhibits for admission into Evidence" is highly improper. (*See* Transcript of May 23: pp. 7:10-13:22; Transcript of May 24: pp. 174:18-180:17.)

JM objects to the extent that IDOT seeks the admission of these exhibits into evidence without any accompanying witness testimony during the remainder of trial, including post hearing briefs. IDOT represented that it wants to use these exhibits to prove up its case-in-chief, its affirmative defenses and possibly other defenses. But without testimony about the exhibits, JM will have no idea how IDOT interprets a particular exhibit (including whether that interpretation is correct or otherwise factually supported), let alone which exhibits IDOT believes supports its various affirmative defenses. The rule is clear that JM is entitled a "full and fair disclosure of the facts" at hearing and that cross examination provides for this. *See* 5 ILCS 100/10-40(b). JM cannot cross examine IDOT on or present rebuttal evidence regarding exhibits without a witness and without knowing how IDOT believes the exhibits fit into the case. IDOT basically wants JM to try the case blind. It would be fundamentally unfair and highly prejudicial to allow IDOT to proceed in this fashion.

In addition to the right of cross examination, Illinois law also requires that party to an administrative hearing be allowed to offer evidence in rebuttal. *N. Shore Sanitary Dist. v. Pollution Control Bd.*, 2 Ill. App. 3d 797, 801 (2d Dist. 1972) ("The rationale for restricting findings to evidence in the record is that due process of law requires that all parties have an opportunity to cross-examine witnesses and to offer evidence in rebuttal"); *Hazelton v. Zoning Bd. of Appeals of City of Hickory Hills, Cook County,* 48 Ill. App. 3d 348, 351 (1st Dist. 1977)

("Findings must be based on evidence introduced in the case, and nothing can be treated as evidence which is not introduced as such. . . . The rationale for restricting findings to evidence produced at the hearing is that due process of law requires that all parties have an opportunity to cross-examine witnesses and to offer evidence in rebuttal.). IDOT must be required to introduce the exhibits it believes support its case through a witness during the hearing. Otherwise, JM's due process rights would be violated. *See Environmental Protection Agency v. Marblehead Lime Co*, PCB No. 73-223, 1974 WL 5748, *4 (Oct. 10, 1974) (finding that respondent's due process rights "were not infringed upon" when the agency used photographs and other physical evidence because, in part, "cross examination was allowed on all such evidence.").

For example, IDOT has alleged many affirmative defenses, including unclean hands and laches. JM has no idea at this point how IDOT intends to establish these defenses, or many of its other affirmative defenses. IDOT is suggesting that these defenses will be established without testimony. Thus, as to these affirmative defenses, it is as if IDOT just showed up, moved these exhibits into evidence and rested. Such a strategy is not permitted under Illinois law. *Scott*, 84 Ill. 2d at 53. As stated by the Illinois Supreme Court, a "decision pursuant to an administrative hearing must be based *upon testimony* and other evidence received at the hearing." *Metro. Sanitary Dist. v. Pollution Control Bd.*, 62 Ill. 2d 38, 43(1975) (emphasis added). JM must know what the evidence allegedly supports in order to cross examine IDOT and offer rebuttal testimony. This case cannot be tried in a vacuum.

IDOT intends to take a similar strategy with the Expert Report of Keith Stoddard. It wants to use his written report without allowing JM to cross examine him. (*See* Transcript of May 25: p. 280:6-10 (IDOT stating that we can just have his "expert disclosure moved in").) JM introduced his Expert Report in its case-in-chief in order to rebut Mr. Stoddard, who was on

IDOT's Witness List. IDOT's need for Mr. Stoddard's expert testimony was the entire reason the trial was postponed and JM was required to endure three months of additional and expensive expert and related discovery. Now IDOT does not want to call Mr. Stoddard and instead wants to just use his disclosure, which is "night and day" from his deposition. (*Id*. at pp. 280:2-282:16.) This prejudice to JM in not being allowed to cross Mr. Stoddard is significant and alarming. But as stated in the Pollution Control Board Rules, written testimony cannot be used at hearing unless the "persons whose written testimony is introduced *are available for cross-examination at hearing.*" 35 Ill. Adm. Code 101.626 (emphasis added).

3. <u>New Evidence Cannot be Used in Closing/Post Hearing Briefs</u>

The Pollution Control Board Rules state that the Hearing Officer can require post-hearing submissions. 35 Ill. Adm. Code 101.612. But exactly how this process fits into the hearing does not appear to be set forth in the rules. However, JM understands that post-hearing briefs can be submitted in lieu of oral closing argument. Here, IDOT wants to argue in closing argument/post-hearing briefing about documents that were never discussed as evidence. This is not allowed. It is well-established that "[c]omments on the evidence during closing argument are proper only if proven by direct evidence or if based on a reasonable inference from the facts." *Copeland v. Stebco Products Corp*., 316 Ill. App. 3d 932, 947-948 (1st Dist. 2000) (holding that remarks during closing argument that were not based on evidence introduced at trial or reasonable inferences from the evidence were improper).

For the reasons stated above, JM requests that the Hearing Officer order IDOT to introduce any exhibits it intends to rely upon in this case at trial and through 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. This approach will also help the Board streamline its review of this case.

Dated: June 9, 2016

Respectfully submitted,

BRYAN CAVE LLP

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EXHIBIT 2

Exhibits To Which JM Objects

- 022
- 023
- 024
- 025
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- 036
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- 139
- 140
- 142
- 143
- 158
- 159
- 160
- 161
- 162 (JM's objection already sustained)
- 163 (JM's objection already sustained)
- 164
- 165
- 166
- 167
- 200
- 202

EXHIBIT 3

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

BRYAN CAVE
Susan Brice
Partner
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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
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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

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.

BRYAN CAVE **Susan Brice**
Partner

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