

MATTHEW J. DOUGHERTY
Assistant Chief Counsel
Illinois Department of Transportation
Office of the Chief Counsel, Room 313
2300 South Dirksen Parkway
Springfield, Illinois 62764
(217) 785-7524
Matthew.Dougherty@Illinois.gov

CERTIFICATE OF SERVICE

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

I, EVAN J. MCGINLEY, do hereby certify that, today, June 9, 2016, I caused to be served on the individuals listed below, by electronic mail, a true and correct copy of "Respondent's Brief Regarding JM'S Objections to the Expert Testimony of IDOT Witness Steven Gobelman".

Bradley Halloran
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph, Suite 11-500
Chicago, Illinois 60601
Brad.Halloran@illinois.gov

John Therriault
Clerk of the Pollution Control Board
James R. Thompson Center
100 West Randolph, Suite 11-500
Chicago, Illinois 60601
john.therriault@illinois.gov

Susan Brice
Lauren Caisman
Bryan Cave LLP
161 North Clark Street, Suite 4300
Chicago, Illinois 60601
Susan.Brice@bryancave.com
Lauren.Caisman@bryancave.com


Evan J. McGinley

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

JOHNS MANVILLE, a Delaware corporation,)	
Complainant,)	
)	
v.)	PCB No. 14-3
)	(Citizen Suit)
ILLINOIS DEPARTMENT OF)	
TRANSPORTATION,)	
)	
Respondent.)	

**RESPONDENT’S BRIEF REGARDING JM’S OBJECTIONS TO
THE EXPERT TESTIMONY OF IDOT
WITNESS STEVEN GOBELMAN**

NOW COMES RESPONDENT, the Illinois Department of Transportation (“IDOT”), through its attorney LISA MADIGAN, Attorney General of the State of Illinois, which files this brief as directed by the Hearing Officer during the hearing on May 25, 2016 and by Order of June 1, 2016. JOHNS MANVILLE (“JM”) objected to IDOT expert witness Steven Gobelman testifying as to the fill material of the embankment of Greenwood Avenue, part of which includes Site 6 and the use of stereoscopic analysis of aerial photographs. Finally, this brief addresses the parties’ stipulations on the authenticity and admissibility of hearing exhibits.

I. Site 6 and the embankment to Greenwood Avenue.

Mr. Gobelman should be allowed to testify and give his opinion regarding the embankment to Greenwood Avenue and the fill of Site 6 because contrary to JM’s objections during hearing, Gobelman did disclose his opinions regarding this subject. First, his expert report, The Expert Rebuttal Report of Steven L. Gobelman, (“Gobelman Report”) addresses the embankment and fill of Greenwood Avenue. Second, he was questioned during his deposition of July 10, 2015 about the Greenwood Avenue embankment, Site 6 and the fill material. Third, Mr. Gobelman’s testimony responds to incorrect and misleading testimony provided by Mr. Dorgan

is his direct testimony regarding fill allegedly placed by IDOT and is consistent with his already disclosed opinions. Finally, if the Board believes this testimony lies outside of Gobelman's explicit opinions of his Report, which IDOT believes it does not, Illinois law provides that "a witness may elaborate on a properly disclosed opinion." *Wilbourn v. Cavalnes*, 398 Ill.App.3d 837, 849 (1st Dist. 2010) (citing *Becht v. Paca*, 317 IllApp.3d 1026, 1037). As the *Wilbourn* court noted, "[t]he fact that trial testimony is more precise than the opinion as originally disclosed does not necessarily result in a violation." *Id.* (Internal citations omitted.) Further, it is appropriate for an expert witness to testify at trial and to provide logical corollaries and elaborations on their original opinions and statements. *Id.* at 850.

The suggestion that Mr. Gobelman did not opine about the embankment of Greenwood Avenue or Site 6 is entirely ridiculous and a desperate attempt to prevent IDOT from explaining what would have happened in the building of the embankment and defending itself.

1. Contrary to JM's position during the hearing, the Gobelman Report includes multiple references regarding Site 6 and the embankment to Greenwood Avenue, including the following, (emphasis in bold is added):

- The Report states it is about **Sites 3 and 6**, (p.1, first sentence).
- Gobelman states he reviewed records in bibliography and historical records available regarding **Sites 3 and 6**. (p.1, second sentence).
- Report discussed unsuitable material and use in an **embankment** when discussing the background Information regarding the construction project and the Standard Specifications for Road and Bridge Construction, (e.g. p.3, third paragraph, and p. 4, first paragraph.) This would apply to Site 6.
- Gobelman's opinion is, "The Department did not use, spread, bury, place and dispose of ACM regarding site 3 and **6**, ..." (p. 8, heading 8, first sentence), and "There was no record showing that the Department dictated the use, spread, placement, and disposable of ACM on Site 3 and **Site 6**..." (p. 8, heading 8, second sentence). Report includes references to Greenwood Avenue, which is where Site 6 is located. (p.9, heading 8, end of 1st paragraph.)

- Report discusses that “fly ash was being used as the borrow material in the **embankments**”, which pertains to the building of the embankment on Site 6. (p.10-11.)
- “Prior to building the **embankment on Greenwood Avenue**... No material from Site 3 could have been used in the **embankment for Greenwood Avenue** of Sand Street because the roads are still open at the time the detours are completed and there was no embankments being built at this time...No material from the closure of the detour road could have been used as part of the **embankment** because the **embankments** were all completed. (p. 11, heading 12, second paragraph.)
- A section of the Report discusses “USEPA Remedy of **South Side of Greenwood Avenue**”, which would be Site 6, (p.13, heading 14). “Based on the sequencing... the Contractor would not have placed any asbestos containing materials into **Site 6** from Site 3.” (p. 13, heading 14, first sentence.) “Similar to Site 3, **Site 6**’s potential receptors include utility workers...” (p. 13, heading 14, middle of second paragraph.)

2. Second, Mr. Gobelman was also questioned extensively regarding his opinions and issues related to Site 6 during his deposition of July 10, 2015. See Exhibit A, attached hereto citing numerous references in the deposition transcript to Site 6 and the embankment.

Moreover, Mr. Gobelman was also questioned about the “As Built” plans during his deposition, See Exhibit A, which provide a basis for his opinions regarding fill to the embankment of Greenwood Avenue. Also, the plans are listed in the bibliography of documents cited in the Gobelman Report.

3. Third, on May 9, 2016, almost 14 months after JM served IDOT with the report of its expert, Douglas Dorgan (JM Exhibit 6), and approximately nine and a half months after JM produced Mr. Dorgan’s rebuttal report to IDOT (JM Exhibit 16), JM, for the first time, produced demonstrative figures(JM 7201-7210) to IDOT. These demonstrative figures displayed soil boring cross sections prepared by Mr. Dorgan. For the hearing, these figures were marked as Exhibit 84.

The figures contain misleading characterizations as to the nature of fill material and erroneously suggest that all the fill in the embankment on Greenwood Avenue came from the

building of the Amstutz project and would have been provided by IDOT. Neither of Dorgan's reports contained any discussion or demonstrated how much fill was placed by IDOT. Instead, his reports merely referenced soil boring results from post-construction site investigation work and asserted that fill was needed for the embankment. But most importantly, Dorgan's reports did not include the demonstrative figures provided on May 9, 2016

During the first day of hearing, on May 23, 2016, Mr. Dorgan testified about the soil borings, the cross sections and the alleged nature of the fill during his direct testimony. May 23 2016 transcript, pages 217 to 223. And, for the first time in his direct testimony, Dorgan testified about the baseline of fill allegedly provided by IDOT's contractor. See May 23, 2016 transcript, pages 217 to 220. The fill line is displayed incorrectly and misleadingly on these figures as IDOT fill when the record shows that all the so called fill material in the demonstrative would not have been placed by IDOT in the Amstutz project. As the Second District of the Appellate Court of Illinois noted in dicta in the case of *People v. Rodriguez*, 313 Ill.App.3d 877, 885 (2000), "the parties in a criminal or civil trial [are entitled to] a fair opportunity to present their case." The principle articulated by the *Rodriguez* court requires that the Board allow IDOT the opportunity to respond to the newly developed information and characterizations contained in Mr. Dorgan's recently created demonstrative figures. To hold otherwise would be to deny IDOT the requisite "fair opportunity".

Gobelman discussed Site 6 fill as well as the "As built" drawings in his report and deposition testimony. He further explains the cross section sampling demonstrative and shows what would have been fill added by IDOT's contractor. Gobelman's testimony regarding fill has been disclosed in his Report and he was questioned about them by Johns Mansville's counsel during his July 10, 2015 deposition. He should be allowed to explain a new demonstrative

provided by JM. His testimony is entirely consistent with opinions he has provided in this matter, and that IDOT or its contractor would not have placed Transite pipe in fill material to the embankment of Greenwood Avenue. He should not be prevented from providing his opinions.

II. Aerial photos

JM objected to IDOT witness Steven Gobelman testifying about examining photos in stereoscopic analysis of aerial photographs.

First, analyzing photos in stereoscopic analysis of aerial photography is a common technique utilized by professionals in the field. Second, aerial photographs are listed in the bibliography of documents cited in the Gobelman Report. Moreover, IDOT produced these images in stereo – there were two images produced for a particular date, which obviously allows for stereoscopic analysis. Third, Gobelman was asked extensively about the aerial photos in his deposition. See Exhibit A, attached hereto.

While we cannot account for an oversight by JM's counsel regarding stereoscopic analysis, because it should have been obvious, JM's oversight should not prevent a qualified expert from using his expertise. That would render these proceedings absurd.

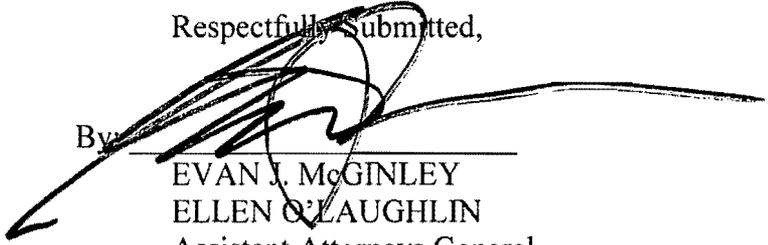
JM witness Mr. Dorgan testified that he saw piles in an aerial photo. Mr. Gobelman should be allowed to testify as to how he, the professional, also views the Aerial photos.

III. Authenticity and Admissibility of Exhibits

JM has flipped its position regarding the authenticity and admissibility of exhibits. It had previously so stipulated to both the authenticity and the admissibility to the majority of IDOT's exhibits. It has now backtracked on that position, but should not be allowed to do so. See email correspondence attached as Exhibit B. For those exhibits for which JM had provided stipulations as to the authenticity and admissibility, IDOT must be allowed to move those exhibits into the

Record of this matter and provide citations in post hearing briefing. To allow otherwise would, again, render these proceedings absurd and unnecessarily prolong the matter.

Respectfully Submitted,

By 

EVAN J. MCGINLEY
ELLEN O'LAUGHLIN
Assistant Attorneys General
Environmental Bureau
69 W. Washington, 18th Floor
Chicago, Illinois 60602
(312) 814-3153
emcginley@atg.state.il.us
eolaughlin@atg.state.il.us
mccaccio@atg.state.il.us

MATTHEW J. DOUGHERTY
Assistant Chief Counsel
Illinois Department of Transportation
Office of the Chief Counsel, Room 313
2300 South Dirksen Parkway
Springfield, Illinois 62764
(217) 785-7524
Matthew.Dougherty@Illinois.gov

EXHIBIT A

Steven L. Gobelman Deposition, July 10, 2015

1. Testimony regarding Aerial Photos and topographical maps:
 - Pg. 191:2-192:6
 - Pg. 197:7 - 205:12 (describes the 1967 photo being more wet than the 1970), (“reviewed aerial photographs for a very, very long time.” pg. 200:16-17), (notes changes in photos regarding the parking lot)

2. Testimony regarding Site 6 (JM counsel uses Site 3 and 6 in numerous questions):
 - Pg. 11:13- 12:10
 - Pg. 13:10-14:19
 - Pg. 23:16-29:13
 - Pg. 33:17-24
 - Pg. 39:14-41:7
 - Pg. 63:3-70:15
 - Pg. 99:22-102:14
 - Pg. 176:6-177:15
 - Pg. 180:5-23
 - Pg. 195:18-197:6
 - Pg. 205:14-209:8
 - Pg. 236:1-237:5

3. Testimony regarding Embankment:
 - Pg. 72:9-78:1
 - Pg. 81:7-84:14
 - Pg. 84:15-87:24
 - Pg. 108:4-116:4
 - Pg. 117:11-118:7 (including stations of Greenwood Avenue and fill for embankment)
 - Pg. 118:8-122:11
 - Pg. 124:7-126:3
 - Pg. 129:1-130:9
 - Pg. 133:4-140:1 (including stations, pg. 136:2 to 138:2)
 - Pg. 141:22-150:8
 - Pg. 180:11-23
 - Pg. 183:8-187:16
 - Pg. 211:10-213:23
 - Pg. 235:19-237:5

4. Testimony regarding As Built plans:
 - Pg. 19:1 to 21:9
 - Pg. 95:1 to 100:17
 - Pg. 153:15 to 155:9

5. Testimony regarding borings:

- Pg. 160:12 to 24
- Pg. 184:15 to 187:9

O'Laughlin, Ellen

From: Brice, Susan <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.

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

T: +1 312 602 5124 F: +1 312 698 7524
BRYAN CAVE LLP 161 North Clark Street, Suite 4300, Chicago, IL 60601-3315
susan.brice@bryancave.com

bryancave.com | A Global Law Firm

Exhibit B

This electronic message is from a law firm. It may contain confidential or privileged information. If you received this transmission in error, please reply to the sender to advise of the error and delete this transmission and any attachments.
bcllp2016