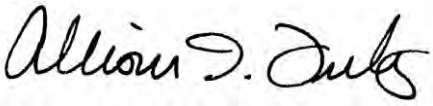
BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:	)	
	)	
WEGLARZ HOTEL III, L.L.C.	)	
WEGLARZ HOTEL IV, L.L.C.	)	
WEGLARZ HOTEL V, L.L.C.	)	
	)	PCB 2019-064
Complainants,	)	
	)	
v.	)	
	)	
THE BELT RAILWAY COMPANY OF CHICAGO,	)	
	)	
Respondent	)	

NOTICE OF FILING

Please take notice that today we filed with the Clerk of the Illinois Pollution Control Board ("Board") Complainants Weglarz Hotel III, L.L.C., Weglarz Hotel IV, L.L.C., and Weglarz Hotel V, L.L.C.s' Response in Opposition to The Belt Railway Company's Motion to Stay, a copy of which is served upon The Belt Railway Company.

Respectfully submitted,



Richard J. Skrodzki
Donald S. Rothschild
Goldstine, Skrodzki, Russian, Nemec and Hoff, Ltd.
835 McClintock Drive, Second Floor
Burr Ridge, Illinois 60527-0860
(630) 655-6000 x230
RJS@gsrnh.com
DSR@gsrnh.com

Charles A. Spitulnik
Allison I. Fultz
Kaplan Kirsch & Rockwell LLC
1001 Connecticut Avenue, N.W.
Suite 800
Washington, DC 20036
(202) 955-5600
cspitulnik@kaplankirsch.com
afultz@kaplankirsch.com

Attorneys for Weglarz Hotel III, L.L.C., Weglarz Hotel IV, L.L.C., and Weglarz Hotel V, L.L.C.

November 19, 2018

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THE BELT RAILWAY COMPANY OF CHICAGO,	)	
	)	
Respondent	)	

RESPONSE OF WEGLARZ HOTEL III, L.L.C., WEGLARZ HOTEL IV, L.L.C., AND WEGLARZ HOTEL V, L.L.C. IN OPPOSITION TO THE BELT RAILWAY COMPANY OF CHICAGO'S MOTION TO STAY

Weglarz Hotel III, L.L.C., Weglarz Hotel IV, L.L.C., and Weglarz Hotel V, L.L.C., (collectively, "Weglarz Hotels") files this Response in Opposition to The Belt Railway Company of Chicago's ("BRC") Motion to Stay Proceedings. In moving to stay this proceeding based on BRC's recently-filed complaint in federal court against Weglarz Hotels – as well as individual members of the Pollution Control Board (the "Board") – BRC fails to justify a stay under the Board's applicable standard. BRC's desire to pursue a preemption claim in federal court is not a compelling reason to halt this action indefinitely. The Motion to Stay should be denied.

Weglarz Hotels brought this enforcement proceeding to address the ongoing and damaging noise caused by inert retarders utilized at BRC's rail yard located in the Village of Bedford Park, Illinois. Since 2014, the excessive noise from BRC's operations has unreasonably interfered with the Weglarz Hotels' hotel operations and in violation of Illinois law. Weglarz Hotels initiated this

enforcement action after proactively seeking to avoid litigation by attempting to engage with BRC to mitigate and resolve the unreasonable noise impacts. Complaint ¶¶ 26–30. BRC chose not to cooperate. Weglarz Hotels filed their Complaint on October 2, 2018.

BRC has not answered the Complaint.[1] Instead, on November 5, 2018, BRC filed a complaint in Federal District Court for the Northern District Court of Illinois against Weglarz Hotels, as well as individual members of this Board, alleging that federal law preempts Weglarz Hotels' claims. On that same day, BRC filed its Motion to Stay. Citing to no legal authority, BRC seeks to divest the Board of its enforcement authority and requests that this proceeding be stayed indefinitely so that it may pursue its preemption theory in federal court. Faced with an impending enforcement action, BRC's Motion to Stay is a thinly-veiled attempt to circumvent accountability for its ongoing violations of the Board's noise regulations.

Admitting that the "Board is capable of considering the preemption issue," (Motion to Stay at 3), BRC provides no compelling argument against the Board's deciding both the merits of the Weglarz Hotels' claims and BRC's defensive preemption claim. Rather, BRC's Motion to Stay focuses on the purported "substantial likelihood" of success in bringing its preemption claim in federal court, a showing irrelevant to a request for stay. *See* Motion to Stay at 2. The Board's standards for a Motion to Stay require far more than a mere request that the Board stand down from enforcing the state's noise pollution regulations because of a presumptive win in federal court. BRC fails to demonstrate that a stay is appropriate and necessary, and its Motion to Stay should be denied.

[1] BRC presumes, but provides no legal basis for its presumption, that filing a Motion to Stay tolls the 60-day period for timely-responding to the Complaint. *See* Motion to Stay at 6.

ARGUMENT

I. BRC fails to satisfy the Board's standard for a Motion to Stay.

A motion to stay a proceeding "must be accompanied by sufficient information detailing why a stay is needed." 35 Ill. Adm. Code 101.514(a). The Board considers specific information in determining whether a stay is appropriate. As the Board states in *Sierra Club v. Midwest Generation,* "[w]hen exercising its discretion to determine whether an arguably related matter pending elsewhere warrants staying a Board proceeding, the Board may consider the following factors: (1) comity; (2) prevention of multiplicity, vexation, and harassment; (3) likelihood of obtaining complete relief in the foreign jurisdiction; and (4) the res judicata effect of a foreign judgment in the local forum, i.e., in the Board proceeding." PCB No. 13-15, 2014 Ill. ENV LEXIS 136, at *31 (April 17, 2014) (citing *A.E. Staley Mfg. Co. v. Swift & Co*., 84 Ill. 2d 245, 254 (1980)). The "party seeking a stay must justify it by clear and convincing circumstances outweighing potential harm to the party against whom it is operative." *Kaden v. Pucinski*, 263 Ill. App. 3d 611, 615 (1st Dist. 1994) (citation omitted).

BRC neither acknowledges nor attempts to satisfy those well-established standards applied by the Board. For that reason alone, the Board's Motion to Stay should be denied. Even so, consideration of those factors compels denial of BRC's request.

A. No federal decision exists or is imminent to which the Board should defer, and therefore, "comity" is not a concern

In evaluating a motion to stay, "[c]omity is the principle under which courts will give effect to the decisions of a court of another jurisdiction as a matter of deference and respect." *Mather Inv. Props. v. Illinois State Trapshooters Ass'n Inc.*, PCB No. 05-29, 2005 Ill. ENV LEXIS 451, at *31 (July 21, 2005). The Board has stated that "[w]here another court has taken jurisdiction over a controversy, a court with jurisdiction over the same controversy as a result of a later-filed

suit will generally, as a matter of comity, defer to the first court in ruling on the matter before both courts." *Id*.

Here, there is no threat of conflicting legal decisions at this time as BRC filed its federal complaint just two weeks ago and after the Weglarz Hotels' commencement of this proceeding. The federal proceeding likely will extend for many months. The court may consider issues of preemption but will not examine the substantive issue presented by the Weglarz Hotels' complaint, which is whether the noise generated by the inert retarders at the BRC's classification yard exceeds the state's standards. Because, as the Weglarz Hotels have noted and explained more fully below, the regulation of noise generated by inert retarders is specifically exempt from federal regulations and thus subject to regulation by the state and local governments, there is no likelihood that the federal court will address the issue presented squarely to this Board. Thus, the consideration of "comity" weighs against granting a stay. *See May v. SmithKline Beecham Clinical Labs., Inc*., 304 Ill. App. 3d 242, 248 (5th Dist. 1999) (noting other pending class actions were "in their infant pretrial stage," and therefore, the Court could not find that "comity dictates that a stay be granted").

B. BRC does not contend, nor is there any risk, that conducting this proceeding constitutes multiplicity, vexation, or harassment.

BRC makes no argument that staying this proceeding is necessary to prevent "multiplicity, vexation, and harassment." *Sierra Club*, 2014 Ill. ENV LEXIS 136, at *31. BRC states that "administrative economy is promoted" by the Board staying this proceeding, while the parties litigate the question of preemption in a second legal proceeding. Motion to Stay 5–6. However, BRC provides no reasons – either legally or logically – against the Board resolving the preemption issue as well as Weglarz Hotels' claims in this single proceeding. Continuing with this proceeding not only aids judicial economy, but falls squarely within the capabilities of the Board. Indeed, the Board has addressed preemption issues including whether the federal Noise Control Act (discussed

below) preempts the application of the Illinois' noise regulations. *EPA v. Terminal R.R. Ass'n of St. Louis*, PCB No. 75-267, 1975 Ill. ENV LEXIS 436, *1 (Sept. 18, 1975) (finding that the Noise Control Act did not preempt state regulation because "no federal regulation in effect . . . pertains to the equipment in question").

Moreover, BRC has made no showing of hardship or inequity in being required to proceed with this action. Any duplication of work, which at this point would be minimal, is self-inflicted, as BRC has chosen to file a federal complaint in an attempt to avoid this enforcement proceeding. In contrast, a stay would require Weglarz Hotels to wait for an indefinite period of time before it could pursue relief against the continual, harmful noise its staff and guests have endured since 2014. *Sierra Club*, 2014 Ill. ENV. LEXIS 136, at *39 (because of the "uncertain timing and duration of the [U.S. EPA's] rulemakings" the Board found "that staying this proceeding pending the outcome of the rulemakings would unnecessarily delay resolution of this action."). In the interest of judicial economy, the Board should deny the stay. *See A.E. Staley Mfg.*, 84 Ill. 2d at 254, ("We do not believe that a resident corporation's right to its day in court should await resolution of sister-State litigation where . . . plaintiff's filing of its complaint does not evidence an intent to harass or gain undue influence over defendant and where. . . the possibility of completely resolving this controversy in Illinois is greater.").

C. It is unlikely that BRC can obtain complete relief in federal court.

By devoting a majority of its Motion to Stay to the purported strengths of its preemption argument, BRC is either operating under an inapplicable standard[2] or attempting to convince the

[2] BRC may be seeking to satisfy the standard for a stay *pending appeal* of a final order issued by the Board under 35 Admin. Code § 101.906(c). *See People v. AET Environmental*, PCB No. 07-95, 2013 Ill. ENV. LEXIS 176, at *11 (considering the "whether there is a 'substantial case' on the merits" as a factor in ruling on a motion to stay pending appeal).

Board preemption is a foregone conclusion. Either way, a stay of this proceeding does not turn on the merits of BRC's preemption claim. As the First District Court of Appeals states, "[a] stay order seeks only to preserve the status quo existing on the date of its entry and does not address in any way the merits of the underlying dispute." *Kaden*, 263 Ill. App. 3d at 615; *see also Sierra Club,* 2014 Ill. ENV LEXIS 136, at *43 ("The Board expresses no view as to whether complainants are entitled to the remedies they request here; rather, at this stage of this case, it suffices to clarify that such relief is not necessarily outside the Board's authority to impose."). Even assuming, *arguendo*, that the Board would consider the likelihood of BRC's prevailing against all of Weglarz Hotels' claims, federal railroad laws do not preempt the Board's regulations of noise emitted by inert retarders at rail road yards.

The Interstate Commerce Commission Termination Act (ICCTA) is interpreted to preempt "those state laws that may reasonably be said to have the effect of 'managing' or 'governing' rail transportation, while permitting the continued application of laws of general application having a more remote or incidental effect on rail transportation." *Fl. E. Coast Ry. v. City of West Palm Beach*, 266 F.3d 1324, 1331 (11th Cir. 2001). However, as noted by federal courts, BRC's argument for broad application of the ICCTA's preemptive scope over all aspects of railroad activities "is simple, but it is deceptively simple, for it ignores relevant federal statutes that were enacted before ICCTA, that are administered by one or more agencies other than the [Interstate Commerce Commission or Surface Transportation Board (STB)], and that Congress left intact in enacting ICCTA." *Iowa, Chicago & E. R.R. Corp. v. Wash. Cnty., Iowa*, 384 F.3d 557, 559 (8th Cir. 2004). Federal courts and the STB have held that where a state law is more appropriately considered to fall within an area of law covered by a separate federal regulatory regime, such as rail safety or environmental regulation, the ICCTA's broad preemptive scope does not abrogate

the narrower preemptive scope of these other federal laws. *See Tyrrell v. Norfolk S. Railway Co.,* 248 F.3d 517 (6th Cir. 2001); *see also James Riffin - Petition for Declaratory Order*, STB Finance Docket No. 34997, slip op. at 5 (Service Date May 2, 2008) ("Moreover, where there are overlapping federal statutes, they are to be harmonized to the extent possible. This includes Federal environmental programs that are implemented, in part, by the state, such as the Clean Air Act, the Clean Water Act, the Safe Drinking Water Act, and the regulation of railroad safety under the Federal Railroad Safety Act." (citations omitted)).

In *Tyrrell*, the Sixth Circuit reversed a lower court decision that a railroad employee's state law negligence claim was preempted under the ICCTA. 248 F.3d at 520. The Sixth Circuit held that state safety law covering minimum track clearance requirements was more appropriately considered to be a safety regulation designed and interpreted to protect the safety of railroad employees. *Id.* at 523-24. Thus, the appropriate federal statute for determining preemption was the Federal Rail Safety Act, 49 U.S.C. § 20101 et seq. ("FRSA"), which provides that state laws regarding rail safety are valid until regulated by the Secretary of Transportation. *Id.* at 521 (quoting 49 U.S.C. § 20106). Because there was no federal regulation promulgated pursuant to FRSA that covered the state's minimum track clearance requirement in *Tyrrell*, the Sixth Circuit held there was no preemption under the FRSA. *Id.* at 524-25.

Addressing the apparent conflict between the broad scope of the ICCTA's preemption provision and the more narrow scope of the FRSA, the Sixth Circuit stated that "the ICCTA and its legislative history contain no evidence that Congress intended for the STB to supplant the FRA's authority over rail safety," and that the ICCTA and FRSA must be construed together. *Id.* at 523. Following *Tyrell*, the STB and courts have held that the broad application of preemption under the ICCTA must be "harmonized" with the FRSA and other competing federal laws, and

that the ICCTA's broad preemptive scope does not reach state laws that are only tangentially related to the economic regulation of railroads. *See Iowa, Chicago & E. R.R.*, 384 F.3d at 559-60 (state law requiring railroad to finance the replacement of railroad overpasses was not preempted by ICCTA); *Riffin*, STB Finance Docket No. 34997, slip op. at 5-6 (state environmental and police powers governing permitting with respect to rail lines not preempted).

Here, with respect to the noise pollution caused by the BRC's use of inert retarders, the Noise Control Act of 1972 (42 U.S.C. §§ 4901-4918), and not the ICCTA, is the statute that determines whether the Board's regulations are preempted. As with the FRSA, the Noise Control Act enacts a separate regulatory regime that covers an area of law – noise – distinct from the economic regulation of railroads and comes under the jurisdiction of a separate federal agency, the Federal Railroad Administration ("FRA"). The FRA and U.S. Environmental Protection Agency ("EPA") have both promulgated regulations under the Noise Control Act.

The Noise Control Act's preemptive provisions provide that state and local law is preempted only where promulgated federal regulations apply to "operation of the same equipment or facility" 42 U.S.C. § 4916(c)(1). Although EPA regulations expressly cover "active" retarders (40 C.F.R. §§ 201.1(y), 201.10), the FRA's regulations expressly except "inert" retarders (49 C.F.R. § 210.3(b)(6)). The EPA and FRA's rulemaking history indicate that this language reflected the EPA's decision not to regulate inert retarders. 44 Fed. Reg. at 22964 (EPA's Part 201 notice of proposed rulemaking); 48 Fed. Reg. at 56757 (FRA's Part 210 final rule). There are no federal requirements applicable to noise emitted by inert retarders, which are exempted from FRA jurisdiction, as confirmed by FRA's legal counsel. *See* Complaint ¶ 41. The Board's noise regulations are not preempted.

Importantly, the Board has ruled on a preemption issue similar to BRC's argument in this proceeding. In *Illinois EPA v. Chicago & Northern Western Transportation Company*, regarding pollutant emissions caused by a train derailment, the Board denied Northern Western's preemption argument that "the Board cannot avoid becoming directly involved in the regulation of railroad safety if it attempts to find a violation of air pollution in this case." PCB No. 76-155, 1978 Ill. ENV. LEXIS 123, *4 (June 8, 1978). The Board held that the "two areas of railroad safety and pollution abatement are distinguishable," and that there "was no overlap or inconsistency inasmuch as the sole aim of the local abatement rule was protection of the people's health as opposed to the regulation of transportation." *Id*.

Accordingly, BRC's preemption argument is not likely to prevail. BRC fails to justify foregoing the Board's adjudication of the preemption issue while determining the enforceability Board's noise regulations in a single proceeding. The Board is well-equipped to determine whether an Illinois regulation is preempted. *See id.*; see also *Terminal Railroad Association of St. Louis*, PCB No. 75-267, 1975 Ill. ENV LEXIS 436 at *1 (finding that the Noise Control Act did not preempt state regulation).

D. Consideration of res judicata weighs against granting the Motion to Stay.

In deciding the Motion to Stay, the Board may also consider the doctrine of res judicata, which states that "'once a cause of action has been adjudicated by a court of competent jurisdiction, it cannot be retried again between the same parties or their privies in a new proceeding.'" *Envtl. Site Developers, Inc. v. White & Brewer Trucking, Inc.* PCB Nos. 96-180; 97-11, 1997 Ill. ENV. LEXIS 409, at *12 (July 10, 1997). Consideration of res judicata at this time is premature to justify a stay of this proceeding, since BRC just initiated the federal action two weeks ago. *See id*. at 11.

(concluding "that the potential res judicata effects of a judgment entered by the federal court are too speculative to require a stay of these proceedings.").[3]

In addition, the Board's decision in *White & Brewer Trucking* supports denying a stay. 1997 Ill. ENV LEXIS 409, at *3. A complaint was filed with the Board alleging violations of the Illinois Environmental Protection Act, while related claims under the federal Resource Conservation and Recovery were pending in the Federal District Court for the Central District of Illinois. *Id*. The Board recognized the possibility that a "judgment in the federal case would have a res judicata effect in this case." *Id*. at *13. However, the Board determined its vested authority and legal obligation trumped any inconsistent federal ruling. According to the Board, the only effect of staying the case "would be the needless delay of resolution of the issues involved in this case" and "would be inconsistent with the Board's obligation as a unit of state government to manage its activities so as to minimize environmental damage." *Id*.

Here, the Board should not permit BRC's defensive maneuver of filing in federal court to obstruct the Board's duty of administering its own noise regulations.

E. Staying this proceeding will result in an ongoing and indefinite injury to Weglarz Hotels.

The Board may also weigh the "prejudice a stay would cause the nonmovant against the policy of avoiding duplicative litigation." *Sierra Club*, 2014 Ill. ENV LEXIS 136, at *31 (citing

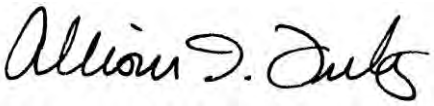
[3] Moreover, where an administrative proceeding is pending, the federal court could elect to abstain from ruling BRC's preemption claim. *See Emps' Resource Mgmt. Co. v. Shannon*, 65 F.3d 1126, 1136 (4th Cir. 1995) (refusing to create an exception to *Younger* abstention based on [the party's] mere assertion of an ERISA preemption challenge" and explaining that the party had "not provided . . . any reason to believe that the [administrative agency was] incapable of reviewing [the party's] claim of preemption"); *see also Colonial Life & Acc. Ins. v. Medley*, 572 F.3d 22, 24 (1st Cir. 2009) (finding that district court should have stayed or dismissed the federal action so that the state agency "may decide the preemption question in the first instance").

Village of Mapleton v. Cathy's Tap, Inc., 313 Ill. App. 3d 264, 267 (3d Dist. 2000)). The prejudice to Weglarz Hotels resulting from a stay strongly supports denying BRC's request. The relief sought by Weglarz would be delayed indefinitely by BRC's federal proceeding, resulting in a continual and significant injury to Weglarz Hotels, their employees, guests, and the general public caused by the unlawful excessive noise from the BRC's rail yard.

CONCLUSION

For the reasons stated herein, the Board should deny BRC's Motion to Stay and should proceed with this enforcement action.

Respectfully submitted,



Richard J. Skrodzki
Donald S. Rothschild
Goldstine, Skrodzki, Russian, Nemec and Hoff, Ltd.
835 McClintock Drive, Second Floor
Burr Ridge, Illinois 60527-0860
(630) 655-6000 x230
RJS@gsrnh.com
DSR@gsrnh.com

Charles A. Spitulnik
Allison I. Fultz
Kaplan Kirsch & Rockwell LLC
1634 Eye Street, N.W.
Suite 300
Washington, DC 20006
(202) 955-5600
cspitulnik@kaplankirsch.com
afultz@kaplankirsch.com

Attorneys for Weglarz Hotel III, L.L.C., Weglarz Hotel IV, L.L.C., and Weglarz Hotel V, L.L.C.

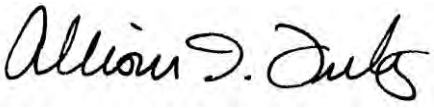
CERTIFICATE OF SERVICE

I, Allison I. Fultz, the undersigned, do certify that on November 19, 2018, I served copies of the foregoing Notice of Filing and Response of the Weglarz Companies In Opposition to the Belt Railway Company of Chicago's Motion to Stay on the Respondent, The Belt Railway Company of Chicago and its counsel, at the address listed below by electronic mail and certified U.S. Mail with return receipt requested to the person listed on the Notice of Filing.

Timothy E. Coffey
General Counsel, Secretary & Director of Human Resources
The Belt Railway Company of Chicago
6900 South Central Avenue
Bedford Park, Illinois 60638
tcoffey@beltrailway.com

Thomas J. Litwiler
James D. Helenhouse
Brandon M. Thompson
Fletcher & Sipperl LLC
29 North Wacker Drive
Suite 800
Chicago, IL 60606-3208
tlitwiler@fletcher-sippel.com
jhelenhouse@fletcher-sippel.com
bthompson@fletcher-sippel.com

Respectfully submitted,



Allison I. Fultz

November 19, 2018