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STATE OF ILLINOIS
Pollution Control Board

ILLINOIS POLLUTION CONTROL BOARD
April 28, 2014

KCBX TERMINALS COMPANY,)
)
Petitioner,)
)
v.) PCB 14-110
) (Permit Appeal - Air)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)



ORIGINAL

HEARING OFFICER ORDER

On April 22, 2014, the Illinois Environmental Protection Agency (Agency) filed motions *in limine* to: (1) exclude witnesses (Mt. to Exclude); (2) bar opinion testimony of KCBX witness Terry Steinert (Mt. to Bar Steinert); and (3) bar improper opinion testimony by KCBX's disclosed witness Dave Kolaz (Mt. to Bar Kolaz). On April 23, 2014, KCBX Terminals Company (KCBX) filed responses in opposition to the Agency's motions concerning Messrs. Steinert (Resp. Opp. Steinert) and Kolaz. KCBX did not file a response to the Agency's motion to exclude witnesses.

Also on April 22, 2014, KCBX filed with the Board a second motion *in limine* regarding its fugitive dust plans, also known as "Fugitive Particulate Operating Programs" (KCBX Sec. Mt.), and a motion *in limine* regarding "Citizen Complaint Forms" and other written and oral complaints received by the Agency (KCBX Mt.). On April 23, 2014, the Agency filed responses in opposition to KCBX's motions *in limine*.

This order first summarizes the filings regarding each motion *in limine* and then provides my ruling on each motion.

AGENCY'S PRE-HEARING MOTIONS

Agency's Motion In Limine to Exclude Witnesses

Summary of Motion

The Agency argues that Section 10-40 of the Administrative Procedure Act (5 ILCS 100/10-40(a) (2012)) requires agencies to apply the rules of evidence applicable in circuit court. Mt. to Exclude at 1. The Agency argues that the Board's hearings are subject to the Illinois Rules of Evidence under Rule 101 (ILCS Evid. Rule 101). *Id.* at 1-2. Pursuant to Rule 615 of the Illinois Rules of Evidence (ILCS Evid. Rule 615), the Agency argues that witnesses must be excluded from a hearing, at a respondent's request, so that they cannot hear the testimony of other witnesses. *Id.* at 2; *see also Smith v. City of Chicago*, 299 Ill. App. 3d 1048, 1053 (1st

Dist. 1998). The Agency requests an order excluding witnesses from the hearing so that they cannot hear the testimony of other witnesses. *Id.* at 3.

Discussion and Ruling

As noted above, KCBX did not file a response to the Agency's motion to exclude witnesses within the deadline I set for responses to any pre-hearing motions. Accordingly, any objection to the motion is waived, although that waiver does not bind me in the disposition of the motion. *See* 35 Ill. Adm. Code 101.500(d). In accordance with Illinois Rule of Evidence 615, which is instructive in the absence of a Board procedural rule on this issue, the motion to exclude witnesses is granted so that witnesses cannot hear the testimony of other witnesses.

Agency's Motion In Limine to Bar Opinion Testimony of Terry Steinert

Summary of Motion

The Agency seeks an order barring KCBX's disclosed witness, Terry Steinert, from providing opinion testimony at trial. *Mt. to Bar Steinert* at 1. The Agency notes that this motion does not address Mr. Steinert in his capacity as a fact witness. *Id.* at 1, n. 1.

The Agency argues, first, that Mr. Steinert's opinion testimony would constitute improper legal conclusion. *Id.* The Agency states that Mr. Steinert is expected to offer testimony regarding the legal conclusion on an ultimate issue before the Board: whether KCBX set forth sufficient information in the July 23, 2013 permit application to demonstrate that the installation of new emission units would not violate the Illinois Environmental Protection Act (Act). *Id.* at 2. The Agency states that if the Hearing Officer grants the Agency's motions to exclude opinion testimony as to Mr. Steinert and Dave Kolaz, the Agency will not offer Ms. Armitage's Illinois Supreme Court Rule 213(f)(3) opinion testimony. *Id.* at 3, n. 2. However, the Agency argues that if its motions are denied, either Mr. Steinert's or Mr. Kolaz's opinion must be stricken as cumulative. *Id.* at 3, n. 2.

Second, the Agency argues that Mr. Steinert's opinion testimony should be barred as cumulative of Mr. Kolaz's expected opinion testimony. *Id.* at 3, citing 35 Ill. Adm. Code 101.610(e). This is so, according to the Agency, because Mr. Steinert's opinion would be essentially identical to Mr. Kolaz's expected testimony on whether the July 23, 2013 permit application contained sufficient information to demonstrate that the granting of the permit would not violate the Act or Board's rules. *Id.* at 4.

Summary of Response

KCBX argues that Mr. Steinert's opinion testimony does not constitute a legal conclusion, and even though it is relevant to the ultimate issue on appeal, the Illinois Rules of Evidence allow such testimony. *Resp. Opp. Steinert* at 3. KCBX also argues that Mr. Steinert's testimony would not be cumulative of Mr. Kolaz's testimony because Mr. Steinert, a former

Environmental Compliance Manager for KCBX, and can assist the Board in understanding the facilities and equipment at issue, whereas Mr. Kolaz, former Chief of the Agency's Bureau of Air, can relate the Agency's procedures and role in the permit application process. *Id.* at 9-10.

Discussion and Ruling

Illinois Rule of Evidence 704 allows opinion testimony on an ultimate fact or issue to be decided by the trier of fact. Ill. R. Evid. 704. Ill R. Evid. 704. Expert opinion testimony is admitted to assist the Board in understanding the ultimate issue to be decided. *See Townsend v. Fassbinder*, 372 Ill. App. 3d 890, 905, 866 N.E.2d 631, 646 (2d Dist. 2007). Accordingly, such testimony is not objectionable because it relates to an ultimate issue to be decided by the trier of fact. Ill. R. Evid. 704.

Applying these standards, I find that Mr. Steinert's opinion testimony is admissible in this proceeding. Both parties correctly recognize that the question before the Board in this appeal is whether sufficient information was set forth in KCBX's permit application to demonstrate that no violations of the Act or Board regulations would have occurred if the permit had been issued. *See, e.g., Prairie Rivers Network v. PCB*, 335 Ill. App. 3d 391, 400-01, 781 N.E.2d 372, 379 (4th Dist. 2002). That is the question for the Board to decide, however, and it is KCBX's burden to make the required showing. In satisfying that burden, KCBX must be permitted to introduce evidence that it submitted sufficient materials relating to each of the Board regulations cited in the letter denying the Request for Revision. KCBX represents that Mr. Steinert, as KCBX's former Environmental Compliance Manager, is familiar with the facilities and equipment at issue and was involved in submitting the Request for Revision. Notably, the Agency does not take issue with Mr. Steinert's qualifications to testify as an expert about the permit application process and the materials KCBX submitted to the Agency to comply with applicable air emission regulations. Thus, I find that that Mr. Steinert's opinion testimony would not constitute improper legal opinion. Even assuming there is some question about the nature of his testimony, the motion to bar his opinion testimony is denied.

The Agency also argues that Mr. Steinert's opinion testimony would be cumulative of Mr. Kolaz's testimony. However, it is well established that multiple experts are allowed to offer their opinion as long as they use their different areas of expertise in helping the Board understand the ultimate issue or fact. *See, e.g. Taylor v. County of Cook*, 2011 IL App (1st) 093085, ¶ 35, 957 N.E.2d 413, 427. KCBX persuasively asserts that Mr. Steinert and Mr. Kolaz have different areas of expertise, as a former KCBX Environmental Compliance Manager and a former Chief of the Agency's Bureau of Air, respectively. Thus, I find that testimony of both witnesses may be helpful in aiding the Board in understanding an ultimate issue in this appeal. Moreover, the Board is fully capable of giving Mr. Steinert's testimony appropriate weight in deciding the issues here. Therefore, I deny the Agency's motion to bar Mr. Steinert's opinion testimony.

**Agency's Motion In Limine to Bar Improper Opinion Testimony by KCBX's Disclosed
Witness Dave Kolaz**

Summary of Motion

The Agency requests an order barring Mr. Kolaz from testifying at trial as to his disclosed Opinions 2, 3, and 4, arguing they constitute improper legal conclusions. Mt. to Bar Kolaz at 1-2. KCBX has disclosed that Mr. Kolaz will testify as to whether the addition of more emission sources at the KCBX site would violate the Act or Board regulations. *Id.* at 2.

The Agency recites that in Opinions 2 and 3, Mr. Kolaz states that evidence considered by the Agency does not support the Agency's permit decision. *Id.* at 3. The Agency argues that this opinion includes the legal conclusion on an ultimate issue before the Board: that the record shows no possible violation of the Act or Board regulations. *Id.* Further, as to Opinion 4, Mr. Kolaz states that the information supplied by KCBX was sufficient to prove no violation of the Act or Board regulations, an opinion the Agency characterizes as a legal conclusion on the correct interpretation of particular sections of the Act. *Id.* at 4.

Summary of Response

KCBX contests the Agency's claim that Mr. Kolaz's opinions constitute improper legal conclusions, arguing first Illinois Rule of Evidence 704 allows opinion testimony on an ultimate issue for the trier of fact. Resp. Opp. Kolaz at 4-5, citing Glasgow v. Granite City Steel, PCB 00-21 (Mar. 7, 2002) KCBX also argues that Mr. Kolaz's testimony does not constitute a legal conclusion because Mr. Kolaz is not testifying to whether KCBX, as a matter of law, has met its burden of proof, but to information contained in the record relates to the regulations cited in the permit denial letter. *Id.* at 8. KCBX argues that it is entitled to introduce such expert testimony it has the burden of proof on these issues. *Id.*

Discussion and Ruling

I find that the above analysis applied to the motion to bar Mr. Steinert's opinion testimony also applies to the motion concerning portions of Mr. Kolaz's disclosed opinions. That is, Mr. Kolaz's does not constitute an opinion on whether, as a matter of law, KCBX has met its burden of proof—the ultimate question before the Board. (As noted above, that his testimony will relate to an ultimate issue in this case does not make it objectionable.) Instead, Mr. Kolaz's opinion testimony concerns how the information and documents contained in the administrative record relates to the regulations set forth in the permit denial letter. The Agency makes no argument that Mr. Kolaz, a former Chief of the Agency's Bureau of Air, is not qualified to testify as an expert on the permit application process and the relationship of the materials KCBX submitted to the Board regulations cited in the denial letter. Thus, Mr. Kolaz's opinion testimony does not constitute an impermissible legal conclusion, and the Agency's motion to bar him from testifying regarding certain disclosed opinions is denied.

KCBX'S PRE-HEARING MOTIONS

KCBX's Motion *In Limine* Regarding "Citizen Complaint Forms" and Other Written and Oral Complaints Received by Illinois EPA

Summary of Motion

KCBX seeks an order excluding all evidence, references to evidence, testimony or argument relating to "citizen complaint forms" or written complaints from elected officials and representatives of non-governmental organizations contained in the record in this case, as well as any oral complaints received by the Agency regarding KCBX's facilities. KCBX Mt. at 1. KCBX states that Agency employees Michael Dragovich and Robert Bernotceit denied at their depositions relying on any citizen complaints in recommending that KCBX's Request for Revision be denied, and that Agency employee Julie Armitage testified that she relied upon citizen complaints in opining that the permit application had to be denied. *Id.* at 2-3.

Relying on Illinois Rule of Evidence 403, KCBX first argues that the trier of fact may exclude evidence where its prejudicial impact outweighs its probative value. *Id.* at 4. KCBX argues that any evidence, references to evidence, testimony or argument relating to reliance upon the citizen complaint forms or written or oral complaints from elected officials or representatives would be purely speculative. *Id.* KCBX further argues that allowing such evidence, which has been extensively redacted to unfairly and materially prejudice KCBX. *Id.* at 4-5.

KCBX next argues that the Agency improperly relied on the citizen complaints, which are mere unadjudicated allegations, some of which may also be outside the record. *Id.* at 5. KCBX adds that the redacted citizen complaint forms in the record are irrelevant and too vague to be relied upon for assessing compliance with Board regulations, and that relying on unadjudicated allegations would deny KCBX due process. *Id.* at 5-6.

KCBX argues it had no meaningful opportunity to respond to allegations in the heavily redacted citizen complaints relied upon by the Agency to deny the Request for Revision. *Id.* at 7. KCBX contends that the forms in the record omit crucial information, such as whether the complainants live anywhere near KCBX's South Facility and how they were impacted by fugitive emissions from the facility. *Id.* at 7-8, citing Wells Manufacturing Co. v. IEPA, 195 Ill. App. 3d 593, 552 N.E.2d 1074 (1st Dist. 1990). As such, KCBX asserts that the Agency should be barred from presenting any evidence or testimony regarding citizen complaints it received. *Id.*

Summary of Response

The Agency argues the motion should be denied because there is no basis to strike documents from the record through a motion *in limine*. Resp. Citizen Complaint Forms at 1-2. The Agency further argues that under Section 101.610 of the Board's rules (35 Ill. Adm. Code 101.610), a hearing officer does not have the authority to strike documents from the administrative record. *Id.* at 4. And, the Agency continues, it properly included these forms in the record since it relied on them in denying the permit application. *Id.* at 1-2. The Agency also claims KCBX does not identify any specific prejudicial impact that would result from allowing evidence regarding oral complaints from being introduced into evidence. *Id.* at 5.

In addition, the Agency argues that KCBX's enforcement action and due process arguments are premature and cannot be addressed until after the hearing has been held. *Id.* This is so, according to the Agency, because the Board should be presented with the entire record and hearing transcript before it determines whether the Agency's denial of the permit application constituted an improper substitute enforcement action and denied KCBX due process, as KCBX contends. *Id.* at 6-7. The Agency states that it issued a "Wells" letter on December 10, 2013 to KCBX expressly advising that the Agency intended to consider information outside the permit application, including the citizen complaint forms. *Id.* at 6.

Discussion and Ruling

KCBX's primary argument for excluding the citizen complaint forms, correspondence, and testimony regarding oral complaints is that the probative value of this evidence is substantially outweighed by the danger of undue prejudice. I find the evidence highly relevant, however, since the permit denial letter expressly states that the Request for Revision was denied in part based on the citizen complaint forms. *See* R. 2. Moreover, as KCBX points out, Agency counsel Julie Armitage testified when deposed that she relied upon the citizen complaints when rendering her opinion that the permit application should be denied. As documents that the Agency undisputedly relied on in making its decision to deny the Request for Revision, the citizen complaints are properly part of the record and, thus, already before the Board. *See* 35 Ill. Adm. Code 105.212(b)(5); Ameren Energy Resources Generating Co. v. IEPA, PCB 14-41, slip op. at 9 (Mar. 20, 2014). And because they are in the record, they are already before the Board, and would be so even if I were to grant to motion to exclude them as evidence. While that is not true of all the complaints—since there purportedly were oral ones—the fact remains that the Agency states that it relied on these, too, in deciding to deny the Request for Revision, making them highly probative as well.

As to prejudice, I find that KCBX's complaint that it cannot rebut allegations in the redacted versions of the complaints is misplaced. The ultimate question on this point is whether the Agency properly relied on the complaints, whether written or oral, in denying the permit application; the veracity and authenticity of the complaints is not at issue. KCBX implicitly recognizes this in arguing that the Agency's reliance on the complaints to deny the Request for Revision was unlawful. *E.g.*, KCBX Mt. at 5-6. And KCBX will have the opportunity at

hearing to cross-examine the Agency's witnesses regarding the reasons they believed it reasonable to rely on the complaints, both written and oral. Thus, I conclude that there is little risk of *undue* prejudice to KCBX, and certainly not a sufficient showing of prejudice to outweigh probative value. For this reason, I further find that allowing evidence regarding citizen complaints would not deny KCBX procedural due process; but this does not in any way preclude KCBX from pressing the due process claim to the Board.

Finally, because the propriety of relying on the complaints in denying the Request for Revision is a core legal dispute, I would deny the motion to exclude evidence about them even assuming the risk of prejudice arguably outweighed the evidence's probative value. *See* 35 Ill. Adm. Code 101.626(b) (when admissibility of evidence turns on a "good faith argument as to the interpretation of substantive law, the hearing officer will admit the evidence"). Of course I reserve discretion to limit testimony and evidence on this and any other issue that is cumulative, irrelevant, or unduly prejudicial as it is presented at hearing.

KCBX's Second Motion *In Limine* Regarding Fugitive Dust Plans, a/k/a "Fugitive Particulate Operating Programs"

Summary of Motion

KCBX seeks an order allowing evidence, testimony, or argument relating to its fugitive dust plans or Fugitive Particulate Operating Programs (FPOPs). *Sec. Mt.* at 1. KCBX states that during discovery depositions in this appeal, counsel for the Agency objected repeatedly to questions related to the FPOPs in the record, including questions regarding the adequacy of the FPOPs, on the basis that they were at issue in the separate circuit court proceeding filed by the People against KCBX. *Id.* at 3. KCBX argues, however, that Julie Armitage's deposition established that the Agency reviewed the adequacy of the FPOPs in making its decision to deny the Request for Revision. *Id.*

Additionally, KCBX states that Ms. Armitage explained that she looked at fugitive dust plans and that these plans were used by an Agency inspector when conducting his inspection of KCBX's South Terminal. *Id.* at 4. KCBX argues that it is clear that the Agency considered the KCBX and other facilities' FPOPs in making its decision to deny the Request for Revision. *Id.* Therefore, KCBX contends that evidence, testimony, or arguments relating to these FPOPs constitute relevant evidence that should be allowed. *Id.*

Summary of Response

The Agency argues that the factual statements in KCBX's FPOPs are relevant to the permit appeal due to the citations to 415 ILCS 5/9 and 35 Ill. Adm. Code 212.301 in the permit denial letter. *Resp. FPOP* at 1. Julie Armitage testified during her deposition that she relied upon KCBX's FPOPs as part of the decision-making process to deny the permit application, and included in the record her notes on the FPOPs and copies of other facilities' FPOPs. *Id.* Thus, the Agency does not object to testimony or arguments relating to documents in the record

concerning the FPOPs. *Id.* at 1-2. However, the Agency states that the denial letter does not cite the Board's fugitive particulate matter regulations as grounds for denial, and therefore may not attempt to rely on such regulations at hearing anyway. *Id.* at 2. Lastly, the Agency asserts that whether KCBX's FPOPs are sufficient or adequate is not at issue here. *Id.*

KCBX's Motion for Leave to File *Instante*r Reply In Support of Motion *In Limine* Regarding FPOPs

KCBX moves for leave to file *instante*r a reply in support of its motion *in limine* regarding FPOPs. KCBX does not explain why leave is warranted to prevent "material prejudice." 35 Ill. Adm. Code 101.500(e).

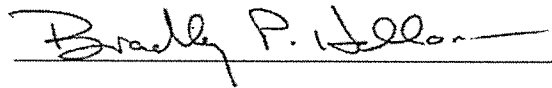
In the attached reply (Reply), KCBX recites that Denial Reason 3 stated that the permit application does not show compliance with Section 212.301 of the Board's regulations, and that FPOPs must describe best management practices used to comply with fugitive particular matter regulations in Part 212. Reply at 3. KCBX states that Ms. Armitage testified when deposed that she relied on the November 2013 FPOP when reaching her conclusion that compliance with Section 212.301 was not shown and that that rule may be violated. *Id.* KCBX contends that it appears the Agency intends to argue that it did consider the adequacy of the FPOP as a basis for denying the permit application. *Id.* at 3-4. KCBX maintains that the Agency "cannot rely on an 'alleged' inadequacy as a basis for denial of the permit, and then attempt to preclude KCBX from introducing evidence at the hearing as to the adequacy of its FPOP." *Id.* at 4.

I grant the motion for leave to file KCBX's reply *instante*r. Although the motion does not provide a ground for seeking such leave, the reply addresses the Agency's claim in its response that the adequacy of the November 2013 FPOP is not at issue in this case. While that argument is more properly addressed to the Board, KCBX had no reason to anticipate that it would be raised in response to its motion and should have the opportunity to respond to it.

Discussion and Ruling

The actual dispute between the parties regarding the FPOPs has nothing to do with its admissibility or that of any testimony or other evidence relating to it. That stands to reason, as the FPOPs are already in the record, and the Board denied the Agency's motion to strike portions of KCBX's petition for review regarding the sufficiency of the FPOPs. KCBX Terminals Co. v. IEPA, PCB 14-110, slip op. at 11-12 (Apr. 17, 2014). Rather, the parties contest whether the adequacy of the FPOP under the Board's regulations is before the Board. That is a matter for the Board to resolve in addressing the merits in this appeal, to the extent it has not already done so, and not a reason to bar evidence or testimony regarding the FPOPs and their relationship to the permit denial grounds. The Board will decide the appropriate weight to give this evidence. Therefore, KCBX's motion is granted of course, this order makes no determination on the sufficiency of the FPOPs.

IT IS SO ORDERED.

A handwritten signature in black ink, reading "Bradley P. Halloran", is written over a horizontal line.

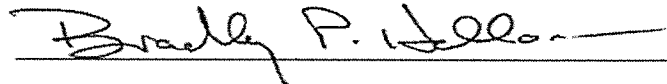
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CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing order were mailed, first class, on April 28, 2014, to each of the persons on the attached service list.

It is hereby certified that a true copy of the foregoing order was hand delivered to the following on April 28, 2014:

John T. Therriault
Illinois Pollution Control Board
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A handwritten signature in black ink, reading "Bradley P. Halloran", is written over a solid horizontal line.

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