

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

KCBX TERMINALS COMPANY )

Petitioner, )

v. )

ILLINOIS ENVIRONMENTAL )  
PROTECTION AGENCY )

Respondent. )

PCB No. 14-110

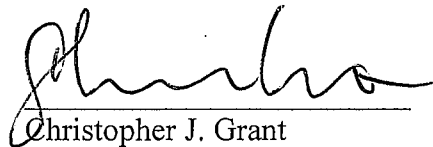
(Permit Appeal-Air)

**NOTICE OF ELECTRONIC FILING**

PLEASE TAKE NOTICE that on the 22<sup>nd</sup> day of April, 2014, the undersigned filed Respondent's Motion in Limine to Bar Improper Opinion Testimony by Petitioner's Disclosed Witness Dave Kolaz, by electronic filing. A copy of the document so filed is attached hereto and served upon you.

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY

By LISA MADIGAN  
Attorney General of the  
State of Illinois



Christopher J. Grant  
Assistant Attorney General  
Environmental Bureau  
69 W. Washington Street  
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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

KCBX TERMINALS COMPANY,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB No. 14-110
	)	(Air Permit Appeal)
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Respondent.	)	

**MOTION IN LIMINE TO BAR IMPROPER OPINION TESTIMONY  
BY PETITIONER'S DISCLOSED WITNESS DAVE KOLAZ**

Respondent, Illinois Environmental Protection Agency, hereby moves the Hearing Officer to bar Petitioner's disclosed opinion witness, Dave Kolaz, from testifying at trial as to his disclosed opinions 2, 3, and 4. In support, Respondent states as follows:

**I. Expert Testimony Constituting a Legal Conclusion is Not Allowed.**

Expert testimony is admissible only if the expert has specialized knowledge that will assist the trier of fact in understanding the evidence or in determining a fact at issue. *Grant v. Pertoff*, 291 Ill.App.3d 795 (1997). However, expert testimony as to legal conclusions that will determine the outcome of the case is inadmissible. *Todd W. Musburger, Ltd v. Meier*, 394 Ill App. 3d 781,800-801 (1<sup>st</sup> Dist. 2009). As noted by the Court in *Musburger*, "No expert can opine as to the law". *Id.* See also: *People v. Panhandle Eastern Pipe Line Co.*, PCB 99-191, (Oct. 18, 2001)(slip op. at 3) (opinion testimony on ultimate issues of law to be decided by the Board held improper and stricken from the record).

It is also clearly established that an expert may not provide testimony on statutory interpretation. *Northern Moraine Water Reclamation District v. Illinois Commerce Commission*, 392 Ill. App. 3d 542, 573 (2<sup>nd</sup> Dist. 2009); *Christou v. Arlington Park-Washington Park Race Tracks Corp.*, 104 Ill. App. 3d 257.261 (1<sup>st</sup> Dist. 1982) (Statutory interpretation is not a matter to which an expert is competent to testify). See also: *People v. Consolidated Freightways Corp. of Delaware et al.*, PCB No. 1976-107 (Oct. 4, 1978) (slip op. at 7) (“...legal conclusions and determinations of fact are matters which rest with this Board”);

Therefore, expert testimony as to legal conclusions or statutory interpretations that may determine the outcome of a case must be excluded from hearing.

**II. Opinions No. 2, 3, and 4 Are Impermissible Legal Conclusions**

The Petitioner’s expert, David Kolaz (“Kolaz”), is expected to offer opinions at hearing that merely constitute legal conclusions. Specifically, Petitioner has disclosed that Kolaz will testify whether the proposed construction activity of the Petitioner (the addition of twelve more emission sources at the subject Site) would violate the Illinois Environmental Protection Act (“Act”) or the Illinois Pollution Control Board (“Board”) regulations. See, *Exhibit A*, excerpt from Petitioner’s March 28, 2014 Witness Disclosure, at pages 8 and 9. Petitioner’s Witness Disclosure states that Kolaz will offer the following testimony:

\* \* \*

2. The field staff observations, as documented by inspection reports in the record, do not provide information that supports the conclusion that the proposed future construction activity may violate 35 Ill. Adm. Code Section 212.301 and should not be used by the Illinois EPA as a basis to deny the permit application.

3. The Illinois EPA should not rely upon past citizen pollution complaints to support a finding that a future construction project may violate Section 212.301. In addition, past citizen complaints do not contain information necessary to assess

future compliance with Section 212.301 by the addition of the ten portable conveyors, one box hopper and one stacker at the Facility.

4. The request for Revisions submitted to Illinois EPA by the Petitioner, including references to the existing Permit No. 07050082 and the supporting applications, information regarding equipment identification numbers provided by e-mail dated September 3, 2013, contained sufficient information: 1) demonstrating that granting the Permit would not violate Section 9 or 35 Ill. Adm. Code Sections 201.152 or 212.301; and 2) satisfy the requirements of 35 Ill. Adm. Code Sections 201.152.

### **Opinions 2 & 3**

The Agency may deny a permit if proof is lacking that the proposed activity will not cause a violation of the Act or regulations. Specifically, “[t]he question before the Board in permit appeal proceedings is whether the applicant proves that the application, as submitted to the Agency, demonstrated that no violation of the Environmental Protection Act . . . or rules under the Act would have occurred if the requested permit had been issued.” *Community Landfill Co. et al. v. Illinois Environmental Protection Agency*, PCB 01-170 at p. 4 (Dec. 6, 2001).

In Opinions No. 2 and 3, Kolaz states that evidence considered by the Agency (observations made by an Illinois EPA inspector and numerous citizen complaints) do not support the Agency’s permit decision. Accordingly, Kolaz’s opinion necessarily includes his contention that this evidence does not show a possible violation of Section 9 of the Act, and the Board regulations cited in these opinions. These opinions constitute impermissible legal conclusions that go to the ultimate issues of law before the Board. It is the role of the Board, not a compensated expert, to determine whether this evidence indicates potential violations. Because his opinion constitutes the legal conclusion that the Board must determine, Kolaz’s opinion testimony must be excluded.

These are legal conclusions, and thus impermissible. Opinions No. 2 and 3 must be excluded from hearing in this matter.

**Opinion 4**

In opinion No. 4, Kolaz states that the information supplied by KCBX was sufficient to prove no violation of Section 9 of the Act, 415 ILCS 5/9 (2012), and to meet the requirements of two Board regulations, 35 Ill. Adm. Code Sections 212.152 and 201.301. Kolaz's opinion is a plain legal conclusion. Opinion 4 also constitutes, an opinion on "correct" interpretations of Section 9 of the Act. Such an opinion constitutes opinion evidence on ultimate issues of law to be decided by the Board, and is improper. *Panhandle*, PCB 99-191, (Oct. 18, 2001)(slip op. at 3)

Issues regarding whether the information provided by Petitioner was sufficient to demonstrate that specific section of the Act and regulations would not be violated is for the Board. Experts may not testify to these matters, and Opinion No. 4 must also be excluded.

**III. Conclusion.**

Expert testimony as to legal conclusions that will determine the outcome of the case is inadmissible. In Opinions No. 2, 3, and 4, Kolaz, is expected to offer nothing more than legal conclusions regarding potential violations of Section 9 of the Act and multiple provisions of the Illinois Administrative Code. The opinions offered by Kolaz in opinions No. 2, 3, and 4 are legal conclusions on issues that are determinative of the outcome of this case, and are for the Board to decide. Accordingly, Kolaz's testimony regarding these opinions must be excluded from hearing.

Wherefore, the Respondent respectfully requests that the Hearing Officer enter an Order barring testimony by Mr. Kolaz as to disclosed Opinions 2, 3, and 4.

Respectfully Submitted,

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY

By:



Christopher J. Grant  
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regarding the Request for Revision submitted to Illinois EPA by the Petitioner; d) the existing permits and the supporting applications for the Facility; e) his involvement in communications and/or meetings between Petitioner and Illinois EPA regarding the Request for Revision; f) Inspections by Illinois EPA inspectors in the Fall of 2013; h) and in rebuttal, as to any matters raised during Illinois EPA's case in chief.

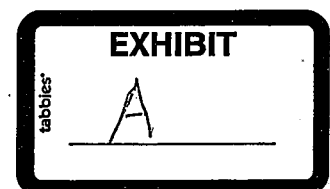
**Opinion Witnesses**

Dave Kolaz, M.S. P.E. (former Chief Bureau of Air, Illinois EPA)

Petitioner expects to elicit testimony from Mr. Kolaz with regard to the following topics: a) Mr. Kolaz's experience and knowledge regarding permit processing and review protocols as well as the considerations germane to decisions to grant or deny a permit in the BOA at Illinois EPA; b) with regard to the Petitioner's South Facility (located at 10730 South Burley Avenue, Chicago, Illinois), his review of the Request for Revision of Permit No. 07050082 at issue in this matter; c) the relevance and significance of the reference in the Request for Revision of Permit No. 07050082 to the previous permit applications and permits for the North Facility (at 3259 East 100<sup>th</sup> Street, Chicago, Illinois) and the South Facility; d) his review of the Record filed by the State in this permit appeal; e) his review of the Petition and Exhibits attached thereto filed by the Petitioner; and f) his review of the "Wells Letter" dated December 10, 2013, the Petitioner's Responses to the Wells Letter dated December 18, 2013 and January 13, 2014, and h) his review of the January 17, 2014 Permit Denial and specific denial bases set forth therein. Petitioner reserves the right to recall Mr. Kolaz in rebuttal, as to any matters raised during Illinois EPA's case in chief. Mr. Kolaz's testimony may also include relevant discussion of State and federal statutes, e.g. the federal Clean Air Act, the Illinois Environmental Protection Act, regulations promulgated under such statutes, as well as State and/or Federal guidance and industrial publications, related to the operation and control of particulate matter emission sources.

Petitioner expects that Mr. Kolaz will tender the following opinions:

1. References in the Request for Revision to information contained in the now active Permit No. 07050082 and its supporting application, is reasonable and sufficient for providing the appropriate data and information related to the ten portable conveyors, one box hopper and one stacker and should be considered in reviewing the Request for Revision and rendering a decision to grant or deny the permit.
2. The field staff observations, as documented by inspection reports in the record, do not provide information that supports the conclusion that the proposed future construction activity may violate 35 Ill. Adm. Code Section 212.301 and should not be used by the Illinois EPA as a basis to deny the permit application.



3. The Illinois EPA should not rely upon past citizen pollution complaints to support a finding that a future construction project may violate Section 212.301. In addition, past citizen complaints do not contain information necessary to assess future compliance with Section 212.301 by the addition of the ten portable conveyors, one box hopper and one stacker at the Facility.

4. The Request for Revision submitted to Illinois EPA by the Petitioner, including references to the existing Permit No. 07050082 and the supporting application, information regarding equipment identification numbers provided by e-mail dated September 3, 2013, contained sufficient information: 1) demonstrating that granting the Permit would not violate Section 9 or 35 Ill. Adm. Code Sections 201.160(a), 212.301, or 212.321; and 2) satisfy the requirements of 35 Ill. Adm. Code Sections 201.152.

The bases for Mr. Kolaz's opinions are:

- Education, training and experience as a Illinois registered professional engineer, generally;
- Extensive former experience as the Chief of the Bureau of Air, Manager of the Compliance & Systems Management Section, Manager Air Monitoring Section, and Permit Analysis Engineer all at the Illinois EPA;
- Familiarity with the Illinois Pollution Control Board's Air Regulations, including in particular, Parts 201 and 212;
- Experience as a private consultant in air permitting and air quality issues;
- Review of Petitioner's Request for Revision and other applications and permits for the North Facility and the South Facility;
- Familiarity with the North Facility and the South Facility and the equipment sought to be permitted;
- Review of the Record, Petitioner's Petition and the Exhibits attached thereto; and
- Review of the Wells Letter, the Petitioner's December 18, 2013 and January 13, 2014 letters in response to the Wells Letter, and the Permit Denial.

Mr. Kolaz's CV is attached as Exhibit 1.



**DAVID J. KOLAZ, M.S., P.E.**

**EDUCATION**

B.S.           Aeronautical and Astronautical Engineering, University of Illinois, 1971  
M.S.           Engineering, specialty in Thermal and Environmental Engineering, Southern Illinois University, 1984

**EMPLOYMENT HISTORY**

2006-Present   Conestoga-Rovers & Associates, Springfield, IL  
2000-04        Chief, Bureau of Air, Illinois EPA  
1994-00        Manager, Compliance & Systems Management Section, Illinois EPA  
1990-94        Manager, Air Systems Management Section, Illinois EPA  
1977-90        Manager, Air Monitoring Section, Illinois EPA  
1974-77        Supervisor, Air Data Unit for the Air Monitoring Section, Illinois EPA  
1973-74        Permit Analysis Engineer, Illinois EPA  
1971-73        Variance Analysis Engineer, Illinois EPA

**PROFESSIONAL REGISTRATIONS/AFFILIATIONS**

Registered Professional Engineer: Illinois

**PROFILE OF PROFESSIONAL ACTIVITIES**

- Prepared, defended, and administered an ~\$85 million dollar annual operating budget and managed a staff of ~340 employees.
- Developed and implemented the programs, policies, and processes necessary to secure and maintain USEPA and legislative support for the Illinois EPA air pollution program.
- Communicated with various interest groups to better understand their agendas and to discuss the goals and priorities of the air pollution control program.
- Prepared necessary legislative initiatives, proposed rule changes, and developed policies and procedures necessary to accomplish air pollution control program objectives.
- Formulated comprehensive strategies sufficient to accomplish program goals and objectives and to guide the general work of managers and administrators engaged in implementing the statewide air pollution control program.
- Briefed the Agency Director, Governor's Office staff, and other key government and community leaders on various aspects of the air pollution control plan and related topics.
- Chaired a diverse workgroup of Bureau of Air and Illinois EPA legal staff to direct the Illinois EPA's statewide air compliance and enforcement program including determining the most appropriate action to take to resolve case specific air pollution violations.
- Co-Chaired a workgroup responsible for establishing the policies and procedures and conducting the outreach needed for the implementation of Illinois' first emission trading program and the first program in the nation to trade volatile organic material.

DAVID J. KOLAZ

- Authored an Enforcement Response Plan approved by USEPA that took an innovative approach distinctly different from other such plans previously approved by USEPA.
- Obtained USEPA approval of a Memorandum of Agreement that delineates air enforcement roles and responsibilities, formally defines a partnership relationship that minimizes USEPA oversight, and provides the Illinois EPA a voice in USEPA's compliance and enforcement program in Illinois.
- Led the Illinois EPA's multi-media Compliance Management Panel in the successful implementation of the extensive revisions to the enforcement provisions of the Illinois Environmental Protection Act.
- Chaired the eight Great Lakes States inventory workgroup that compiled the first complete inventory of air toxic pollutants of interest to the Great Lakes ecosystem.
- Led the successful efforts to develop and promulgate an Annual Emissions Reporting rule impacting over 8,000 Illinois businesses.
- Led the team that negotiated the first Title V permit fee that provides over 50 percent of the Division of Air Pollution Control's program funding.
- Initiated the development of a strategic plan to integrate all of the Division's environmental databases into a single data system while providing for the system to be expanded Illinois EPA-wide at a later time.
- Began the implementation of the Division's integrated comprehensive environmental data management system (ICEMAN) with the development of the industry emissions reporting and fee billing modules.
- Established the Illinois EPA's first computerized air quality modeling capability.
- Provided testimony before the Illinois Pollution Control Board regarding the results of various air quality data analyses and modeling studies.
- Modernized the ambient air monitoring program replacing wet chemical methods with solid-state electronic instruments capable of immediate sampling, analysis, and transmittal of measurement results through a telemetry system.
- Expanded the State-wide ambient monitoring network to emphasize ozone and particulate measurements as well as the analysis of air toxic pollutants.
- Directed the design and installation of a real-time telemetry system capable of immediate access to ambient measurement results as well as the remote assessment of instrument performance and the unattended initiation of instrument calibration and diagnostics.
- Initiated the Agency's first steps in the use of personal computers to meet office business requirements.
- Received a Special Recognition Award from USEPA for "establishing one of the most outstanding state air monitoring programs in the country".
- Helped establish a routine protocol to improve the timeliness and efficiency for issuing incinerator permits.
- Developed and implemented a computerized tracking system to monitor the terms and conditions of approved variance petitions.
- Wrote a computer program to model the atmospheric dispersion of air contaminants to use as a tool in analyzing the environmental impact of variance requests.
- Assisted an international manufacturing facility obtain air permits that provide operational flexibility sufficient to allow the company to respond to changing market conditions.
- Provided a comprehensive analysis of the hazardous emissions profile of an ethanol production facility that demonstrated to the satisfaction of a state regulatory agency that had previously issued a violation notice that emissions had not violated state standards.

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DAVID J. KOLAZ

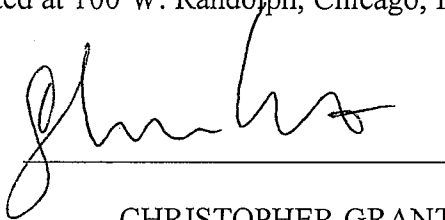
- Assisted a petroleum sector facility obtain an innovative permit to produce a refinery cracker feed stock from used oil.
- Provided guidance and assistance to a joint venture to obtain an air permit to produce pipeline quality "natural" gas from coal.
- Provided a technical analysis of air monitoring data for a major airport expansion to show that air quality standards were not being violated and help refine protocols that used air monitoring measurements to ensure air quality continued to be protected.
- Provided litigation support for a coal handling facility that included analyzing the factual and technical basis of claims and critiques of plaintiff's expert witness analyses. The effort resulted in the client receiving a summary judgment in its favor.

#### PUBLICATIONS AND PRESENTATIONS

- Author of World Book Encyclopedia definitions for soot, smoke, smog.
- D.J. Kolaz and R.L. Swinford, "How to Remove the Influence of Meteorology from the Chicago Area Ozone Trend", 90-97.5, presented at the 83rd Annual Meeting of the Air & Waste Management Association, Pittsburgh, PA, June 1990.
- D.J. Kolaz and R.L. Swinford, "Ozone Air Quality: "How Does Chicago Rate?", 88-19.4, presented at the 81st Annual Meeting of the Air Pollution Control Association, Dallas, TX, June 1988.

**CERTIFICATE OF SERVICE**

I, CHRISTOPHER GRANT, an attorney, do certify that I caused to be served this 22nd day of April, 2014, Respondent's Motion *in Limine* to Bar Improper Opinion Testimony by Petitioners Disclosed Witness Dave Kolaz, and Notice of Filing, upon the persons listed below by electronic mail, facsimile transmission, and by placing same in an envelope bearing sufficient postage with the United States Postal Service located at 100 W. Randolph, Chicago, Illinois.



CHRISTOPHER GRANT

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