

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

**NOTICE OF FILING**

TO: Mr. John Therriault	Mr. Bradley P. Halloran
Assistant Clerk of the Board	Hearing Officer
Illinois Pollution Control Board	Illinois Pollution Control Board
100 West Randolph Street	100 West Randolph Street
Suite 11-500	Suite 11-500
Chicago, Illinois 60601	Chicago, Illinois 60601
<b>(VIA ELECTRONIC MAIL)</b>	<b>(VIA FIRST CLASS MAIL)</b>

**(SEE PERSONS ON ATTACHED SERVICE LIST)**

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board **PETITIONER'S RESPONSE IN OPPOSITION TO MOTION IN LIMINE TO BAR OPINION TESTIMONY OF TERRY STEINERT**, a copy of which is herewith served upon you.

Respectfully submitted,

KCBX TERMINALS COMPANY,  
Petitioner,

Dated: April 23, 2014

By: /s/ Edward W. Dwyer  
Edward W. Dwyer

Katherine D. Hodge  
Edward W. Dwyer  
Matthew C. Read  
HODGE DWYER & DRIVER  
3150 Roland Avenue  
Post Office Box 5776  
Springfield, Illinois 62705-5776  
(217) 523-4900

**CERTIFICATE OF SERVICE**

I, Edward W. Dwyer, the undersigned, hereby certify that I have served the attached PETITIONER'S RESPONSE IN OPPOSITION TO MOTION IN LIMINE TO BAR OPINION TESTIMONY OF TERRY STEINERT upon:

Mr. John Therriault  
Assistant Clerk of the Board  
Illinois Pollution Control Board  
100 West Randolph Street  
Suite 11-500  
Chicago, Illinois 60601

via electronic mail on April 23, 2014 and upon:

Mr. Bradley P. Halloran  
Hearing Officer  
Illinois Pollution Control Board  
100 West Randolph Street  
Suite 11-500  
Chicago, Illinois 60601

Division of Legal Counsel  
Illinois Environmental Protection  
Agency  
1021 North Grand Avenue  
Post Office Box 19276  
Springfield, Illinois 62794-9276

by depositing said documents in the United States Mail, postage prepaid, in Springfield, Illinois on April 23, 2014 and upon:

Kathryn A. Pamenter, Esq.  
Christopher J. Grant, Esq.  
Robert R. Petti, Esq.  
Assistant Attorney General  
Office of the Attorney General  
69 West Washington Street, Suite 1800  
Chicago, Illinois 60602

via facsimile and by depositing said document in the United States Mail, postage prepaid, in Springfield, Illinois on April 23, 2014.

/s/ Edward W. Dwyer  
Edward W. Dwyer

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**PETITIONER'S RESPONSE IN OPPOSITION TO MOTION  
IN LIMINE TO BAR OPINION TESTIMONY OF TERRY STEINERT**

NOW COMES Petitioner, KCBX TERMINALS COMPANY ("KCBX"), a North Dakota corporation, by and through its attorneys, HODGE DWYER & DRIVER, and for its Response in Opposition to Respondent's Motion in Limine to Bar Opinion Testimony of Terry Steinert, states as follows:

**I. INTRODUCTION**

On February 21, 2014, KCBX filed with the Illinois Pollution Control Board ("Board") its Petition for Review ("Petition") of the Permit Denial issued to KCBX by the Illinois Environmental Protection Agency ("Illinois EPA") on January 17, 2014, in response to its July 23, 2013 Request for Revision to Revised Construction Permit ("Request for Revision"). The Illinois EPA filed the Administrative Record in this permit appeal with the Board on March 24, 2014. A Hearing Officer Order was entered scheduling a hearing on April 29, 2014, and ordering the close of discovery on or before April 18, 2014.

In its Permit Denial, the Illinois EPA stated that the permit application was denied "because Sections 9 and 39.2 of the Illinois Environmental Protection Act, and 35 Ill.

Admin. Code §§ 201.152, 201.160(a), 212.301, and 212.321 might be violated.” Permit Denial, p. 1. Specifically, the Illinois EPA stated that “the Act and the Rules and Regulations may not be met” because:

1. The application did not contain the minimum data and information specified in 35 Ill. Adm. Code 201.152 and, as such, the Illinois EPA could not determine compliance with the Act and Regulations;
2. Under 35 Ill. Adm. Code 201.160(a)(1), no construction permit may be granted unless the applicant submits proof to the Illinois EPA that the emission unit or air pollution control equipment will be constructed or modified to operate so as not to cause a violation of the Illinois Environmental Protection Act or applicable regulations;
3. The application did not show compliance with 35 Ill. Adm. Code 212.301 as to Fugitive Particulate Matters, and based on observations of Illinois EPA staff and citizen complaints, emissions from the source may violate 35 Ill. Adm. Code 212.301; and
4. The application did not show whether the particulate matter emissions from the ten portable conveyors, one box hopper, and one stacker will comply with 35 Ill. Adm. Code 212.321.

Permit Denial, pp. 1-2.

On March 28, 2014, KCBX timely filed its Witness Disclosure. KCBX disclosed Terry Steinert and Dave Kolaz as Opinion Witnesses and attached to the Witness Disclosure a CV for both Opinion Witnesses.

On April 22, 2014, the Illinois EPA filed a Motion in Limine to Bar Opinion Testimony of Terry Steinert (“Steinert Motion”). The Illinois EPA moves to bar Mr. Steinert from testifying as to the following opinion disclosed in KCBX’s Witness Disclosure:

- I. The Request for Revision submitted to Illinois EPA by the Petitioner, including references to the existing Permit No. 07050082 and the supporting application, including 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) to satisfy the requirements of 35 Ill. Adm. Code Sections 201.152.

Steinert Motion, p. 2. The Illinois EPA argues that Mr. Steinert's disclosed opinions constitute impermissible opinions regarding legal conclusions or statutory interpretation and, therefore, should be barred. *Id.* pp. 1-3. The Illinois EPA states that "Mr. Steinert's opinion in this matter constitutes an impermissible legal conclusion that goes to the ultimate issue before the Board in this Permit Appeal." *Id.* p. 2. The Illinois EPA alternatively argues that Mr. Steinert's opinion should be barred because it is cumulative of one of Mr. Kolaz's disclosed opinions. *Id.* pp. 3-4.

The Steinert Motion should be denied. The Illinois EPA is not correct that Mr. Steinert's opinion constitutes a legal conclusion or statutory interpretation, and even if, the Illinois EPA is correct that Mr. Steinert's opinion "goes to the ultimate issue before the Board in this Permit Appeal." Such expert testimony is admissible under Illinois law. Further, because Mr. Steinert has a separate area of expertise than Mr. Kolaz, Mr. Steinert's testimony would not be cumulative. Accordingly, the Steinert Motion should be denied and KCBX should be permitted to present Mr. Steinert's opinion at the hearing in this matter.

## **II. APPLICABLE LAW AND ARGUMENT**

### **A. Mr. Steinert's Opinions Are Not Legal Conclusions**

"The 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 (Act) (415 ILCS 5 *et seq.* (2000)) or rules under the Act would have occurred if the requested permit had been issued.” *Community Landfill Co. v. IEPA*, PCB No. 01-170, 2001 Ill. ENV LEXIS 553, \*7 (December 6, 2001).

“If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” ILL. R. EVID. 702. “An expert witness may generally express an opinion as to the ultimate issue in a case. The test for whether to admit an expert’s opinion on the ultimate issue is whether that opinion will aid the trier of fact to understand the evidence or determine a fact in issue.” *Townsend v. Fassbinder*, 372 Ill. App. 3d 890, 905, 866 N.E.2d 631, 646 (2nd Dist. 2007).

Recently enacted Illinois Rule of Evidence 704 provides that “[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.” ILL. R. EVID. 704. Even prior to adoption of this rule, however, it had “been settled for some time that expert opinion testimony on an ultimate fact or issue does not impermissibly intrude on the fact finder’s role, as long as all of the other requirements for the admission of the testimony are met.” *Jackson v. Seib*, 372 Ill. App. 3d 1061, 1071, 866 N.E.2d 663, 674 (5th Dist. 2007) (citing *Zavala v. Powermatic, Inc.*, 167 Ill. 2d 542, 545 (1995)). “The reason for this is that the trier of fact is not required to accept the expert’s conclusion.” *Id.*

“When a petitioner in a permit appeal is the permit applicant, the petitioner has the burden of proving that the requested permit would not violate the Act or the Board's regulations.” *Prairie Rivers Network v. Illinois Pollution Control Bd.*, 335 Ill. App. 3d 391, 400-01, 781 N.E.2d 372, 379 (4th Dist. 2002). “The Board has determined that it is the denial letter which frames the issue in a permit appeal to the Board.” *ESG Watts, Inc. v. Pollution Control Bd.*, 286 Ill. App. 3d 325, 335, 676 N.E.2d 299, 306 (3rd Dist. 1997) (citing *Pulitzer Community Newspapers v. Illinois Environmental Protection Agency*, Op. 90-142 (Ill.Pol.Control.Bd. Dec. 20, 1990); *Centralia Environmental Services, Inc. v. Illinois Environmental Protection Agency*, Op. 89-170 (Ill.Pol.Control.Bd. May 10, 1990)).

Thus, while the legal conclusion to be determined by the Board is whether KCBX proves that the application demonstrated that no violations would have occurred if the requested permit had been issued, the issues in the case are framed by the Denial Letter. KCBX has the burden to prove these issues by showing that the alleged deficiencies or purported violations set forth in the Denial Letter were inaccurate.

As set forth above, several regulations were cited in the Denial Letter. 35 Ill. Admin. Code § 201.160(a) provides that:

a) No construction permit shall be granted unless the applicant submits proof to the Agency that:

1) The emission unit or air pollution control equipment will be constructed or modified to operate so as not to cause a violation of the Act or of this Chapter; and

\* \* \*

35 Ill. Admin. Code § 201.160(a). Also cited in the Denial Letter is 35 Ill.

Admin. Code § 212.301, which provides that: “No person shall cause or allow the emission of fugitive particulate matter from any process, including any material handling or storage activity, that is visible by an observer looking generally toward the zenith at a point beyond the property line of the source.”

35 Ill. Admin. Code § 212.301. In addition, 35 Ill. Admin. Code § 212.321(a) provides, in part:

Except as further provided in this Part, no person shall cause or allow the emission of particulate matter into the atmosphere in any one hour period from any new process emission unit which, either alone or in combination with the emission of particulate matter from all other similar process emission units for which construction or modification commenced on or after April 14, 1972, at a source or premises, exceeds the allowable emission rates specified in subsection (c) of this Section.

35 Ill. Admin. Code § 212.321(a). Finally, 35 Ill. Admin. Code § 201.152 provides, in part:

An application for a construction permit shall contain, as a minimum, the following data and information: The nature of the emission unit and air pollution control equipment, including the expected life and deterioration rate; information concerning processes to which the emission unit or air pollution control equipment is related; the quantities and types of raw materials to be used in the emission source or air pollution control equipment; the nature, specific points of emission and quantities of uncontrolled and controlled air contaminant emissions at the source that includes the emission unit or air pollution control equipment; the type, size, efficiency and specifications (including engineering drawings, plans and specifications certified to by a registered Illinois professional engineer) of the proposed emission unit or air pollution control equipment; maps, statistics and other data reasonably sufficient to describe the location of the emission unit or air pollution control equipment. ...

35 Ill. Admin. Code § 201.152. KCBX consequently has the burden of presenting evidence to the Board – that these regulations as applied to the facts of this case did not

justify denial of the permit. The Board will then consider all the ultimate issues together to reach the legal conclusion as to whether KCBX met its burden of proof as a matter of law.

In *Glasgow v. Granite City Steel*, PCB No. 00-021, 2002 Ill ENV LEXIS 112 (March 7, 2002), a nuisance case, the Board overruled a Hearing Officer's order barring an expert from testifying. The respondent argued that the hearing officer properly barred an expert's testimony regarding unreasonable noise interference "since it is the ultimate issue in the case." *Glasgow*, 2002 Ill ENV LEXIS 112, \*11. The Board noted that "[a]s part of its nuisance analysis, the Board determines if the noise at issue caused an unreasonable interference with the enjoyment of life." *Id.* The Board found that although it "makes the ultimate determination on whether or not nuisance noise is unreasonable," it would nonetheless admit the expert's testimony on that subject. *Id.* at \*12 (citing 35 Ill. Admin. Code § 101.626(b)) ("When the admissibility of evidence depends upon a good faith argument as to the interpretation of substantive law, the hearing officer will admit the evidence.")

Here, KCBX is not attempting to have Mr. Steinert opine on the legal conclusion the Board will ultimately reach. Its Witness Disclosure did not state that Steinert would provide the opinion that KCBX has, as a matter of law, met its burden of proof of showing that the application as submitted demonstrated that no violation of any provision of the Act or any regulations would have occurred if the requested permit were issued.

Instead, Mr. Steinert's disclosed opinions relate to how materials in the Record relate to the content of the very specific regulations set forth in the Permit Denial. For

example (and not by way of limitation), Mr. Steinert may provide opinions with respect to (1) what information did KCBX provide with respect to how “the emission unit or air pollution control equipment will be constructed or modified” (35 Ill. Admin. Code § 201.160(a)); (2) what information did KCBX provide with respect to “the emission of fugitive particulate matter” (35 Ill. Admin. Code § 212.301); (3) what information did KCBX provide with respect to “the emission of particulate matter into the atmosphere” (35 Ill. Admin. Code § 212.321(a)); and (4) what information did KCBX provide with respect to “the nature of the emission unit and air pollution control equipment, including the expected life and deterioration rate” or “the quantities and types of raw materials to be used in the emission source or air pollution control equipment” (35 Ill. Admin. Code § 201.152). Since KCBX has the burden of proving these issues, it must be permitted to submit testimony to the Board that assists it in understanding the evidence related to these issues, i.e., expert testimony.

The Illinois EPA does not contend that Mr. Steinert is not qualified to provide expert testimony, that his testimony will not assist the Board in understanding the evidence, or that any other requirement for the admission of expert testimony is lacking; it only claims that Steinert’s opinion “constitutes an “impermissible legal conclusion *that goes to the ultimate issue before the Board in this Permit Appeal.*” Steinert Motion, p. 2 (emphasis added). As established above, however, Steinert’s opinion is not a legal conclusion, and expert testimony regarding “the ultimate issue before the Board in this Permit Appeal” is specifically permitted by Illinois law.

Accordingly, Mr. Steinert should be permitted to testify as to his disclosed opinion and the Steinert Motion should be denied.<sup>1</sup>

**B. Mr. Steinert's Testimony Would Not Be Cumulative**

“A trial court has discretion to exclude cumulative evidence.” *Steele v. Provena Hospitals*, 2013 IL App (3d) 110374, ¶ 77. “Within this discretion is a trial court's ability to limit the number of expert witnesses a party may present.” *Id.* A trial court properly allows multiple experts to testify, however, where the experts have different areas of expertise. *See id.* at ¶ 78; *Taylor v. Cnty. of Cook*, 2011 IL App (1st) 093085, ¶ 35.

In *Steele*, the court held that the trial court properly allowed a party to present expert testimony by two different doctors. *Steele*, 2013 IL App (3d) 110374 at ¶ 78. The court reasoned that one doctor specialized in internal medicine and infectious diseases and the other doctor specialized in emergency care. The court found that the testimony of the two doctors “was not necessarily cumulative, and the trial court did not abuse its discretion when it denied” a motion to bar the testimony of one of the doctors as cumulative. *Id.*

In *Taylor*, the court similarly held that “[t]he circuit court did not abuse its discretion when it denied [plaintiff's] motion in limine to bar defendants' expert testimony on the basis that the testimony was cumulative.” *Taylor*, 2011 IL App (1st) 093085 at ¶ 35. The court reasoned that while all three expert physicians testified regarding the standard of care, two of the doctors specialized in rheumatology while one specialized in neurology. *Id.*

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<sup>1</sup> KCBX has, in the very least, established that the admissibility of Mr. Steinert's testimony “depends upon a good faith argument as to the interpretation of substantive law” and, therefore, “the hearing officer will admit the evidence.” 35 Ill. Admin. Code § 101.626(b) ; *Glasgow*, 2002 WL 392181, \*12.

Here, the Illinois EPA claims that Mr. Steinert's testimony would be cumulative of Mr. Kolaz's testimony because Mr. Steinert's only disclosed opinion is nearly identical to the fourth disclosed opinion of Mr. Kolaz. Steinert Motion, pp. 3-4. Mr. Steinert and Mr. Kolaz, however, have different areas of expertise. Mr. Steinert is a former Environmental Compliance Manager for KCBX and is thus extremely familiar with the facilities and equipment in question and was involved in the application process. Exhibit 2 to Witness Disclosure. He can assist the Board in understanding the issues from the Petitioner's perspective. Mr. Kolaz, on the other hand, is the former Chief of the Illinois EPA Bureau of Air and is thus extremely familiar with the Illinois EPA's procedures and involvement in the application process and can assist the Board in understanding the issues from the Illinois EPA's perspective. Exhibit 1 to Witness Disclosure. As Mr. Steinert and Mr. Kolaz have different areas of expertise and different viewpoints, their testimony is not cumulative. Consequently, the Steinert Motion should be denied in its entirety.

### **III. CONCLUSION**

The Board should reject the Illinois EPA's arguments that Mr. Steinert's opinion constitutes a legal conclusion or statutory interpretation. Instead, Mr. Steinert's opinions go "to the ultimate issue before the Board in this Permit Appeal" (Steinert Motion, p. 2) and testimony regarding the ultimate issue is admissible by rule and by well-established precedent. KCBX has the burden of proof and must be permitted to provide opinion testimony relating to the ultimate issues that Board can either accept or reject in ultimately rendering its legal conclusion as to whether KCBX has met its burden.

Accordingly, the Board should deny the Steinert Motion and allow KCBX to present its case. In addition, Mr. Steinert's testimony would not be cumulative of Mr. Kolaz's testimony because the two experts occupy different positions and offer different perspectives from their separate realms of expertise. Therefore, the Steinert Motion should be denied in its entirety.

WHEREFORE Petitioner, KCBX TERMINALS COMPANY, respectfully prays that the Board deny Illinois EPA's Motion in Limine to Bar Opinion Testimony of Terry Steinert.

Respectfully submitted,

KCBX TERMINALS COMPANY,  
Petitioner,

Dated: April 23, 2014

By: /s/ Edward W. Dwyer  
One of Its Attorneys

Katherine D. Hodge  
Edward W. Dwyer  
Matthew C. Read  
HODGE DWYER & DRIVER  
3150 Roland Avenue  
Post Office Box 5776  
Springfield, Illinois 62705-5776  
(217) 523-4900