

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
(VIA ELECTRONIC MAIL)	(VIA FIRST CLASS MAIL)

(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 DAVE KOLAZ**, 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
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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 DAVE KOLAZ 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
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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 DAVE KOLAZ**

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 Dave Kolaz, 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 Improper Opinion Testimony by Petitioner’s Disclosed Witness Dave Kolaz (“Kolaz Motion”). The Illinois EPA moves to bar Mr. Kolaz from testifying as to the following opinions disclosed in KCBX’s Witness Disclosure:

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.

Kolaz Motion, pp. 2-3. The Illinois EPA argues that Mr. Kolaz's disclosed opinions constitute impermissible opinions regarding legal conclusions or statutory interpretation and, therefore, should be barred. *Id.* pp. 1-4. The Illinois EPA states that Mr. Kolaz's opinions in this matter "constitute impermissible legal conclusions that go to the ultimate issues of law before the Board." *Id.* p. 3.

The Kolaz Motion should be denied. The Illinois EPA is not correct that Mr. Kolaz's opinions constitute legal conclusions or statutory interpretation, and even if the Illinois EPA is correct that Mr. Kolaz's opinions "go to the ultimate issues" before the Board, such expert testimony is admissible under Illinois law. Accordingly, the Kolaz Motion should be denied and KCBX should be permitted to present Mr. Kolaz's opinions at the hearing in this matter.

II. APPLICABLE LAW AND ARGUMENT

“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 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. Kolaz opine on the legal conclusion the Board will ultimately reach. Its Witness Disclosure did not state that Kolaz 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. Kolaz's disclosed opinions relate to how information in the Record relates to the content of the very specific regulations set forth in the Permit Denial. For

example (and not by way of limitation), Mr. Kolaz 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. Kolaz 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 Kolaz’s opinions “constitute impermissible legal conclusions *that go to the ultimate issues*” before the Board. Kolaz Motion, p. 3 (emphasis added). As established above, however, Kolaz’s opinions are not legal conclusions, and expert testimony regarding “the ultimate issue before the Board in this Permit Appeal” is

specifically permitted by Illinois law. Accordingly, Mr. Kolaz should be permitted to testify as to his disclosed opinions and the Kolaz Motion should be denied.¹

III. CONCLUSION

The Board should reject the Illinois EPA's arguments that Mr. Kolaz's opinions constitute legal conclusions or statutory interpretation. Instead, Mr. Kolaz's opinions "go to the ultimate issues" (Kolaz Motion, p. 3) 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 the 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 Kolaz Motion and allow KCBX to present its case.

WHEREFORE Petitioner, KCBX TERMINALS COMPANY, respectfully prays that the Board deny Illinois EPA's Motion in Limine to Bar Improper Opinion Testimony by Petitioner's Disclosed Witness Dave Kolaz.

Respectfully submitted,

KCBX TERMINALS COMPANY,
Petitioner,

By: /s/ Edward W. Dwyer

One of Its Attorneys

Dated: April 23, 2014

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¹ KCBX has, in the very least, established that the admissibility of Mr. Kolaz'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 Ill. ENV LEXIS 112, *12.