

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
KCBX TERMINALS COMPANY) PCB 2014-110
v.) (Permit Appeal - Air)
ILLINOIS ENVIRONMENTAL PROTECTION)
AGENCY)

NOTICE OF FILING

To: see attached Certificate of Service

On the 6th Day of May, 2014, I filed my Appearance and Public Comments on behalf of the Southeast Environmental Task Force with the Office of the Clerk of the Illinois Pollution Control Board.

A copy of this filing is hereby served upon you.

By: 
Keith Harley, Chicago Legal Clinic, Inc.

Dated: May 6, 2014

Keith Harley
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CERTIFICATE OF SERVICE

I, Keith Harley, the undersigned attorney, hereby certify that I served the attached documents – Appearance and Public Comments on behalf of the Southeast Environmental Task Force – by delivering it to:

John Therriault, Clerk
Illinois Pollution Control Board
100 West Randolph, Suite 11-500
Chicago, IL 60601-7447

Bradley O'Halloran, Hearing Officer
Illinois Pollution Control Board
100 West Randolph, Suite 11-500
Chicago, IL 60601-7447

and by mailing it to:

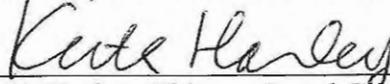
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by depositing it in the United States Mail, postage prepaid, from 211 W. West Wacker, Suite 750, before the hour of 5:00 p.m., on this 6th day of May, 2014.



Keith Harley, Chicago Legal Clinic, Inc.

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APPEARANCE

I, Keith Harley, an attorney, hereby enter my Appearance on behalf of the Southeast Environmental Task Force in the above matter.


Keith Harley, Chicago Legal Clinic, Inc.

Date: May 6, 2014

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PUBLIC COMMENTS OF THE SOUTHEAST ENVIRONMENTAL TASK FORCE

Now comes Keith Harley of the Chicago Legal Clinic, Inc. and makes the following public comments on behalf of the Southeast Environmental Task Force (“SETF”)

SETF is a community-based organization that advocates on behalf of public health and environmental quality on Chicago’s southeast side. SETF supports the decision of the Illinois EPA to deny the permit request made by KCBX Terminals to install new air emission units. In addition to being new sources of air emissions, the units would also enable the applicant to increase the throughput rate of its material handling and storage operations. The new emission units would be installed at a facility that was and remains the subject of enforcement actions and citizen complaints regarding air pollution even while operating under existing conditions. The Illinois EPA’s decision to deny a request to install additional air emitting units, which will also increase the intensity of an already troubled facility’s air emitting operations, is a prudent exercise of its discretionary authority and is well supported by the evidence in the record. SETF urges this Board to uphold the Illinois EPA’s permit denial in light of the clear evidence that the permitted activity will violate the Illinois Environmental Protection Act and its implementing regulations. 415 ILCS 5/39(a); 35 Ill.Adm.Code 201.141.

SETF defers to the Illinois Attorney General to make comprehensive arguments in support the Illinois EPA's decision. Instead, SETF will comment on two issues arising from its perspective as a community-based environmental organization. SETF's first comment addresses a procedural issue that could be critically important to secure full and complete public participation in this matter. SETF's second comment underscores the critical importance of citizen complaints as part of Illinois EPA's permit record in evaluating potential violations the Illinois Environmental Protection Act and its implementing regulations. 415 ILCS 5/39(a); 35 Ill. Adm. Code 201.141.

Comment One: The Illinois Pollution Control Board Should Affirm the Illinois EPA's Permit Denial. The Board's Decision Should Be Informed by the Procedural Status of This Permitting Matter and Should Be Consistent With The Goal of Providing A Full and Complete Opportunity For Public Participation.

Illinois EPA's denial of KCBX's permit application is based on EPA's review of the application and relevant, contemporaneous information. Notably, Illinois EPA denied the permit at a preliminary stage, before it was necessary for Illinois EPA to develop a draft permit for public review. Consequently, the public process that follows an Illinois EPA draft permit – in the form of public notice, a public hearing(s) and a public written comment period – has not occurred in this case. On one hand, SETF asserts the IL EPA was correct in denying the permit request at a preliminary stage of review. On the other hand, SETF must also point out that even if this Board concludes the Illinois EPA should proceed on the basis of the existing permit application, this does not mean Illinois EPA must issue a permit to KCBX. Rather, in the normal course of business, Illinois EPA would proceed to develop a draft permit that it believes fulfills the requirements of the

Act and regulations. At that point, SETF asserts IL EPA retains the authority and responsibility to provide a full and complete opportunity for the public to contribute to the record on which the ultimate permitting decision will be made. This would include a public notice, a public hearing(s) and a written comment period. Of course, this would also be true if KCBX is required to apply anew.

On this procedural point, the present case is distinguishable from recent Board permit appeal cases. For example, in Illinois Environmental Protection Agency v. Illinois Pollution Control Board, the Board's decision to overturn the Illinois EPA's NPDES permit was based on a permitting record that included public notice of a draft permit, a transcribed public hearing conducted by an Agency Hearing Officer and a subsequent written comment period. Illinois EPA v. Illinois Pollution Control Board, 386 Ill.App.3d 375, 377-79 (2008). Similarly, in Prairie Rivers Network v. Illinois Protection Agency, the record before the Board included public notice of a draft permit, the record of a public hearing and "numerous comments" submitted during a subsequent 30-day written comment period. Prairie Rivers v Illinois EPA, PCB 01-112 (August 9, 2001); 2001 WL 950017, 10 (Ill.Pol.Control.Bd.). In Village of Barrington v. Illinois Environmental Protection Agency, the record included a draft permit, published public notices, mailed public notices to interested parties, a transcribed public hearing that attracted 200 participants and a subsequent written comment period. Village of Barrington v. Illinois Environmental Protection Agency, 2005 WL 946593, 3 (Ill.Pol.Control.Bd.). In the present case, none of these activities designed to elicit public engagement have occurred because of the preliminary stage at which IL EPA concluded its review. If this Board concludes the Illinois EPA should proceed on the basis of the existing permit application,

Illinois EPA would still need to develop a draft permit that it believes fulfills the requirements of the Act and regulations, both in terms of the new air emitting units and the pollution controls that the Agency mandates. At that point, SETF asserts IL EPA retains the authority and responsibility to provide a full and complete opportunity for the public to contribute to the record on which the ultimate permitting decision will be made, including a public notice, a public hearing(s) and a written comment period.

SETF's interest in ensuring there is a full and complete opportunity for public participation is not its afterthought in reviewing this permitting process. Rather, on November 18, 2013, in light of the significant public interest evidenced during an informal environmental justice meeting on Thursday, November 14, 2014, SETF asserted Illinois EPA should exercise its authority "...to grant full and complete public participation, including a written comment period." Because there wasn't a draft permit for public review, SETF framed its request as being a critical part of the IL EPA's deliberations on its responsibilities pursuant to 415 ILCS 5/39(a). This request has not been withdrawn, and is still before the Illinois EPA, pending the result of the present permit appeal. SETF urges this Board to avoid foreclosing the Illinois EPA's ability to undertake public notice, a public hearing and a written comment period, even if this Board concludes this matter should be remanded to the Illinois EPA for continued permitting activities.

Comment Two: Illinois EPA's Permit Denial Fulfills the Standards Mandated by Illinois Law and Is Well-Supported By the Factual Record Including Multiple Citizen Complaints.

Exhibit 27 of permit record contains significant, relevant information derived from members of the public that fully supports the Illinois EPA's permit denial decision. This information, in the form of dozens of individual pollution complaints submitted contemporaneously with the permit review process, is directly relevant to a permit application review factor, namely, the duty of the applicant to demonstrate its activities will not cause violations of the Illinois Environmental Protection Act or its implementing regulations. Many of the citizen complaints describe airborne releases of material from KCBX's operations into nearby residential neighborhoods. These releases occurred when the facility operated without the additional air emitting units it seeks to install, and before the applicant could increase the throughput rate of its operations using the new equipment. Based on these complaints and its own inspection reports, Illinois EPA had a strong factual basis to conclude that, 1. adding new air emitting units, 2. that would also increase the throughput rate, 3. at an already troubled facility, would lead to violations of the Act and regulations. Under these circumstances, Illinois EPA acted correctly, and certainly within the legitimate scope of its discretionary authority, in denying the requested permit.

The Illinois Environmental Protection Act prohibits any person from:

Caus[ing] or threaten[ing] or allow[ing] the discharge of emission of any contaminant into the environment in any State so as to cause or tend to cause air pollution in Illinois, either alone or in combination with contaminants from other sources, or so as to violate regulations or standards adopted by the Board under [the Environmental Protection] Act. 415 ILCS 5/9(a).

For purposes of this provision, “air pollution” is defined as “the presence in the atmosphere of one or more contaminants in sufficient quantities and of such character and duration as to be injurious to human, plant, or animal life, to health, or to property, or to unreasonably interfere with the enjoyment of life or property.” 415 ILCS 5/3.115. A “contaminant” is “any solid, liquid or gaseous matter, any odor, or any form of energy, from whatever source.” 415 ILCS 5/3.165. For its part, the Board’s implementing regulation, 35 Ill.Adm.Code 201.141, states: “No person shall cause or threaten or allow the discharge or emission of any contaminant into the environment in any State so as, either alone or in combination with contaminants from other sources, to cause or tend to cause air pollution in Illinois, or so as to violate the provisions of this Chapter, or so as to prevent the attainment or maintenance of any applicable ambient air quality standard.”

When measured against these legally mandated standards, the citizen complaints include highly relevant information for the Illinois EPA to include in its deliberative process. The complaints which specifically identify the responsible company as the KCBX/Koch south facility describe:

1. “dust particles in house and on property”
2. “constant black dust in house even with windows closed”
3. “constantly cleaning black dust from [excised] outside”
4. “petcoke windstorms and in the river”, recorded on November 16, 2013,
5. “unable to open windows or doors without black soot coming in”
6. “cannot sell my property because of the smell and pollution in this area”
7. “There are very large piles of petroleum coke stored along the waterways of the southeast side of Chicago. We have seen large clouds of black dust floating through the

air. This has been to the extent of people refraining from open air festivities such as backyard parties and family gatherings. The dust accumulates on the streets and coats our homes. If our bricks are turning black from this dust, what is happening to our lungs. These piles are uncovered and some are as high as five stories! The trucks that transport this petcoke generally travel uncovered as well, which spreads the dust around faster...I feel that the mere presence of this hazardous material in my neighborhood lowers the value of the real estate. [excised] darkened considerably in the past 18 months," recorded November 16, 2013.

8. "The ash from this terminal is constantly all over my property. Is all over my [excised] lawn furniture, it comes in through the CLOSED windows and gets all over my house. This problem happens whether the wind is present or not...This happens every day at no specific [sic] time. If the day is windy, that's when it gets worse." November 15, 2013.

9. "Dust from the Coke flying around covering the ground and air and water we eat and drink from." November 15, 2013.

10. "The fumes of petroleum are coming [excised] constantly feeling nauseated and feel extremely tired...For the past 3 months, during the night, after 9pm, I've noticed the smell of petroleum fumes coming [excised]." November 15, 2013.

11. "The problem is anytime there is wind the petcoke dust flies all over our community. There were 2 severe windstorms this past summer 2013 the dust that landed and coated everything outside (luckily my windows were shut). The dust was almost measurable, after sweeping it up I became congested and coughing. Another concern is my [excised] but when the dust settles and becomes part of the soil, it's contaminated and toxic. So then I'm ingesting it when I [excised]." November 15, 2013.

12. "petcoke piles stored outdoors, when wind blow it gets all over home, cars, gardens, cars, gardens. children have trouble brething [sic]." November 15, 2013.

13. "Frequent petcoke dust covers our neighborhood. Company is being allowed to operate without a proper functioning suppression system. Using street sweepers to wash away petcoke which is seeping into our sewers. Connecting street sweepers to our fire hydrants to fill water trucks on the street sweepers without the REQUIRED BLACKFLOW PREVENTERS is allowing petcoke to backwash into our drinking water." November 15, 2013.

14. "Pet coke is getting in my house and yard...Dirty windows, brick [excised] in the yard until I clean." November 14, 2013.

15. "Petcoke entering my house from KCBX." November 14, 2013.

Within Exhibit 27, there are several other complainants that attribute their pollution problems to the KCBX/Koch North Facility on 100th Street as well as some complainants that attribute the problems they experience to petcoke storage facilities generally. As to these complaints, it is very important that the Illinois Environmental Protection Act and the Board's implementing regulations specifically prohibit air pollution "either alone *or in combination with contaminants with other sources*" (emphasis added). 415 ILCS 5/9(a); 35 Ill. Adm. Code 201.141. This statutory mandate is particularly relevant in the present case because of attempts by the permit applicant to combine its two distinct facilities into a single operating permit. Further, both the Act and the regulations anticipate the risks posed by prospective polluting acts and prohibit persons from *threatening* air pollution, not only causing or allowing contaminant emissions (emphasis added). *Id.* Finally, it should be noted that Exhibit 27 is time limited; it consists of a

response to a Freedom of Information Act request and does not include complaints subsequent to the FOIA response date. To this point, the City of Chicago conducted a transcribed public hearing on the southeast side as part of developing regulatory standards for bulk material storage facilities. This hearing was conducted on January 13, 2014 – four days before Illinois EPA’s permit denial - and generated a transcript filled with the same types of citizen complaints about the effects of pollution from KCBX. See: http://www.cityofchicago.org/content/dam/city/depts/cdph/environmental_health_and_foia/TranscriptPublicHearCDPHProRegs_Jan132014.pdf

In light of this evidence, the Board should not substitute its judgment for that of the Illinois EPA. The Illinois EPA was evaluating a permit application to add new air emission units, increasing the facility’s throughput rate, at the same time citizens were complaining that existing pollution from this source unreasonably interferes with their use and enjoyment of property, and is injurious to their property and health. These citizen complaints are entirely consistent with Illinois EPA’s own inspection reports and the allegations of an enforcement action brought by the Illinois Attorney General on behalf of the People of the State of Illinois. People of the State of Illinois ex. Rel. Lisa Madigan, Attorney General of the State of Illinois v. KCBX Terminals Company, a North Dakota Corporation, 2013CH24788, In The Circuit Court of Cook County, Chancery Division. Faced with these facts, it was entirely reasonable for the Illinois EPA to conclude that adding new emission units which would have the effect of increasing the facility throughput rate would lead to further violations of the Illinois Environmental Protection Act and its implementing regulations.

In light of these facts, the Illinois EPA's decision was certainly not against the manifest weight of evidence, and should be affirmed by this Board as an entirely legitimate exercise of Illinois EPA's discretionary authority as a permitting agency. In matters where an applicant appeals a permit rejection by the Illinois EPA, the Board is clear that the burden is on the applicant to show that granting the permit at issue would not violate the Act or Board regulations. Slocum Drainage District, PCB 05-09, 4, 2005 WL 946593 (April 21, 2005). KCBX has not met its burden. Because KCBX has not shown that its permit, if granted, would comply with all requirements of the Act and Board regulations, it has not met its burden, and the Board should not substitute its judgment for that of the Illinois EPA.

Respectfully Submitted,

A handwritten signature in cursive script, reading "Keith Harley", is written over a horizontal line.

Keith Harley
Attorney for the Southeast Environmental Task Force