

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

KCBX TERMINALS COMPANY, )

Petitioner, )

v. )

ILLINOIS ENVIRONMENTAL )  
PROTECTION AGENCY, )

Respondent. )

PCB No. 14-110  
(Air Permit Appeal)

NOTICE OF ELECTRONIC FILING

To: *Via Facsimile*

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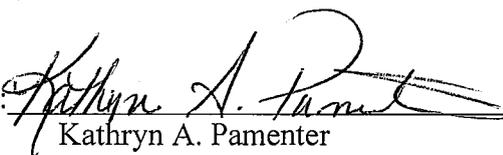
*Via Email*

Bradley P. Halloran  
Hearing Officer  
Illinois Pollution Control Board  
James R. Thompson Center, Suite 11-500  
100 W. Randolph Street  
Chicago, Illinois 60601

PLEASE TAKE NOTICE that on the 22nd day of April, 2014, the Respondent's Motion in Limine to Bar Opinion Testimony of Terry Steinert was filed with the Illinois Pollution Control Board, a true and correct copy of which is attached hereto and is hereby served upon you.

ILLINOIS ENVIRONMENTAL PROTECTION  
AGENCY

By:



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DATE: April 22, 2014

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

**MOTION IN LIMINE TO BAR OPINION TESTIMONY OF TERRY STEINERT**

Respondent, Illinois Environmental Protection Agency, hereby moves the Hearing Officer, pursuant to Illinois Pollution Control Board Rules 101.500, 101.502 and 101.610, for an Order barring Petitioner’s disclosed witness, Terry Steinert, from providing opinion testimony at trial.<sup>1</sup> In support of this Motion in Limine, Respondent states as follows:

**I. Mr. Steinert’s Expert Testimony Constitutes a Legal Conclusion and is Not Proper.**

Expert testimony is admissible only if the expert has specialized knowledge that will “assist the trier of fact in understanding the evidence.” *Grant v. Petroff*, 291 Ill. App. 3d 795, 801 (5th Dist. 1997). When determining whether proffered expert testimony assists the trier of fact, it is settled that “expert testimony as to legal conclusions that will determine the outcome of the case is inadmissible.” *Good Shepherd Manor Foundation, Inc. v. City of Momence*, 323 F.3d 557, 564 (7th Cir. 2003) (finding that expert’s opinions were legal conclusions where expert opined that city’s actions violated a statute); *see also Northern Moraine Wastewater Reclamation Dist. v. Illinois Commerce Com’n*, 392 Ill. App. 3d 542, 573 (2d Dist. 2009) (a witness may not give testimony regarding statutory interpretation or legal conclusions); *People v. Consolidated Freightways Corp. of Delaware et al.*, PCB No. 76-107, 1978 WL 9011 at \* 5 (Oct. 4, 1978)

<sup>1</sup> KCBX Terminals Company also lists Mr. Steinert as a fact witness in its Witness Disclosure. This Motion in Limine does not address Mr. Steinert in his capacity as a fact witness.

("[w]hile it is proper for Mr. Cutler [a proposed expert witness] to describe the conduct of Respondent pursuant to specified rules and regulations, legal conclusions and determinations of fact are matters which rest with this Board"); *People v. Panhandle Eastern Pipe Line Co.*, PCB No. 99-191, 2001 WL 1286284 at \*2 (Oct. 18, 2001) (citing *Coyne v. Robert H. Anderson & Assocs., Inc.*, 215 Ill. App. 3d 104, 112 (2d Dist. 1991) ("an expert witness cannot testify regarding legal conclusions"))).

Mr. Steinert is expected to offer an opinion regarding the legal conclusion of whether the Petitioner set forth sufficient information in the July 23, 2013 permit application to demonstrate that the installation of twelve new emission units at the Petitioner's site would not violate the Illinois Environmental Protection Act or the Illinois Administrative Code. (See Petitioner's Witness Disclosure, a true and correct copy of page 10 of which is attached hereto as Exhibit A.) Specifically, the Petitioner's Witness Disclosure states that Mr. Steinert will offer the following opinion testimony:

1. 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.

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. 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 No.

01-170, 2001 WL 1598272 at \*2 (Dec. 6, 2001). Because his opinion constitutes the legal conclusion that the Board must determine, Mr. Steinert's opinion testimony must be excluded.<sup>2</sup>

**II. Alternatively, Mr. Steinert's Opinion Testimony is Cumulative of Mr. Kolaz's Opinion Testimony and Should not be Admitted.**

Rule 101.610(e) of the Board's Procedural Rules provides as follows:

The hearing officer has the duty to manage proceedings assigned, to set hearings, to conduct a fair hearing, to take all necessary action to avoid delay, to maintain order, and to ensure development of a clear, complete, and concise record for timely transmission to the Board. The hearing officer has all powers necessary to these ends, including the authority to:

\* \* \*

- (e) Establish reasonable limits on the duration of the testimony and the questioning of any witness, and *limit repetitive or cumulative testimony and questioning*; . . . .

35 Ill. Adm. Code 101.610(e) (emphasis added); *see also Dillon v. Evanston Hospital*, 199 Ill.2d 483, 494-95 (2002) (cumulative expert evidence excluded); *Kozasa v. Guardian Elec. Mfg. Co.*, 99 Ill. App. 3d 669, 678 (1st Dist. 1981) (the exclusion of cumulative evidence is within the discretion of the trial court, whose ruling will not be reversed absent a clear abuse of that discretion); *Yassin v. Certified Grocers of Illinois, Inc.*, 150 Ill. App. 3d 1052, 1060-61 (1st Dist. 1986) (the court's discretion includes limiting the number of expert witnesses).

In this matter, it is well within the Hearing Officer's authority to exclude Mr. Steinert's opinion testimony, which is cumulative of Mr. Kolaz's opinion testimony. Mr. Kolaz's fourth opinion in this matter provides:

4. The Request for Revision submitted to Illinois EPA by the Petitioner, including references to the existing Permit No. 07050082 and the

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<sup>2</sup> Contemporaneously herewith, Respondent filed its motion to bar opinion testimony of Dave Kolaz. To the extent that the Hearing Officer grants Respondent's motions to exclude opinion testimony as to Mr. Steinert and Mr. Kolaz, Respondent will not offer Ms. Armitage's Rule 213(f)(3) opinion testimony set forth in the Respondent's Amended Witness Disclosure filed on April 17, 2014. Moreover, to the extent that the Hearing Officer denies Respondent's motion as to Mr. Steinert and Mr. Kolaz, one of the two opinions must be stricken as cumulative, as discussed in Section II of this motion.

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.

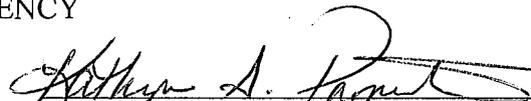
(See Petitioner's Witness Disclosure, a true and correct copy of pages 8 and 9 of which is attached hereto as Exhibit B.) Except for the two words in brackets, Mr. Steinert's opinion (quoted in Section I above) is identical to Mr. Kolaz's fourth opinion. Mr. Steinert's opinion testimony is cumulative of that of Mr. Kolaz and thus should be barred.

**III. Conclusion.**

Based on the foregoing and in the interests of judicial economy, Respondent respectfully requests that the Hearing Officer enter an Order precluding Mr. Steinert from offering his opinion testimony at trial and granting such other relief as the Hearing Officer deems proper.

ILLINOIS ENVIRONMENTAL PROTECTION  
AGENCY

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**EXHIBIT A**

Terry Steinert

Southwest Region Environmental Manager  
Koch Mineral Services, LLC  
4111 East 37th Street North  
Wichita, Kansas 67220

Petitioner expects to elicit testimony from Mr. Steinert with regard to the following topics: a) Mr. Steinert's job description and past/current responsibilities with regard to the Petitioner's facility; b) the operations of Petitioner's facility in Chicago, Illinois, which is at issue in this matter; c) the preparation of submittals from the Petitioner to Illinois EPA regarding the Request for Revision submitted to Illinois EPA by the Petitioner; d) the previous permit applications and permits for the Facility and the North Facility; e) the history of communications and/or meetings between Petitioner and Illinois EPA regarding the Request for Revision, in particular his communications with Mike Dragovich; f) the January 17, 2014 Permit Denial; g) the review of information from Illinois EPA regarding the Request for Revision, the existing permits and supporting application for the Facility; h) authentication of any documents, knowledge or lack of knowledge on the part of the Petitioner as to matters raised during the testimony of Illinois EPA employees; and in rebuttal, as to any matters raised during Illinois EPA's case in chief. Testimony is also expected to include relevant discussion of State and federal statutes, e.g. the federal Clean Air Act, the Act, regulations promulgated under such statutes, as well as State and/or Federal guidance and industrial publications, related to emission source classification and emission limit calculations.

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

1. 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.

The bases for Mr. Steinert's opinion are:

- Education, training and experience as an environmental professional;
- Former Position as Environmental Compliance Manager for KCBX
- Familiarity with the Facility and the equipment sought to be permitted;
- Involvement in preparing and submitting the Request for Revision;
- His familiarity with the existing permits for the Facility issued to the prior owner, DTE;
- Review of the Record, Petitioner's Petition and the Exhibits attached thereto,
- Review of the Wells Letter and the Permit Denial.

**EXHIBIT B**

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.

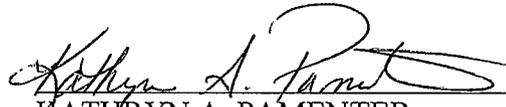
The bases for Mr. Kolaz's opinions are:

- 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.

**CERTIFICATE OF SERVICE**

I, KATHRYN A. PAMENTER, an Assistant Attorney General, do certify that I caused to be served this 22nd day of April, 2014, the attached Notice of Electronic Filing and Respondent's Motion in Limine to Bar Opinion Testimony of Terry Steinert upon (a) Edward W. Dwyer, Katherine D. Hodge and Matthew C. Read *via facsimile* and (b) Bradley P. Halloran *via email*.

  
KATHRYN A. PAMENTER