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April 21, 2003

ILLINOIS POLLUTION CONTROL BOARD

KAREN & ANTHONY ROTI, et al,	)	
	)	
Complainants,	)	
	)	
v.	)	PCB 99-19
	)	(Enforcement - Noise, Citizens)
LTD COMMODITIES,	)	
	)	
Respondent,	)	

RESPONDENT'S MOTION TO FILE CLOSING BRIEF INSTANTER

Respondent, LTD Commodities, Inc., by its attorneys, Baizer & Kolar, P.C., respectfully requests that the PCB allow LTD to file *instanter* its closing brief. LTD's brief was due on Friday April 18, 2003. LTD's attorney was unable to complete the brief by April 18 because of depositions he had scheduled the week of April 14, 2003. Respondents were given a six-week extension to file their closing brief and LTD requests only a two-business day extension to file its brief.

WHEREFORE, LTD Commodities respectfully requests that the Illinois Pollution Control Board accept LTD's closing brief for filing instanter on April 22, 2003 and grant Complainants until May 6, 2003 (the same two-business day extension) to file their reply brief.

LTD Commodities

By Joseph E. Kolar
Joseph E. Kolar, one Of Its Attorneys

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CERTIFICATE OF SERVICE

The undersigned attorney certifies that on April 21, 2003, he served the original and nine copies of the foregoing RESPONDENT'S MOTION TO FILE CLOSING BRIEF INSTANTER by Federal Express upon the Illinois Pollution Control Board, at the following address:

Ms. Dorothy M. Gunn
Clerk of the Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

and one copy by fax and regular mail upon the following person:

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Chicago, IL 60601
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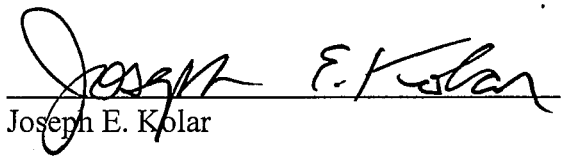

Joseph E. Kolar

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April 21, 2003

ILLINOIS POLLUTION CONTROL BOARD

KAREN & ANTHONY ROTI, et al,	)	
	)	
Complainants,	)	
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v.	)	PCB 99-19
	)	(Enforcement - Noise, Citizens)
LTD COMMODITIES,	)	
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Respondent,	)	

RESPONDENT LTD COMMODITIES' CLOSING BRIEF REGARDING APPROPRIATE REMEDIES

I. Introduction

In its February 15, 2001, decision the PCB found that LTD was a nuisance regarding its *nighttime* trucking operations. The PCB ordered this matter to hearing "to further address appropriate remedies." (February 15, 2001, decision, p. 33). A PCB hearing officer received additional testimony on October 15-16, 2002, and December 9, 2002. On October 16, 2002, LTD's vice president of distribution, Jack Voigt, testified that LTD would not operate its second shift (nighttime shift) as of October 18, 2002. (Jack Voigt, October 16, 2002, p. 76). Mr. Voigt explained that LTD was able to shut down its second shift because it had opened a new Naperville facility that reduced truck traffic in Bannockburn. (Jack Voigt, October 16, 2002, pp. 76-77). When Mr. Voigt testified again on December 9, 2002, he confirmed that LTD had not operated a second shift since October 18, 2002. (Jack Voigt, December 9, 2002, p. 74). This testimony by Mr. Voigt is very relevant to the section 33(c) factors the PCB must consider in determining an appropriate remedy. However, the Complainants basically ignore this crucial evidence and instead argue that LTD should build a wall that towers 35 feet over its truck dock employees and will cost $1.5 to 3.0 million. Clearly, with the changed circumstances at the LTD

site, it would be grossly unreasonable and contrary to the section 33(c) factors to require LTD to build any wall. For the same reasons, any civil penalty would be inappropriate as well.

II. LTD's Closing Argument

A. Circumstances Have Changed At LTD Since The PCB's February 15, 2001, Decision

The PCB must consider the section 33(c) factors when "making its orders and determinations." Thus, the factors must be considered when determining an appropriate remedy. As noted above, as of October 18, 2002, LTD was not even operating at night. Two section 33(c) factors are very relevant regarding this change of circumstances. First, the "character and degree of injury" is not the same as when the PCB found LTD's nighttime operations to be a nuisance. Indeed, as of October 18, 2002, the nuisance no longer existed! The nuisance also did not exist as of December 9, 2002, when Mr. Voigt testified for a second time during the remedy phase of this case. Thus, the "character and degree of injury" factor now favors LTD.

B. The Section 33(c) "Subsequent Compliance" Factor Strongly Favors LTD

In their closing brief, Complainants state that since February 15, 2001, "LTD did absolutely nothing to find appropriate methods for reducing the level of noise at LTD or preventing the noise migrating off-site." (Complainants' Closing Brief, pp. 3-4). This statement is false. It is an absolute misstatement of the record and steps taken by LTD since the PCB's February 15, 2001, decision.

LTD's warehouse space in Bannockburn totals 350,000 square feet. (February 15, 2001, decision, p. 5). In May 2001, *after the PCB's February 15, 2001, decision,* LTD opened a facility in Naperville. (Jack Voigt, October 16, 2002, p. 75). This facility is 400,000 square feet.

(Jack Voigt, October 16, 2002, p. 58). The volume of shipping at LTD's Bannockburn facility dropped when LTD opened a new facility in Aurora. (February 15, 2001, decision, p. 4). When LTD opened its Naperville facility, the volume dropped even further. (Jack Voigt, October 16, 2002, pp. 76-77). This drop in volume enabled LTD to shut down its night shift on Friday, October 18, 2002. (Jack Voigt, October 16, 2002, pp. 76-77). LTD did not work a night shift the rest of its busy season. It only had a couple of trucks a night leave LTD (and no incoming trucks) the week of December 9, 2002. (Jack Voigt, December 9, 2002, p. 74). This evidence completely refutes the Complainants' argument that "LTD did absolutely nothing" to reduce the migration of noise to their properties.

The closing of LTD's second shift is very relevant regarding an appropriate remedy. Any subsequent compliance is a factor to consider under section 33(c). Indeed, in its February 15, 2001, decision, the PCB weighed this factor against LTD because "the noise problem was ongoing as of the time of the hearing." (February 15, 2001, decision, p. 31). Since the noise problem was not ongoing as of the remedy hearings, this factor now must be weighed in LTD's favor.

Contrary to Complainants' false assertion in their closing brief, LTD took other steps after February 15, 2001, regarding an appropriate remedy to the noise complaints. First, LTD further investigated the cost to install a wall. (See Respondent's Ex. K, May 21, 2001, proposal). The May 21, 2001, proposal was in addition to the many other proposals LTD obtained before February 15, 2001. (See February 15, 2001, decision, pp. 13-14). Since no one gave LTD assurances a wall would eliminate the noise complaints, it did not pursue a noise wall further. (Jack Voigt, October 16, 2002, pp. 74-75). As of the hearing last October, Dr. Schomer and

Steve Mitchell (whose company would build any wall) were still unwilling to assure LTD that any wall would eliminate the complaints in this case. (Dr. Schomer, October 15, 2002, p. 178; Steve Mitchell, October 15, 2002, pp. 245-46). No responsible business can spend even $300,000 on a wall that *may possibly* eliminate the complaints in this case.

LTD investigated possible noise mitigation measures besides a wall. First, LTD investigated the cost to enclose its truck dock operations. This option was deemed too costly. (Jack Voigt, October 16, 2002, pp. 51-52). LTD also investigated installing absorptive materials on the north face of its warehouse. However, this option was not pursued further because neither Dr. Tom Thunder nor Dr. Paul Schomer believed it would be beneficial. (Dr. Paul Schomer, October 15, 2002, p. 188; Dr. Tom Thunder, October 15, 2002, pp. 270-71).

Finally, LTD has committed to turning off the backup beeper on its yard tractor at night. It has agreed to hire a dock pilot for use at night to keep trucks off Lakeside Drive. (Jack Voigt, October 16, 2002, p. 53). These steps have been unnecessary so far because LTD has not operated a night shift since October 18, 2002.

C. The Wall Proposed By Dr. Paul Schomer Is Neither Technically Practicable Nor Economically Reasonable

As the PCB is aware, another section 33(c) factor is the "technical practicability and economic reasonableness" of a proposed remedy. The 25-foot high, 520-foot long wall proposed by Dr. Schomer does not meet either element of this factor.

1. Dr. Schomer's Wall Is Not Technically Practicable

David Lothspeich, the former village manager for Bannockburn, testified at the hearing. He testified that he was familiar with Bannockburn's zoning code regarding walls. Mr.

Lothspeich testified that the Bannockburn zoning code only permitted fences and/or walls up to six feet high. (David Lothspeich, October 15, 2002, p. 150). He testified that a 25-foot high wall was not allowed by the zoning code. (David Lothspeich, October 15, 2002, p. 150). Mr. Lothspeich further explained that Bannockburn had a variance procedure in its zoning code. However, the existing variance procedure only allows height variances of up to 20 percent of the permitted height of a wall (six feet here). (David Lothspeich, October 15, 2002, p. 151). Thus, assuming Bannockburn approved a full 20 percent variance (which is not a given), LTD could only build a wall that was approximately seven feet tall. While LTD could request Bannockburn to amend some provision of its zoning code to approve a 25-foot high wall, such an amendment is unlikely since it would apply throughout Bannockburn. Bannockburn undoubtedly does not want to set a precedent for 25-foot high walls throughout the community. Thus, the wall proposed by Dr. Schomer is not technically practicable when it is not permitted by Bannockburn's zoning code.

Dr. Schomer's proposed wall is not technically practicable because it cannot be built where shown by Dr. Schomer. LTD hired engineer Edward Anderson to investigate if a wall could be built where shown by Dr. Schomer. Mr. Anderson, after much investigation, determined that there was a fabric mesh that supported LTD's retaining wall in the dock area. Mr. Anderson and Jack Voigt saw the actual fabric that supports the retaining wall. (Edward Anderson, October 16, 2002, p. 15; Jack Voigt, October 16, 2002, p. 44). Mr. Anderson even produced a drawing that depicted the support fabric. (See Respondent's Ex. M). With the support fabric, nothing can be built within 16 feet of the retaining wall without destroying the retaining wall. (Respondent's Ex. M, p. 1; Edward Anderson, October 16, 2002, pp. 21-26).

Steve Mitchell of the Huff Company, the company that would oversee construction of any wall, agreed that no wall could be built in the 16-foot zone of influence. (Steve Mitchell, October 15, 2002, pp. 234, 245).

Complainants make much of the fact that LTD obtained proposals to build a wall where now proposed by Dr. Schomer. This fact does not mean it is technically practicable to build a wall there. The proposal submitted to Dr. Schomer contained the following note:

> "This proposal is based upon normal soil conditions. Soil samples must be obtained prior to final caisson design. Actual soil conditions may effect design and cost of caissons."

(See Respondent's Ex. K). The soil conditions are not normal in the area where Dr. Schomer proposes construction of a wall. Mr. Anderson testified that fill soil does not provide the same support from wind loads as clay soil. (Edward Anderson, October 16, 2002, p. 29). Mr. Anderson testified that there was necessarily fill soil in the location where Dr. Schomer proposed construction of a wall because of the fabric mesh used to support the retaining wall. (Edward Anderson, October 16, 2002, p. 28). The construction drawing for the retaining wall shows fill soil deposited over the various layers of fabric. (See Respondent's Ex. M, p. 2). Thus, even if LTD had committed to building a wall, it would have quickly learned that a wall could not be built along the retaining wall.

The wall location recommended by Dr. Schomer also is not technically practicable because it poses a danger to workers in the truck dock area. The truck dock is about ten feet below the grade where Dr. Schomer recommends construction of the wall. Thus, the wall recommended by Dr. Schomer would *tower 35 feet above the truck dock area.* Photos submitted by LTD illustrate the frightening height of the wall recommended by Dr. Schomer. Respondent's

exhibit A is a photo of a light pole in the area where Dr. Schomer recommends construction of his 25-foot high wall. The pole in the photo is 28 feet high. (Respondent Ex. A; Jack Voigt, October 16, 2002, p. 43).

No one in this case has experience with a 25-foot high free standing wall, let alone one built next to a 10-foot grade change. Dr. Schomer could not point to such a tall free standing wall anywhere. (Dr. Paul Schomer, October 15, 2002, p. 212). Edward Anderson, the only civil engineer to testify in this case, only has experience with walls 18-20 feet high. (Edward Anderson, October 16, 2002, p. 27). Mr. Anderson basically indicated that when walls get more than 20 feet high, they are usually connected to three other walls and called a building. (Edward Anderson, October 16, 2002, pp. 27-28). Steve Mitchell testified that his company built a wall 26-feet high, but the wall was located in a field near Libertyville. (Steve Mitchell, October 15, 2002, p. 237). Most important, this wall had a second side built at a right angle that provided support for such a high wall. (Steve Mitchell, October 15, 2002, p. 242; Edward Anderson, October 16, 2002, pp. 27-28). Similarly, the structure to the east of LTD and shown in Complainants' exhibit B4 has four sides which add strength to the structure. (Edward Anderson, October 16, 2002, p. 29). The wall proposed by Dr. Schomer is free standing. It has no other right angle walls to support the wall. Most important, it is proposed at the edge of a 10-foot grade change with workers down below. Based on the safety concern of a wall towering 35 feet above a work area, Dr. Schomer's proposed wall is not technically practicable.

To avoid damage to the retaining wall, Complainants suggest that LTD should build a wall outside the support fabric's "zone of influence." This would place Dr. Schomer's proposed wall in LTD's north parking lot. (Jack Voigt, October 16, 2002, pp. 45-46). As noted below,

this proposal is not economically reasonable. However, this suggestion is also not technically practicable. In its February 15, 2001, decision, the PCB concluded that it "will not order the construction of a noise wall if it would not be effective." (February 15, 2001, decision, p. 32). Dr. Tom Thunder, the noise expert retained by LTD, testified that a wall in the parking lot would not be effective because walls are most effective when built close to the source or receiver. (Dr. Tom Thunder, December 9, 2002, p. 21). Dr. Schomer agreed that "when the barrier is in the middle, kind of out in the open, the barriers don't work as well." (Dr. Paul Schomer, October 15, 2002, p. 114). Thus, it is clear that Dr. Schomer's proposed wall cannot be built on the retaining wall and cannot be built in the parking lot.

Dr. Schomer's proposed wall is not technically practicable because it is based on a flawed design and misunderstanding of the facts in this case. First, Dr. Schomer proposes a 150-foot extension of the wall (or relocating LTD's exit ramp) because of noise problems on Lakeside Drive. (Complainants' Ex. A, p. 2). However, the PCB found that "Complainants did not strongly object to the noise of the trucks on Lakeside Drive." (February 15, 2001, decision, p. 22). Second, Dr. Schomer determined that a 25-foot high wall was needed because the "critical path is sound from the 12-ft high source that reflects off the hard LTD wall, over the noise barrier, to the second floor of the indicated [Weber] residence." (Complainants' Ex. A, p. 4). The 12-foot high noise source is exhaust from trucks. (Complainants' Ex. A, p. 4). However, the primary complaints here concern noise at the four-foot high level. This is the level of the air brakes on trucks and the fifth wheel. (Dr. Paul Schomer, October 15, 2002, pp. 183-85). Dr. Thunder agreed that Dr. Schomer's wall was not designed to mitigate the noise at issue in this case. (Dr. Tom Thunder, December 9, 2002, p. 29).

Dr. Schomer determined the height of his wall based on the Weber house being 21 feet above the elevation of the dock area. (See Complainants' Ex. A, pp. 2 and 4). However, Dr. Schomer did not consider that the Weber home is significantly farther away from LTD than the Roti and Rosenstrock homes. Dr. Thunder testified that the Weber home was less affected by noise because of its distance from the source. (Dr. Tom Thunder, October 15, 2002, p. 260; December 9, 2002, p. 18). The sheer distance between the Weber home and LTD's dock area is undoubtedly the reason Christopher Weber is not affected by noise from LTD. (February 15, 2001, decision, p. 9). While Dr. Schomer spoke to the Webers the day before he testified on October 15, 2002, he did not ask them if the noise was now affecting their son. (Dr. Paul Schomer, October 15, 2002, pp. 181, 226).

2. Dr. Schomer's Wall Is Not Economically Reasonable

In this case, the PCB has concluded that "the $300,000 estimate for the noise wall herein is a significant sum." (February 15, 2001, decision, p. 30). The Complainants' response to this conclusion was to propose a wall that cost a minium of $623,350! The cost of Dr. Schomer's wall would jump to nearly $900, 000 if another 150-foot section was added to the wall. (Complainants' Ex. A, p. 2; Dr. Paul Schomer, October 15, 2002, p. 206). As noted above, Dr. Schomer's proposed wall cannot even be built for various reasons. Assuming that Bannockburn would amend its ordinances and allow a 25-foot tall noise wall on top of the retaining wall, such a wall would cost $1.5 to $3 million. (Edward Anderson, October 16, 2002, p. 26). The cost of a wall where proposed by Dr. Schomer increases dramatically because the entire retaining wall would have to be demolished and then the retaining wall and noise wall built as a unified structure. A wall costing at least $1.5 million is not economically reasonable under any

definition of that phrase.

As noted above, a wall in LTD's parking lot (constructed away from the retaining wall) is not technically practicable. However, such a wall also is not economically reasonable. Jack Voigt testified that LTD already has insufficient parking at its Bannockburn facility. LTD leases about 110 parking spaces from a nearby church. (Jack Voigt, October 16, 2002, pp. 44-45). Mr. Voigt testified that if the wall were built outside the support fabric "zone of influence," LTD would lose 35-40 parking spaces. (Jack Voigt, October 16, 2002, pp. 45-46). Mr. Voigt testified that Bannockburn will not allow LTD to lease additional parking spaces offsite. (Jack Voigt, October 16, 2002, p. 47). Most important, Mr. Voigt testified that the loss of 35-40 parking spaces would depreciate the fair market value of the entire LTD site. (Jack Voigt, October 16, 2002, pp. 48-49). While Mr. Voigt is not an appraiser, he worked closely with consultants and architects to design LTD's 1995 warehouse expansion. (Tr. 1205-06). This expansion included an employee parking lot on the south side of LTD's warehouse. Thus, Mr. Voigt does have an adequate base of knowledge to conclude that losing 35-40 parking spaces would depreciate the overall value of the LTD site.

The construction of even a $623,350 noise wall is not economically reasonable for other reasons as well. Those reasons include that LTD has never operated a night shift at Bannockburn on a year round basis. Even in its busiest years, it only operated a second shift from late July until Christmas. Dr. Thunder agreed that construction of the wall proposed by Dr. Schomer was not reasonable for a seasonal operation. (Dr. Tom Thunder, December 9, 2002, p. 12). Moreover, LTD discontinued its night shift effective October 18, 2002. While Mr. Voigt could not guarantee that there would be no night shift in the future, it is not economically reasonable to

require LTD to spend more than $1 million based on the possibility of future operations after 10:00 p.m. Moreover, the PCB should be aware that since December 9, 2002, LTD has leased an additional 700,000 square feet of space in Aurora. Besides Bannockburn, LTD now has two buildings in Aurora (260,000 and 700,000 square feet) and the 400,000 square feet building in Naperville that opened in May 2001. The additional Aurora building should further reduce truck traffic at LTD's Bannockburn facility.

LTD, contrary to the suggestion by Complainants, is not a cash cow that can easily afford a wall costing more than $1 million. All businesses look at the benefits of capital improvements. In this case, LTD offered the following stipulation to Complainants regarding its financial ability to pay for a noise wall:

> LTD Commodities stipulates that by borrowing money, it could pay for the construction of a $623,350 noise wall. However, a noise wall costing that amount would be a significant expense for LTD with no operating benefit to LTD.

(October 16, 2002, pp. 5-6). While Complainants would not agree to this stipulation, it still is accurate regarding LTD's position on a $623,500 wall. LTD's position obviously would be the same regarding a wall that cost more than $1 million. Regardless of whether a wall cost $300,000, $623,350, $1,500,000 or $3,000,000, any proposed wall is not economically reasonable when Dr. Schomer, Dr. Thunder and Steve Mitchell cannot assure LTD that the wall would eliminate complaints from neighbors to the north (whether current or future residents). (February 15, 2001, decision, p 28).

D. <u>Priority Of Location Favors LTD</u>

In its February 15, 2001, decision, the PCB concluded that "LTD clearly has the priority of location." (February 15, 2001, decision, p. 27). This is an important factor to consider when

E. LTD Is Not An Alleged Nighttime Nuisance Until Noise Is Emitted "Beyond The Boundaries" Of Its Property

LTD respectfully disagrees with the PCB that it is a nuisance during nighttime hours. Even if LTD was a nuisance, circumstances have changed at the site. For these reasons, LTD does not believe it should be required to build a noise wall anywhere on its property. Regardless, the two nuisance provisions at issue here give LTD a right to build a noise wall on its north property line if it is ultimately required to build a wall. Section 24 of the Environmental Protection Act provides that "no person shall emit beyond the boundaries of his property any noise that unreasonably interferes with the enjoyment of life . . . ." 415 ILCS 5/24. Similarly, section 900.102 of the PCB's regulations provides that "no person shall cause or allow the emission of sound beyond the boundaries of his property . . . so as to cause noise pollution in Illinois. . . ." 35 Ill. Adm. Code 900.102. These provisions make clear that noise is not a nuisance until it is emitted beyond LTD's property. Thus, LTD has a right to operate its business and emit noise all over its property without creating a nuisance. These provisions give LTD a right, if it is ultimately required to build a noise wall, to have a property line noise wall. Both Dr. Schomer and Dr. Thunder testified a property line noise wall would be effective. (Dr. Paul Schomer, October 15, 2002, p. 145; Dr. Tom Thunder, October 15, 2002, p. 262; December 9, 2002, p. 20). Steve Mitchell testified that he could put a wall "within a foot or so" of LTD's north property line. (Steve Mitchell, October 15, 2002, p. 251).

Dr. Schomer and Dr. Thunder both agreed that a property-line noise wall would have the added benefit of blocking noise from LTD's north parking lot. (Dr. Paul Schomer, October 15, 2002, p. 196; Dr. Tom Thunder, October 15, 2002, p. 267). The problem with a property-line

noise wall is that Complainants do not want a property-line noise wall. At the hearing, LTD's attorney made the following statement in his closing argument:

> Just in wrapping up, I would state to Mr. Kaiser and his clients, I think they owe it to the Pollution Control Board to state whether they would agree to a wall on the north property line of the heights indicated by Dr. Schomer in Exhibits C1, 2 and 3. And if they're not willing to have a wall on the north property line, then they're not in this to reduce noise coming to their property. They're in it just to try to hurt LTD.

(December 9, 2002, p. 160). Complainants did not answer this question in their Closing Brief. Thus, it is clear they are not interested in a noise wall for abatement purposes but to exact a financial penalty from LTD.

III Conclusion

Fortunately for Complainants and LTD, circumstances have changed since February 15, 2001. As of the hearing last October and December, LTD was not operating after 10:00 p.m. LTD was not even operating a second shift after October 18, 2002. Since circumstances have changed, it would be inappropriate under section 33(c) to require LTD to build a noise wall at any cost. Moreover, a financial penalty would be inappropriate since there has been no alleged nuisance since October 18, 2002.

LTD Commodities

By Joseph E. Kolar
Joseph E. Kolar, one Of Its Attorneys

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CERTIFICATE OF SERVICE

The undersigned attorney certifies that on April 21, 2003, he served the original and nine copies of the foregoing RESPONDENT LTD COMMODITIES' CLOSING BRIEF REGARDING APPROPRIATE REMEDIES by Federal Express upon the Illinois Pollution Control Board, at the following address:

Ms. Dorothy M. Gunn
Clerk of the Illinois Pollution Control Board
100 West Randolph Street
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and one copy by fax and regular mail upon the following person:

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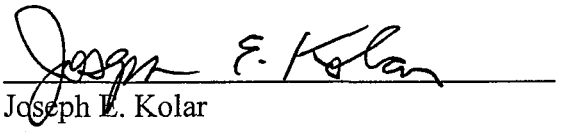

Joseph E. Kolar