ENVIRONMENTAL LAW & POLICY CENTER
Protecting the Midwest's Environment and Natural Heritage

February 13, 2015

Julie Morita, M.D.
Acting Commissioner of Health
Chicago Department of Public Health
Attn: Environmental Permitting and Inspections
333 South State Street, Room 200
Chicago, IL 60604

RE: Comment on Variance Application from Chicago Port Railroad Co.

Via email to EnvComments@cityofchicago.org

Dear Ms. Morita,

Thank you for the opportunity to comment on Chicago Port Railroad Co. and Midwest Marine Terminals Inc.'s request for a variance from the City of Chicago Rules and Regulations Pertaining to the Handling and Storage of Bulk Material Piles. ELPC is submitting these comments on behalf of itself and the Southeast Side Coalition to Ban Petcoke. We strongly disagree with the justifications the companies set forth in support of their variance request. The companies are **not** exempt from the City's regulations under federal preemption. Furthermore, the companies have not met the requirements for a variance. We urge you to explicitly reject the preemption claim and deny the variance request in its entirety.

I. Federal laws and regulations do not preempt the City's regulations with respect to Chicago Port Railroad Co. and Midwest Marine Terminals Inc.

A. Federal Railroad Safety Act

The companies begin their variance request by alleging that because Chicago Port Railroad Co. is a federally regulated railroad, both it and its "sister corporation," Midwest Marine Terminals Inc., are exempt from the City's regulations due to federal preemption by the Federal Railroad Safety Act and corresponding regulations. This argument is legally unfounded, and the companies provide no legal analysis or factual support for their assertion.

First, any preemption discussion must begin with the basic principle that federal preemption is disfavored, and the presumption is therefore that state and local laws and regulations are not preempted. New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 654 (U.S. 1995). Moreover, Chicago's regulations deal with a public health and public nuisance issue. In these areas that are traditionally of state concern, the presumption against

preemption is particularly strong, and preemption is not found "unless that was the clear and manifest purpose of Congress." Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (U.S. 1947).

Next, the City's regulations cannot be preempted by federal railroad safety laws and regulations because they do not regulate the operation of a railroad as such, and therefore do not deal with railroad safety. The City's rules are about the handling and storage of bulk material piles. Federal railroad safety laws and regulations deal with the actual operation of a railroad—things like when a train must sound its horn, 49 CFR § 221.21, and certification of train conductors, 49 CFR Part 242. There simply is no overlap with the City's rules. The fact that a single company (or in this case, "sister corporations") may operate both a railroad and a bulk material storage and transloading facility does not exempt that company (or those companies) from complying with local regulations that deal with bulk material storage and have nothing to do with the operation of a railroad. The Federal Railroad Safety Act doesn't exempt a company that operates a railroad from local regulations that deal with other aspects of its commercial activities. If Chicago Port Railroad Co. decided to open a restaurant, for example, it would not be exempt from City health code requirements for restaurants simply because it also operated a railroad.

Moreover, even if Chicago's regulations did deal with railroad safety, there would be no preemption. Federal law explicitly allows local laws and regulations "related to railroad safety" unless or until the Secretary of Transportation "prescribes a regulation or issues an order covering the subject matter" of the local requirement. 49 USCS § 20106(a)(2). The Secretary of Transportation has neither prescribed a regulation nor issued an order concerning handling and storage of bulk material piles. Thus, even if the City's regulations dealt with railroad safety issues (an untenable interpretation, as discussed above), they do not cover the same subject matter as federal safety regulations, and would therefore not be preempted.

Finally, even if the City regulations were preempted with respect to Chicago Port Railroad Co., this preemption certainly wouldn't apply to the railroad's "sister corporation," West Marine Terminals Inc. It is absurd to argue that a federal law that (allegedly) preempts local regulations for a federally-regulated railroad would also then preempt regulation of any other corporations that happen to both be owned by the same parent corporation. In summary, the City's regulations are not preempted by the Federal Railroad Safety Act or its associated regulations.

B. Interstate Commerce Commission Termination Act

Although the variance request does not mention the Interstate Commerce Commission Termination Act ("ICCTA"), it is important to note that the City's regulations are also not preempted with respect to Chicago Port Railroad Co. or West Marine Terminals Inc. under the ICCTA.

As with the preemption analysis under the Federal Railroad Safety Act, the discussion of preemption under the ICCTA must start with the presumption against preemption, especially since the City's regulations deal with an area that has traditionally been regulated by the states. See Fla. E. Coast Ry. v. City of West Palm Beach, 266 F.3d 1324, 1328 (11th Cir. Fla. 2001). As emphasized in a recent Second Circuit case, "although ICCTA's pre-emption language is unquestionably broad, it does not categorically sweep up all state regulation that touches upon

railroads. Island Park, LLC v. CSX Transp., 559 F.3d 96, 104 (2d Cir. N.Y. 2009) (emphasis added).

Both federal and Surface Transportation Board case law establish that the ICCTA does not preempt reasonable public health regulations that happen to apply to railroad carriers. See New York Susquehanna & W. Ry. Corp. v. Jackson, 500 F.3d 238, 252 (3d Cir. N.J. 2007); Green Mt. R.R. Corp. v. Vermont, 404 F.3d 638, 642 (2d Cir. Vt. 2005) ("[L]ocal bodies retain certain police powers which protect public health and safety."); King County, WA, 1 S.T.B. 731, 735 (1996) ("[T]he ICCTA does not usurp the right of state and local entities to impose appropriate public health and safety regulation on interstate railroads."). Local health and safety regulation is not preempted as long as it is not "unreasonably burdensome" and "does not discriminate against railroads." New York Susquehanna, 500 F.3d at 253. See also Green Mt. R.R. Corp., 404 F.3d at 642 ("[D]irect environmental regulations enacted for the protection of the public health and safety, and other generally applicable, non-discriminatory regulations . . . would seem to withstand preemption.").

The City of Chicago's regulations on bulk material storage and handling are clearly non-discriminatory and are not targeted at the railroad industry. The rules apply to any and all bulk material storage and handling facilities, regardless of whether the companies that operate the facilities are also a railroad carrier, and regardless of whether the material at the site is transported by rail, truck, or barge. The City's regulations are entirely focused on the handling and storage of bulk material and affect rail carriers only incidentally, and only when rail carriers happen to also engage in the business of transloading bulk materials. Further, the provisions that apply specifically to the loading of railcars are identical to the provisions for the loading of trucks, except that, unlike trucks, railcars are not even required to be covered after the loading process. If anything, then, rail carriers are treated preferentially under the regulations.

The companies have provided no evidence that the City's regulations are unreasonably burdensome. Preemption under the ICCTA requires a fact-specific inquiry into whether the local regulation is burdensome or interferes with rail transportation. Franks Inv. Co. LLC v. Union Pac. R.R. Co., 593 F.3d 404, 414 (5th Cir. La. 2010). The companies provide no factual support or information of any kind showing that the City's regulations would be burdensome or interfere with rail transportation. New York Susquehanna explains that under the 'unreasonably burdensome' prong of the preemption test, "[t]he animating idea is that, while states may set health, safety, and environmental ground rules, those rules must be clear enough that the rail carrier can follow them and that the state cannot easily use them as a pretext for interfering with or curtailing rail service." New York Susquehanna, 500 F.3d at 254. The City's regulations are clear, specific, and as detailed as reasonably possible. These are not vague or subjective regulations that would allow the City to interfere with a railroad's operations.

The Third Circuit's decision in New York Susquehanna is particularly instructive here because the regulations at issue in that case—known as New Jersey's "2D" regulations—were of a similar nature to those at issue here. The New Jersey rules were put in place after residents near solid waste transloading facilities "complained that their houses and yards were covered in dust and grime . . . and the wastewater and stormwater runoffs were dirty." New York Susquehanna, 500 F.3d at 242-43. The Third Circuit rejected the argument that the regulations, which included dust control, paving, and wastewater management, were facially preempted. The Chairman of the

Surface Transportation Board, in fact, stated that he "would not object to New Jersey implementing its 2D regulations, or to other states adopting and implementing similar regulations." Christina Hawkins, How States and Municipalities Can Retain Carrier-Owned Solid Waste Transfer Facilities, 26 Pace Envtl. L. Rev. 289, 304 (2009).

The City's rules are public health regulations implemented under the police power, and neither discriminate against railroads nor unreasonably burden them. The City of Chicago regulations on bulk material handling and storage are not preempted by federal railroad laws and regulations, and the Department of Public Health should make this clear in its response to the variance request.

II. Chicago Port Railroad Co. and Midwest Marine Terminals Inc. have not met the requirements for a variance and the request should be denied.

Chicago Port Railroad Co. and Midwest Marine Terminals Inc. argue in the alternative that the companies should be awarded variances from many of the requirements of the City regulations, including requirements regarding fugitive dust monitoring, wind monitoring, covered conveyors, wheel wash stations and rumble strips, paving and roadway cleaning, recordkeeping, protection of waterways, dust suppressant systems, and runoff management. The regulations provide that a variance request must demonstrate "that issuance of the variance will not create a public nuisance or adversely impact the surrounding area, surrounding environment, or surrounding property uses." § 8.0(2)(d). The companies have not made the required demonstration for any of the provisions for which they request a variance. In addition, they have not described the amount and types of material to which any of the variances would apply, as required under § 8.0(2)(c), nor have they described the population and geographic area potentially affected by the sites, as required under § 8.0(2)(b). Further, for many of the provisions, the companies failed to adequately explain why the variance is necessary or sufficiently explore reasonable alternatives, as required under §§ 8.0(2)(e) and (g). Accordingly, their variance request should be denied in full.

A. Fugitive Dust Monitoring

The companies first ask for a variance from fugitive dust monitoring requirements. The companies' primary argument for why they should be granted the variance seems to be the poorly supported assertion that none of the dozens of materials kept on the site create fugitive dust. The variance request does not, however, refer to or provide any particulate matter monitoring data, or any other empirical evidence that the facility does not create fugitive dust. Instead, it simply states that "[b]ased on historic quantities handled and published emission factors," fugitive emissions are "negligible." Variance Request, p.3. The variance request does not elaborate on how much of each material the companies handle, not does it provide the emission factors or even reference the source of emission factors allegedly used to calculate emissions. In fact, the facility admits that it handles fly ash, a by-product of combustion, usually the burning of coal. Fly ash is "a very fine, powdery material," 75 Fed. Reg. 35137—certainly the type of substance that easily becomes airborne.[1] The companies also handle slag; according

[1] Note that the regulations define "bulk solid material" as "any solid substance or material that can be used as a fuel or as an ingredient in a manufacturing process that may become airborne or be scattered by the wind . . . ." § 2.0(3).

to a report by the City's consultant, modeling showed that dust emissions from a conceptual bulk slag facility would be 89 tons per year.[2]

Fugitive dust monitoring is crucial to ensuring that nearby residents are protected from airborne particulate matter, which can cause serious cardiovascular and respiratory damage. Monitoring allows the City, as well as the regulated companies, to better understand whether there is a fugitive dust problem, and if so, the extent of the problem and what steps would be necessary to solve it. The fact that this may create some costs for the company does not mean that the company should be exempt from the requirements. The Department of Public Health was aware of these costs when it created the regulations. Chicago Port Railroad Co. and West Marine Terminals Inc. do not state that they are situated any differently than every other bulk material handling facility, or that the requirements somehow create a greater hardship on them, such that the regulations create an arbitrary or unreasonable burden. Indeed, the purpose of a variance is to provide relief from the unintended burdens of a regulation. In this case, though, the consequences are exactly those contemplated by the regulations.

Further, Chicago Port Railroad Co. and West Marine Terminals Inc. are required, but fail, to describe "in detail" "[t]he quantity and types of materials" to which the variance would apply. § 8.0(2)(c). Instead, the companies simply list several dozen types of materials that may be stored on the site, along with the statement "[t]he quantities vary widely from 25 tons to 30,000 tons." The variance request does not give any further information, such as estimates of the average or maximum amount of each material stored on the sites.

In addition, the variance request does not describe the population and geographic area affected or potentially affected by the sites, as required under § 8.0(2)(b). In fact, the companies make no attempt to comply with this requirement—for section (b), the request only states that the variance is requested for "[a]ll process and activities of the Facility." The variance request does state in a later section that the "area, environment, and property uses surrounding the Facility are highly industrial." Google maps, however, reveals that several houses are located on South Torrence Avenue, directly across from the facility. These residents of those homes likely would be adversely affected if the requested variance were granted.

B. Wind Monitoring

The companies next state that they should be granted a variance from the wind monitoring requirements because the installation of a weather station supposedly "has no impact on the public or surrounding area," and because wind information is available online. What the request ignores altogether is that very local wind information is essential to determine when dust suppression steps that do have a direct impact on surrounding areas, such as halting all disturbances of outdoor piles during high wind conditions, are triggered. Wind monitoring data is

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If the companies store and handle materials that truly do not create any fugitive dust, the regulations may not even apply to the storage and handling of these materials. Other materials may also not be regulated under the rules based on this definition; for example, it may be that landscape boulders cannot be used as a fuel or as an ingredient in a manufacturing process.

[2] CDM Smith, City of Chicago Fugitive Dust Study, http://www.cityofchicago.org/content/dam/city/depts/cdph/environmental_health_and_food/PetCoke_Public_Comments/102512DustReport031314.pdf, p.ES-2, 3-7 (Mar. 2014).

also crucial for understanding and using particular matter monitoring information. Without accurate local weather information, it would be impossible to understand the role wind plays in creating and spreading fugitive dust, and effectively remedy any particulate matter problems.

In fact, the companies do not even identify the closest weather monitoring station whose data they would access online, so it is appears that the companies' plan is to simply rely on weather information generic to the City of Chicago in determining when to take certain dust suppression steps. City-level weather information is not nearly granular enough for the response actions required under the regulations. Indeed, allowing reliance on such high-level weather data would make it extremely challenging for the City or affected citizens to determine if the companies are complying with the regulations.

In addition, as with the fugitive dust monitoring variance request, the companies do not state that the costs of purchasing and installing a wind monitoring station would be any different for them than for other companies, such that a variance would be appropriate. Also, as with the variance request for fugitive dust monitoring, the companies give no description of the surrounding area and population, and only an insufficient, cursory description of the materials to which the variance would apply. Accordingly, the variance is deficient and should be denied.

C. Conveyors

The companies also argue that the City should grant them a variance from the requirement that conveyors be covered or enclosed. Instead of a demonstration that a variance would not adversely impact the surrounding area, however, the request simply states in a single sentence that "[c]overing the spouts and transfer points of the conveyors, as is the practice at the Facility, adequately ensures that fugitive dust does not migrate from the conveyors to areas surrounding the Facility." Variance Request, p.6. This is not a demonstration; it is merely a bald assertion. The request does not provide any evidence that its current procedures are adequate, other than a simple, conclusory statement that they are. This is not sufficient for the granting of a variance. If the Department of Public Health had determined that covering the spouts and transfer points of conveyors was sufficient to address fugitive dust emissions from bulk material handling facilities, it would have simply required that instead of fully enclosed conveyors. Instead, the Department noted in its determination on KCBX's June 9, 2014 variance request that the effectiveness of reducing dust by using covered conveyors, explaining that a study "found that covering conveyors carrying material at iron and steel plants offered 70% to 99% emissions control efficiency." P.11. Moreover, the companies do not even attempt to argue that they are different enough from other facilities such that the requirement of covered conveyors would be arbitrary or unreasonable if applied to them.

As with the above requests, there is an insufficient list of the materials on the site, in place of a detailed description of types and quantities of materials, and no description of the surrounding population and geographic area that is or could be affected. The variance should be denied.

D. Wheel Wash Station and Rumble Strips

Next, the companies ask for a variance from the requirement that the site have a wheel wash station and rumble strips to remove loose material and dust from outgoing trucks. Instead of

demonstrating no adverse impact, the companies again simply state in a single, conclusory sentence that there isn't a problem: "The dry materials present at the Facility do not have a propensity to accumulate on vehicles or tires." Variance Request, p.7. The companies do not elaborate or offer any evidence to support that statement. It is the companies' burden to establish that, unlike at other bulk material storage sites, somehow none of the dozens of materials stored at the site could stick to a truck or get caught in the tires. The fact that the companies store and handle black dirt, as well as fly ash—which, as discussed above, is a fine, powdery substance—belies that untenable claim.

Instead of providing adequate information to justify a variance, the request simply alleges that "[v]ehicles are inspected prior to leaving the Facility and any accumulated material is manually removed." Variance Request, p.7. The companies do not give any further detail, making it impossible to know whether each and every truck is carefully cleaned, or, more likely, only large and very noticeable chunks of material get removed. And once again, the variance request does not describe the surrounding geographic area and population. Like the companies' other requests, this variance request should be denied.

E. Paving and Roadway Cleaning

The companies also request a variance from the requirement that internal roads at the facility be paved and that a street sweeper be used to clean internal roads and external roads within a quarter of a mile of the facility. The request admits that "vehicles at the Facility traverse over wide . . . areas of gravel and compacted dirt." Variance Request, p.8. Yet once again, the companies give no demonstration that a lack of paving and street cleaning would not cause negative impacts to the surrounding area. They simply state that the lack of pavement and cleaning doesn't cause a public nuisance or adverse impact, with no evidence or explanation to support the claim. According to a study conducted by the City's consultant, CDM Smith, dust that becomes resuspended due to truck traffic can be a large portion of the airborne dust created by a bulk material facility, regardless of the type of material handled at the site. This dust "reflects the degree of fine dust covering the road due to all sources."[3] The companies do not prove an arbitrary or unreasonable burden, but simply note the basic costs of compliance that any facility would bear. This isn't sufficient for a variance. Moreover, the request does not describe the affected or potentially affected geographic area or population. The variance must be denied.

F. Recordkeeping

Next, the companies request a variance from all recordkeeping requirements related to street sweeping, weather station data, application of water or chemical stabilizers, fugitive dust monitoring, and visual fugitive dust tests. The request states, without any support or evidence, that "[t]he absence of recordkeeping relative to these items has not resulted in any public nuisance or adverse impact to the surrounding area, environment or property uses." Variance Request, p.10. Recordkeeping is an integral part of the regulatory framework set out in the City's regulations. First, it demonstrates and tracks compliance, letting the City determine when violations have occurred, and giving regulated companies the data to prove compliance. Second,

[3] CDM Smith, City of Chicago Fugitive Dust Study, http://www.cityofchicago.org/content/dam/city/depts/cdph/environmental_health_and_food/PetCoke_Public_Comments/102512DustReport031314.pdf, p.3-2 (Mar. 2014).

it provides both regulators and regulated companies information about fugitive dust prevention, including how weather and water or chemical stabilizers affect opacity and levels of fugitive dust. The fact that the recordkeeping requirements may create some costs for the companies is not enough to warrant a variance. Chicago Port Railroad Co. and Midwest Marine Terminals Inc. should not be excused from the substantive requirements to which the recordkeeping requirements relate, and they should not be granted a variance from the associated recordkeeping provisions.

G. Protection of Waterways

The companies also ask for a variance from the requirement that outdoor storage piles be set back at least 50 feet from any waterway. In support of their request, they allege that the materials stored at their facility are "generally" not water soluble and that the facility's perimeter has "absorbent materials such as dirt, rock and/or gravel which are designed to prevent storm water runoff." These allegations are problematic on many levels. First, materials that are not water soluble can readily be transported by storm water runoff; imagine a pile of sand, dirt, or fly ash (all of which are stored at the facility) being eroded and carried away by simple rainfall. Second, rock and gravel are not absorbent materials, and hard-packed dirt may also be nonabsorbent; there is no evidence presented to show that a minimal buffer area comprised of these substances would have any value in protecting nearby waterways.

The request also mentions "containment walls" and "steel pilings" used on the site. However, the request does not in any way demonstrate that these structures are sufficient to protect the Calumet River. The companies do not state what material the containment walls are made of, nor do they provide an explanation of the design or construction of the barriers. The request does not even state whether all area within 50 feet of a waterway have a barrier. Accordingly, the companies have failed to demonstrate that a variance would not result in adverse impacts to the surrounding area.

The companies also claim that because the facility is "long and narrow," a setback of 50 feet would make "[o]utdoor storage . . . in the remaining space . . . impracticable." Variance Request, p.12. They completely fail to discuss the alternative of storing the materials in an enclosed area, such that the 50 foot setback would not apply. Moreover, the request does not describe the surrounding area or population that could be affected, nor does it give a detailed description of the quantities and types of materials to which the variance would apply. Accordingly, the variance is insufficient and should be denied.

H. Dust Suppressant Systems

Next, the companies ask for a variance from the requirements relating to chemical stabilizers and water spray systems for their outdoor storage piles. In support of their request, they simply state that the facility does not produce "significant" fugitive dust, and that "[w]ater cannot be sprayed on some materials stored at the Facility." Variance Request, p.13. The request does not address whether chemical stabilizers could be used on these materials, nor does it evaluate the possible alternative of storing such materials in an enclosed structure. Moreover, the companies request a variance for all materials stored at their facility, not just the ones that they allege cannot be sprayed with water.

In addition, the companies do not describe in detail the materials and quantities to which the variance would apply, not do they describe the potentially affected area or population. The city should deny the variance.

I. Runoff Management

Finally, the companies ask for a variance from the storm water management requirements. Yet again, the request utterly fails to comply with the City's requirements for obtaining a variance. The request states that the facility is already required to use "best management practices," but does not explain what practices are used at the facility, why they would be sufficient on their own, or what additional storm water management controls would be necessary to comply with the City's regulations. The companies do not even provide a cost estimate for compliance, simply stating vaguely that the cost would be "more than the Facility could bear." Variance Request, p.14. And again, the request does not describe in detail the materials to which the variance would apply or the affected or potentially affected geographic area and population. In short, the companies have essentially disregarded all the City's requirements for obtaining a variance. Accordingly, the variance should be denied.

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The City's regulations on the storage and handling of bulk material are not preempted by federal railroad laws or regulations. Federal railroad safety laws do not preempt the city's regulations because Chicago is not regulating railroad safety. The Interstate Commerce Commission Termination Act also does not preempt the city's rules because they are non-discriminatory and any effects on rail carriers are minor and incidental. Moreover, the companies have failed to satisfy the requirements for a variance request. For all of the request variances, the Chicago Port Railroad Co. and Midwest Terminals Inc. fail to demonstrate that there will be no adverse effects on the surrounding area, fail to describe in detail the amount and type of material to which the variance would apply, and fail to describe the affected or potentially affected area and population. For many of the requests, the companies also fail to sufficiently explain why a variance is necessary or adequately explore reasonable alternatives. The Department of Public Health should reject the preemption argument and deny the variance request in its entirety.

Sincerely,

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