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February 7, 2014

Department of Public Health
Attn: Environmental Permitting and Inspections
333 South State Street, Room 200
Chicago, IL 60604

By e-mail: petcokecomments@cityofchicago.org

Re: Proposed Rules and Regulations for Bulk Solid Materials

To The Commissioner:

Please be advised that I represent the Southeast Environmental Task Force. The Southeast Environmental Task Force ("SETF") is an Illinois not-for-profit, 501(C)(3) organization comprised of people who live in Southeast Chicago. SETF is dedicated to developing and implementing strategies that will protect the health of local residents, enhance area environmental conditions, and provide an attractive location for responsible businesses to operate.

SETF participated with the Natural Resources Defense Council in the preparation of technical comments on the City's regulatory proposal. In addition, individual members of SETF are submitting comments focusing on the specific impacts of storage facilities on their own homes and neighborhoods. My comments are intended to supplement these comments by underscoring SETF's perspective on the urgent need for decisive regulatory action by the City.

By way of summary, these comments will describe southeast Chicago and the effects of fugitive dust emissions from unenclosed storage piles in this region. The comments will describe the chaotic and dangerous situation that was created when petcoke storage became prevalent during the past few months, and will introduce several documents into the record of this rulemaking that evidence this unacceptable situation. SETF will assert that the City has the authority and responsibility to establish an immediate moratorium on the storage of regulated material, and describe the extremely limited circumstances under which lifting a moratorium should be considered. Finally, if a moratorium is not enacted,

SETF will argue that bulk solid material facilities should be regarded as a special use for purposes of zoning approval, and that special use approval should be required.

I. There is Clear Evidence of the Significant, Adverse Public Health and Environmental Effects of Emissions From Unenclosed Storage Piles In Southeast Chicago

Emissions from material storage facilities have been a chronic problem in southeast Chicago for many years. These emissions became an acute problem when area facilities began storing exponentially greater amounts petcoke in the past year. Fugitive emissions from storage facilities substantially and unreasonable interfere with the ability of southeast Chicago residents to enjoy their homes and neighborhoods. They create a substantial and imminent threat to public health and safety. Fugitive emissions and runoff from material storage sites are contrary to the preservation and enhancement of public lands and natural resources. The operation and proliferation of storage facilities is contrary to initiatives to establish a forward looking regional plan in which responsible industry, residential neighborhoods and natural resources can co-exist and thrive.

The effects of storage facilities on environmental quality and the quality of life are clearly evidenced in the testimony of local residents in a public hearing on January 13, 2014. The January 13th public meeting was convened by the City of Chicago to receive public comments on its proposed regulations in response to the outdoor storage of bulk material. In the transcribed public hearing, local residents expressed their concerns about the observed impacts on outdoor storage of petcoke and coal, specifically: 1. the effects on water quality in Calumet waterways from blown material and from leachate and runoff; 2. the effects of materials running off and leaching into the local sewers; 3. dust on cars and personal property; 4. fugitive emissions landing on vegetable gardens and outdoor markets; 5. the effects of fugitive emissions on schools, including inside school buildings; 6. the effect on ambient air quality especially for people attempting to enjoy outdoor recreation; 7. the accumulation of dust on the exterior and interior of people's homes; and, 8. the health effects on people who are inhaling dust. Similar testimony was given by area residents on November 14th at a public hearing at the East Side Methodist Church. http://www.suntimes.com/23757888-761/southeast-side-residents-vent-about-petcoke-at-iepa-meeting.html

The negative effects described by community residents in public hearings are echoed by regulators and affected individuals in five separate legal actions filed during a one-month period of time starting on October 24, 2013. On October 24, 2013 the Illinois Environmental Protection Agency issued a Notice of Violation to Beemsterboer Slag Company alleging, in part, that Beemsterboer's outdoor storage of coke and coal "...caused, threatened, or allowed the discharge of particulate matter into the atmosphere generated during material handling and storage operations causing or tending to cause air pollution." Citing to 415 ILCS 5/9(a) and 415 ILCS 5/3.115, Illinois EPA mandated that Beemsterboer "immediately cease causing or tending air pollution from the material handling and storage operations," and, that Beemsterboer "...submit a compliance plan which will ensure the prevention of air pollution from the facility that cause, threaten, or allows the unreasonable interference with the enjoyment of life and property of local

citizens." A true and accurate copy of this NOV is attached to these comments and labeled as SETF Exhibit One.

On October 31, 2013, a class action lawsuit was initiated in the Circuit Court of Cook County on behalf of residents including four named plaintiffs affected by "...sprawling, uncovered piles up to five-stories high" of coal and petcoke on Chicago's southeast side. The Complaint alleges: Every day, winds hit Defendants' uncovered piles of coal and petcoke, and black clouds of coal and petcoke dust – called "fugitive dust" – are blown into the air and subsequently fall on homes, businesses, yards, streets, alleys, parkways, and other types of property neighboring Defendants' terminals. A true and accurate copy of this Complaint is attached to these comments and labeled as SETF Exhibit Two.

On November 4, the People of the State of Illinois initiated an environmental enforcement action against KCBX in the Circuit Court of Cook County. In the Complaint, the Illinois Attorney General alleges the emissions of petcoke and coal dust into the surrounding neighborhood "..threatened the human health of the local residents in the vicinity of the Site and unreasonable interfered with their enjoyment of life and/or property." A true and accurate copy of this Complaint is attached to these comments and labeled as SETF Exhibit Three.

On or about November 22, 2013, the City of Chicago and the People of the State of Illinois initiated an action in the Circuit Court of Cook County against Beemsterboer. Noting the close proximity of residential neighborhoods, schools and playgrounds, the plaintiffs alleged that:

> "...fine particles...have been escaping Defendants' Facility during periods of moderate and heavy wind and inundating the surrounding communities with black dust. As a direct result, residents within the surrounding community often must curtail their activities out of concern for their health and well-being. Children attempting to play outdoors are frequently driven into their homes to avoid inhaling black dust. During the dead of summer, even families without air conditioning were forced to keep their windows sealed shut so dust from Defendants' Facility would not blow into their homes. To prevent unsightly damage and discoloration, residents are forced to frequently wash black dust off the exterior of their houses."

A true and accurate copy of this Complaint is attached to these comments and labeled as SETF Exhibit Four.

On November 25, 2013, another class action case was filed on behalf of residents of southeast Chicago, including 5 named plaintiffs. Based on allegations of "exposure to airborne fugitive petcoke dust contamination" of home and property, the Complaint makes claims arising from willful and wanton conduct (by the petcoke generator, BP), as well as strict liability, trespass, nuisance and many other related claims. A true and accurate copy of this Complaint is attached to these comments and labeled as SETF Exhibit Five.

In one month, the public health and environmental consequences of the outdoor storage of bulk storage materials generated a Notice of Violation, two enforcement Complaints in the Circuit Court of Cook County, two class action lawsuits and, in a short time thereafter, proposed regulations by the City of Chicago's Department of Health and the Illinois Environmental Protection Agency. Apart from some potentially regulated entities, there is a clear consensus among every category of stakeholder that a decisive regulatory response is required to address a serious threat to Chicago and its residents.

SETF emphasizes that although recent legal actions focus on acute consequences of fugitive emissions arising from exponentially greater petcoke storage over the past year, there is also evidence of a chronic problem in this region. For example, in the recent past, residents repeatedly complained about fugitive dust emissions from the Carmeuse Lime facility, giving rise to several City citations and, ultimately, an enforcement action by U.S. EPA. A summary of documents in the possession of the City of Chicago regarding fugitive dust emissions from Carmeuse Lime is attached and labelled as SETF Exhibit Six. The Consent Order resolving the federal enforcement action is available at: http://www.epa.gov/region5/air/enforce/pdfs/20121023-carmeuse-consent-decree.pdf. In addition, for years, SETF and other southeast Chicago organizations have attempted to resolve chronic complaints about fugitive dust emissions from KCBX and Beemsterboer through direct dialogue with the facility operators. Based on the fact that problems have now worsened, SETF has legitimately concluded that non-regulatory strategies cannot be successful, and now looks to the City of Chicago to undertake decisive action to protect the public health, safety and welfare. This is especially true because, as IL EPA pointed out in its filing before the Illinois Pollution Control Board, there is a proliferation of proposals for storage of these materials. If so, absent decisive action by the City, the situation in southeast Chicago is going spiral even farther into chaos, devastating neighborhoods. Perhaps even more troubling, the experience in southeast Chicago is going to be replicated, with every similarly situated community in Chicago being put at risk.

II. The Urgent Need to Address Fugitive Emissions is Justified By Clear Evidence of Poor Air Quality In Southeast Chicago.

The Lake Calumet area was one of the last areas in the Chicago region to achieve the federal PM-10 National Ambient Air Quality Standard. see: Federal Register Vol. 70, No. 183, p. 55546 September 22, 2005 available at: http://www.gpo.gov/fdsys/pkg/FR-2005-09-22/pdf/05-18957.pdf#page=1. Notably, this redesignation from nonattainment to attainment does not conclude the Clean Air Act's mandates related to air quality in the Lake Calumet area. Rather, pursuant to section 175A of the Clean Air Act, measures must be taken to ensure and verify that the Lake Calumet area does not regress back into PM-10 nonattainment. These measures are contained in the mandated Maintenance Plan for the region. In part, this Maintenance Plan is based on projections of sources for the years 2002-2014, including fugitive dust sources. Id. at 55547. The Maintenance Plan also requires Illinois "...to develop and implement a plan to address PM2.5 that will further improve air quality for particulate matter in this area. Future emission reductions

needed to attain the PM2.5 NAAQS will also help ensure continued attainment of the PM-10 NAAQS in the Lake Calumet area." Id. at 55548.

Despite this mandate, in 2013, the Illinois EPA proposed that a multi-county region including Chicago should be designated as nonattainment with the PM2.5 standard. See: http://www.epa.state.il.us/public-notices/2013/pm25-nonattainment/Chi_annualPM25_Oct_23_2013.pdf at p. 44. Although IL EPA intends to designate Cook and several nearby counties as nonattainment, there is only one monitor in the entire region that is in violation of the 2012 health-based PM2.5 air quality standards. This violating monitor is at Washington School, 3535 E. 114th Street, in the midst of the southeast side. Id. at 13. The annual level of PM2.5 at Washington High School averaged over three years is 12.7 $\mu g/m^3$; the health-based standard is 12 $\mu g/m^3$. No other monitor in the multi-county Chicago region violated the PM2.5 standard.

From an air quality perspective, there could not be a worse place in Illinois to put exponentially expanding sources of fugitive emissions than the southeast side of Chicago. Because of this area's long history of unhealthy air quality, this area is subject to a Maintenance Plan that is designed to prevent regression back into PM-10 nonattainment. In light of this vulnerability, it is foolish to allow large, unanticipated new sources of fugitive particulate matter emissions to operate. The urgency of this issue is heightened by new evidence of nonattainment with health-based PM air quality standards at Washington School. The cumulative public health effects caused by new and expanding sources of fugitive emissions will only compound existing, well-documented air quality challenges in this area. This public health issue alone justifies a decisive regulatory action to protect the public health, welfare and safety of the residents of southeast Chicago.

III. Emissions From Bulk Material Storage Facilities Threaten Substantial Progress in Establishing the Future of Southeast Chicago.

Southeast Chicago faces air quality challenges, but has made economic and environmental progress by every other measure. Poorly controlled emissions from bulk material storage facilities impede this progress because of the impact on public health, safety and welfare, the impact on the quality and use of natural areas and waterways, the impact on property value and redevelopment, and public perceptions of the region. Simply, southeast Chicago should not be treated as a sacrifice zone, and progress toward a sustainable future should not be derailed.

There are several indications of a bright future for southeast Chicago, all of which are at risk by virtue of emissions from bulk material storage facilities. Two enormous former steel sites, the South Works and the Wisconsin Steel Works, have completed the requirements of the Illinois Site Remediation Program and are primed for redevelopment. Both sites are also in the shadow of exponentially expanding bulk material facilities. The Ford Torrence facility was the catalyst to the development of a supplier park on a former brownfield site immediately adjacent to Hegewisch. Under the Mayor's leadership, efforts are now underway to revitalize the Illinois Port Authority. Emissions from bulk material storage facilities are out of keeping with these kind of job-rich, modern

economic redevelopment initiatives. Area neighborhoods including Pullman and Altgeld Gardens have been recognized for their national historic value, prompting public and private initiatives to enhance their status and the quality of life for their residents.

Water quality standards for the Calumet waterways have been upgraded based on evidence of increasing recreational use and diversity of aquatic life. These uses will only improve by virtue of the completion of the regional tunnel and reservoir project and wastewater disinfection at the Calumet wastewater treatment plant, both of which will occur by 2016. Yet, today, large segments of these waterways including areas closest to Lake Michigan are dominated by the operations of bulk material storage operations. Fugitive dust and runoff not only threaten neighborhoods, but adjacent waterways as well. Area wetlands like the Indian Ridge Marsh are also being restored, and the Whitford Pond habitat is now home to a nesting pair of Bald Eagles, the first nesting pair in Chicago in generations. Under the Governor's leadership, a new Millenium Reserve is being created to preserve, enhance and connect regional ecological resources, an effort which is designed to make the Calumet region a destination for a full range of recreational uses. The effects of fugitive emissions on this initiative and on regional ecological receptors (flora, fauna and habitat) have not been assessed and are inappropriately overlooked in the present public debate.

The emissions from existing and proposed bulk storage operations not only impact the present day residents of this Chicago community. They also pose a risk to attaining a much brighter future where neighborhoods, ecological resources and responsible industry can co-exist and thrive.

IV. Because of the Significant, Adverse and Disproportionate Effects of Existing Bulk Material Storage Facilities and the Risk of Their Proliferation, the City Should Prohibit the Placement and Retention of These Materials in Chicago Until Regulated Entities Meet All Regulatory Standards, Resolve Pending Enforcement Actions, Receive Special Use Approval and Demonstrate They Can Operate In A Manner That Is Completely Protective of Human Health and the Environment.

SETF diverges from the City because SETF believes there should be an immediate moratorium on the placement and retention of bulk storage materials. It is incomprehensible to SETF that the City can acknowledge the illegal effects of emissions from these facilities as it does in its allegations in the Beemsterboer Complaint, and yet contemplate a protracted, two-year period before full compliance is achieved. By contrast, SETF asserts the following – no bulk storage materials should be retained or placed in Chicago at any existing or new facility. Instead of allowing facilities to operate in conditions the City acknowledges violate public health and environmental standards and threaten City residents, the City should immediately halt the retention and placement of bulk storage materials.

SETF also diverges from the City because SETF believes the City possesses the authority and responsibility to enact a permanent moratorium on new and expanded bulk material storage facilities, as the City Council has contemplated. SETF's basis for this position is

the City's longstanding moratorium on new and expanded landfills, which survived multiple legal challenges and which is responsible for substantially improved conditions throughout the southeast side. SETF believes this authority also exists for existing facilities. However, if it is established by a court of competent jurisdiction that the City lacks legal authority to impose a permanent moratorium on the retention and placement of bulk storage materials at existing facilities, SETF asserts a moratorium should be effective until such time that a facility can demonstrate it fully achieves:

1. new regulatory standards mandated by the City of Chicago, the State of Illinois and the United States;

2. measures necessary to resolve all administrative and judicial enforcement actions;

3. special use approval from the City as described in Comment V below;

4. financial assurance in an amount adequate to fulfill all corrective action, closure and post-closure responsibilities; and,

5. a determination by the Commissioner through a public process that a facility can operate in a manner that is fully protective of human health and the environment, now and in the future.

SETF urges the City to enact a moratorium on new and expanded bulk material storage facilities, and believes the City possess the authority to maintain this moratorium permanently. As to existing facilities, in the event a categorical moratorium is determined by a court to be legally invalid, SETF asserts a facility-by-facility moratorium should remain in place unless a facility can entirely attain and maintain these standards.

V. In the Absence of A Moratorium, Bulk Material Storage Operations Must Be Reclassified As Special Uses Under The Chicago Municipal Code.

Proximity to the source of petcoke, the BP facility in Whiting, is not the only reason bulk material storage facilities are proliferating on the southeast side. Chicago's approach to land use is also responsible for the aggregation of facilities in this location, and must be corrected.

The regulations developed by the Department of Health do not address some fundamental aspects of local land use decision making for bulk material storage operations. Under existing land use controls, a bulk material storage operation can be a permissible land use without any process to determine if the operation:

1. is in the interest of the public convenience and will not have a significant adverse impact on the general welfare of the neighborhood or community;

2. is compatible with the character of the surrounding area in terms of site planning and building scale and project design;

3. is compatible with the character of the surrounding area in terms of operating characteristics, such as hours of operation, outdoor lighting, noise, and traffic generation; and,

4. is designed to promote pedestrian safety and comfort. Chicago Municipal Code § 17-13-0905.

These kinds of broader land use considerations are the essence of a special use determination, which should be mandated as part of granting local land use approval for new or modified bulk material storage operations. The special use process is the well-established, public process for thoroughly evaluating land uses that can have a significant, long term impact on the communities in which they operate. Through the public special use process, the City is able to prevent damaging land uses or to condition approval in such a way as to eliminate or minimize potential harms. Because bulk storage operations and all of the ancillary activities associated with them create intense, long lasting impacts on communities, they should be regarded as special uses that must be approved as part of establishing or modifying operations. This is especially true because of the cumulative risks posed by multiple facilities operating in close proximity to one another, a realistic prospect under Chicago's existing land use system.

Under Chicago's existing zoning and land use controls, bulk storage facilities are permissible uses in two kinds of zones. First, if a facility is engaging in the outdoor bulk storage of raw materials, it is a permissible use in M-3 zones. Chicago Municipal Code § 17-5-0207. Second, facilities that store extracted, raw, recycled or secondary materials as part of manufacturing, production and industrial services are permissible uses in planned manufacturing districts, which are found throughout Chicago including the Calumet region. Chicago Municipal Code § 17-6-0403-F. For example, because petcoke is presumably classified as a secondary (not raw) material, a facility engaged in the bulk storage of petcoke should be limited to operating in a planned manufacturing district. This is true whether the petcoke is being stored inside or outside. By virtue of this, all petcoke facilities will necessarily aggregate in planned manufacturing districts, where their effects will be experienced cumulatively. This consequence of Chicago's Zoning Ordinance is already in evidence in the Calumet Region.

Under Chicago's existing Zoning Ordinance, bulk storage operations in M-3 zones and planned manufacturing districts are "permitted by right." This means that facilities that fit within the permissible use classification are free to locate and operate anywhere within these areas. This is one reason why the expanded setbacks contemplated by the Department of Health are so critical. As in the Calumet region, the PMD perimeter (and sometimes interior) consist of waterways, public spaces and, especially, residential neighborhoods. Because of these natural, public and residential uses, it is unwise to continue to allow this category of intensive uses to be "permitted by right". The City should amend its Zoning Ordinance to require bulk storage operations to acquire special use approval as a pre-condition for new and modified facilities.

Requiring special use approval for new and modified bulk storage operations will have several immediate benefits. First, as noted, a broader range of factors regarding the suitability of the use can be considered. By contrast to the one-size-fits-all "permitted by right" approach, the City will be authorized to view each new and modified operation in a tailored, site specific manner. Second, the City will be authorized to evaluate the suitability of the use according to broad indicators related to the public interest, not merely the more technical regulatory specifications contained in the Department's proposed regulations. Third, potential operators will need to be much more careful and proactive in developing their proposals in order to adhere to the special use approval criteria. Fourth, the special use process incorporates opportunities for public notice and participation. The public will be informed and engaged at the earliest stage of a proposal. Fifth, the special use process will allow the City to control the risk of the aggregation of multiple facilities that could create a significant cumulative impact. Sixth, requiring special use approval will necessarily involve engagement by local elected officials, especially the Alderman, allowing for a more proactive role for public representatives. Seventh, uniformly requiring special use approval will restrain a "race to the bottom", that is, the tendency for facilities to aggregate in locations that offer the path of least resistance. Requiring special use review according to uniformly administered procedures and decision factors will restrain the aggregation of facilities in the most vulnerable communities. Eighth, in PMDs, the special use approval process will also provide a basis for the City to evaluate two additional criteria explicitly mandated by the Zoning Ordinance:

1. existing manufacturing activities, including the potential for land use conflicts and nuisance complaints; and

2. efforts to market other property within the *planned manufacturing district* for industrial use.

Chicago Municipal Code § 17-13-0905-C.

The Department of Health's proposal only addresses part of the issue with bulk storage facilities. On a more fundamental level, the issue is land use. A moratorium is the best solution. In the absence of a moratorium, any meaningful response by Chicago must also include changes to the land use approval process for new and modified bulk material storage facilities. Fortunately, this is not a significant change. Rather, it only requires extending the requirement for special use approval to this category of facilities. While this requires action by the City Council and cannot be accomplished by regulations alone, it must be done to prevent the uncontrolled proliferation of facilities, clustered in those small areas of Chicago where today they are permitted by right.

VI. In Order To Allow For A Full and Complete Opportunity For Public Participation, SETF Joins It Community Partners In requesting An Extension of the Comment Period

Mindful that many affected community residents may need additional time to develop comments on the City's regulatory proposal, SETF joins with them to request an extension on the February 7th deadline.

Thank you for your consideration of these comments.

Respectfully Submitted,

Keith Harley
Attorney for the Southeast Environmental Task Force

Enc.