

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

KCBX TERMINALS COMPANY,)	
)	
Petitioner,)	
)	
v.)	PCB 11-43
)	(Air Permit Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

NOTICE OF FILING

TO: Mr. John Therriault	Mr. Bradley P. Halloran
Assistant Clerk of the Board	Hearing Officer
Illinois Pollution Control Board	Illinois Pollution Control Board
100 West Randolph Street	100 West Randolph Street
Suite 11-500	Suite 11-500
Chicago, Illinois 60601	Chicago, Illinois 60601
(VIA ELECTRONIC MAIL)	(VIA FIRST CLASS MAIL)

(SEE PERSONS ON ATTACHED SERVICE LIST)

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board **PETITIONER'S RESPONSE IN OPPOSITION TO RESPONDENT'S MOTION TO STRIKE REQUESTS FOR ADMISSION**, a copy of which is herewith served upon you.

Respectfully submitted,

KCBX TERMINALS COMPANY,
Petitioner,

Dated: April 8, 2011

By: /s/ Katherine D. Hodge
Katherine D. Hodge

Katherine D. Hodge
Edward W. Dwyer
Lauren C. Lurkins
HODGE DWYER & DRIVER
3150 Roland Avenue
Post Office Box 5776
Springfield, Illinois 62705-5776
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CERTIFICATE OF SERVICE

I, Katherine D. Hodge, the undersigned, hereby certify that I have served the attached PETITIONER'S RESPONSE IN OPPOSITION TO RESPONDENT'S MOTION TO STRIKE REQUESTS FOR ADMISSION upon:

Mr. John Therriault
Assistant Clerk of the Board
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601

via electronic mail on April 8, 2011 and upon:

Mr. Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601

Christopher Grant, Esq.
Illinois Attorney General's Office
69 West Washington Street
Suite 1800
Chicago, Illinois 60602

Christopher R. Pressnall, Esq.
Illinois Environmental Protection Agency
Division of Legal Counsel
1021 North Grand Avenue East
Post Office Box 19276 - mail code #21
Springfield, Illinois 62794-9276

by depositing said documents in the United States Mail, postage prepaid, in Springfield, Illinois on April 8, 2011.

/s/ Katherine D. Hodge
Katherine D. Hodge

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**PETITIONER'S RESPONSE IN OPPOSITION TO
RESPONDENT'S MOTION TO STRIKE REQUESTS FOR ADMISSION**

NOW COMES Petitioner, KCBX TERMINALS COMPANY ("KCBX"), a North Dakota corporation, by and through its attorneys, HODGE DWYER & DRIVER, and for its Response in Opposition to the Illinois Environmental Protection Agency's ("Illinois EPA") Motion to Strike Requests for Admission ("Motion"), states as follows:

1. On February 1, 2011, KCBX initiated this proceeding by filing with the Illinois Pollution Control Board ("Board") its Petition for Review ("Petition") regarding the Renewed Federally Enforceable State Operating Permit issued to KCBX by Illinois EPA on December 29, 2010.
2. In its Motion, Illinois EPA claims, again, that KCBX "has demanded an early hearing" in this matter.
3. As noted in KCBX's previous filings, however, on February 17, 2011, Illinois EPA filed a Request for Extension of Time to File Record, requesting a 30-day extension of the deadline to file the Record, or until April 4, 2011.

4. On February 24, 2011, KCBX agreed to Illinois EPA's Request for Extension of Time to File Record, and also agreed to a corresponding 30-day limited waiver of the Board's statutory decision deadline until July 1, 2011.

5. Thereafter, on March 8, 2011, KCBX filed with the Board a Notice of Waiver of 120-Day Decision Deadline for an Additional 48 Days, or until August 18, 2011.

6. Therefore, KCBX did not insist on an early hearing date in this matter, but instead, agreed to two extensions of the statutory 120-day decision deadline. In addition, KCBX agreed to the additional extensions in order to allow additional time for the parties to prepare for hearing and to brief the issues remaining after hearing in advance of the Board's decision deadline.

7. On March 9, 2011, KCBX served upon Illinois EPA written discovery requests, including the Requests for Admission at issue in Illinois EPA's Motion.

8. On March 15, 2011, Illinois EPA filed with the Board its Motion for Additional Time to Respond to Discovery, requesting an additional 30 days to respond to the written discovery requests. Illinois EPA, however, did not raise any arguments regarding the Requests for Admission and/or the recent amendment to Illinois Supreme Court Rule 216 ("Supreme Court Rule 216") in its Motion for Additional Time to Respond to Discovery.

9. On March 25, 2011, counsel for Illinois EPA forwarded a copy of the recent amendment to Supreme Court Rule 216 to the undersigned, along with a request

that KCBX withdraw its Requests for Admission and resubmit under the limitations of the amended rule. The undersigned denied the request in good faith.

10. KCBX's Requests for Admission were prepared and propounded pursuant to Section 101.618 of the Board rules, 35 Ill. Adm. Code § 101.618. Section 101.618 includes nine subparts, but does not limit the number of Requests for Admission one party may propound on another party.

11. Additionally, Section 101.616 of the Board rules, 35 Ill. Adm. Code § 101.618, states the following, in relevant part: "For purposes of discovery, the Board may look to the Code of Civil Procedure and the Supreme Court Rules for guidance where the Board's procedural rules are silent (see Section 101.100(b))." (Emphasis added.)

12. As noted above, however, the Board rules are not silent with regard to Requests for Admission. Instead, Section 101.618 includes detailed requirements regarding Requests for Admission, but does not contain a limit on the number of Requests for Admission one party may propound on another party. The Board rules do, however, contain a limit on the number of written Interrogatories one party may propound on another. See 35 Ill. Adm. Code § 101.620(b). The fact that the Board rules include a limit on the number of written Interrogatories is evidence that if the Board wanted to limit the number of Requests for Admission, it would have done so in the context of Section 101.618. Additionally, in Section 101.616, it is permissive, not mandatory, that that Board reference and/or follow the Code of Civil Procedure or Illinois Supreme Court Rules.

13. It is contrary to the Board rules, and unreasonable, to require parties in any matter before the Board -- as Illinois EPA seems to suggest should be done -- to compare the Board's discovery rules line-by-line with the Code of Civil Procedure and Illinois Supreme Court Rules, and to carefully select which requirements should be extracted from the other sources and added to the Board rules.

14. As the Hearing Officer is aware, if the Board wishes to include in its rules a limit on the number of Requests for Admission to reflect the recent amendment to Supreme Court Rule 216, it may do so in the context of a rulemaking proceeding. The current Board rules, however, include no such limit.

15. KCBX properly relied on Section 101.618 of the Board rules when propounding its Requests for Admission on Illinois EPA, and it would be contrary to the Board rules, and unreasonable, if the Hearing Officer considered the recent amendment to Supreme Court Rule 216 incorporated by reference in this matter.

16. In its Motion, Illinois EPA asks that if the Hearing Officer declines to incorporate the recent amendment to Supreme Court Rule 216 into the Board rules, "he should consider limiting the Requests to prevent an abuse of the discovery process." Illinois EPA further states that KCBX's Requests for Admission, combined with its demand for an "early hearing," are "unreasonable and harassing."

17. As stated above, KCBX did not request an "early hearing" in this matter. Further, KCBX's Requests for Admission are not "unreasonable and harassing." There is nothing in KCBX's Requests for Admission that is inconsistent with its Petition and the exhibits thereto. Further, the purposes of discovery are to clarify the issues and,

hopefully, narrow the issues for hearing. KCBX propounded its Requests for Admission in order to achieve those purposes.

18. Depositions are scheduled in this matter for April 14 and 15, 2011. KCBX propounded its Requests for Admission in order to clarify the issues, and, hopefully, narrow the issues to be discussed during deposition.

19. Therefore, it would be contrary to the Board rules, and unreasonable, for the Hearing Officer to now strike KCBX's Requests for Admission in this matter, and to limit any future requests to 30, including subparts, as Illinois EPA requests.

20. For the reasons stated herein, KCBX opposes Illinois EPA's request that the Hearing Officer strike KCBX's Requests for Admission, or limit the number of any future requests, consistent with the recent amendment to Supreme Court Rule 216.

WHEREFORE Petitioner, KCBX TERMINALS COMPANY, respectfully prays that the Hearing Officer deny the Respondent's Motion to Strike Requests for Admission, and provide it all other relief just and proper in the premises.

Respectfully submitted,

KCBX TERMINALS COMPANY,
Petitioner,

Dated: April 8, 2011

By: /s/ Katherine D. Hodge
One of Its Attorneys

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KCBX:003/Fil/FESOP Permit Appeal/Response to Motion to Strike Requests for Admission