

ILLINOIS POLLUTION CONTROL BOARD

April 21, 2011

KCBX TERMINALS COMPANY,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 10-110
	)	PCB 11-43
ILLINOIS ENVIRONMENTAL	)	(Permit Appeal - Air)
PROTECTION AGENCY,	)	(Consolidated)
	)	
Respondent.	)	

ORDER OF THE BOARD (by T.E. Johnson):

This order addresses several procedural motions presently pending in two air permit appeals. The appeals were brought by KCBX Terminals Company (KCBX), seeking review of Illinois Environmental Protection Agency (IEPA) permit determinations concerning KCBX's bulk materials terminal, which is located at 3259 East 100th Street in Chicago, Cook County. In docket PCB 10-110, KCBX filed a petition to contest conditions of a revised construction permit issued by IEPA on May 25, 2010. In docket PCB 11-43, KCBX filed a petition to contest conditions of a renewed federally enforceable state operating permit (FESOP) issued by IEPA on December 29, 2010. The Board has already accepted both petitions for hearing in separate orders.

The Board rules upon four motions today. In docket PCB 10-110, accompanying KCBX's petition was a motion asking the Board to exercise its discretionary authority to stay the effectiveness of the contested conditions of the revised construction permit during the pendency of the appeal. In docket PCB 11-43, accompanying KCBX's petition for review was a motion asking the Board to confirm that the effectiveness of the renewed FESOP is automatically stayed pending appeal. Finally, in docket PCB 10-110, KCBX filed a motion to supplement IEPA's permit determination record, and IEPA filed a motion to consolidate PCB 10-110 with PCB 11-43 for hearing and decision. For the reasons provided below, the Board (1) grants KCBX's motion for a discretionary stay, but with modifications, (2) grants KCBX's motion to confirm the automatic stay, (3) grants KCBX's motion to supplement, and (4) grants IEPA's motion to consolidate, but only for purposes of hearing, not necessarily decision.

In this order, the Board first sets forth the procedural history of both cases. The Board then discusses the parties' arguments regarding, and the Board's respective rulings upon, KCBX's motion for a discretionary stay in PCB 10-110, KCBX's motion to confirm the automatic stay in PCB 11-43, KCBX's motion to supplement the IEPA record in PCB 10-110, and IEPA's motion for consolidation of the two permit appeals.

## **PROCEDURAL HISTORY**

### **PCB 10-110, Revised Construction Permit**

On June 29, 2010, KCBX timely filed the petition for review (Pet. Constr.), along with the motion for a discretionary stay of the contested conditions of the revised construction permit (Mot. Stay Constr.). In an order of July 15, 2010, the Board accepted the petition for hearing but reserved ruling upon the motion for stay. On July 26, 2010, IEPA filed a motion for leave to file *instanter* a response opposing KCBX's motion for stay, attaching the response. The Board grants IEPA's motion and accepts IEPA's response (Resp. Stay Constr.) to the KCBX stay motion.

Since these initial filings, and as documented in several hearing officer orders beginning in August 2010, the parties requested that the Board delay ruling upon KCBX's motion for stay while the parties pursued settlement. With the hearing officer's leave, IEPA filed the record of its revised construction permit determination on February 1, 2011 (IEPA Rec. Constr.). In an order of February 3, 2011, the hearing officer stated that IEPA no longer agreed to the request that the Board delay ruling upon KCBX's stay motion. On February 17, 2011, with the hearing officer leave, KCBX filed a reply (Reply Stay Constr.) to IEPA's response opposing a discretionary stay.

On February 23, 2011, KCBX filed a motion to supplement (Mot. Supp. Rec.) the IEPA permit determination record. IEPA has since informed the hearing officer that IEPA does not oppose KCBX's motion to supplement. On March 29, 2011, IEPA filed a motion to consolidate (Mot. Consol.) the PCB 10-110 appeal with the PCB 11-43 appeal.<sup>1</sup> On April 5, 2011, KCBX filed a response (Resp. Consol.) conditionally agreeing to IEPA's motion to consolidate. On April 8, 2011, KCBX filed a waiver of the statutory deadline for the Board to decide this appeal, extending the deadline to August 18, 2011. A Board meeting is currently scheduled for August 18, 2011.

### **PCB 11-43, FESOP**

On February 1, 2011, KCBX timely filed the petition for review (Pet. FESOP), along with the motion to confirm the automatic stay of the FESOP (Mot. Stay FESOP). In an order of February 17, 2011, the Board accepted the petition for hearing, but reserved ruling upon the stay motion. On February 25, 2011, with the hearing officer's leave, IEPA filed a response (Resp. Stay FESOP) to KCBX's stay motion. In the response, IEPA agrees that the automatic stay applies but, citing a recent amendment to the Environmental Protection Act (Act) (415 ILCS 5 (2008)), questions the authority upon which KCBX relies.

In an order of March 2, 2011, the hearing officer stated that a June 1, 2011 hearing date had been agreed upon and that a notice of hearing would be issued accordingly. Further, the hearing officer required that all pre-hearing motions be filed by May 2, 2011, and any responses

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<sup>1</sup> The Board reminds that motions to consolidate should be filed in each of the cases sought to be consolidated, rather than in just one of them.

thereto filed by May 9, 2011. On March 8, 2011, KCBX filed a waiver of the statutory deadline for the Board to decide this appeal, extending the deadline to August 18, 2011, which, as noted, is the date of a currently-scheduled Board meeting. Also on March 8, 2011, the hearing officer issued an order stating the following regarding the parties' agreed discovery schedule:

The discovery schedule is accepted to the extent as follows. Petitioner's opinion witnesses and their opinions must be disclosed on or before March 15, 2011. Respondent's opinion witnesses and their opinions must be disclosed on or before March 22, 2011. Depositions must be completed on or before April 19, 2011. All discovery is closed on April 19, 2011. PCB 11-43, Hearing Officer Order at 1 (Mar. 8, 2011).

Since the March 8, 2011 hearing officer order issued, the parties have made numerous filings related to discovery. These filings include IEPA's motion to quash subpoena and IEPA's motion to strike requests for admission. The discovery motions were directed to, and have been ruled upon by, the hearing officer. *See* PCB 11-43, Hearing Officer Order (Apr. 18, 2011).

With the hearing officer's leave, IEPA filed the record of its FESOP renewal determination on April 4, 2011. With this filing, IEPA included a motion for leave to file a reduced number of copies of the 540-page record (Mot. Reduc.). In the motion, IEPA represents that filing an original and nine copies of the IEPA record would be "a strain on State resources" and asks that the Board permit the filing of an original and two copies. Mot. Reduc. at 1. IEPA has since also filed a compact disk of the IEPA record. KCBX has not responded to IEPA's motion for filing relief. The Board notes that its procedural rules require an original and four, not nine, copies of IEPA permit determination records (35 Ill. Adm. Code 101.302(h)(2)), but the Board grants IEPA's motion.

## **DISCUSSION**

### **PCB 10-110, Motion for Discretionary Stay of Contested Conditions of Revised Construction Permit**

#### **Background**

According to KCBX's petition for review in PCB 10-110, KCBX "currently receives, among other bulk solids, petroleum coke and has an opportunity to receive fluid petroleum coke ('Fluid Coke'), a low moisture material." Pet. Constr. at 1-2. KCBX further states that IEPA issued a revised construction permit to KCBX on October 17, 2008, "for the installation of two conveyors" (2008 revised construction permit). *Id.* at 2. The 2008 revised construction permit, KCBX continues, was "issued as a result of discussions between the Illinois EPA and KCBX regarding the air permit appeal before the Board captioned KCBX Terminals Company v. Illinois EPA, PCB 08-103." *Id.*<sup>2</sup>

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<sup>2</sup> In PCB 08-103, the Board issued an order on November 5, 2009, granting KCBX's motion to withdraw the petition for review of the "Construction Permit Grant - Operating Permit Denial -

On February 3, 2010, KCBX submitted to IEPA a construction permit application concerning the two conveyors. Pet. Constr. at 2. On May 25, 2010, IEPA issued another revised construction permit (2010 revised construction permit). *Id.*, Exh. A at 1. Special Conditions 6a., 6a.ii., 7a., 11a.i., and 11a.iv. of the 2010 revised construction permit are the subject of the appeal in PCB 10-110.

In seeking Board review, KCBX alleges that the facility should be allowed to receive fluid coke with a moisture content of generally less than 1.3%, that the requirements of Special Condition 6a. should not apply when “receiving” fluid coke, and that the application of water spray or blending with higher moisture materials should be considered part of “receiving.” Pet. Constr. at 3-4. According to KCBX, other than an apparent typographical error in Special Condition 6a.ii., all of the contested conditions require modification to reflect KCBX’s distinction between “receiving” and “handling.” *Id.* at 4-5. KCBX’s petition sets forth the company’s proposed amendments to the contested conditions. *Id.*

### **Parties’ Discretionary Stay Filings**

**KCBX’s Motion.** KCBX moves the Board to stay the effectiveness of the 2010 revised construction permit’s contested conditions pursuant to the Board’s authority to grant discretionary stays of permit conditions. Mot. Stay Constr. at 1, citing Community Landfill Co. v. IEPA, PCB 01-48, PCB 01-49 (consol.) (Oct. 19, 2000). In its petition for review, KCBX maintains that the contested permit conditions must be modified to effectuate IEPA’s intent and clarify that the proposed activity will not cause a violation of the Act or Board regulations. Mot. Stay Constr. at 1-2.

KCBX asserts that a stay of Special Conditions 6a., 6a.ii., 7a., 11a.i., and 11a.iv. is needed “to prevent irreparable harm to KCBX.” Mot. Stay Constr. at 2. According to KCBX, if these conditions are not revised as described in the petition, KCBX “would not be allowed to receive fluid petroleum coke.” *Id.*; *see also* Pet. Constr. at 4-5. KCBX also argues that a stay is necessary to protect KCBX’s right to appeal these permit conditions because this appeal “would be rendered meaningless if it must comply with these provisions while its appeal is pending.” Mot. Stay Constr. at 2-3. KCBX states that it has no adequate remedy at law, and that it has a probability of success on the merits. *Id.* at 3. Lastly, KCBX represents that if a stay is granted until the Board’s final action in this matter, IEPA, the public, and the environment will not be harmed. *Id.*

**IEPA’s Response.** IEPA argues that a stay of the contested conditions of the 2010 revised construction permit would allow KCBX to avoid controlling particulate emissions from the processing of the fluid coke material in the conveyors, which would constitute a violation of the Act. Resp. Stay Constr. at 2. According to IEPA, the requested stay would:

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NSPS Source” issued on May 23, 2008. *See* KCBX Terminals Co. v. IEPA, PCB 08-103, slip op. at 1 (Nov. 5, 2009) (also closing the docket).

allow KCBX to avoid using water sprays to control particulate emissions [6.a], avoid compliance with established emission limits [7.a], and avoid its recordkeeping responsibilities [11.a]. These requirements have nothing to do with KCBX's claimed misapplication of the term "received", and have been included in Site Permits (in one form or another) for years. Thus, KCBX's stay request is unnecessary and overbroad. If a stay was granted by the Board, it would likely lead to violations of the act. *Id.* (bracketed information in original).

IEPA states that although it has not objected to the delivery and acceptance of rail cars of fluid coke at the KCBX facility, thereafter "processing" or "blending" the fluid coke with other materials in the conveyors "requires additional emission controls." Resp. Stay Constr. at 2-3. IEPA maintains that KCBX's claims that the company is prevented from "receiving" fluid coke, causing irreparable harm, are without merit. *Id.* at 3.

**KCBX's Reply.** KCBX claims that it is not avoiding, and has no intent to avoid, controlling the particulate matter emissions from the processing of fluid coke material. Reply Stay Constr. at 4. KCBX represents that if the contested conditions in the 2010 revised construction permit are stayed:

the interim operation of the conveyors will be governed by the "Construction Permit – Revised" that was issued to KCBX on October 17, 2008 ("October 2008 Revised Construction Permit"), as a result of the previous permit appeal before the Board, PCB No. 08-103. While Condition 6a. in the October 2008 Revised Construction Permit includes a moisture limit of 1.5%, and the Revised Construction Permit includes a moisture limit of 1.3%, KCBX operates the conveyors in compliance with the more stringent limit of 1.5%. Additionally, Condition 6a.ii. in the Revised Construction Permit should, but for a minor typographical error on the part of Illinois EPA, include the same language as the October 2008 Revised Construction Permit. Furthermore, Conditions 7a. [particulate emission limits] and 11a.i. [recordkeeping of good material handling practices] are the same in both permits. Condition 11a.iv. [recordkeeping for name and amount of each bulk material processed], however, is included in the Revised Construction Permit, but is not included in the October 2008 Revised Construction Permit.<sup>3</sup> Therefore, during this proceeding, KCBX will continue to comply with the recordkeeping requirements contained in the October 2008 Revised Construction Permit. Additionally, as stated above, KCBX has not yet started receiving fluid coke at the Facility, and KCBX requests the contested conditions in the Revised Construction Permit be revised so that KCBX may do so. *Id.* at 4-5.

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<sup>3</sup> Special Condition 11a.iv. of the 2010 revised construction permit appears as Special Condition 11a.ii. of the 2008 revised construction permit. Special Condition 11a.v. of the 2010 revised construction permit appears as Special Condition 11a.iii. of the 2008 revised construction permit. *See* Pet. Constr., Exh. A at 9-10; IEPA Rec. Constr. at KCBX00128.

### **Board's Discretionary Stay Analysis**

The Board has consistently held that it “has the authority to grant discretionary stays from permit conditions.” Community Landfill, PCB 01-48, PCB 01-49 (consol.), slip op. at 4; *see also, e.g., Hartford Working Group v. IEPA*, PCB 05-74, slip op. at 1 (Nov. 18, 2004). As the Board explained in Community Landfill, the permit appeal system would be “rendered meaningless in many cases, if the Board did not have the authority to stay permit conditions.” Community Landfill, PCB 01-48, PCB 01-49 (consol.), slip op. at 4 (granting stay of challenged permit conditions). In deciding whether to grant a discretionary stay, the Board may consider various factors articulated in Illinois case law, such as the avoidance of irreparable harm, but the Board is “particularly concerned about the likelihood of environmental harm if a stay is granted.” *Id.*, citing Motor Oils Refining Co. v. IEPA, PCB 89-116, slip op. at 2 (Aug. 31, 1989)

KCBX seeks a discretionary stay not of the entire 2010 revised construction permit, but rather of Special Conditions 6a., 6a.ii., 7a., 11a.i., and 11a.iv. of that permit.<sup>4</sup> The parties’ dispute centers upon whether KCBX’s conveyors would be subject to *any* particulate emission controls and limits during the stay. IEPA appears to believe that KCBX will be processing fluid coke while this appeal is pending. IEPA expresses concern that a stay would allow KCBX to avoid controlling the resulting particulate emissions and, more generally, that a stay of all of the contested conditions of the 2010 revised construction permit might result in violations of the Act. IEPA observes that other permits for the facility have imposed similar requirements concerning particulate emission control, emission limits, and recordkeeping.

KCBX makes a number of representations in reply to the issues raised by IEPA. KCBX states that if the motion for discretionary stay is granted, the operation of the two conveyors during this appeal would be subject to the 2008 revised construction permit. The 2008 revised construction permit is part of the IEPA record of the 2010 permit determination. *See* IEPA Rec. Constr. at KCBX00120-130. According to KCBX, the earlier permit includes a minimum moisture content requirement of 1.5% by weight for bulk material (Special Condition 6a.), more stringent than the 1.3% moisture level required by the 2010 revised construction permit (Special Condition 6a.). *See id.* at KCBX00124. KCBX also states that the 2008 revised construction permit includes the same particulate matter emission limits (Special Condition 7a.) as in the instant permit (Special Condition 7a.), and has similar recordkeeping requirements (respective Special Conditions 11a.). *See id.* at KCBX00125-126, 128; *see also* footnote 2 above. Finally, KCBX maintains that in order to start receiving fluid coke at the facility, KCBX requires that its requested amendments to the contested conditions of the 2010 revised construction permit be given effect. *See* Reply Stay Constr. at 5; *see also* Mot. Stay Constr. at 2, Pet. Constr. at 4-5. IEPA did not seek leave to file a surreply to dispute any of these statements by KCBX.

Under the circumstances described above, the Board finds that there is little likelihood that environmental harm will result from granting the requested stay. However, KCBX has not

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<sup>4</sup> KCBX’s stay motion refers once to 5 ILCS 100/10-65(b) (2008), but neither KCBX’s motion nor its reply makes any argument with respect to the Administrative Procedure Act’s automatic stay provision. The Board therefore does not further address the matter in connection with PCB 10-110.

persuaded the Board that the company will suffer irreparable harm absent the stay. Both the 2008 and 2010 revised construction permits appear to address the same activity: construction and initial operation of the two conveyors. *See* Pet. Constr., Exh. A at 1; IEPA Rec. Constr. at KCBX00120. KCBX requests the stay in order to avoid alleged irreparable harm, but then states that during this appeal, the company would be subject to almost identical conditions from the 2008 revised construction permit. Further, the alleged irreparable harm KCBX seeks to avoid through a stay is the inability to receive fluid coke, yet KCBX states that it cannot receive fluid coke until the contested conditions are amended as KCBX proposes. Because staying the contested conditions will not enable KCBX to receive fluid coke, the Board finds that KCBX has not demonstrated that a stay is necessary to avoid irreparable harm.

Nevertheless, the Board finds that there is merit in granting a discretionary stay. Staying the contested conditions in favor of the corresponding conditions to which KCBX has been subject for several years may help prevent confusion during the pendency of this appeal. For example, Special Condition 6a.ii. of both permits refers to “testing requirements,” but the 2008 provision cross-references Special Condition 6(c), which concerns testing requirements, while the 2010 provision cross-references Special Condition 6(b), which concerns equipment monitoring. *See* Pet. Constr., Exh. A at 5; IEPA Rec. Constr. at KCBX00124-125. Moreover, as KCBX points out, the 2008 revised construction permit is more stringent than its 2010 counterpart with respect to the moisture content requirement.

Exercising its discretion, the Board grants KCBX’s request for a discretionary stay. However, for continuity, the Board stays Special Conditions 6, 7, and 11 in their entirety instead of just Special Conditions 6a., 6a.ii., 7a., 11a.i., and 11a.iv. This measure should prevent unduly disjointed interplay between the 2008 and 2010 revised construction permits during this appeal. The balance of the 2010 permit remains in effect. Accordingly, Special Conditions 6, 7, and 11 of the 2010 revised construction permit are stayed until the Board’s final action in this matter. During this time, KCBX will instead be subject to Special Conditions 6, 7, and 11 of the 2008 revised construction permit. With these rulings, “the Board makes no findings on the merits of the permit appeal . . . .” *Motor Oils*, PCB 89-116, slip op. at 2.

**PCB 11-43, Motion to Confirm  
Automatic Stay of FESOP**

**Background**

In PCB 11-43, KCBX appeals on the grounds that the renewed FESOP, issued by IEPA on December 29, 2010, includes conditions that are arbitrary and capricious, not required by the Act or regulations, and not necessary to correct, detect, or prevent noncompliance with, or to otherwise accomplish the purposes of, the Act or regulations. Further, KCBX claims that IEPA failed to include certain conditions in the renewed FESOP that are necessary to accurately reflect the information KCBX submitted and the actual operations of the facility. Finally, KCBX contends that the renewed FESOP contains miscellaneous errors that must be corrected to accurately reflect facility operations. Pet. FESOP at 3-10.

### **Parties' Automatic Stay Filings**

**KCBX's Motion.** KCBX asserts that the provision for the “automatic stay” of licenses under the Administrative Procedure Act (APA) (5 ILCS 100/10-65(b) (2008)) applies to FESOPs. Mot. Stay FESOP at 3. KCBX relies upon Borg-Warner Corporation v. Mauzy, 100 Ill. App. 3d 862 (3d Dist. 1981), “the only Illinois appellate case to interpret the APA licensing provision in the context of the Act and its regulations.” *Id.* KCBX also relies upon Board decisions applying the APA automatic stay to Clean Air Act Permit Program (CAAPP) permits. *Id.*, citing United States Steel Corp. v. IEPA, PCB 10-23 (Nov. 19, 2009); Dynegy Midwest Generation, Inc. (Havana Power Station) v. IEPA, PCB 06-71 (Feb. 16, 2006).

KCBX acknowledges that the Board “has not directly addressed the issue of the application of the APA’s automatic stay to FESOPs,” but maintains that the analyses in Borg-Warner and the Board’s CAAPP orders cited above “would appropriately apply to FESOPs.” Mot. Stay FESOP at 3. Accordingly, continues KCBX, the renewed FESOP is automatically stayed and not currently effective, and KCBX’s “existing permits will continue in full force and effect.” *Id.* at 3-4. KCBX requests “confirmation” from the Board that the renewed FESOP is automatically stayed, pursuant to the APA, “until the final Board decision on the permit has been made.” *Id.* at 4. In the alternative, if the Board decides that the APA’s automatic stay does not apply here, KCBX argues that the Board should exercise its discretion and stay the effectiveness of the entire CAAPP permit in order to prevent irreparable harm to, and preserve the certain and clearly ascertainable appeal right of, KCBX. *Id.* at 4-5.

**IEPA's Response.** IEPA states that it “agrees to the requested stay” of KCBX’s renewed FESOP under the APA automatic stay provision. Resp. Stay FESOP at 1. However, the Board decisions cited by KCBX, continues IEPA, are not “relevant or binding in this case” because they “involved appeals of CAAPP permit conditions. *Id.* IEPA concedes that the APA “controls stays of permit conditions in appeals of FESOP renewals,” but argues that “the same is no longer true” for CAAPP permits due to the recent addition of Section 40.2(f) to the Act. *Id.* at 1, 2. That statutory amendment, effective June 21, 2010, “removed certain permit appeals from the automatic stay provisions of the APA,” according to IEPA, but the amendment “only mentions CAAPP permits, which are issued under Section 39.5 of the Act, 415 ILCS 5/39.5 (2010).” *Id.* at 2.

IEPA states that it “does not interpret Section 40.2(f) as also applying to FESOP permits, which are issued under Section 39(a) of the Act, 415 ILCS 5/39(a) (2010), and appealed under Section 40 of Act, 415 ILCS 5/40 (2010).” Resp. Stay FESOP at 2. However, IEPA believes that “the question of the scope of the amended Section 40.2 is one of first impression,” and maintains that if the Board decides that Section 40.2(f) “also incorporates the State’s FESOP program,” then the Board should stay only the contested conditions of KCBX’s renewed FESOP. *Id.*, n.2.

### **Board's Automatic Stay Analysis**

KCBX asks the Board to confirm that the renewed FESOP issued by IEPA is subject to the automatic stay at Section 10-65(b) of the APA (5 ILCS 100/10-65(b) (2008)). IEPA agrees



that the APA’s automatic stay is applicable, but asserts that KCBX’s reliance on case law for CAAPP permit stays is misplaced because those Board decisions predate the addition of subsection (f) to Section 40.2 of the Act (415 ILCS 5/40.2(f), added by P.A. 96-934, eff. June 21, 2010). Further, IEPA states that if the Board finds that Section 40.2(f) of the Act applies to staying FESOPs, rather than Section 10-65(b) of the APA, then IEPA requests that the Board “stay only the contested provisions of the permit at issue.” Resp. Stay FESOP at 2, n.2.

The Board provides brief background on FESOPs and CAAPP permits before turning to the mentioned statutory provisions. For the reasons below, the Board finds that Section 40.2(f) of the Act does not apply to KCBX’s renewed FESOP and that Section 10-65(b) of the APA does apply.

**Background on FESOPs and CAAPP Permits.** Title V of the federal Clean Air Act (42 U.S.C. §§7661-7661f) sets forth the CAAPP. For Illinois, the CAAPP, including the issuance of CAAPP permits, is codified in the Act at Section 39.5 (415 ILCS 5/39.5 (2008)). Section 39.5 defines a “CAAPP permit” as “any permit issued, renewed, amended, modified or revised pursuant to Title V of the Clean Air Act.” 415 ILCS 5/39.5(1) (2008).

Section 39.5 of the Act also addresses FESOPs:

3. Agency Authority To Issue CAAPP Permits and Federally Enforceable State Operating Permits.

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c. The Agency shall have the authority to issue a State operating permit for a source under Section 39(a) of the Act, . . . which includes federally enforceable conditions limiting the “potential to emit” of the source to a level below the major source threshold for that source as described in paragraph 2(c) of this Section, thereby excluding the source from the CAAPP, when requested by the applicant pursuant to paragraph 5(u) of this Section. The public notice requirements of this Section applicable to CAAPP permits shall also apply to the initial issuance of permits under this paragraph. 415 ILCS 5/39.5(3)(c) (2008); *see also* 415 ILCS 5/39.5(1.1), (5)(u) (2008).<sup>5</sup>

A FESOP therefore restricts a source’s potential to emit air pollutants to below major source thresholds through the imposition of federally enforceable limits. A source otherwise subject to Title V may seek a FESOP specifically to avoid having to obtain a CAAPP permit, which can be

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<sup>5</sup> “Federally enforceable” means “enforceable by USEPA [United States Environmental Protection Agency].” 415 ILCS 5/39.5(1) (2008). “Potential to emit” is also defined in the Act. *Id.*

considered to be more complex than a FESOP.<sup>6</sup> *See* 415 ILCS 5/39.5(1.1), (3)(c) (2008). KCBX's renewed FESOP states:

This federally enforceable state operating permit is issued to limit the emissions of air pollutants from the source to less than major source thresholds (i.e., 100 tons/year for Carbon Monoxide (CO), Nitrogen Oxides (NO<sub>x</sub>), Particulate Matter with an aerodynamic diameter less than or equal to 10 micrometers (PM<sub>10</sub>), and 100 tons/year for Sulfur Dioxide (SO<sub>2</sub>). As a result, the source is excluded from the requirements to obtain a Clean Air Act Permit Program (CAAPP) permit. Pet, Exh. C at 1.

**Section 40.2(f) of the Act.** IEPA's response to KCBX's stay motion raises the question of whether a recent amendment to the Act concerning stays would apply to FESOPs. The amendment added subsection (f) to Section 40.2 of the Act through Public Act 96-934, effective June 21, 2010. Generally, Section 40.2 of the Act provides for appeals of IEPA's CAAPP permit determinations, which are made under Section 39.5 of the Act. *See* 415 ILCS 5/39.5, 40.2 (2008). New Section 40.2(f) reads as follows:

(f) If requested by the applicant, the Board may stay the effectiveness of *any final Agency action identified in subsection (a) of this Section* during the pendency of the review process. If requested by the applicant, the Board shall stay the effectiveness of all the contested conditions of a CAAPP permit. The Board may stay the effectiveness of any or all uncontested conditions if the Board determines that the uncontested conditions would be affected by its review of contested conditions. If the Board stays any, but not all, conditions, then the applicant shall continue to operate in accordance with any related terms and conditions of any other applicable permits until final Board action in the review process. If the Board stays all conditions, then the applicant shall continue to operate in accordance with all related terms and conditions of any other applicable permits until final Board action in the review process. Any stays granted by the Board shall be deemed effective upon the date of final Agency action appealed by the applicant under this subsection (f). *Subsection (b) of Section 10-65 of the Illinois Administrative Procedure Act shall not apply to actions under this subsection.* 415 ILCS 5/40.2(f), added by P.A. 96-934, eff. June 21, 2010 (emphasis added).

As stated in the last sentence of new subsection (f), Section 10-65(b) of the APA (*i.e.*, the APA's automatic stay) does not apply when Section 40.2(f) of the Act is applicable. The first sentence of Section 40.2(f) specifies the "final Agency action" to which Section 40.2(f) applies: final action by IEPA "identified in subsection (a) of this Section [40.2]." In turn, subsection (a) identifies the various types of final IEPA action that may be appealed to the Board pursuant to Section 40.2: "If the Agency refuses to grant or grants with conditions a CAAPP permit, makes a determination of incompleteness regarding a submitted CAAPP application, or fails to act on

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<sup>6</sup> USEPA Region 5 notes that "[a] FESOP permit will be less complex than a Title V permit, so many sources may opt to obtain a FESOP to limit their emissions and not be subject to the Title V program." <http://www.epa.gov/reg5oair/permits/oper.html> (last updated Oct. 12, 2010).

an application for a CAAPP permit, permit renewal, or permit revision within the time specified in paragraph 5(j) of Section 39.5 of this Act . . . .” 415 ILCS 5/40.2(a) (2008).

None of these final IEPA actions, described in Section 40.2(a) and referenced in Section 40.2(f), constitute the issuance of a renewed FESOP. FESOPs, which are issued pursuant to IEPA’s general permitting authority under Section 39(a) of the Act, are not CAAPP permits, which are issued under Section 39.5 of the Act. The Board agrees with IEPA that the stay provisions of new Section 40.2(f) do not apply to FESOPs. In addition, as IEPA points out, before the addition of Section 40.2(f) to the Act, the Board issued decisions applying Section 10-65(b) of the APA to CAAPP permits. KCBX relies upon some of these decisions in its stay motion. *See, e.g., United States Steel*, PCB 10-23 (Nov. 19, 2009); *Dynegy*, PCB 06-71 (Feb. 16, 2006). The Board further agrees with IEPA that the stay of CAAPP permits would now be addressed through Section 40.2(f) of the Act, instead of Section 10-65(b) of the APA.

**Section 10-65(b) of the APA.** The remaining question is whether Section 10-65(b) of the APA applies to the renewal of KCBX’s FESOP.<sup>7</sup> The automatic stay at Section 10-65(b) states:

When a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, the existing license shall continue in full force and effect until the final agency decision on the application has been made unless a later date is fixed by order of a reviewing court. 5 ILCS 100/10-65(b) (2008).

Interpreting this language in the context of an appealed National Pollutant Discharge Elimination System (NPDES) permit, the appellate court held in *Borg-Warner Corp. v. Mauzy*, 100 Ill. App. 3d 862, 427 N.E.2d 415 (3rd Dist. 1981) as follows:

Borg-Warner made application for renewal of its NPDES permit, that application was timely and sufficient on the record before us, and therefore its original permit continues in effect until final action on the application by the administrative bodies charged with making the determination. A final decision, in the sense of a final and binding decision coming out of the administrative process before the administrative agencies with decision making power, will not be forthcoming in the instant case until the PCB rules on the permit application, after Borg-Warner has been given its adjudicatory hearing before the PCB. Thus, until that time, under [the APA automatic stay], the effectiveness of the renewed permit issued by the EPA is stayed. *Borg-Warner*, 100 Ill. App. 3d at 870-71, 427 N.E.2d at 421.

Here, the FESOP is a “license,” which the APA defines to include “the whole or part of any agency permit . . . .” 5 ILCS 100/1-35 (2008). KCBX represents that it timely applied with IEPA to renew KCBX’s FESOP. Pet. FESOP at 1. IEPA issued the renewed FESOP, conditions

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<sup>7</sup> Neither party suggests that the FESOP program is “grandfathered out of the APA.” *Electric Energy Inc. v. IEPA*, PCB 06-65, slip op. at 7 (Feb. 16, 2006) (finding APA applicability provision at 5 ILCS 100/1-5(a) did not exclude CAAPP program from APA).

of which are the subject of this appeal, and IEPA agrees that the APA automatic stay applies. Based on this record, the Board finds that KCBX “made timely and sufficient application for the renewal of a license” within the meaning of the APA’s automatic stay provision. 5 ILCS 100/10-65(b) (2008). Accordingly, KCBX’s existing permit continues in full force and effect until the Board’s final decision in this appeal. *See id.*; Borg-Warner, 100 Ill. App. 3d at 870-71, 427 N.E.2d at 421. The Board therefore finds that, until that time, the effectiveness of the renewed FESOP issued by IEPA is automatically stayed under Section 10-65(b).

**Board’s Automatic Stay Ruling.** For the reasons set forth above, the Board grants KCBX’s motion, confirming that the effectiveness of the renewed FESOP issued to KCBX is automatically stayed under the APA until the Board’s final action in this appeal. Having found that the APA automatically stays the renewed FESOP, it is unnecessary for the Board to reach KCBX’s alternative request that the Board exercise its discretion to stay the effectiveness of the permit.

### **PCB 10-110, KCBX’s Motion to Supplement**

KCBX moves to supplement the IEPA record with documents “relied upon” by IEPA in making the 2010 revised construction permit determination. Mot. Supp. Rec. at 1. KCBX maintains that the following documents should have been included in the IEPA record filed by IEPA on February 1, 2011:

- A complete version of the February 3, 2010 letter from Jim Simmons (KCBX) to Edwin C. Bakowski, P.E. (Illinois EPA) regarding the Construction Permit Application, Receipt and Handling of Fluid Coke, attached hereto as Exhibit A, Bates stamped KCBX000131-KCBX000162 (the version of this letter contained in the Record is incomplete);
- A March 2, 2010 e-mail from Christopher Bailey (KCBX) to George Kennedy (Illinois EPA) regarding Fluid Coke, with attachment, attached hereto as Exhibit B, Bates stamped KCBX000163-KCBX000171 (omitted from the Record);
- A May 7, 2010 letter from Jim Simmons (KCBX) to Edwin C. Bakowski, P.E. (Illinois EPA) regarding Construction Permit Application - Receipt and Handling of Fluid Coke, Response to Agency Request for Information, attached hereto as Exhibit C, Bates stamped KCBX000172-KCBX000174 (omitted from the Record);
- Illinois EPA’s May 14, 2010 Notice of Additional Construction Permit Application Fees, attached hereto as Exhibit D, Bates stamped KCBX000175-KCBX000176 (omitted from the Record); and
- The Revised Construction Permit, issued to KCBX by Illinois EPA on May 25, 2010, attached hereto as Exhibit E, Bates stamped KCBX000177-KCBX000192 (omitted from the Record). *Id.* at 2-3

KCBX seeks to have these documents included in the IEPA record because the IEPA record is otherwise “incomplete.” Mot. Supp. Rec. at 1, 3. KCBX attached the documents to its motion, and consecutively numbered them in accordance with the documents filed by IEPA as the IEPA record. IEPA did not file a formal response to KCBX’s motion to supplement the IEPA record, but IEPA has informed the hearing officer that IEPA has no objection to the Board granting KCBX’s motion.<sup>8</sup>

The 2010 revised construction permit itself is among the proposed supplemental documents and must be included in the IEPA record. *See* 35 Ill. Adm. Code 105.212(b)(3). The other proposed supplemental documents predate IEPA’s May 25, 2010 permit issuance and, aside the IEPA’s notice of additional fees, were “submitted by the petitioner to the Agency related to the permit application.” *See* 35 Ill. Adm. Code 105.212(b)(2). IEPA does not dispute that these documents were before IEPA in reaching its permit determination. *See* 35 Ill. Adm. Code 105.214(a) (hearing will be “based exclusively on the record before the Agency at the time the permit or decision was issued”). The Board grants KCBX’s motion to supplement and accordingly accepts the exhibits attached to the motion as part of the record of IEPA’s permit determination in PCB 10-110.

### **IEPA’s Motion to Consolidate**

#### **Parties’ Consolidation Filings**

**IEPA’s Motion.** IEPA moved the Board to consolidate the two pending KCBX permit appeals, docketed as PCB 10-110 and PCB 11-43, for purposes of hearing and decision. Mot. Consol. at 1. IEPA asserts that in the PCB 10-110 appeal, KCBX challenges language in the 2010 revised construction permit “requiring the use of moisture to control particulate emissions during the handling” of “low moisture fluid petroleum coke.” *Id.* In the PCB 11-43 appeal, according to IEPA, KCBX challenges various FESOP renewal permit conditions, including conditions “related to the receipt, handling and storage of various coal and petroleum coke products.” *Id.*

IEPA argues that consolidation of these two permit appeals is in the best interests of the Board and the parties. Mot. Consol. at 2. The “sole issue” in PCB 10-110, according to IEPA, concerns KCBX’s ability to receive and handle low moisture fluid petroleum coke. *Id.* IEPA maintains that “[a]lmost identical conditions are also at issue in PCB 11-43.” *Id.*, citing Pet. FESOP at 6-7 (condition 9 of renewed FESOP). IEPA asserts that “the moisture issues” in the two permits therefore should be considered together. *Id.* at 3. IEPA notes that KCBX’s burdens of proof are the same in each appeal. *Id.* Consolidation of the two cases “cannot result in any prejudice” to KCBX, continues IEPA, but instead “a consolidated hearing and posthearing schedule” will prevent the fluid coke issues in the two appeals from “becoming confused,” and will allow the Board to render “a consistent and unambiguous decision.” *Id.*

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<sup>8</sup> *See also* 35 Ill. Adm. Code 101.500(d) (failure to file a response to a motion is deemed a waiver of objection to the motion being granted).

IEPA also argues that consolidation will not result in any delay. Mot. Consol. at 3. IEPA states that the respective IEPA records are or will have been filed, and asserts that the issues in PCB 10-110 are “relatively simple, and closely related” to the PCB 11-43 issues. *Id.* IEPA also maintains that “hearing the cases together will not require additional time” and that based on “the witnesses disclosed and the evidence in the record,” a consolidated hearing “may easily be completed on June 1, 2010, as scheduled for PCB 11-43.” *Id.* IEPA asks the Board to order that the appeals be consolidated and that a hearing on both cases be held on June 1, 2011. *Id.*

**KCBX’s Response.** KCBX states that in PCB 10-110, KCBX challenges conditions in the 2010 revised construction permit “related to limitations and recordkeeping associated with the ‘moisture content’ of bulk solids materials received, handled and stored at the Facility.” Resp. Consol. at 1. In PCB 11-43, KCBX continues, the company challenges conditions in the renewed FESOP, “including conditions related to limitations and recordkeeping associated with the ‘moisture content’ of bulk solids materials received, handled, and stored at the Facility.” *Id.* at 2. According to KCBX, the issues regarding the “moisture content” language in both permits are “essentially the same.” *Id.*

KCBX does not object to consolidation, “provided *only* that the consolidation results in no delay to the Discovery Schedule previously agreed to by the parties in Case No. PCB 11-43 (and which is contained in the March 8, 2011 Hearing Officer Order in that case) and/or to the schedule to complete the record as contained in the March 2, 2011 Hearing Officer Order in that case.” Resp. Consol. at 2 (emphasis in original). However, KCBX continues, if these PCB 11-43 schedules “will be delayed in any way as a result of the consolidation, KCBX objects to such consolidation.” *Id.*

### **Board’s Consolidation Analysis**

The Board’s procedural rules allow for consolidating proceedings. Section 101.406 of those rules provides:

The Board, upon the motion of any party or upon its own motion, may consolidate two or more proceedings for the purpose of hearing or decision or both. The Board will consolidate the proceedings if consolidation is in the interest of convenient, expeditious, and complete determination of claims, and if consolidation would not cause material prejudice to any party. The Board will not consolidate proceedings where the burdens of proof vary. 35 Ill. Adm. Code 101.406.

The parties are the same in the PCB 10-110 and PCB 11-43 appeals, and both appeals concern the same bulk solids material terminal. Both cases are permit appeals challenging the conditions of issued air permits. The parties represent that the appeals have related “moisture content” issues. Also, KCBX’s burdens of proof do not vary. In addition, both cases presently have the same statutory decision deadline of August 18, 2011. Finally, it is not apparent to the Board how consolidation itself would result in any delay to the PCB 11-43 discovery schedule or hearing date agreed to by the parties and documented in the hearing officer orders of March 2 and 8, 2011. *See* PCB 11-43, Hearing Officer Order at 2, n.2 (Apr. 18, 2011).

The Board finds that consolidating the two permit appeals for purposes of hearing is in the interest of convenient, expeditious, and complete determinations of the claims. The Board also finds that such consolidation would not cause material prejudice to either party. Under these circumstances, the Board grants IEPA's motion to consolidate PCB 10-110 and PCB 11-43 for hearing, but not necessarily for Board decision. *See National City Environmental, LLC v. IEPA*, PCB 03-138, PCB 03-139, PCB 03-140 (consol.), slip op. at 3 (Mar. 20, 2003) (consolidating permit appeals for hearing but not for decision). Future filings must reflect the amended caption of this order.

Finally, as noted above, the hearing officer's March 2, 2011 order in PCB 11-43 stated that a June 1, 2011 hearing date had been agreed upon and that a notice of hearing would be issued accordingly. The Board defers to the hearing officer for the ultimate scheduling of the consolidated hearing and therefore declines IEPA's request to order the parties to a June 1, 2011 hearing.

### **CONCLUSION**

In PCB 10-110, the Board grants KCBX's motion for a discretionary stay of the contested permit conditions of the 2010 revised construction permit. However, Special Conditions 6, 7, and 11 are stayed in their entirety. During this appeal, KCBX is instead subject to Special Conditions 6, 7, and 11 of the 2008 revised construction permit. In PCB 11-43, the Board grants KCBX's motion to confirm that the renewed FESOP is automatically stayed under the APA. Additionally, the Board grants KCBX's motion to supplement the record of IEPA's permit determination in PCB 10-110. Lastly, for hearing but not necessarily for purposes of decision, the Board grants IEPA's motion to consolidate PCB 10-110 and PCB 11-43.

### **SUMMARY**

1. The Board grants KCBX's June 29, 2010 motion for a discretionary stay, but Special Conditions 6, 7, and 11 of the revised construction permit issued on May 25, 2010, are stayed in their entirety. During the stay, KCBX is subject to Special Conditions 6, 7, and 11 of the revised construction permit issued on October 17, 2008. The stay will last until the Board takes final action in PCB 10-110.
2. The Board grants KCBX's February 1, 2011 motion to confirm that the renewed FESOP issued by IEPA on December 29, 2010, is automatically stayed under Section 10-65(b) of the APA (5 ILCS 100/10-65(b) (2008)). The stay will last until the Board takes final action in PCB 11-43.
3. The Board grants KCBX's February 23, 2011 motion to supplement the record of IEPA's May 25, 2010 revised construction permit determination in PCB 10-110.
4. The Board grants IEPA's March 29, 2011 motion to consolidate PCB 10-110 and PCB 11-43 for hearing but not necessarily for decision. Future filings must reflect this order's amended caption.

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on April 21, 2011, by a vote of 5-0.

A handwritten signature in black ink that reads "John T. Therriault". The signature is written in a cursive style with a long horizontal stroke at the end.

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John Therriault, Assistant Clerk  
Illinois Pollution Control Board