

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

KCBX TERMINALS COMPANY,)	
)	
Petitioner,)	
)	
v.)	PCB No. 11-43
)	(Permit Appeal-Air)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY)	
)	
Respondent.)	

INTERLOCUTORY APPEAL FROM HEARING OFFICER APRIL 18, 2011 ORDER DENYING MOTION TO STRIKE REQUESTS FOR ADMISSION

Now comes Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY (“Illinois EPA”), by LISA MADIGAN, Attorney General of the State of Illinois, pursuant to Section 101.518 of the Illinois Pollution Control Board (“Board”) regulations, and request that the Board reverse an Order issued by the Hearing Officer on April 18, 2010. Specifically, Respondent requests reversal of the Hearing Officer’s denial of Respondent’s Motion to Strike Petitioner’s Requests to Admit.

INTRODUCTION

Petitioner KCBX Terminals Company (“KCBX”) filed this permit appeal on February 1, 2011, and has demanded an early hearing¹. This matter is the third permit appeal filed by KCBX since June 27, 2008.

In expectation of the limited discovery common to permit appeals (because the complete permit record is automatically filed with the Board, little if any discovery is taken in the majority

¹ Hearing is now scheduled for June 1-2, 2011. Petitioner agreed to 48 day extension of the decision deadline only after the Hearing Officer first proposed a hearing date of March 24th. However, in its waiver, Petitioner states that it “...does not intend to file any additional waivers of the 120-day deadline in this matter.” Petitioner’s Notice of Waiver, March 8, 2011, p.2.

of permit appeals), Respondent agreed to an abbreviated schedule, and requested an extension, until April 4, 2011, for filing of the record. Because relevance could only be determined in reference to the Permit Record, Respondent subsequently requested an extension for filing its responses to discovery. Despite the clear merits of waiting until the record had been filed, Petitioner opposed any extension.

However, counsel for Petitioner subsequently served an overwhelming amount of written discovery on Respondent. Included were nineteen pages of Requests to admit, containing one hundred six (106) separate Requests for Admission². Petitioner also served interrogatories and requests for documents. In addition, Petitioner subpoenaed three current and former Illinois EPA employees for depositions on April 13-14, 2011³.

RESPONDENT'S MOTION

On March 25, 2011, respondent contacted Petitioner with a request that it withdraw and refile its Requests for Admission. Respondent's request was based on the Illinois Supreme Court's January 1, 2011 revisions to Rule 216, which limited the number of Requests to Admit which could be served upon a party to 30 (without leave of court). After KCBX refused to withdraw its Requests, Respondent moved to strike the Requests on April 5, 2011.

The Hearing officer verbally denied the Motion on April 13, 2011, and issued his written order on April 18, 2011⁴.

THE ISSUES ARE NOT MOOT

Because of the short time period available for completion of discovery and to avoid the

² A copy of Petitioner's Requests is attached as Exhibit 1

³ The Hearing Officer denied Respondent's Motion to Quash one of the two depositions of Retired Permit Engineer George Kennedy. Mr. Kennedy, a retired Illinois EPA Permit Engineer with no deposition experience was subjected to six hours of questioning by counsel for KCBX.

⁴ A copy of the April 18, 2011 Hearing Officer Order is attached as Exhibit 2

potentially severe consequences of failure to submit responses to requests to admit, Respondent provided responses to the KCBX's 106 requests to admit on April 18, 2011⁵. However, the Board should find that this appeal is not moot. An appeal is moot where events occur which make it impossible for the court to grant effectual relief⁶. Because Respondent is requesting that the Board strike Petitioner's Requests to Admit 31 through 106, as well as the Responses thereto, the Board can grant effective relief. Also, Respondent believes that the public policy exception to the mootness doctrine covers the issues in this appeal.

The Public Policy exception to the mootness doctrine applies where: 1) the question is of a public nature; 2) an authoritative resolution of the question is desirable to guide public officers; and 3) the question is likely to recur⁷. The issue in this Appeal, i.e., questions relating to the incorporation of Supreme Court Rule 216, as amended, satisfy these criteria. As the issues involve the decisions of Illinois EPA, the first factor is satisfied. Also, the lack of clear precedent on the issues argues in favor of Board guidance to its Hearing Officers. Finally, these issues are almost certain to come before the Board again through discovery disputes in permit appeals and/or enforcement cases⁸.

THE BOARD SHOULD REVERSE THE HEARING OFFICER'S DECISION AND STRIKE REQUESTS TO ADMIT 31 THROUGH 106

In denying Respondent's Motion to Strike, the Hearing Officer declined to adopt the limit dictated by the Supreme Court in the recently amended Rule 216. The amended rule, effective January 1, 2011, provides:

³ In the Certificate of Service filed with the Board, Respondent reserved the right to appeal the Hearing Officer's order allowing the excessive number of requests.

⁴ *Midwest Generation v. Illinois EPA*, PCB 04-185 (April 7, 2011, p.7)

⁵ *Id.*, p.8 (citing *Cinkus v. Village of Stickney Municipal Officers Electoral Board*, 228 Ill. 2d 208),

⁶ Petitioner has appealed the last three permits issued to it by Illinois EPA. It is not unlikely that the same issues will arise between the same parties.

Rule 216. Admission of Fact or of Genuineness of Documents

* * *

(f) Number of Requests. The maximum number of requests for admission a party may serve on another party is 30, unless a higher number is agreed to by the parties or ordered by the court for good cause shown. If a request has subparts, each subpart counts as a separate request.

In the Committee Comments to the amended rule, the Court describes the reason for the limitation:

COMMITTEE COMMENT

(October 1, 2010)

Paragraphs (f) and (g) are designed to address certain problems with Rule 216, including the service of hundreds of requests for admission. For the vast majority of cases, the limitation to 30 requests now found in paragraph (f) will eliminate this abusive practice....

Although the Supreme Court Rules do not bind the Board in its rulings, Respondent believes that the reasons for the amendment to Rule 216 have been routinely recognized and applied by the Board, especially in permit appeals. Moreover the Board regulations provide that "...the Board may look to the code of Civil Procedure and the Supreme Court Rules for guidance where the Board procedural rules are silent⁹." The Board rules "are silent" on the number of allowable Requests to Admit.

The Board has recognized the potential abuses of discovery in Permit Appeals. In *Joliet Sand and Gravel Company v. Illinois EPA*, the Board noted:

Discovery in a permit appeal must be viewed in the procedural context of such appeal....

What is 'reasonable' discovery must be determined in the light of these practical time constraints as well as the legislative 120 day constraint of Section 40(a). Full discovery of the sort afforded in enforcement cases can be a year long process. A petitioner's

⁹ 35 Ill. Adm. Code 101.616

insistence upon full discovery 'rights' of this type could effectively preclude timely action on any appeal, at the expense of the rights of the public to have the Board determine whether issuance of a permit is environmentally proper. These competing interests must be balanced in the interests of due process¹⁰.

In the present case, Petitioner's discovery requests have been overwhelming and abusive, particularly in light of Illinois EPA's agreement to stay the permit conditions of the renewed FESOP. KCBX has created an artificial 'urgency' by insisting on an early hearing date. However, they also have also insisted of full discovery 'rights', including submission of nineteen pages of requests to admit, as well as comprehensive interrogatory requests and multiple depositions of Illinois EPA personnel. Further, despite having the Burden of Proof in this appeal, KCBX has not identified any witnesses besides the three Illinois EPA witnesses deposed on April 13-14. Clearly, they are engaged in a fishing expedition¹¹.

Petitioner's overwhelming discovery demands are exactly the reason that limits such as those contained in the Amended Rule 216 were developed. Respondent urges the Board to recognize the need for such limitations and adopt the limit provided in the Amendments to Supreme Court Rule 216. Respondent requests that the Hearing Officer's ruling be reversed, and that KCBX's Requests to Admit 31 through 106, and Respondent's Responses thereto, be stricken from the record.

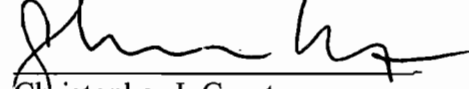
⁸ PCB 86-159 (December 23, 1986, slip op. at 2)

¹¹ In the *Joliet Sand & Gravel* case, the Board noted: "Were the Agency a natural person, Joliet's discovery requests would amount to an attempt to hold the person upside down, to shake that person, and to see what fell out of the person's pockets, without differentiating between lint and items of value."

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

by LISA MADIGAN
Attorney General of the
State of Illinois

A handwritten signature in black ink, appearing to read "Christopher J. Grant", written over a horizontal line.

Christopher J. Grant
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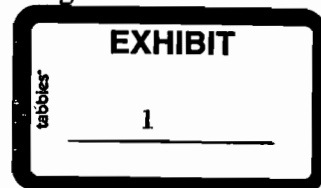
KCBX TERMINALS COMPANY,)	
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v.)	PCB 11-43
)	(Air Permit Appeal)
ILLINOIS ENVIRONMENTAL)	
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PETITIONER'S FIRST SET OF REQUESTS FOR ADMISSION TO RESPONDENT

NOW COMES Petitioner, KCBX TERMINALS COMPANY ("KCBX"), by its attorneys, HODGE DWYER & DRIVER, and pursuant to Section 101.618 of the Illinois Pollution Control Board's ("Board") procedural rules, 35 Ill. Admin. Code § 101.618, propounds the following Requests for Admission on Respondent, Illinois Environmental Protection Agency ("Illinois EPA"). Failure to respond to the following Requests to Admit within twenty-eight (28) days may have severe consequences. Failure to respond to the following requests will result in all the facts requested being deemed admitted as true for this proceeding. If you have any questions about this procedure, you should contact the hearing officer assigned to this proceeding or an attorney.

DEFINITIONS

- (a) "Act" means Illinois Environmental Protection Act.
- (b) "Board" means the Illinois Pollution Control Board.
- (c) "Facility" means the bulk materials terminal owned and operated by KCBX and located at 3259 East 100th Street, Chicago, Illinois.
- (d) "FESOP" means Federally Enforceable State Operating Permit.



(e) "KCBX" means KCBX Terminals Company.

(f) "Renewed FESOP" means the permit issued to KCBX Terminals Company by Illinois EPA on December 29, 2010.

(g) "Respondent," "Illinois EPA," "you" and "your" mean the Illinois Environmental Protection Agency and any of its officers, directors, employees, agents, representatives, or assigns, as well as any other person acting or purporting to act on its behalf.

(h) "USEPA" means the United States Environmental Protection Agency.

REQUESTS FOR ADMISSION

1. Admit that KCBX owns and operates a bulk materials terminal located at 3259 East 100th Street, Chicago, Illinois.

2. Admit that Illinois EPA has assigned Facility ID No. 031600AHI to the KCBX Facility.

3. Admit that, on January 27, 2005, KCBX timely submitted an application to Illinois EPA for renewal of the FESOP for the Facility.

4. Admit that, when making its determination regarding the issuance of the December 29, 2010 Renewed FESOP for the Facility, and the conditions contained therein, Illinois EPA relied on the application KCBX submitted to it on January 27, 2005, and the information contained therein.

5. Admit that, since January 27, 2005, KCBX representatives met with representatives of Illinois EPA on a number of occasions.

6. Admit that, since January 27, 2005, KCBX has provided Illinois EPA with information in addition to the application for renewal of the FESOP for the Facility.

7. Admit that, on June 24, 2009, Illinois EPA sent KCBX an informal preliminary draft FESOP for renewal ("Preliminary Draft") for its review.
8. Admit that, on August 7, 2009, KCBX submitted its comments regarding the Preliminary Draft to Illinois EPA for review.
9. Admit that, when making its determination regarding the issuance of the December 29, 2010 Renewed FESOP, and the conditions contained therein, Illinois EPA relied on the August 7, 2009 comments of KCBX, and the information contained therein.
10. Admit that, on June 16, 2010, Illinois EPA published a public notice of the draft FESOP for renewal ("Public Notice Draft").
11. Admit that, on July 16, 2010, KCBX submitted its comments regarding the Public Notice Draft to Illinois EPA.
12. Admit that, when making its determination regarding the issuance of the December 29, 2010 Renewed FESOP, and the conditions contained therein, Illinois EPA relied on KCBX's July 16, 2010 submittal.
13. Admit that, on August 26, 2010, representatives of KCBX and Illinois EPA met to discuss issues related to the renewal of the FESOP for the Facility, including a number of the issues that are the subject of this appeal.
14. Admit that, in a letter dated October 13, 2010, KCBX submitted additional information to Illinois EPA in follow up to the August 26, 2010 meeting.
15. Admit that, when making its determination regarding the issuance of the December 29, 2010 Renewed FESOP, and the conditions contained therein, Illinois EPA relied on KCBX's October 13, 2010 submittal.

16. Admit that, on December 29, 2010, Illinois EPA issued the Renewed FESOP to KCBX.
17. Admit that, for issuance of the Renewed FESOP on December 29, 2010, Robert W. Bernoteit signed the permit on behalf of Edwin C. Bakowski, P.E.
18. Admit that Conditions 1a, 10a, 10b and Attachment A of the Renewed FESOP involve emissions limitations.
19. Admit that the Renewed FESOP, issued by Illinois EPA on December 29, 2010, included the following annual emissions limitations: 92.0 tons per year ("tpy") for Carbon Monoxide ("CO"), 92.0 tpy for Nitrogen Oxide ("NO_x"), 88.0 tpy for Particulate Matter ("PM"), 88.0 tpy for PM with an aerodynamic diameter less than or equal to 10 micrometers ("PM₁₀"), 21.9 tpy for Sulfur Dioxide ("SO₂") and 40.1 tpy for Volatile Organic Matter ("VOM").
20. Admit that the Construction Permit-Revised issued by Illinois EPA to KCBX on May 25, 2010 ("May 2010 Construction Permit"), included the following emissions limitations: 160.0 tpy for PM and 79.0 tpy for PM₁₀.
21. Admit that the Construction Permit-Revised issued by Illinois EPA to KCBX on October 17, 2008, included the following emissions limitations: 160.0 tpy for PM and 79.0 tpy for PM₁₀.
22. Admit that the Construction Permit Grant-Operating Permit Denial-NSPS Source issued by Illinois EPA to KCBX on May 23, 2008, included the following emissions limitations: 160.0 tpy for PM and 79.0 tpy for PM₁₀.
23. Admit that the FESOP-Revised issued by Illinois EPA to KCBX on

April 8, 2004 ("Existing FESOP"), included the following emissions limitations: 99.0 tpy for NO_x, 95.2 tpy for PM, 5.0 tpy for PM₁₀ (from generators and other fuel combustion units) and 66.8 tpy for SO₂.

24. Admit that the permits Illinois EPA has issued to KCBX over the past several years have included a variety of emissions limitations for a variety of pollutants, which conflict with each other.

25. Admit that, as a supplement to its original application, KCBX included in its July 16, 2010 submittal to Illinois EPA an Attachment C, entitled "Emission Calculations (Fuel Combustion) – KCBX Terminal Co. Chicago, IL" ("Attachment C").

26. Admit that KCBX provided data in Attachment C, which demonstrated that its potential to emit NO_x is 175 tpy.

27. Admit that KCBX provided data in Attachment C, which demonstrated that its potential to emit CO is 43 tpy.

28. Admit that KCBX provided data in Attachment C, which demonstrated that its potential to emit SO_x is 17 tpy.

29. Admit that KCBX provided data in Attachment C, which demonstrated that its potential to emit PM is 5.8 tpy.

30. Admit that KCBX provided data in Attachment C, which demonstrated that its potential to emit PM₁₀ is 5.8 tpy.

31. Admit that KCBX provided data in Attachment C, which demonstrated that its potential to emit PM with an aerodynamic diameter less than or equal to 2.5 ("PM_{2.5}") micrometers is 5.8 tpy.

32. Admit that KCBX provided data in Attachment C, which demonstrated that its potential to emit Volatile Organic Compounds ("VOC") is 18.4 tpy.

33. Admit that, based on the application submitted to Illinois EPA by KCBX and the supplemental materials thereto, the emissions limitations for CO, SO₂ and VOM are not necessary because the Facility is genuinely a "minor source" for these pollutants.

34. Admit that Conditions 1a, 2c, 2d, 2i, 2m, 2n, 2o, 2p, 7b, 8c, 8d, 8e and 13b.i. of the Renewed FESOP involve fugitive emissions.

35. Admit that, during the August 26, 2010 meeting held between KCBX representatives and Illinois EPA representatives, KCBX and Illinois EPA discussed emissions of PM from material storage and handling, including conveying operations, at bulk material operations, such as the KCBX Facility.

36. Admit that, during the August 26, 2010 meeting held between KCBX representatives and Illinois EPA representatives, Illinois EPA raised the question of whether such emissions should be considered fugitive in nature.

37. Admit that AP-42, *Compilation of Air Pollutant Emission Factors* ("AP-42") distinguishes activities that involve the processing of minerals from activities that involve only the handling and storage of materials.

38. Admit that Chapter 11 of AP-42 covers the "Mineral Products Industry."

39. Admit that Chapter 11 of AP-42 includes 31 different production, processing, crushing and screening sources, such as sand and gravel processing (at Section 11.19.1) and crushed stone processing and pulverized mineral processing (at Section 11.19.2).

40. Admit that Chapter 13 of AP-42 covers "Miscellaneous Sources."

41. Admit that Section 13.2 of AP-42 addresses six different types of "Fugitive Dust Sources."

42. Admit that the six types of fugitive dust sources referenced in Section 13.2 of AP-42 include outdoor "aggregate handling and storage piles."

43. Admit that, while Section 13.2 of AP-42 covers aggregate, its extension to the coal and petroleum coke handled at the KCBX Facility has been recognized by Illinois EPA in various permit actions, including the Existing FESOP.

44. Admit that, by placing fugitive dust from aggregate handling and storage piles in a separate section of AP-42, USEPA is acknowledging that the activities associated with storage pile construction and reclamation, including material batch (loader) or continuous (conveyor) drops, create fugitive emissions to be considered apart from the Mineral Products Industry.

45. Admit that KCBX's storage and handling operations are, for the most part, associated with storage piles.

46. Admit that Section 13.2.4.1 of AP-42 notes that fugitive emissions result from "material loading onto [a] pile, disturbances by strong wind currents, and load out from the pile," as well as from "the movement of trucks and loading equipment in the storage pile area."

47. Admit that AP-42 demonstrates that emissions from material storage and handling, including conveying operations at the Facility, are fugitive in nature.

48. Admit that the Illinois regulations, at 35 Ill. Admin. Code Part 212, Subpart K, are structured based on the understanding that the PM emissions from these sources are fugitive in nature.

49. Admit that the fugitive PM rules at 35 Ill. Admin. Code Part 212, Subpart K support the fact that PM emissions from material handling and storage are fugitive in nature.

50. Admit that, in the Board's November 1, 1979 Opinion in In the Matter of: Fugitive Particulate Emissions from Industrial Sources, R78-11, the Board included a summary of the "[t]raditional sources of controllable fugitive particulate matter," which included the following:

- 1) Material loss from conveyors, which primarily occurs at feeding, transfer and discharge points or from spills;
- 2) Emissions during loading and unloading of bulk materials into transportation vehicles, which arise mainly from mechanical agitation of the material as it strikes the sides and bottom of the vehicle and from air turbulence created as the material is moved into and out of the vehicle;
- 3) Load-in (addition) and load-out (removal) operations from storage piles, vehicular traffic around storage piles, and wind erosion of the surficial material from storage piles (R.13);
- 4) Material handling operations, such as railcar side dumping, motorized car side chute dumping, clam shell bucket loading and material sizing at screening operations (R.20); and
- 5) Vehicle traffic on dust-laden plant roads, which can lead to dust reentrainment (R.28).

51. Admit that, in Illinois EPA's Statement of Reasons, received by the Board on August 19, 1991, in In the Matter of: PM-10 Emission Limits for McCook and Lake

Calumet Areas in Cook County, Illinois and the Granite City Area in Madison County,

Illinois, R91-22, Illinois EPA discussed the differences between point sources, process fugitive sources and open fugitive dust emissions.

52. Admit that, with regard to open fugitive dust emissions, Illinois EPA stated as follows:

Open fugitive dust emissions result primarily from raw material handling and from reentrainment from vehicular activities on paved and unpaved plant roads. Open fugitive dust sources are generally distributed throughout an industrial facility and are typically located at or near ground level.

53. Admit that the regulatory history of 35 Ill. Admin. Code Part 212, Subpart K supports the fact that PM emissions from material handling and storage are fugitive in nature.

54. Admit that the Illinois EPA 391-CAAPP Form, which is entitled "Fugitive Emissions Data and Information," includes "some examples of emissions which are typically considered fugitive."

55. Admit that Illinois EPA 391-CAAPP Form, lists the following examples of emissions which are typically considered fugitive:

- Road dust emissions (paved roads, unpaved roads, and lots);
- Storage pile emissions (wind erosion, vehicle dump and load);
- Loading/unloading operation emission;
- Emissions from material being transported in a vehicle;
- Emissions occurring from the unloading and transporting of materials collected by pollution control equipment;

56. Admit that Illinois has been delegated the authority to issue air permits to facilities regulated by New Source Performance Standard ("NSPS") requirements, on behalf of USEPA, therefore referred to as a "delegated State."

57. Admit that, on October 8, 2009, USEPA promulgated amendments to the NSPS for coal preparation and processing plants at 74 Fed. Reg. 51950.

58. Admit that, when USEPA promulgated amendments to the NSPS for coal preparation and processing plants, it established work practice standards to control fugitive coal dust emissions from open storage piles located at new coal preparation plants.

59. Admit that, in doing so, USEPA explained it had determined it was not feasible to establish opacity or PM limits for these types of facilities and it believed, at that time, that it was difficult and prohibitively expensive to measure actual PM emissions from individual storage piles.

60. Admit that, based on that determination, USEPA required owners or operators of open storage piles associated with new coal preparation plants to develop and comply with a fugitive coal dust emissions control plan to control fugitive PM emissions.

61. Admit that USEPA stated the following, in pertinent part:

A fugitive coal dust emissions control plan is required for open storage piles, which include the equipment used in the loading, unloading and conveying operations of the affected facility, constructed, reconstructed or modified after May 27, 2009.

* * *

For open coal storage piles, the fugitive coal dust emissions plan must require that one or more of the following control measures will be used to minimize to the greatest extent practicable fugitive coal dust: locating the source inside a partial enclosure, installing and operating a water spray or fogging system, applying appropriate chemical dust suppression agents on the source (when additional provisions discussed below are met), use of a wind barrier, compaction, or use of a vegetative cover. The owner or operator must select, from the list provided, the control measures that are most appropriate for the site conditions.

62. Admit that, the NSPS requirement to develop a fugitive coal dust emissions control plan does not apply to the KCBX Facility, as it was not constructed, reconstructed, or modified after May 27, 2009.

63. Admit that USEPA's language in promulgating the control plan requirement for new facilities illustrates that USEPA treats the emissions associated with open storage piles – including “loading, unloading and conveying operations of the affected facility” – as fugitive and identifies several control measure options for such piles.

64. Admit that the fact that controls are required for open storage piles does not mean that emissions from the open storage piles are not fugitive in nature.

65. Admit that USEPA considers “operating a water spray or fogging system” to be an appropriate control measure for some site conditions.

66. Admit that USEPA states that the owner or operator of the site is responsible for the selection of the most appropriate control measure(s) for the specific conditions of the site.

67. Admit that USEPA states that emissions can be controlled by methods other than venting through a control device.

68. Admit that USEPA's comments regarding the control of fugitive coal dust emissions from open storage piles located at coal preparation and processing plants, supports the fact that PM emissions from material handling and storage are fugitive in nature.

69. Admit that, with regard to the PM and PM₁₀ limitations included in the Renewed FESOP, the emissions from material storage and handling, including conveying operations, at the Facility are fugitive in nature.

70. Admit that, under federal and state law, fugitive emissions are not considered when making the determination of whether the Facility is a "major source."

71. Admit that Illinois EPA did not indicate to KCBX which of the Facility's emissions Illinois EPA considers to be fugitive and which it does not.

72. Admit that Conditions 8c.i and 8c.ii of the Renewed FESOP, through their reference to 35 Ill. Admin. Code § 212.308, specifically designate emissions from "crushers, grinding mills, screening operations, bucket elevators, conveyor transfer points, conveyors, bagging operations, storage bins and fine product truck and railcar loading operations" as fugitive.

73. Admit that, based upon the application submitted to Illinois EPA by KCBX and the supplemental materials thereto, the only emission limitation needed in the Renewed FESOP for the Facility in order to avoid "major source" status was for NO_x.

74. Admit that Condition 9 of the Renewed FESOP involves the moisture content of materials handled at the Facility.

75. Admit that the Renewed FESOP states the following at Condition 9:

- 9a. The moisture content of the bulk material handled by the source shall be at least 1.3% by weight. The Permittee shall show compliance with this requirement by recording the moisture content of the bulk material received at the source as provided by the supplier of the feed material. If moisture content falls below 3.0% by weight as documented by the supplier, then the Permittee shall:
- i. Utilize water sprays on the material handling operations (e.g., material transfer, screening and crushing) associated with bulk materials having a moisture content below 3.0% by weight to reduce particulate matter emissions and to maintain compliance with the applicable visible emissions standards for each affected material handling operation; or
 - ii. Follow the testing requirements of Condition 9 (c).
- b. If the Permittee relies on Condition 9(a)(i) to demonstrate compliance with Condition 9(a), the Permittee shall monitor the water spray equipment as follows during non-freezing conditions:
- i. The water supply to the spray equipment shall be equipped with a master metering device used to determine water usage for the control of particulate matter emissions.
 - ii. Inspections of water spray equipment and operation (such as leaking, maintaining adequate flow, clogging of flow lines, etc.) shall be performed at least once per week when the material handling operations are in operation.
- c. If the Permittee relies on Condition 9(a)(ii) to demonstrate compliance with Condition 9(a), the Permittee shall measure the moisture content of a representative sample of the bulk material having a moisture content below 3.0% as provided by the supplier, at least once per week, when water spray is not being utilized, using ASTM Procedure D 3302 for coal and ASTM Procedure D 3172 and D 4931 for petroleum coke. Should three consecutive tests at the source show moisture contents of 3.0% or greater by weight, this testing shall no longer be required for the subject bulk material.
- d. The diesel-powered generators shall only be operated with distillate fuel oil as the fuel. The use of any other fuel in the diesel-powered generators requires that the Permittee first obtain a

construction permit from the Illinois EPA and then perform stack testing to verify compliance with all applicable requirements.

- e. The Permittee shall not keep, store or use distillate fuel oil (Grades No. 1 and 2) at this source with a sulfur content greater than the larger of the following two values:
 - i. 0.28 weight percent, or
 - ii. The wt. percent given by the formula: Maximum wt. percent sulfur = $(0.00015) \times (\text{Gross heating value of oil, Btu/lb})$.
 - f. Organic liquid by-products or waste materials shall not be used in any emission unit at this source without written approval from the Illinois EPA.
 - g. The Illinois EPA shall be allowed to sample all fuels stored at the above location.
76. Admit that the May 2010 Construction Permit states the following at

Condition 6:

- 6a. The moisture content of the bulk material handled by the source shall be at least 1.3% by weight. The Permittee shall show compliance with this requirement by recording the moisture content of the bulk material received at the source as provided by the supplier of the feed material. If moisture content falls below 3.0% by weight as documented by the supplier, then the Permittee shall:
 - i. Utilize water sprays on the material handling operations (e.g., material transfer, screening and crushing) associated with bulk materials having a moisture content below 3.0% by weight to reduce particulate matter emissions and to maintain compliance with the applicable visible emissions standards for each affected material handling operation; or
 - ii. Follow the testing requirements of Condition 6(b).
- b. If the Permittee relies on Condition 9(a)(i) to demonstrate compliance with Condition 6(a), the Permittee shall monitor the water spray equipment as follows during non-freezing conditions:

- i. The water supply to the spray equipment shall be equipped with a master metering device used to determine water usage for the control of particulate matter emissions.
 - ii. Inspections of water spray equipment and operation (such as leaking, maintaining adequate flow, clogging of flow lines, etc.) shall be performed at least once per week when the material handling operations are in operation.
- c. If the Permittee relies on Condition 6(a)(ii) to demonstrate compliance with Condition 6(a), the Permittee shall measure the moisture content of a representative sample of the bulk material having a moisture content below 3.0% as provided by the supplier, at least once per week, when water spray is not being utilized, using ASTM Procedure D 3302 for coal and ASTM Procedure D 3172 and D 4931 for petroleum coke. Should three consecutive tests at the source show moisture contents of 3.0% or greater by weight, this testing shall no longer be required for the subject bulk material.

77. Admit that Illinois EPA understands that the Facility seeks to receive bulk material with less than 1.3% moisture.

78. Admit that the requirements contained in Condition 9 of the Renewed FESOP and Condition 6 of the May 2010 Construction Permit were issued by Illinois EPA with the intent of allowing KCBX to receive and handle/process bulk material with less than 1.3% moisture.

79. Admit that the requirements contained in Condition 9 of the Renewed FESOP and Condition 6 of the May 2010 Construction Permit apply to the handling of bulk material with less than 1.3% moisture.

80. Admit that the requirements contained in Condition 9 of the Renewed FESOP and Condition 6 of the May 2010 Construction Permit regarding the application of water spray and/or blending with higher moisture materials will be considered part of

the receiving of bulk material with less than 1.3% moisture.

81. Admit that, pursuant to the requirements contained in Condition 9 of the Renewed FESOP and Condition 6 of the May 2010 Construction Permit, receiving bulk material with less than 1.3% moisture does not constitute handling.

82. Admit that, receiving and off-loading of bulk material, including the initial application of water spray to the bulk material and/or blending with higher moisture bulk material, during such receiving and off-loading, shall not constitute handling for purposes of compliance with the requirements contained in Condition 9 of the Renewed FESOP and Condition 6 of the May 2010 Construction Permit.

83. Admit that Condition 2i of the Renewed FESOP lists the emission units subject to an operating program for fugitive emissions, as listed in 35 Ill. Admin. Code § 212.309(a).

84. Admit that Condition 2i omits emission units described in 35 Ill. Admin. Code § 212.316.

85. Admit that the emission units described in 35 Ill. Admin. Code § 212.316 include, among other units, fugitive emissions from screening of coke and coal, fugitive emissions from roadways and parking areas, and fugitive emissions from storage piles.

86. Admit that fugitive emissions from screening of coke and coal, fugitive emissions from roadways and parking areas, and fugitive emissions from storage piles were covered in the application for the Renewed FESOP.

87. Admit that Condition 5 of the Renewed FESOP states that the permit is issued based on the two electric conveyors not being subject to NSPS Subpart Y because

the conveyors will not be used to convey coal to machinery at the coal preparation plant.

88. Admit that Condition 5 of the Renewed FESOP should discuss the applicability NSPS Subpart Y to the coal screener operated at the Facility.

89. Admit that KCBX's Existing FESOP requires KCBX to determine compliance with the annual limits on a monthly basis.

90. Admit that Conditions 10c and 14a.vi. of the Renewed FESOP both involve compliance determinations to be conducted at defined frequencies.

91. Admit that Condition 10c of the Renewed FESOP requires that KCBX determine compliance with the annual limits on a weekly basis.

92. Admit that Condition 1c of the Renewed FESOP states that it supersedes prior operating permits.

93. Admit that Condition 1c of the Renewed FESOP does not speak to operating authorities granted under construction permits, such as the May 2010 Construction Permit.

94. Admit that Illinois EPA has failed to incorporate other operating authorities.

95. Admit that the opening paragraph of the Renewed FESOP lists the horsepower of KCBX's generators as 425 kW and 450 kW.

96. Admit that Condition 2o of the Renewed FESOP lists the equipment to which 35 Ill. Admin. Code § 212.322 applies.

97. Admit that KCBX requested that Condition 2q contain language stating that all equipment not specifically named in Condition 2o is covered by Condition 2q.

98. Admit that, with the language in Condition 2q as included in the Renewed FESOP, there are several pieces of equipment and processes that are not covered by a process weight rate limit contained in 35 Ill. Admin. Code § 212.321.

99. Admit that the factors, or constants, listed in Conditions 2o.i and 2o.ii of the Renewed FESOP were copied from Condition 2q of the Renewed FESOP without being changed.

100. Admit that the factors, or constants, listed in Conditions 2o.i and 2o.ii of the Renewed FESOP are not consistent with the factors listed in 35 Ill. Admin. Code § 212.322.

101. Admit that Illinois EPA did not afford KCBX the exclusion of stockpile emissions granted in 35 Ill. Admin. Code § 212.323 when calculating process emissions under 35 Ill. Admin. Code §§ 212.321 and 212.322.

102. Admit that, in Condition 10a of the Renewed FESOP, Illinois EPA provided only a partial reference to emission factor sources in Condition 10a.

103. Admit that, in Condition 10b of the Renewed FESOP, Illinois EPA omitted a variable in the equation.

104. Admit that use of the equation in Condition 10b, as provided in the Renewed FESOP, will produce incorrect results.

105. Admit that the emission factors for NO_x from the combustion of diesel at the end of Condition 10b are reversed for engines less than or equal to 600 horsepower and engines that are greater than 600 horsepower.

106. Admit that use of the emission factors as stated in the Renewed FESOP will produce incorrect results.

ATTESTATION

STATE OF ILLINOIS)
)
COUNTY OF _____) SS.

_____, being first duly sworn on oath, deposes and states that he/she is a plaintiff in the above-captioned matter, that he/she has read the foregoing document, and the answers made herein are true, correct and complete to the best of his/her knowledge and belief.

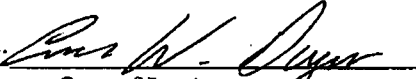
Subscribed and sworn to before me
this ___ day of _____, 2011.

Notary Public

Respectfully submitted,

KCBX TERMINALS COMPANY,
Petitioner,

Dated: March 9, 2011

By: 
One of Its Attorneys

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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KCBX:003/Fil/Discovery/Request to Admit - IEPA

ILLINOIS POLLUTION CONTROL BOARD
April 18, 2011

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APR 18 2011

STATE OF ILLINOIS
Pollution Control Board

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

HEARING OFFICER ORDER

On April 5, 2011, all parties participated in a telephonic status conference with the hearing officer. After discussing the filing timeline for petitioner's response to respondent's motion to quash subpoena, the telephonic conference was continued to April 7, 2011.

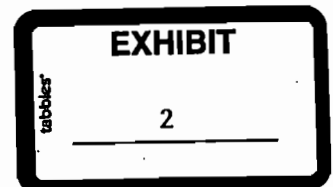
On April 7, 2011, the parties again participated in a telephonic status conference with the hearing officer. Discussions centered on respondent's motion to strike requests for admission, filed April 5, 2011, respondent's motion to quash subpoena, filed March 25, 2011, and respondent's motion for additional time to respond to discovery, filed March 15, 2011. Petitioner has timely filed its respective responses. The April 7, 2011, telephonic status conference was then continued to April 14, 2011, where the above-captioned case was discussed along with a related case.¹

Respondent's Motion For Additional Time To Respond To Discovery

On March 15, 2011, the respondent filed a motion for additional time to respond to discovery. Respondent states in its motion that it needs an additional 30 days, or May 6, 2011, to respond to petitioner's requests to admit, interrogatories and document requests because it will not be able to assemble and file the administrative record in this matter until two days before the responses are due. *Id.* at 2. Respondent's responses were due April 6, 2011. Respondent states that the additional time is needed because petitioner's discovery requests are extensive and burdensome. *Id.*

On March 22, 2011, petitioner filed its response. In its response, the petitioner asserts that the written discovery requests are "relevant..necessary...straightforward and seek information easily attainable by the Illinois EPA". *Id.* at 3-4.

¹ On March 29, 2011, the respondent filed a motion to consolidate KCBX v. IEPA, PCB 10-110, with KCBX v. IEPA, PCB 11-43. The motion to consolidate as well as petitioner's response is under consideration by the Board.



Over objection, respondent's motion for additional time to respond to discovery was granted to the extent that respondent's responses to petitioner's request to admit, interrogatories and document requests are now due to be filed on or before April 19, 2011.²

Respondent's Motion To Strike Requests For Admission

On April 5, 2011, the respondent filed a motion to strike requests for admission. Respondent argues that petitioner's requests to admit extremely exceed the maximum amount allowed by the recently amended Illinois Supreme Court Rule 216. Illinois Supreme Court Rule 216 allows a maximum of 30 requests "unless a higher number is agreed to by the parties..." *Id.* at 2. The respondent correctly notes that the Board's procedural rules do not limit the number of requests that can be served on a party, but that it can look to the Supreme Court Rules for guidance. *Id.* Finally, the respondent cites to Section 101.616(d) of the Board's procedural rules and asks that the hearing officer find an abuse of the discovery process and limit the number of requests to admit. *Id.* at 2-3.

On April 8, 2011, the petitioner filed its response in opposition to respondent's motion to strike requests for admission. The petitioner notes that Section 101.618 of the Board's procedural rules addressing requests to admit is silent on the number of requests to admit one may propound. *Id.* at 3. Additionally, the petitioner states that the requests to admit are not unreasonable or harassing and that the number of requests are for the purpose of clarifying and narrowing the issues at hearing. *Id.* at 4-5.

The respondents' motion was denied. The respondent has been given a reasonable amount of time to answer the written discovery. Further, the requests may assist in clarifying and narrowing issues at hearing.

Respondent's Motion To Quash Subpoena

On March 25, 2011, the respondent filed a motion to quash subpoena filed by the petitioner relating to witness George Kennedy. Mr. Kennedy is a former Illinois Environmental Protection Agency engineer named by petitioner as a witness in this case. In particular, the respondent requests the hearing officer quash the discovery deposition of Mr. Kennedy scheduled for April 14, 2011, because the petitioner has subpoenaed Mr. Kennedy for an evidentiary deposition later that same day. *Id.* The respondent also requests that the evidence deposition be limited to 3 hours. *Id.* at 8.

The respondent also notes that Mr. Kennedy will be out of the country at the time of the

² It is noted that petitioner, in its response to respondent's motion to consolidate case PCB 110-10 with case PCB 11-43, had no objection to respondent's motion to consolidate filed in KCBX v. IEPA, PCB 10-110, provided that the consolidation does not result in delay to the discovery scheduled agreed to in this case. The ruling today, granting an extension of time to respond to discovery, is not in any way the result of the possible consolidation of PCB 11-43 and PCB 10-110.

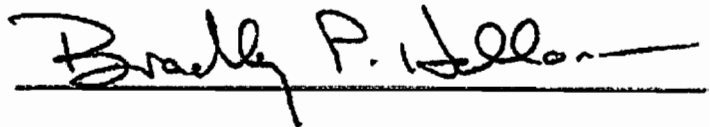
hearing scheduled for June 1, 2011. The respondent argues that taking a discovery deposition and an evidentiary deposition on the same day is "nothing but harassment". *Id.* at 3.

On April 5, 2011, the petitioner filed its response in opposition to respondent's motion to quash subpoena. The petitioner states, *inter alia*, that the Board's rules nor the Illinois Supreme Court Rules prohibit both discovery depositions and evidentiary depositions taken on the same day, and that there exists no time limit for evidentiary depositions. The petitioner states that it needs to determine whether Mr. Kennedy has any relevant testimony and utilize the evidence deposition because Mr. Kennedy will be out of the country on the date of the scheduled hearing. *Id.* at 6.

The respondent's motion to quash is denied. There exists no rules, either in the Board's rules or the Illinois Supreme Court Rules, that prohibit the number and type of depositions per day, nor do any of the rules place a time limit on evidence depositions.

The parties or their legal representatives are directed to appear at a telephonic status conference with the hearing officer on May 12, 2011 at 10:00 a.m. The telephonic status conference must be initiated by the complainant, but each party is nonetheless responsible for its own appearance. At the conference, the parties must be prepared to discuss the status of the above-captioned matter and their readiness for hearing.

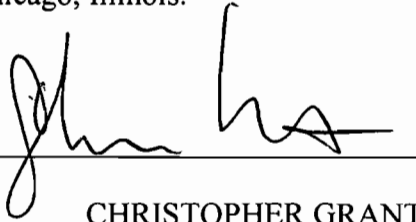
IT IS SO ORDERED.

A handwritten signature in black ink, reading "Bradley P. Halloran", is written over a horizontal line.

Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 W. Randolph Street
Chicago, Illinois 60601
312.814.8917

CERTIFICATE OF SERVICE

I, CHRISTOPHER GRANT, an attorney, do certify that I caused to be served this 2d day of May, 2011, Illinois EPA's Interlocutory Appeal from Hearing Officer April 18, 2011 Order Denying Motion to Strike Requests for Admission, and Notice of Electronic Filing, upon the persons listed below by placing same in an envelope bearing sufficient postage with the United States Postal Service located at 100 W. Randolph, Chicago, Illinois.



CHRISTOPHER GRANT

Mr. John Therriault
Assistant Clerk
Illinois Pollution Control Board
100 W. Randolph
Chicago, Illinois 60601
(by electronic filing)

Mr. Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
100 W. Randolph
Chicago, Illinois 60601
(by hand delivery)

Ms. Katherine D. Hodge
Ms. Lauren C. Lurkins
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(by first class mail)