

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

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

(SEE PERSONS ON ATTACHED SERVICE LIST)

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control **PETITIONER'S RESPONSE IN OPPOSITION TO RESPONDENT'S INTERLOCUTORY APPEAL FROM HEARING OFFICER APRIL 18, 2011 ORDER DENYING MOTION TO STRIKE REQUESTS FOR ADMISSION**, a copy of which is herewith served upon you.

Respectfully submitted,

KCBX TERMINALS COMPANY,
Petitioner,

Dated: May 5, 2011

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

Katherine D. Hodge
Edward W. Dwyer
Lauren C. Lurkins
HODGE DWYER & DRIVER
3150 Roland Avenue
Post Office Box 5776
Springfield, Illinois 62705-5776
(217) 523-4900

CERTIFICATE OF SERVICE

I, Katherine D. Hodge, the undersigned, hereby certify that I have served the attached PETITIONER'S RESPONSE IN OPPOSITION TO RESPONDENT'S INTERLOCUTORY APPEAL FROM HEARING OFFICER APRIL 18, 2011 ORDER DENYING MOTION TO STRIKE REQUESTS FOR ADMISSION upon:

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

via electronic mail on May 5, 2011 and upon:

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

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

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

by depositing said documents in the United States Mail, postage prepaid, in Springfield, Illinois on May 5, 2011.

/s/ Katherine D. Hodge

Katherine D. Hodge

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**PETITIONER'S RESPONSE IN OPPOSITION TO RESPONDENT'S
INTERLOCUTORY APPEAL FROM HEARING OFFICER APRIL 18, 2011
ORDER DENYING MOTION TO STRIKE REQUESTS FOR ADMISSION**

NOW COMES Petitioner, KCBX TERMINALS COMPANY ("KCBX"), a North Dakota corporation, by and through its attorneys, HODGE DWYER & DRIVER, and for its Response in Opposition to the Illinois Environmental Protection Agency's ("Illinois EPA") Interlocutory Appeal from Hearing Officer April 18, 2011 Order Denying Motion to Strike Requests for Admission ("Interlocutory Appeal"), states as follows:

1. On February 1, 2011, KCBX initiated PCB No. 11-43 by filing with the Illinois Pollution Control Board ("Board") its Petition for Review ("Petition") regarding the Renewed Federally Enforceable State Operating Permit issued to KCBX by Illinois EPA on December 29, 2010.
2. In its Interlocutory Appeal, Illinois EPA claims that KCBX "has demanded an early hearing" in this matter.
3. However, on February 17, 2011, Illinois EPA filed a Request for Extension of Time to File Record, requesting a 30-day extension of the deadline to file the Record, or until April 4, 2011.

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

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

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

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

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

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

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

10. On April 5, 2011, Illinois EPA filed a Motion to Strike Requests for Admission, arguing that KCBX's Requests for Admission were contrary to the limits contained in the recent amendment to Supreme Court Rule 216.

11. During the April 14, 2011 telephone status conference, the Hearing Officer verbally denied Illinois EPA's Motion to Strike Requests for Admission, and, on April 18, 2011, the Hearing Officer issued a written Hearing Officer Order regarding the same. The Hearing Officer, however, allowed Illinois EPA additional time, until April 19, 2011, to answer the written discovery. Additionally, the Hearing Officer stated in his April 18, 2011 Order that "the requests may assist in clarifying and narrowing the issues at hearing." Hearing Officer Order, KCBX Terminals Company v. IEPA, PCB No. 11-43 (Ill.Pol.Control.Bd. April 18, 2011). In making his decision with regard to Illinois EPA's Motion to Strike Requests for Admission, the Hearing Officer found a suitable middle ground -- he allowed KCBX to be provided with responses to written discovery in an effort to hopefully clarify and narrow the issues for hearing, while at the same time allowing Illinois EPA additional time to answer the written discovery.

12. On April 19, 2011, Illinois EPA served upon KCBX its Responses to Petitioner's Requests for Admission and its Answers to Petitioner's First Set of Interrogatories and Request for Production of Documents.

13. KCBX's Requests for Admission were prepared and propounded pursuant to Section 101.618 of the Board rules, 35 Ill. Admin. Code § 101.618. Section 101.618

includes nine subparts, but does not limit the number of Requests for Admission one party may propound on another party.

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

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

16. It is contrary to the Board rules, and unreasonable, to require parties in any matter before the Board -- as Illinois EPA seems to suggest should be done -- to compare the Board’s discovery rules line-by-line with the Code of Civil Procedure and Illinois

Supreme Court Rules, and to carefully select which requirements should be extracted from the other sources and added to the Board rules.

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

18. KCBX properly relied on Section 101.618 of the Board rules when propounding its Requests for Admission on Illinois EPA. Further, the Hearing Officer properly denied Illinois EPA's Motion to Strike Requests for Admission, and then allowed Illinois EPA an additional period of time to answer the written discovery.

19. In its Interlocutory Appeal, Illinois EPA asks the Board to "recognize the need for such limitations and adopt the limit provided in the Amendments to Supreme Court Rule 216," and 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."

20. Illinois EPA further claims in its Interlocutory Appeal that KCBX's discovery requests have been "overwhelming and abusive," that KCBX "created an artificial 'urgency' by insisting on an early hearing date," and that KCBX is "engaged in a fishing expedition."

21. Illinois EPA's allegations as to the motives behind KCBX's discovery requests are completely unfounded, grossly exaggerated and patently false. KCBX's discovery requests have not been "overwhelming and abusive." Further, KCBX did not

request an “early hearing” in this matter, as discussed above, and is not engaged in a “fishing expedition.” There is nothing in KCBX’s Requests for Admission that is inconsistent with its Petition and the exhibits thereto. Further, the purposes of discovery are to clarify the issues and, hopefully, narrow the issues for hearing. KCBX propounded its Requests for Admission in order to achieve those purposes.

22. For the reasons stated herein, KCBX opposes Illinois EPA’s request for the Board to “recognize the need for such limitations and adopt the limit provided in the Amendments to Supreme Court Rule 216,” and its request 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.”

WHEREFORE Petitioner, KCBX TERMINALS COMPANY, respectfully prays that the Board deny the Respondent’s Interlocutory Appeal from Hearing Officer April 18, 2011 Order Denying Motion to Strike Requests for Admission, confirm the Hearing Officer’s April 18, 2011 Hearing Officer Order, deny Illinois EPA’s request to

strike KCBX's Requests to Admit 31 through 106, and Illinois EPA's Responses thereto,
and provide all other relief just and proper in the premises.

Respectfully submitted,

KCBX TERMINALS COMPANY,
Petitioner,

Dated: May 5, 2011

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

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KCBX:003/Fil/FESOP Permit Appeal/Response to Interlocutory Appeal