

ILLINOIS POLLUTION CONTROL BOARD
May 19, 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 rules upon a motion to supplement a permit record and an interlocutory appeal of a hearing officer ruling. These air permit appeals were brought by KCBX Terminals Company (KCBX), seeking review of Illinois Environmental Protection Agency (IEPA) 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 petitioned to contest conditions of a revised construction permit issued by IEPA on May 25, 2010. In docket PCB 11-43, KCBX petitioned 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. On April 21, 2011, the Board issued an order ruling on several procedural motions, including granting IEPA's motion to consolidate the two appeals, but only for purposes of hearing, not necessarily decision. Hearing in the consolidated appeals is currently set to begin on June 1, 2011. Pursuant to waivers filed by KCBX, the statutory deadline for the Board to decide the appeals is August 18, 2011.

Since the issuance of the Board's April 21, 2011 order, two contested procedural matters have arisen in PCB 11-43 requiring the Board's attention. First, KCBX filed a motion to supplement the administrative record of IEPA's FESOP determination with 45 documents. IEPA objects to having 17 of the documents identified by KCBX added to the permit record. Second, IEPA filed an interlocutory appeal of the hearing officer's denial of IEPA's motion to strike KCBX's requests for admission. KCBX opposes IEPA's interlocutory appeal.

For the reasons below, the Board (1) grants in part and denies in part KCBX's motion to supplement and (2) accepts IEPA's interlocutory appeal but affirms the hearing officer's discovery ruling. In today's order, the Board first provides an abbreviated procedural history of this proceeding and addresses several preliminary motions before turning to KCBX's motion to supplement and IEPA's interlocutory appeal.

PROCEDURAL HISTORY AND PRELIMINARY MOTIONS

For a detailed account of the procedural histories of these now-consolidated permit appeals leading up to consolidation, please refer to the Board's order of April 21, 2011. Since that order, a notice of hearing for June 1-2, 2011, was issued. In addition, the parties have made numerous additional filings concerning the appeal of the renewed FESOP.

On April 28, 2011, KCBX filed a motion to supplement IEPA's administrative record of the FESOP renewal determination with 45 documents (Mot. Supp.). IEPA filed a response on May 6, 2011, objecting to the addition of some but not all of the proposed supplemental documents (Resp. Supp.). On May 11, 2011, the Board received KCBX's reply.¹

On May 2, 2011, the Board received IEPA's interlocutory appeal of the hearing officer's April 18, 2011 denial of IEPA's April 5, 2011 motion to strike KCBX's requests for admission (Int. App.).² On May 5, 2011, KCBX filed a response opposing the interlocutory appeal (Resp. Int. App.). On May 6, 2011, the Board received IEPA's reply (Reply Int. App.).

On May 3, 2011, KCBX filed a motion, directed to the hearing officer, to compel IEPA to supplement IEPA's FESOP record with the permit reviewer notes and emissions calculations sheets of retired IEPA Permit Engineer George Kennedy. IEPA has represented to the hearing officer that it will not be filing a response to the motion to compel. Instead, on May 11, 2011, IEPA filed a motion to supplement IEPA's FESOP record with Mr. Kennedy's notes and calculations, stating that they are the materials KCBX seeks. During a May 12, 2011 conference call conducted by the hearing officer, KCBX counsel represented that the company had no objection to IEPA's motion to supplement being granted and that KCBX's motion compel would thereby be rendered moot. The Board grants IEPA's motion to supplement. With the addition of Mr. Kennedy's notes and calculations to the FESOP record, the Board denies as moot KCBX's motion to compel.

Finally, the Board notes that IEPA's interlocutory appeal was not accompanied by the required motion for leave to file. *See* 35 Ill. Adm. Code 101.518. Further, within IEPA's related reply, IEPA asked the Board to consider the reply, but IEPA failed to file a formal motion for leave to file the reply. *See* 35 Ill. Adm. Code 101.500(e). In addition, KCBX's reply to IEPA's response to the KCBX motion to supplement was not accompanied by a motion for leave to file the reply. *Id.* However, the interlocutory appeal and the replies were timely-submitted (35 Ill. Adm. Code 101.500(e), 101.616(e)), and with the scheduled June 1 hearing fast approaching, the Board accepts and considers these documents to avoid any undue delay or material prejudice.

¹ On May 10, 2011, KCBX filed a motion, directed to the hearing officer, for the admission of an evidence deposition transcript, and exhibits thereto, as hearing evidence. The transcript and numerous exhibits are attached to the motion, which is pending. In ruling today upon KCBX's motion to supplement, the Board has not reviewed any of these materials directed to the hearing officer.

² KCBX's requests for admission are attached to the interlocutory appeal as Exhibit 1.

**KCBX's MOTION TO SUPPLEMENT
IEPA's PERMIT RECORD**

With the hearing officer's leave, IEPA filed a 540-page record of the December 29, 2010 FESOP renewal determination on April 4, 2011 (Bates stamped K:00001 through K:00540). In its motion to supplement, KCBX identifies 45 documents that allegedly should have been included in the IEPA record of decision but were omitted. Mot. Supp. at 2. Attached to KCBX's motion are the proposed supplemental documents, identified as Exhibits 1 through 45 (Exhs. 1-45). KCBX has also Bates stamped the 45 documents as K:000541-K:000907, continuing consecutively from the last page of permit record filed by IEPA.

KCBX asserts that it seeks to add "certain documents [IEPA] relied upon in making its determination regarding KCBX's application for the renewal of its [FESOP]." Mot. Supp. at 1. To provide the Board with "all documents relevant to this matter," KCBX moves to add the 45 documents to the "incomplete" record of decision filed by IEPA. *Id.* at 7. IEPA objects to including 18 of the 45 the documents, generally on the ground that they were not relied upon by IEPA in reaching the FESOP renewal determination. Resp. Supp. at 2-13. IEPA addresses each of the 45 documents, articulating its objection or lack of objection to inclusion of the given document. *Id.* In reply, KCBX specifically disputes IEPA's objections to adding 17 of the 18 documents. Reply Supp. at 2-8.

Below, the Board provides legal background before ruling upon the uncontested documents. The Board then rules upon the contested documents, after which the Board summarizes its rulings on KCBX's motion with respect to all 45 proposed supplemental documents.

Legal Background

"It is the Agency's responsibility to file the complete record that is before it" Industrial Salvage, Inc. v. IEPA, PCB 93-60, PCB 93-61 (consol.), slip op. at 2 (Feb. 17, 1994); *see also* 35 Ill. Adm. Code 105.116 (IEPA "must file with the Board the entire record of its decision"). Section 105.212(b) of the Board's procedural rules addresses the required contents of an IEPA permit record:

- b) The record must include:
 - 1) Any permit application or other request that resulted in the Agency's final decision;
 - 2) Correspondence with the petitioner and any documents or materials submitted by the petitioner to the Agency related to the permit application;
 - 3) The permit denial letter that conforms to the requirements of Section 39(a) of the Act or the issued permit or other Agency final decision;

- 4) The hearing file of any hearing that may have been held before the Agency, including any transcripts and exhibits; and
- 5) Any other information the Agency relied upon in making its final decision. 35 Ill. Adm. Code 105.212(b).

Board hearings will be based exclusively on the record before IEPA at the time IEPA issued its permit determination. *See* 35 Ill. Adm. Code 105.214(a). Accordingly, though the Board hearing affords a permit applicant the opportunity to challenge IEPA's reasons for denying or conditionally granting the permit, information developed after IEPA's decision typically is not admitted at hearing or considered by the Board. *See* Alton Packaging Corp. v. PCB, 162 Ill. App. 3d 731, 738, 516 N.E.2d 275, 280 (5th Dist. 1987); Community Landfill Co. & City of Morris v. IEPA, PCB 01-170 (Dec. 6, 2001), *aff'd sub nom. Community Landfill Co. & City of Morris v. PCB & IEPA*, 331 Ill. App. 3d 1056, 772 N.E.2d 231 (3rd Dist. 2002).

To prevail in an appeal of a permit condition, the petitioner "must show the IEPA's imposed modifications 'were not necessary to accomplish the purposes of the Act, or, stated alternatively, [the petitioner] had to establish that its plan would not result in any future violation of the Act and the modifications, therefore, were arbitrary and unnecessary.'" IEPA v. Jersey Sanitation Corp., 336 Ill. App. 3d 582, 593, 784 N.E.2d 867, 876 (4th Dist. 2003), quoting Browning-Ferris Industries of Illinois, Inc. v. IPCB, 179 Ill. App. 3d 598, 603, 534 N.E.2d 616, 620 (2nd Dist. 1989).

Uncontested Documents

In its motion to supplement, KCBX makes the general assertion that it is seeking to include in IEPA's record of decision certain omitted documents that IEPA relied upon in reaching the FESOP determination at issue. Mot. Supp. at 1. IEPA addresses each of the 45 proposed supplemental documents, ultimately not objecting to the inclusion of 27 of the 45 documents. Resp. Supp. at 3-13.

The Board notes that among the 27 uncontested documents is the renewed FESOP itself. All of the other uncontested documents concern air emissions or air permitting at the KCBX facility and are readily found to have been before IEPA at the time of permit issuance, each one post-dating IEPA's December 29, 2010 FESOP determination. The Board finds that each of the 27 documents over which the parties do not disagree falls within one or more of the categories of documents described in Section 105.212(b). *See* 35 Ill. Adm. Code 105.212(b). The Board therefore grants KCBX's motion to the extent that the following 27 uncontested documents are added to the IEPA FESOP record: Exhibits 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 20, 22, 23, 26, 30, 31, 32, 33, 34, 37, 39, 40, 41, 42, 43, and 44.

Contested Documents

In response to KCBX's motion to supplement, IEPA objects to 18 of the proposed supplemental documents being included in IEPA's FESOP renewal record. Resp. Supp. at 2-13. In reply, KCBX contests IEPA on 17 of those 18 documents. Reply Supp. at 2-8.

KCBX's reply is silent as to one of the 18 documents objected to by IEPA, an IEPA letter of January 6, 2011, to KCBX and an attached report of a January 4, 2011, IEPA inspection of the KCBX facility. This documentation, constituting Exhibit 45 to KCBX's motion, was issued after IEPA's December 29, 2010 permit decision. The materials could not have been before IEPA at the time of the FESOP determination and therefore are not properly part of the IEPA permit record. Accordingly, the Board denies KCBX's motion as to Exhibit 45.

Remaining are the 17 proposed supplemental documents on which the parties actively disagree. Below, the Board addresses these documents, setting forth (1) IEPA's objections to inclusion; (2) KCBX's counter-arguments; and (3) the Board's rulings.

FESOP Issued by IEPA to KCBX on June 22, 2000 (Exh. 1)

In objecting to the inclusion of the June 22, 2000 FESOP, IEPA explains that it consulted the IEPA "permit file" maintained for FESOP Application No. 95050167, "the renewal of which is at issue in PCB No. 11-43." Resp. Supp. at 2. IEPA states that the permit file does not include a copy of the 2000 FESOP. Further, IEPA represents that it did not rely upon the 2000 FESOP in rendering its December 29, 2010 FESOP determination. Instead, IEPA continues, IEPA relied upon the revised FESOP issued on April 8, 2004, which IEPA did include in the filed permit record. *Id.* at 2-3. KCBX asserts that it is necessary to include the 2000 FESOP because the document "establishes the FESOP history of the Facility and allows a full understanding of how Illinois EPA has permitted the Facility to operate in the past." Reply Supp. at 2. KCBX further maintains that in deposition testimony, IEPA representatives "referenced the two prior FESOPs issued to the Facility as justification for the issuance of the FESOP at issue in this matter." *Id.*

The permit being appealed is a FESOP, issued to KCBX on December 29, 2010. Before IEPA issued this 2010 FESOP, IEPA issued a FESOP to KCBX in 2000 and in 2004. In the permit record filed with the Board, IEPA included the 2004 FESOP, but not the 2000 FESOP. Both the 2000 and 2004 FESOPs are relatively recent permits and both were before IEPA at the time of the 2010 FESOP issuance. KCBX specifically represents that that deposed IEPA representatives referenced the two prior FESOPs as justification for issuing the FESOP now under review. In addition, no question is raised as to the authenticity of the copy of the 2000 FESOP proposed to be added by KCBX. Under these circumstances, the Board grants KCBX's motion to supplement the FESOP renewal record with the 2000 FESOP (Exh. 1).

November 29, 2004 IEPA Letter to KCBX Regarding Expiration and Renewal of FESOP (Exh. 2)

Objecting to the inclusion of its November 29, 2004 letter, IEPA states that the document, "generated and sent by clerical staff," was not reviewed or relied upon by IEPA in

drafting and issuing the FESOP renewal. Resp. Supp. at 3. KCBX maintains that the letter from IEPA to KCBX “helps establish a complete timeline of the permitting of the Facility.” Reply Supp. at 2.

The Board notes that, among other things, the November 29, 2004 IEPA letter states that the FESOP will expire on June 22, 2005, and informs KCBX of which application form to submit for renewal. Mot. Supp., Exh. 2 at 1. KCBX submitted a FESOP renewal application to IEPA on January 27, 2005. The November 29, 2004 letter constitutes IEPA correspondence with KCBX related to the permit application. The Board grants KCBX’s motion to supplement the FESOP renewal record with Exhibit 2.

IEPA Letter of September 13, 2007, to KCBX, and Attached Report of an August 29, 2007 IEPA Inspection of the KCBX Facility (Exh. 4)

IEPA opposes including the September 13, 2007 IEPA cover letter and attached report of an August 29, 2007 IEPA inspection of the KCBX facility. IEPA asserts that the documentation was not reviewed or relied upon by IEPA in drafting and issuing the FESOP renewal. Resp. Supp. at 3. KCBX replies that because IEPA included information from a July 6, 2005 IEPA facility inspection in the filed FESOP record (citing Bates stamps K:00197-K:00214), the information from the more recent inspection should also be included. Reply Supp. at 3.

Both inspection reports (1) were prepared by IEPA, (2) concern air emissions at the KCBX facility at issue, and (3) are identified as “Tier III.” The report of the July 6, 2005 facility inspection notes the facility’s FESOP expiration date of June 22, 2005 and that the renewal application had been submitted. *See* K:00197. The August 27, 2009 inspection report makes the same notations and identifies the last inspection as having taken place on July 6, 2005. IEPA included the older inspection report in the permit record filed. Additionally, IEPA raises no question as to the authenticity of the copy of the letter and report proposed to be added by KCBX. The Board finds that the more recent inspection report, which pre-dates permit issuance, should also be included. The Board grants KCBX’s motion to supplement the FESOP renewal record with the September 13, 2007 IEPA letter and attached report of the August 29, 2007 IEPA inspection (Exh. 4).

E-Mail Messages Between the Parties’ Attorneys (Exhs. 14, 16, 17, 18, 19, 21, 24, 25, 27, 28, 29, 35, 36)

Documented in numerous exhibits to KCBX’s motion to supplement are e-mail exchanges between Chris Pressnall, IEPA Assistant Counsel, and Katherine Hodge of Hodge Dwyer & Driver, counsel for KCBX. KCBX argues to include these exhibits in IEPA’s FESOP record. Mot. Supp. at 3-6. IEPA contests the inclusion of only some of these e-mail exhibits. Resp. Supp. at 5-12. The other exhibits of e-mail messages between the parties’ attorneys (*e.g.*, Exhs. 13, 15, 20, 22, 23) are already part of the FESOP record through the above grant of KCBX’s motion.

In all, there are 13 contested e-mail exhibits, and the parties make the same arguments with respect to each one of them. In objecting to inclusion, IEPA states that the e-mails were not

relied upon by IEPA in drafting and issuing the FESOP renewal. Resp. Supp. at 5-11. KCBX maintains, however, that the e-mails are similar to other e-mails already included by IEPA in the permit record filed. Reply Supp. at 3-8, citing, *e.g.*, K:00018, K:00243, K:00244. According to KCBX, including the additional e-mails “helps establish a complete understanding of the communications” between counsel for the parties, demonstrates the “iterative process of permit writing,” and proves that KCBX was “actively engaged in communications and meetings” with IEPA throughout, “providing requested information” to assist IEPA in “drafting the FESOP.” *Id.* KCBX asserts that such e-mails are therefore relevant as to what information was before IEPA when the FESOP renewal issued. *Id.*

The Board finds that the e-mail messages at issue constitute correspondence between IEPA and KCBX concerning the air permitting application process for this facility, including reviewing and commenting on drafts and arranging meetings and teleconferences. No question has been raised as to whether the e-mail exchanges in the contested exhibits actually took place. The e-mail messages often relate or refer to e-mail messages or permitting documentation already in the permit record as originally filed or as supplemented above. The contested e-mails date from September 4, 2008 through October 15, 2009, falling between the January 27, 2005 submission of the FESOP renewal application and the December 29, 2010 issuance of the renewed FESOP. The Board grants KCBX’s motion to supplement the FESOP renewal record with these e-mail documents (Exhs. 14, 16, 17, 18, 19, 21, 24, 25, 27, 28, 29, 35, 36).

KCBX Letter of May 4, 2010, to IEPA and Attached Revised Fugitive Particulate Operating Program and Contingency Measures Plan (Exh. 38)

IEPA opposes inclusion of KCBX’s Exhibit 38, asserting that IEPA did not rely upon this documentation in drafting and issuing the FESOP renewal. Resp. Supp. at 12. KCBX states that IEPA included, in the filed record, “information regarding a June 29, 2009 Revision to Fugitive Particulate Operating Program.” Reply Supp. at 8, citing K:00221-K:00230.

KCBX submitted a June 29, 2009 revised Fugitive Particulate Operating Program and Contingency Measures Plan to IEPA. KCBX also submitted a May 4, 2010 revised Fugitive Particulate Operating Program and Contingency Measures Plan to IEPA. Both revised plans concern air emissions at the KCBX facility at issue. IEPA included the older revised plan in the filed permit record. In this appeal, KCBX seeks review of, among other things, particulate matter conditions of the renewed FESOP. Petition at 3-6. The Board finds that the more recent revised plan, which pre-dates FESOP renewal issuance, should be included in IEPA’s record of decision. The Board grants KCBX’s motion to supplement the permit record with the KCBX cover letter of May 4, 2010, to IEPA and the attached revised plan (Exh. 38).

Summary of the Board’s Rulings on KCBX’s Motion to Supplement

The Board grants KCBX’s motion to supplement IEPA’s administrative record of the FESOP renewal with Exhibits 1 through 44 of KCBX’s motion. Accordingly, KCBX’s Bates stamped pages K:000541 through K:000897 are added to the permit record. The Board denies KCBX’s motion to supplement the FESOP renewal record with Exhibit 45 of KCBX’s motion.

KCBX's Bates stamped pages K:000898 through K:000907 are therefore not added to the permit record.

IEPA's INTERLOCUTORY APPEAL

IEPA's Arguments

IEPA argues that "limited discovery" is "common to permit appeals" because "the complete permit record is automatically filed with the Board." Int. App. at 1. Despite this, IEPA continues, KCBX served "an overwhelming amount" of written discovery on IEPA, including 106 separate requests for admission. *Id.* at 2. When IEPA moved to strike these requests for admission, the hearing officer denied the motion in an order of April 18, 2011. *Id.* IEPA asks the Board to reverse the hearing officer's decision. *Id.* at 3-4.

According to IEPA, "[b]ecause of the short time period available for completion of discovery and to avoid the potentially severe consequences of failure to submit responses to requests to admit," IEPA provided responses to the KCBX's 106 requests for admission on April 18, 2011.³ Int. App. at 2-3. IEPA asserts that its interlocutory appeal is not moot, however, because the Board can grant effective relief. *Id.* at 3. IEPA asks the Board to strike KCBX's requests for admission numbered 31 through 106, as well as IEPA's responses to those requests. *Id.* IEPA also maintains that even if this matter is moot, the "public policy exception" to the mootness doctrine applies as, among other things, there is a lack of guidance for the Board's hearing officers on the recently-amended Illinois Supreme Court Rule 216. *Id.*

IEPA notes that Illinois Supreme Court Rule 216 was amended, effective January 1, 2011, to limit the number of requests for admission to 30, unless a greater number is agreed to by the parties or ordered by the court for good cause shown. Int. App. at 4. IEPA further observes that according to the Committee Comment to the amended rule, the number limit should, in the vast majority of cases, eliminate the abusive practice of serving hundreds of requests for admission. *Id.* IEPA argues that the reasons for amending Rule 216 have been "routinely recognized and applied by the Board, especially in permit appeals." *Id.* at 4-5, citing Joliet Sand and Gravel Co. v. IEPA, PCB 86-159, slip op. at 3 (Dec. 23, 1986) ("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)."). IEPA further argues that the Board may look to Rule 216 for guidance because the Board's procedural rules are silent on "the number of allowable Requests to Admit." *Id.* at 4, citing 35 Ill. Adm. Code 101.616.

IEPA asserts that KCBX's "overwhelming and abusive" discovery requests are part of a "fishing expedition" and are "exactly the reason that limits such as those contained in the

³ Generally, failing to specifically deny or object to a request for admission within 28 days after service constitutes an admission of the matters of which admission is requested. *See* 35 Ill. Adm. Code 101.618(f). IEPA's responses to the requests have not been filed with the Board. *See* 35 Ill. Adm. Code 101.302(i) ("No written discovery . . . or any response to written discovery, may be filed with the Clerk of the Board except upon leave or direction of the Board or hearing officer.").

Amended Rule 216 were developed.” Int. App. at 5. IEPA complains as well of KCBX’s “comprehensive interrogatory requests and multiple depositions of Illinois EPA personnel.” *Id.* Within the “short time frame provided,” continues IEPA, KCBX has placed “an unreasonable discovery burden” on IEPA. Reply Int. App. at 2. IEPA concludes that KCBX does not have “the right to impose unreasonable discovery obligations on the Agency, nor to use discovery for the purpose of harassment.” *Id.* at 2.

KCBX’s Arguments

KCBX states that the April 18, 2011 hearing officer order allowed IEPA additional time, until April 19, 2011, to answer the written discovery. Resp. Int. App. at 1-2. KCBX emphasizes that 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.” *Id.* at 3.

KCBX asserts that its requests for admission were prepared and propounded pursuant to Section 101.618 of the Board’s procedural rules (35 Ill. Adm. Code § 101.618), which “includes nine subparts, but does not limit the number of Requests for Admission.” Resp. Int. App. at 3-4. KCBX argues that the Board’s procedural rules are therefore not silent on requests for admission and even so, the Board is not required to apply any Illinois Supreme Court Rule. *Id.* at 4, citing 35 Ill. Adm. Code 101.616.

KCBX argues that it is contrary to the Board rules, and unreasonable, to require that parties “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.” Resp. Int. App. at 4-5. KCBX sharply disputes IEPA characterizations of the requests to admit and asserts that the requests are consistent with the petition and intended to clarify and narrow the issues for hearing. *Id.* at 5-6.

Board’s Analysis

Section 101.518 of the Board’s procedural rules provides as follows: “Interlocutory appeals from a ruling of the hearing officer may be taken to the Board. The Board may consider an interlocutory appeal upon the filing of a written motion.” 35 Ill. Adm. Code 101.518. IEPA seeks reversal of the hearing officer’s denial of IEPA’s motion to strike KCBX’s requests for admission. The Board considers and rules upon IEPA’s interlocutory appeal below.

Initially, the Board finds that the issue raised by IEPA’s interlocutory appeal is not rendered moot merely because IEPA has already responded to KCBX’s requests for admission. “An issue is moot if no actual controversy exists or where events occur which make it impossible for the court to grant effectual relief.” Dixon v. Chicago & North Western Transp. Co., 151 Ill. 2d 108, 116, 601 N.E.2d 704 (1992); Krohn v. Arthur, 301 Ill. App. 3d 138, 141, 703 N.E.2d 602 (1st Dist. 1998) (“An appeal is considered moot if one of [the] two circumstances arises.”). KCBX did not address IEPA’s argument that this interlocutory appeal is not moot. However, based on the filings, it is plain that an actual controversy exists over whether KCBX’s 106

requests for admission should be limited to the first 30 among them. In addition, the Board agrees with IEPA that effectual relief can be granted by striking the requests for admission numbered 31 through 106.

Having decided that this interlocutory appeal is not moot, the Board turns to the merits. IEPA argues that the hearing officer should have applied Illinois Supreme Court Rule 216, which, based on a recent amendment, generally limits requests for admissions to 30 in number. Section 101.100(b) of the Board's procedural rules refers to the Supreme Court Rules:

The provisions of the Code of Civil Procedure [735 ILCS 5] and the Supreme Court Rules [Ill. S. Ct. Rules] do not expressly apply to proceedings before the Board. However, 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. 35 Ill. Adm. Code 101.100(b).

Section 101.616 of the Board's procedural rules likewise states: "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. Adm. Code 101.616.

The Board's procedural rules, as KCBX notes, do contain numerous provisions concerning requests for admissions of fact and the genuineness of documents. *See* 35 Ill. Adm. Code 101.618(a)-(i). However, as IEPA maintains, the Board's rules do not specify a limit on the number of permissible requests to admit. Whether the Board's procedural rules are "silent" depends upon the issue at hand. For example, in People v. QC Finishers, Inc., PCB 01-7 (July 8, 2004), the Board found that although its procedural rules addressed the subject of affirmative defenses, the Board could look to the Code of Civil Procedure for guidance on affirmative defenses where *an aspect* of such defenses is not addressed in the Board's rules. *See QC Finishers, Inc.*, PCB 01-7, slip op. at 5, 15. In denying a motion to strike an affirmative defense, the Board applied a provision of the Code of Civil Procedure that addressed whether a proper affirmative defense could seek to defeat only *part* of a cause of action, a matter on which the Board's procedural rules are silent. *Id.* at 15.

The Board finds that the issue in this interlocutory appeal does not simply concern "requests for admission," but rather their number. The Board agrees with IEPA that the Board's procedural rules are silent on the specific number of requests for admission that may be propounded.⁴ Therefore, the Board "may" look to Illinois Supreme Court Rule 216 "for guidance," but, as KCBX asserts, the Board is not required to do so. *See Procedural Rules Revision* 35 Ill. Adm. Code 101, 106 (Subpart G), and 107, R88-5(A), slip op. at 2-3 (Mar. 2, 1989) (explicitly declining to automatically apply the Code of Civil Procedure or the Illinois Supreme Court Rules where the Board's rules are silent.).

⁴ The Board's procedural rules do, however, contain provisions to prevent and sanction abuses of discovery procedures. *See* 35 Ill. Adm. Code 101.616(d), 101.802.

Illinois Supreme Court Rule 216 on requests for admissions of fact and the genuineness of documents was amended on October 1, 2010, effective January 1, 2011. Among the amendments is the addition of a new paragraph (f):

(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. Ill. Sup. Ct., R 216 (2011).

The October 1, 2010 Committee Comment associated with this amendment reads in relevant part that paragraph (f) is “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.” Ill. Sup. Ct., R 216 Committee Comment (Oct. 1, 2010).

KCBX made 106 requests for admission. IEPA moved the hearing officer to strike all of the requests for admission and to limit any future requests to 30, citing Illinois Supreme Court Rule 216 and the need to prevent an abuse of discovery. IEPA stated that the high number of requests for admission is part of KCBX’s “unreasonable and harassing” approach to this litigation. Motion at 3 (Apr. 5, 2011). KCBX disputed IEPA’s claims and argued, among other things, that there is nothing in the requests for admission that is inconsistent with KCBX’s petition for review of the FESOP renewal. Response at 3-5 (Apr. 8, 2011). The hearing officer order denying IEPA’s motion to strike also granted IEPA an additional 13 days to respond to written discovery. PCB 11-43, Hearing Officer Order at 1-2 (Apr. 18, 2011). In denying IEPA’s motion to strike, the hearing officer explained that IEPA “has been given a reasonable amount of time to answer the written discovery,” and “[f]urther, the requests may assist in clarifying and narrowing issues at hearing.” *Id.* at 2.

In this interlocutory appeal, IEPA generally complains of harassment but does not identify any specific request for admission as being irrelevant, not calculated to lead to relevant information, or unduly burdensome. *See* 35 Ill. Adm. Code 101.616(a). IEPA has, in fact, already responded to all of the requests after receiving additional time to do so. Accordingly, reversing the hearing officer’s ruling now cannot relieve IEPA from having responded to requests 31 through 106. Further, as the hearing officer indicated, IEPA’s responses may help to clarify and narrow issues for hearing, which is the purpose of requests for admission. *See P.R.S. International, Inc. v. Shred Pax Corp.*, 184 Ill. 2d 224, 237, 703 N.E.2d 71 (1998).

The Board finds no fault with the hearing officer’s reasoning or ruling. The hearing officer arrived at a fair balance in denying IEPA’s motion to strike while giving IEPA extra time to respond to the requests for admission. Air permit appeals can be complex. KCBX appeals over 20 conditions of the issued FESOP, as well as other provisions of the permit. Petition at 3-11. As evidenced by today’s order, even assembling the complete permit record has not been straightforward. *See Waste Management, Inc. v. IEPA*, PCB 84-45, PCB 84-61, PCB 84-68 (consol.), slip op. at 1 (Oct. 1, 1984) (permit appeal with extensive discovery where there was difficulty compiling IEPA record), *aff’d. sub nom. IEPA v. IPCB*, 115 Ill. 2d 65, 503 N.E.2d 343 (1986). KCBX represents that the requests for admission are consistent with KCBX’s petition

for review. IEPA does not dispute this, nor does IEPA claim that any of the requests are inconsistent with the hearing being “based exclusively on the record before the Agency at the time the permit or decision was issued.” 35 Ill. Adm. Code 105.214(a). The Board has long been mindful of the types of concerns noted in the Committee Comment to Supreme Court Rule 216, as IEPA points out (Joliet Sand and Gravel, PCB 86-159), but the Board finds no abuse by KCBX here.

Under these circumstances, the Board declines to apply the numeric cap on requests for admission from Illinois Supreme Court Rule 216. *See People v. Chiquita Processed Foods, LLC*, PCB 02-56, slip op. at 2-3 (Aug. 22, 2002) (Board rules silent on replies to answers, but Board declined to apply Supreme Court Rule requiring reply to answer). The Board therefore affirms the hearing officer’s denial of IEPA’s motion to strike. Accordingly, the Board denies IEPA’s interlocutory request that KCBX’s numbered requests 31 through 106, and IEPA’s responses to those requests, be stricken.

CONCLUSION

The Board grants in part and denies in part KCBX’s motion to supplement IEPA’s FESOP renewal record. In addition, the Board accepts IEPA’s interlocutory appeal but affirms the hearing officer’s ruling to deny IEPA’s motion to strike KCBX’s requests for admission. Below is a detailed summary of these rulings.

SUMMARY

1. The Board grants in part and denies in part KCBX’s April 28, 2011 motion to supplement IEPA’s administrative record of the December 29, 2010 FESOP renewal. In accordance with this ruling:
 - a. Added to the IEPA permit record are Exhibits 1 through 44 of the KCBX motion, which correspond to Bates stamped pages K:000541 through K:000897; and
 - b. Not added to the IEPA permit record is Exhibit 45 of the KCBX motion, which corresponds to Bates stamped pages K:000898 through K:000907.
2. The Board affirms the hearing officer’s April 18, 2011 denial of IEPA’s motion to strike KCBX’s requests for admission. KCBX’s numbered requests 31 through 106, and IEPA’s responses thereto, are accordingly not stricken.

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on May 19, 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.

John Therriault, Assistant Clerk
Illinois Pollution Control Board