

ILLINOIS POLLUTION CONTROL BOARD
April 17, 2014

KCBX TERMINALS COMPANY,)	
)	
Petitioner,)	
)	
v.)	PCB 14-110
)	(Permit Appeal - Air)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

ORDER OF THE BOARD (by J.D. O’Leary)¹:

On February 21, 2014, KCBX Terminals Company (KCBX) timely filed a petition (Pet.) asking the Board to review a January 17, 2014 determination of the Illinois Environmental Protection Agency (Agency or Illinois EPA). *See* 415 ILCS 5/40(a)(1) (2012); 35 Ill. Adm. Code 101.300(b), 105.206. The determination concerns KCBX’s bulk material terminal at 10730 South Burley Avenue in Chicago, Cook County (South Facility, South Site, or Souther Terminal). The Agency denied KCBX’s “Request for Revision to Revised Construction Permit for its South Facility.”

KCBX appealed the Agency’s determination on various grounds. On February 25, 2014, KCBX filed a motion to supplement the petition for review. On March 6, 2014, the Board accepted the petition for review, and on March 20, 2014, granted the unopposed motion to supplement the petition. On March 24, 2014, the Board received the administrative record of the Agency’s determination (R.).

On March 28, 2014, KCBX filed notices of discovery depositions, attached to each of which was a deposition rider seeking production of certain documents. On April 2, 2014, the Agency filed a motion for a protective order regarding the deposition riders, and KCBX filed its response on April 4, 2014. On April 8, 2014, the hearing officer issued an order denying the Agency’s motion. On April 14, 2014, the Agency filed an interlocutory appeal of the hearing officer order (Appeal). KCBX filed its response opposing the appeal (Opp.) on April 15, 2014.

On March 28, 2014, the Agency filed a motion to strike specified paragraphs of KCBX’s petition for review and one of the exhibits attached to it (Mot. Strike). On April 4, 2014, KCBX filed a response to the Agency’s motion (Resp. Strike). On April 7, 2014, the Agency filed a motion for leave to file a reply (Mot. Leave), accompanied by its reply (Reply Strike).

¹ Chad Kruse, who worked for the Illinois Environmental Protection Agency prior to joining the Board as an attorney assistant on March 19, 2013, has taken no part in the Board’s drafting or deliberation of any order or issue in this matter.

On April 7, 2014, KCBX filed a motion to supplement the record (Mot. Supp.). On April 11, 2014, KCBX filed a motion for leave to amend its motion to supplement (Mot. Amend). On April 14, 2014, the Agency filed a response to KCBX's motion for leave to supplement the record (Resp. Supp.). On April 15, 2014, the Agency filed a response to KCBX's motion for leave to amend its motion (Resp. Amend). Also on April 15, 2014, KCBX filed a motion for leave to reply (Mot. Leave 2), accompanied by its reply (Reply Supp.).

Below, the Board first briefly summarizes the hearing officer's April 8, 2014 order denying an Agency motion for a protective order regarding discovery riders. The Board then summarizes the Agency's interlocutory appeal of that order and KCBX's response in opposition before deciding the appeal.

Second, the Board first summarizes the Agency's motion to strike and KCBX's response. The Board then grants the Agency's motion for leave to file before summarizing the Agency's reply. The Board then discusses the issues presented before reaching its conclusion on the motion to strike.

Third, the Board summarizes KCBX's motion to supplement and for leave to amend its motion. The Board then summarizes the Agency's responses to the motions. Finally, the Board discusses the issues presented before reaching its conclusions on the motion to amend and the motion to supplement.

The Board concludes by issuing its order.

AGENCY INTERLOCUTORY APPEAL

Summary of April 8, 2014 Hearing Officer Order

On March 28, 2014, KCBX filed notices of discovery depositions of four witnesses, attached to each of which was a deposition rider seeking the production of certain documents including notes and draft permits pertaining to KCBX's request. On April 2, 2014, the Agency filed a motion for a protective order regarding the deposition riders. The Agency argued that the riders were not calculated to lead to relevant information and were unduly burdensome. The Agency also argued that the information requested is subject to the predecisional deliberative process privilege. The Agency also raised the issue of the attorney-client privilege. KCBX responded to the Agency's motion on April 4, 2014.

On April 8, 2014, the hearing officer issued an order denying the Agency's motion. The hearing officer first found, "based on the Board's procedural provisions and the abundance of case law, that the discovery requested by KCBX is both relevant and reasonably calculated to lead to relevant information, as well as not unduly burdensome." Hearing Officer Order at 5. The hearing officer next concluded that, based on People ex rel. Birkett v. City of Chicago, 184 Ill.2d 521 (1998), "the predecisional deliberative process privilege does not apply to the production requested by KCBX here." *Id.* Finally, the hearing officer found "that the Agency has failed to establish that any privilege, including the attorney-client privilege, applies to the requested production." *Id.* at 6.

Summary of Agency Interlocutory Appeal

Deliberative Process Privilege

The Agency argued that, in Harwood v. McDonough, 344 Ill. App. 3d 242, 247 (1st Dist. 1993), a Freedom of Information Act (FOIA) decision, the Appellate Court stated that “[t]he Birkett court did not hold that a deliberative process exemption did not exist in Illinois.” Appeal at 3. The Agency argued that the Birkett case involving specific discovery issues in circuit court does not bind the Board in its administrative hearings. *Id.* The Agency recognized the recent decision in Fox Moraine, LLC v. United City of Yorkville, 2011 IL App (2d) 100017 (Ill. App. Ct.), stating that “the Court found that inquiry into the mental process of the decision makers was improper. . . .” Appeal at 3. The Agency concluded that, because Fox Moraine did not reject a mental process privilege in permit appeal and Harwood found that Birkett does not apply in all cases, the hearing officer’s order findings applying Birkett were “overbroad and incorrect.” *Id.* at 4.

Relevance

The Agency argued that the information sought by KCBX “cannot be relevant to the Board’s decision in this case.” Appeal at 4 (emphasis in original). The Agency claimed that, because KCBX cannot challenge prior non-final determinations, “none of the pre-decisional information requested is relevant for the purpose of the Board’s decision.” *Id.* The Agency further claimed that KCBX inquired extensively into the requested documents in the course of depositions. *Id.* The Agency argued that “the Board should find that further inquiry into irrelevant issues is unwarranted.” *Id.*

Attorney-Client Privilege

The Agency stated that its Administrative Record included a privilege log. Appeal at 6, citing Exhibit 1. The Agency stressed an expedited schedule in claiming that the Board should find attorney-client privilege adequately established. Appeal at 6. The Agency argued that “[t]here is no question that the Illinois EPA attorneys listed on the privilege log provided legal advice related to this permit decision.” *Id.* The Agency noted that the Board has rarely relied on the remedy of *in camera* inspection of contested documents by the hearing officer, and “[t]here is no reason for the Board to order such an extraordinary procedure 15 days before hearing in this case.” *Id.* at 7.

Summary of KCBX Opposition

Procedure

KCBX cites Section 101.518 of the Board’s procedural rules, which provides that the Board may consider an Interlocutory Appeal upon the *filing of a written motion*.” Opp. at 3, citing 35 Ill. Adm. Code 101.518. KCBX argued that, in the absence of such a motion, the appeal is improper and should be denied. Opp. at 3. In the alternative, KCBX requests that the Board deny the appeal on the grounds summarized below. *Id.*

Deliberative Process Privilege

KCBX distinguished Fox Moraine and Rochelle Waste Disposal LLC v. City of Rochelle, PCB 03-218 (Apr. 15, 2004) from this case, arguing that it “is not seeking to elicit the testimony of Illinois EPA’s employees regarding their “mental processes,” but rather is seeking documentation containing information that was relied upon or should have been relied upon by Illinois EPA.” Opp. at 4. KCBX also argued that the Agency understates the Birkett decision. *Id.* at 5. KCBX claims that the Agency “cannot rely upon a privilege that the Supreme Court of Illinois has held does not exist.” *Id.* KCBX also discounted the Agency’s reliance on Harwood, noting the distinction in that case between a deliberative process privilege and an exemption under FOIA. *Id.* at 5-6.

KCBX argued that, even if the Board found that a deliberative process privilege applies in this case, it is still entitled under Birkett to discover “factual aspects of predecisional communications.” Opp. at 6 (citations omitted). Under those circumstances, KCBX argues that the Board “should review the documents claimed to be privileged *in camera* and allow production of any factual matters contained in the documents.” *Id.*, citing West Suburban Recycling and Energy Center v. IEPA, PCB 95-119, 95-125 (Oct. 17, 1996).

Relevance

KCBX argues that the hearing officer correctly determined that the information sought by the deposition riders is relevant. Opp. at 7. KCBX emphasizes Supreme Court Rule 204 providing in pertinent part that notice of deposition is sufficient to require the production of any documents or tangible things listed in the notice.” *Id.* at 8, citing ILL. S. CT. RULE 204(a)(3). KCBX thus discounts the Agency’s claim the deposition riders seek to avoid discovery deadlines imposed by its insistence on the statutory decision deadline. Opp. at 8. KCBX also discounts the Agency’s claim that the opportunity to depose witnesses should bar further inquiry about the documents identified in the riders. *Id.* KCBX further argues that the Agency’s view of the relevance of the documents requested in the riders “has no bearing on its obligation to file the complete administrative record in this proceeding.” *Id.* at 10, citing 35 Ill. Adm. Code 105.212.

Attorney-Client Privilege

KCBX argued that the Board has found that a party claiming attorney-client privilege must establish eight factors. Opp. at 11-12, citing IEPA v. Celotex Corp., PCB 79-145 (Dec. 6, 1984). KCBX noted the Board’s statement that “the factual basis for Agency decision-making on permits *does not result in an expectation of confidentiality*.” Opp. at 12, citing Waste Management, Inc. v. IEPA, PCB 84-45, 84-61, 84-68 (Aug. 10, 1984). KCBX argued that the privilege log “does not establish that the communications were made for the purpose of legal advice and does not establish that the communications were *not* part of the Illinois EPA’s *factual basis* for its decision-making.” Opp. at 12. KCBX claimed that the Agency’s submissions are insufficient to warrant overturning the Hearing Officer’s order on this subject. *Id.*

KCBX states that, if the Board finds that the hearing officer's order on the attorney-client privilege was erroneous, the Board should examine the documents listed in the privilege log to determine whether those documents or elements of them should be produced before hearing. Opp. at 13.

Board Discussion and Ruling

The Board has reviewed the hearing officer's April 8, 2014 order and has also considered the arguments raised by the Agency in its interlocutory appeal and in KCBX's response. Having done so, the Board agrees with the hearing officer's conclusion that "the predecisional deliberative process privilege does not apply to the production requested by KCBX here." The Board also agrees with the hearing officer's finding "that the discovery requested by KCBX is both relevant and reasonably calculated to lead to relevant information, and is not unduly burdensome." Finally, the Board agrees with hearing officer's finding "that the Agency has failed to establish that any privilege, including the attorney-client privilege, applies to the requested production." Accordingly, the April 8, 2014 hearing officer order is affirmed in its entirety.

MOTION TO STRIKE

Summary of Agency's Motion

The Agency first stated that, by filing its motion to strike specific elements of KCBX's petition for review, it does not agree that the administrative record includes other information and exhibits included in KCBX's petition. Mot. Strike at 1 n.1. The Agency stated that it "reserves the right to object to any motion that KCBX Terminal Company files seeking to supplement the Administrative Record." *Id.*

Paragraph 51 and Exhibit 30

Paragraph 51 of KCBX's petition states in its entirety that

KCBX provided Illinois EPA with test results from soil and surface sampling in the neighborhoods around KCBX's facilities. Exhibit 30, Petcoke Test Results, David L. MacIntosh, Sc.D, C.I.H., Environmental Health & Engineering, Inc. (Jan. 13, 2014). The samples were collected and tested in accordance with ASTM and EPA methods by independent environmental professionals and laboratories. These test results show no evidence of key chemical indicators of pet coke or coal on surfaces or in soil in the neighborhoods surrounding the KCBX facilities. Therefore, no significant amount of pet coke or coal from the KCBX facilities has been deposited in the areas sampled. Pet at 13-14 (¶51).

Exhibit 30 to the petition is a 12-page document dated January 13, 2014, and entitled "Petcoke-Coal Results." Pet., Exh. 30.

The Agency argued that the Board's review in this appeal "is limited to information submitted to the Agency during the statutory review period." Mot. Strike. at 2, citing West Suburban Recycling and Energy Center v. IEPA, PCB 95-119, 125 (Oct. 17, 1996). The Agency claimed that KCBX "did not provide a copy of Exhibit 30 to Illinois EPA prior to the issuance of the Permit Denial on January 17, 2014." Mot. Strike at 2, citing Mot. Strike., Exh A. (copy of e-mail dated Jan. 21, 2014). The Agency further claimed that "KCBX also did not provide the laboratory analytical results that served as the basis for Exhibit 30 until February 11, 2014." *Id.* at 2, citing Mot. Strike, Exh. B (copy of e-mail dated Feb. 11, 2014). The Agency argued that, "[b]ecause KCBX did not submit Exhibit 30 to the Illinois EPA during the statutory review period which ended on January 17, 2014, Paragraph 51 and Exhibit 30 of the Petition for Review should be stricken, and no discovery or trial testimony should be permitted on the subject matter." Mot. Strike at 2.

Paragraphs 56 and 57

Paragraph 56 of KCBX's petition for review states in its entirety that "[a]llegations in the reports of September inspections regarding deficiencies in the fugitive particulate operating program (hereafter "FPOP") at the South Facility do not provide a basis for the denial of the Request for Revision." Pet. at 15 (¶56).

Paragraph 57 of KCBX's petition for review states that

FPOP deficiencies in the inspection report are simply allegations of legal noncompliance, which Illinois EPA cannot consider when deciding whether to grant or deny the Request for Revision. . . . Furthermore, the Board not Illinois EPA, has the authority to determine the adequacy of FPOPs. Finding otherwise would be an unauthorized delegation of the Board's authority to set emission or equipment standards. In addition, KCBX's FPOP is not deficient. Pet. at 15 (¶57).

The Agency stated that on November 4, 2013,² the People of the State of Illinois filed a complaint for injunctive relief and civil penalties against KCBX for alleged violation at the South Facility. Mot. Strike at 2. The Agency further stated that Count II of the complaint "alleges that KCBX failed to amend and maintain a current fugitive particulate matter operating program regarding its operation at the site between December 20, 2012 and October 1, 2013." *Id.*, citing Exh. 3 at 7-12 (copy of complaint). The complaint alleged that this failure to amend and maintain the program violated Sections 212.310 and 212.312 of the Board's regulations. Mot. Strike, Exh. 3 at 10 (¶23); *see* 35 Ill. Adm. Code 212.310, 212.312 (Fugitive Particulate Matter). The Agency added that this case remains pending before the Circuit Court of Cook County. Mot. Strike at 3.

The Agency stated that its permit denial did not cite Section 212.310 or 212.312. The Agency argued that, based upon these factors, "Paragraphs 56-57 of the Petition for Review

² While the motion refers to a filing date of November 4, 2014, the Board considers this merely an inadvertent technical error. *See* Mot., Exh. 3 (complaint).

should be stricken, and no discovery or trial testimony should be permitted on the subject matter.” Mot. Strike at 3.

Summary of KCBX Response

Paragraph 51 and Exhibit 30

KCBX states that it “does not contest Illinois EPA’s Motion to Strike Paragraph 51 and Exhibit 30.” Resp. Strike at 1.

Paragraphs 56 and 57

KCBX stated that the Agency’s denial relied on September 2013 reports which refer to the FPOP that was in effect when KCBX requested permit revision (Initial FPOP). Resp. Strike at 1-2, citing R at 59-61 (Fugitive Dust Plan). KCBX further stated that Paragraphs 56 and 57 address this reliance. Resp. Strike at 1.

KCBX countered the Agency’s claim that KCBX’s petition “raises alleged deficiencies in its fugitive particulate matter operating program.” Resp. Strike at 2 n.1, citing Mot. Strike at 2. KCBX stated that Paragraphs 56 and 57 refer to allegations regarding the Initial FPOP made in the Agency’s September 2013 inspection reports. Resp. Strike at 2.

KCBX sought to clarify that the Circuit Court complaint cited in the Agency’s motion to strike relates to the Initial FPOP. KCBX stated that the Initial FPOP was revised during the permit review period and that the Revised FPOP appears in the Agency’s administrative record. Resp. Strike at 2, citing R. at 150-63 (Operating Program for Fugitive Particulate Control). Noting that the Agency has not sought to strike allegations in Paragraph 58 related to the Revised FPOP, KCBX indicated that the Agency’s motion “is limited to the paragraphs discussing the allegations in the Sept. Inspection Report regarding the Initial FPOP.” Resp. Strike at 2-3.

KCBX stated that the Agency’s motion to strike appears to be based on “a conflict between the enforcement action and the present permit appeal with regard to the Initial FPOP.” Resp. Strike at 3. Claiming that there is no conflict, KCBX stated that

[t]he Initial FPOP is at issue in the Circuit Court Complaint because Count 2 of that Complaint alleges that the Initial FPOP was insufficient. The Initial FPOP is at issue in this appeal because Illinois EPA made allegations regarding the Initial FPOP in its September 2013 reports, on which it relied to deny the Request for Revision. Resp. Strike at 3.

KCBX also argued that the Agency “does not explain why the Initial FPOP cannot be an issue in both the enforcement action and in the context of Illinois EPA’s Permit Denial.” *Id.* KCBX claimed that

[t]his appeal will not decide the issues in the Circuit Court - namely, whether that court has jurisdiction to hear the State’s complaints regarding the initial FPOP,

and, if so, whether the Initial FPOP was inadequate. Likewise, the Circuit Court matter will not decide the issue in this appeal - namely, whether the information on which Illinois EPA relied to deny the Request for Revision, including the allegations in the Sept. Inspection Report regarding the FPOP, were sufficient to justify that denial. *Id.*

KCBX also claimed that the Agency “appears to suggest that the Initial FPOP is not relevant to this permit appeal.” *Id.* KCBX argued that “the Initial FPOP and the Revised FPOP are relevant to Illinois EPA’s decision to deny the Request for Revision, and the Initial FPOP and the Revised FPOP were before the Illinois EPA when assessing the Request for Revision.” Resp. Strike at 3.

KCBX addressed the Agency’s claim that issuance of the revised permit might violate Section 9 of the Environmental Protection Act (Act) and Section 212.301 of the Board’s regulations. Resp. Strike at 4, citing 415 ILCS 5/9 (2012), 35 Ill. Adm. Code 212.301 (Fugitive Particulate Matter); *see* R. at 1-3 (Permit Denial). KCBX claimed that FPOPs include “best management practices” for compliance with fugitive particulate matter regulations including Section 212.301. Resp. Strike at 4, citing 35 Ill. Adm. Code 212.310(e) (Minimum Operating Program). KCBX argued that FPOPs therefore “describe activities that are designed to achieve compliance with Section 212.301, a subject that is at issue in this permit appeal. . . .” Resp. Strike at 4. KCBX added that the Agency included both the Initial FPOP and Revised FPOP in its administrative record. *Id.*, citing R. at 116-18, 150-63. KCBX argued that including these programs in the record demonstrates that the Agency “considered the FPOPs when making its decision to issue the Permit Denial.” Resp. Strike at 4.

Based on these factors, KCBX argued that “Paragraphs 56-57 of the Petition for Review must not be stricken and discovery or trial testimony related to the FPOP must be permitted.” Resp. Strike at 5.

Summary of Agency Reply

Motion for Leave to File

The Agency argued that, if it is not allowed to file a reply in support of its motion to strike, it “will be materially prejudiced as to Paragraphs 56-57 of KCBX’s Petition for Review.” Mot. Leave at 2. Noting the People’s pending enforcement action against KCBX, the Agency claimed that “the issues to be considered in depositions and to be presented at the Permit Appeal hearing must be clear.” *Id.* The Agency argued that it seeks the Board’s leave to file a reply “to avoid material prejudice.” *Id.*

Section 101.500(d) of the Board’s procedural rules provides in pertinent part that,

[w]ithin 14 days after service of a motion, a party may file a response to the motion. If no response is filed, the party will be deemed to have waived objection to the granting of the motion, but the waiver of objection does not bind the Board or the hearing office in its disposition of the motion. Unless undue delay or

material prejudice would result, neither the Board nor the hearing officer will grant any motion before expiration of the 14 day response period except in deadline driven proceedings where no waiver has been filed.

At a March 20, 2014 status conference with the hearing officer, KCBX indicated that it was not prepared to file a waiver of the statutory decision deadline (KCBX Terminals Co. v. IEPA, PCB 14-110 (Mar. 20, 2014)), and KCBX has filed no waiver or extension of that deadline. *See* 415 ILCS 5/40 (2012); 35 Ill. Adm. Code 101.308(c). While the 14-day response deadline has not run, the Board under these circumstances grants the Agency's motion for leave to file and accepts the Agency's reply.

Agency Reply

The Agency stated that its January 17, 2014 denial is not based upon Sections 212.309, 212.310, or 212.312 of the Board's fugitive particulate matter regulations. Reply Strike at 1, citing 35 Ill. Adm. Code 212.309, 212.310, 212.312. The Agency cited West Suburban Recycling and Energy Center v. IEPA, PCB 95-119, 125 (Oct. 17, 1996) (West Suburban), in which the Board stated that "[t]he Illinois Supreme Court itself has held that Section 39(a) requires that each denial point be supported by identification of the specific provisions in the Act or Board regulations that the Agency believes may be violated if the permit were to issue." Reply Strike at 1-2, citing West Suburban at 15 (citation omitted). The Agency suggests that, since its denial did not list Sections 212.309, 212.310, or 212.312, KCBX cannot attempt to rely on those regulations at hearing. Reply Strike at 1. The Agency claims that KCBX's reference in Paragraphs 56 and 57 to "September inspection reports regarding deficiencies in KCBX's fugitive particulate matter operating program does not cause such statements to constitute a basis" for the Agency's denial. Reply Strike at 2. The Agency argued that "[t]he Permit Denial letter governs." *Id.*, citing West Suburban at 15.

The Agency added that litigation addressing issues raised in Paragraph 57 is now pending in the Circuit Court of Cook County. Reply Strike at 2.

The Agency discounts KCBX's argument that Paragraphs 56 and 57 should be considered because the Agency did not move to strike Paragraph 58 referring to the Revised FPOP. Reply Strike at 2. The Agency characterizes Paragraph 58 as "a factual statement" about the Revised FPOP that does not address its sufficiency. *Id.* at 2-3. The Agency also discounted KCBX's statement that the Revised FPOP is included in the Administrative Record. The Agency argued that it included it in the record because it describes KCBX's water cannon system. Reply Strike at 3, citing R. at 150-63. The Agency stated that it "is prepared to enter into a Joint Stipulation striking the November 1, 2013 fugitive particulate matter operating program from the Administrative Record." Reply Strike at 3.

The Agency challenged KCBX's contention that the FPOP was a basis to deny the permit revision because the September inspection reports included that program and described deficiencies in it. Reply Strike at 3, citing R. at 51-53, 59-61. The Agency also challenged KCBX's contention that the FPOP was a basis for denial because the record includes a copy of the action alleging violation of Sections 212.310 and 212.312 pending in the Circuit Court of

Cook County, attached to which is a copy of the program. Reply Strike at 3, citing R. at 109-118. The Agency again argued that “the Permit Denial letter controls.” Reply Strike at 3, citing West Suburban at 15. In addition, the Agency claimed that it “was required to include a complete copy of those documents in the Administrative Record.” Reply Strike at 3. The Agency stated that, “[t]o ensure clarity on the issues before the Board, Respondent is prepared to enter into a Joint Stipulation prohibiting consideration of” the pages 51-53, 59-61, and 109-18 of the Administrative Record. *Id.*

The Agency emphasized that its denial does not list Sections 212.309, 212.310, or 212.312. Reply Strike at 3. The Agency claimed that it is “irrelevant” that KCBX believed that alleged deficiencies in its programs were a basis to deny the permit application. *Id.* at 4. The Agency argued that failure to maintain and amend a current fugitive particulate matter operating program as alleged in the pending Circuit Court action and the sufficiency of the November 1, 2013 fugitive particulate matter operating program are not at issue in this appeal. *Id.* The Agency claimed that discovery and testimony on these issues should not be permitted. *Id.*

However, the Agency stated that “[t]he factual statements in KCBX’s fugitive particulate matter operating programs regarding KCBX’s dust suppression controls at the site are relevant to the Permit Appeal due to the citations to 415 ILCS 5/9 and 35 Ill. Adm. Code 212.301 in the Permit Denial.” Reply Strike at 4. The Agency stated that, if KCBX does not enter a joint stipulation as described by the Agency, “discovery and trial testimony should only be permitted on the factual statements in KCBX’s fugitive particulate matter operating program regarding KCBX’s dust suppression controls at the site.” *Id.*

Board Discussion of Motion to Strike

Paragraph 51 and Exhibit 30

As noted above, KCBX does not contest the Agency’s motion to strike paragraph 51 of the petition for review and Exhibit 30. Resp. Strike at 1. Based on its own review of the motion and KCBX’s stated position, the Board grants the Agency’s uncontested motion to strike both paragraph 51 of KCBX’s petition for review and Exhibit 30 of that petition.

Paragraphs 56 and 57

In its January 17, 2014 denial letter, the Agency denied KCBX’s permit application because authorities including Sections 212.301 and 212.321 of the Board’s regulations “might be violated.” R. at 1; *see* 35 Ill. Adm. Code 212.301, 212.321. Among other grounds for denial, the Agency stated that, “[b]ased on the observations made by the Division of Air Pollution Control’s field staff and citizen pollution complaint forms, emissions from the source may violate 35 Ill. Adm. Code 212.301.” R. at 2 (¶3). The Agency further stated that KCBX’s application did not clearly show whether emissions from specified equipment would comply with 35 Ill. Adm. Code 212.321. *Id.* (¶4).

Section 212.301 of the Board’s air regulations provides in its entirety that “[n]o person shall cause or allow the emission of fugitive particulate matter from any process, including any

material handling or storage activity, that is visible by an observer looking generally toward the zenith at a point beyond the property line of the source.” 35 Ill. Adm. Code 212.301.

Section 212.321(a) generally prohibits the emission of particulate matter into the atmosphere in any one-hour period at rates exceeding those listed in subsection (c). 35 Ill. Adm. Code 212.321(a), (c). Subsection (b) provides an equation for use in determining “[i]nterpolated and extrapolated values of the data in subsection (c).” 35 Ill. Adm. Code 212.321(b), (c).

In its narrative report of a September 5, 2013 inspection, the Agency reported that inspectors observed no blowing dust after a downpour the night before resulted in wet material but that “the potential for emissions during drier weather persists.” R. at 165. Addressing Section 212.301 after inspections on September 11 and 13, 2013, the Agency reported findings including that “[t]here is a threat of visible emissions crossing the property line from storage piles.” R. at 45. The Agency also reported observation of visible emissions from truck traffic that may have crossed a property line. *Id.* at 47; *see id.* at 58 (conclusions). In addition, the Agency’s inspector concluded that KCBX had failed to develop and maintain an operating program “designed to significantly reduce fugitive particulate matter emissions” in violation of 35 Ill. Adm. Code 212.309, 212.310 and 212.312. *Id.* at 58. The Agency attached the Initial FPOP to its inspection report. *Id.* at 59-62. In addition, the Agency’s administrative record includes citizen complaints attributing emission of particulate matter to KCBX. *E.g.*, R at 289.

KCBX’s petition for review argued that the Agency’s allegation in the inspection reports that the Initial FPOP was deficient does not provide a basis to deny KCBX’s application. Pet. at 15 (¶56). KCBX claimed that the Agency cannot consider these allegations of legal noncompliance in determining to deny the requested permit revision. *Id.* (¶57).

In its motion to strike, the Agency addressed paragraphs 56 and 57 by noting that the People have filed a complaint in the Circuit Court of Cook County alleging in part that KCBX had failed to maintain a current FPOP. Mot. Strike at 2; *see id.*, Exh. 3 at 7-11 (complaint). Count II of the complaint alleges that KCBX violated 35 Ill. Adm. Code 212.310 and 212.312. Mot. Strike, Exh. C at 10 (¶23). The Agency reports that this case remains pending. Mot. Strike at 3.

The Board believes that KCBX has persuasively explained that resolution of the issues before the Circuit Court would not conflict with resolution of the issues before the Board in this permit appeal. *See* Resp. Strike at 3. The pending enforcement action is neither duplicative of this permit appeal nor would the enforcement action obviate it. The Board does not view the pending Circuit Court action as a basis to strike paragraphs 56 and 57 from KCBX’s petition for review.

The Agency’s motion to strike appears to argue that Paragraphs 56 and 57 regarding FPOPs are not relevant because the permit denial letter is not based on regulations establishing requirements for those plans. *See* Mot. Strike at 3; Reply Strike at 1. The Agency stated that its denial was not based on Sections 212.309, 212.310, or 212.312 and claimed that KCBX may not rely on those provisions in its appeal. Reply Strike at 1. The Agency cited West Suburban, in which the Board noted an Illinois Supreme Court holding that Section 39(a) of the Act “requires

that each denial point be supported by identification of the specific provisions in the Act or Board regulations that the Agency believes may be violated if the permit were to issue.” West Suburban at 15 (citation omitted). However, the Board also noted that “Section 39(a) imposes several explicit requirements upon the Agency when the Agency denies a permit application.” *Id.* The Board is not faced here with a claim that the Agency has failed to meet these requirements.

While the Agency’s denial letter frames the issues on appeal (Pulitzer Cmty. Newspapers, Inc. v. IEPA, PCB 90-142 (Dec. 20, 1990)), KCBX has confronted the allegation that the revised permit may violate Section 212.301 in part by referring to its FPOPs. Pet. at 15 (¶¶56, 57). KCBX argued that FPOP are required to include “best management practices” for compliance with requirements including Section 212.301. Resp. Strike at 4, citing 35 Ill. Adm. Code 212.310(e). In addition, the Agency had included the FPOPs in its Administrative Record. The Agency appears to discount the presence of the Initial FPOP in the record, stating that it was required to include it. Reply Strike at 3. This requirement does not give the Board any reason to determine that the plan is not relevant.

For the purposes of deciding this motion to strike, the Board cannot conclude that the allegations in paragraphs 56 and 57 of the petition are irrelevant to the issues in this permit appeal. The Agency’s motion to strike those paragraphs is denied. Of course, the Board today makes no finding on the sufficiency of the FPOPs.

Board Conclusion on Motion to Strike

First, the Board grants the Agency’s uncontested motion to strike paragraph 51 and Exhibit 30 of KCBX’s petition for review. Second, the Board denies the Agency’s motion to strike paragraphs 56 and 57 of the petition.

MOTION TO SUPPLEMENT

On April 7, 2014, KCBX moved to supplement the existing record with certain documents that the Agency “relied upon or should have relied upon in making its determination” regarding KCBX’s Request for Revision. Mot. Supp. at 1. KCBX asserted that, during its review of the record, it noticed that several documents were missing from the record that should have been included in it. *Id.* at 2.

KCBX argues that, when the Board hears a permit appeal, its decision must be “based exclusively on the record before the Agency,” and the Agency must file the entire record. Mot. Supp. at 2, citing 415 ILCS 5/40(d) (2012); 35 Ill Adm. Code 105.212(a), (b)(5). The record must include all documents that the Agency either relied on or “reasonably should have relied on” and it is the Agency’s responsibility to file the complete record. Mot. Supp. at 2 (citations omitted). KCBX stated that, when the Agency has not filed a complete record, the petitioner has the opportunity to supplement the record. Mt. to Supp. at 3, citing KCBX Terminals, Co. v. IEPA PCB 10-110, 11-43 (May 19, 2011).

Each of the documents KCBX seeks to add to the record was attached as an exhibit to its petition for review. Mot. Supp. at 3. After addressing two preliminary issues, the Board summarizes the parties' arguments on each of those documents.

KCBX's Motion for Leave to Amend

Summary of Motion

On April 11, 2014, KCBX filed a motion for leave to amend its motion to supplement the record (Mot. for Leave). KCBX states that, although its motion to supplement refers to the Agency's Privilege Log, it determined that the Privilege Log has not been filed with the Board as part of the record. Mot. for Leave at 1, 2, citing Mot. Supp. at ¶¶ 17, 23, 27, 28. KCBX seeks leave to file an amendment to its motion to supplement with a copy of the Agency's Privilege Log and transmittal letter, which is attached to the motion.

Summary of Agency Response

On April 15, 2014, the Agency filed a response to KCBX's motion for leave to amend the motion to supplement the record. The Agency states that it "has no objection to the Board's consideration of the privilege log in ruling on KCBX's request within its Motion to Supplement to have certain, specified documents listed on the privilege log included in the Administrative Record." Resp. at 1, n. 1. The Agency points out, however, that KCBX, in its motion for leave, did not request that the documents listed in the privilege log be added to the record. Resp. at 1.

The Agency added that counsel at the Illinois Attorney General's Office representing the Agency in this permit appeal created the privilege log between March 21-24, 2014. Resp. at 2. The Agency argues that the Board's review of the Agency's January 17, 2014 Permit Denial is limited to information submitted to the Agency during the statutory review period. Resp. at 2, citing West Suburban Recycling and Energy Center, L.P. v. IEPA, PCB 95-119, 95-125, 1996 WL 633368, at *3 (Oct. 17, 1996). The Agency argues that "[b]ecause the privilege log was created between March 21-24, 2014, well after the end of the statutory review period at issue in this Permit Appeal, KCBX's request to include the privilege log in the Administrative Record should be denied." Resp. at 2.

Board Discussion

The Board notes that the Agency did not object to KCBX's motion for leave to amend its motion to supplement the administrative record to the extent that the Board considers the privilege log in ruling on KCBX's motion to supplement the record with specified documents. Accordingly, the Board grants KCBX leave to amend its motion with the privilege log and transmittal letter.

KCBX's Motion for Leave to Reply

KCBX stated that, since filing its motion to supplement, it has deposed Agency employees and discovered additional information about documents addressed in its motion.

KCBX requests, in light of this discovery and in order to prevent material prejudice, leave to reply to the Agency's response to its motion.

Section 101.500(d) of the Board's procedural rules provides in pertinent part that,

[w]ithin 14 days after service of a motion, a party may file a response to the motion. If no response is filed, the party will be deemed to have waived objection to the granting of the motion, but the waiver of objection does not bind the Board or the hearing office in its disposition of the motion. Unless undue delay or material prejudice would result, neither the Board nor the hearing officer will grant any motion before expiration of the 14 day response period except in deadline driven proceedings where no waiver has been filed.

At a March 20, 2014 status conference with the hearing officer, KCBX indicated that it was not prepared to file a waiver of the statutory decision deadline (KCBX Terminals Co. v. IEPA, PCB 14-110 (Mar. 20, 2014)), and KCBX has filed no waiver or extension of that deadline. *See* 415 ILCS 5/40 (2012); 35 Ill. Adm. Code 101.308(c). While the 14-day response deadline has not run, the Board under these circumstances grants KCBX's motion for leave to file and accepts KCBX's reply.

Petition Exhibit 2: Permit Issued to KCBX April 5, 2012

KCBX Motion

KCBX stated that the equipment described in the Request for Revision is currently operating at KCBX's North Terminal pursuant to this Federally Enforceable State Operating Permit (FESOP). Mot. Supp. at 3. KCBX further stated that it noted its intent to transfer this equipment from its North Terminal to its South Terminal in its cover letter to the Request for Revision, which alerted the Agency to the FESOP and to KCBX's intention to operate the North and South Terminals as a single source. Mot. Supp. at 3, citing R. at 186-187. KCBX also stated that it noted its intent to transfer the equipment in a September 3, 2013 e-mail from Terry Steinert to Mike Dragovich (R. at 182) and a January 13, 2014 letter to Raymond E. Pilapil (R. at 11-16). Mot. Supp. at 3. KCBX added that this letter explained that the equipment at issue is operated pursuant to the FESOP. Mt. to Supp. at 3. KCBX argues that the Agency relied upon or reasonably should have relied upon this FESOP, which therefore it should be included in the Record. Mot. Supp. at 3-4.

Agency Response

The Agency notes that, to date, no FESOP has been issued to KCBX for the South Site and that KCBX is not permitted to operate the North and South Site as a single source. Resp. Supp. at 3. The Agency also notes that KCBX referenced the existence of only the FESOP for the North Site in the July 23, 2013 permit application in the context of its intention to operate the site as a single source. Resp. Supp. at 3, citing R. at 186. Because of this, the Agency argues that "the persons at [the Agency] who made the denial decision had no reason to consider any information in the FESOP and did not rely on such FESOP." Resp. Supp. at 3. The Agency

further argues that it should not have relied on the FESOP because it simply includes ten conveyors, one box hopper, and one stacker, with no additional supporting information. *Id.* Therefore, the Agency requests that KCBX's request to include the FESOP in the record should be denied. Resp. at 3.

KCBX Reply

KCBX asserts that it first referenced the North Terminal FESOP and the "potential to move equipment from the North to the South Terminal in its cover letter to the Request for Revision. Reply Supp. at 3. KCBX adds that "some" information in the cover letter related to KCBX's plan to operate the two terminals as a single source, but that this plan "does not in any way allow" the Agency to "disregard the information related to the North Terminal FESOP." Reply Supp. at 3. KCBX claims that it also indicated its intent to relocate equipment from the North Terminal in other documents in the record. Reply Supp. at 3. According to KCBX, Agency permit engineer Michael Dragovich testified when deposed that he did in fact "look at" permits and permit applications for the North Terminal in reviewing KCBX's Request for Revision. Reply Supp. at 3, citing Exh. A, Discovery Deposition Transcript of Michael Dragovich, Apr. 9, 2014, at 82-83. Thus, KCBX continues, the Agency should have reviewed, and actually did review, North Terminal permits as part of its review of KCBX's Request for Revision; as such, KCBX concludes, the North Terminal FESOP belongs in this record. Reply Supp. at 3.

Board Discussion

The Board notes Mr. Dragovich's testimony when deposed that he did "look at" permits and permit applications for the North Terminal in reviewing KCBX's Request for Revision. The Board can only conclude that this examination places this information within the documents that the Agency should have reviewed or did review in determining whether to grant KCBX's request. The Board grants KCBX's motion to supplement the record with this information.

Petition Exhibit 9: December 20, 2012 Letter

KCBX Motion

KCBX argued that a December 20, 2012 letter from Monica T. Rios to Lori Pennington notified the Agency of the transfer of the South Terminal to KCBX and its intent to operate under the permit issued on December 18, 2012. Mot. Supp. at 4. KCBX argued that the Agency relied upon or reasonably should have relied upon this document because the letter refers to the permit that KCBX attempts to revise in its Request for Revision. *Id.*

Agency Response

Addressing this letter, the Agency argues that the purchase of the South Site from DTE is not at issue in this proceeding. Resp. Supp. at 3. Similarly, the Agency argues that the construction permit issued to KCBX on December 18, 2012 is also irrelevant to this proceeding. *Id.* The Agency states that it is the "Construction Permit – NSPS and NESHP Source –

Revised” issued on April 18, 2013 that was the construction permit in place at the time of KCBX’s submission of the July 23, 2013 permit application. *Id.* The Agency states that this April 18, 2013 permit is already included in the record. *Id.*, citing R. at 130-49. The Agency argues that it did not rely on, and reasonably should not have relied on, the December 20, 2012 letter and that KCBX’s request should be denied. Resp. at 3-4.

KCBX Reply

KCBX argues that the letter is in fact relevant here because it relates to the transfer of a prior construction permit with the same application number as the existing permit, involves the “ongoing modification of the existing construction permit,” and was before the Agency during the permit application review period. Reply Supp. at 3-4. KCBX adds that Mr. Dragovich stated at his deposition that, in receiving a permit application for Agency review, the file clerk pulls together a file, which in this case would be an existing file because KCBX submitted a revision request. Reply Supp. at 4, citing Exh. A at 34. Thus, KCBX opines, prior construction permits and permit applications sharing the same permit application number were before the Agency when it made the permit decision challenged in this appeal. Reply Supp. at 4.

Board Discussion

The Board notes Mr. Dragovich’s deposition testimony regarding Agency procedures for permit application files. However, the Board is not persuaded that the transfer of the site or permit is relevant to the issues raised in the Agency’s January 17, 2014 determination. Accordingly, the motion to supplement the record with this letter is denied.

Petition Exhibit 10: Construction Permit Application and Letter

KCBX Motion

KCBX seeks to supplement the record with the full September 17, 2012 construction Permit Application for DTE Fuels Terminal, LLC (DTE) and a December 20, 2012 letter from Katherine D. Hodge to Edwin C. Bakowski enclosing that application. Mot. Supp. at 4. KCBX states that the request for revision references the permit application, excerpts of which are in the record. *Id.*, citing R. at 205-221. KCBX added that its request for revision seeks an update of the permit issued as a result of this application. Mot. Supp. at 4. The Permit Denial was also issued under the same permit number as the April 18, 2013 permit. Mot. Supp. at 4. KCBX also states that the letter from Katherine D. Hodge requested that the permit application be considered as a supplement to the pending FESOP application for KCBX’s South Terminal. *Id.* Noting that the April 18, 2013 permit is in the record (R. 130-48), KCBX argues that the full application for that permit and the December 20 letter were relied upon or reasonably should have been relied upon by the Agency. Mot. Supp. at 4.

If the Board decides that the December 20, 2012 letter should not be included in the record, KCBX requests that the September 17, 2012 permit application alone be added to the record. Mot. Supp. at 4.

Agency Response

The Agency states that, in the July 23, 2013 permit application, KCBX directed the Agency to particular pages within the September 17, 2012 Construction Permit Application. Resp. Supp. at 4, citing R. at 196, 198. The Agency states that the record already includes the pages KCBX referred to. Resp. Supp. at 4, citing R. at 205-21. The Agency states that, in preparing for depositions, its counsel noted that the record at page 202 refers to “Tables 1-12 in initial application” in small print. Resp. Supp. at 4. The Agency states that it does not object to the inclusion of Tables 1-4 and 7-12 in the record, but objects to the inclusion of any additional pages from Petition Exhibit 10. *Id.* The Agency argues that “[t]o include the additional pages would permit KCBX to supplement its construction permit application after the conclusion of the statutory review period.” *Id.*

KCBX Reply

KCBX contends that its Request for Revision sought revision of an existing construction permit, which was revised “multiple times prior to this request.” Reply Supp. at 4. The DTE application, KCBX continues, requested revision of a prior version of the same construction permit. Reply Supp. at 4. As such, KCBX asserts it is relevant to the “ongoing modification of the construction permit,” and it was before the Agency during the permit application review period. Reply Supp. at 4. KCBX reiterates that, according to Mr. Dragovich’s deposition testimony, the existing Agency file for this construction permit would include prior construction permits and permit applications sharing the same construction permit number, and would have been before the Agency when it made its permit decision. Reply Supp. at 4-5.

Board Discussion

The Board notes the Agency’s acknowledgement that its record cites to Tables 1-12 of the initial application, signifying that the application itself was either relied upon or should have been relied upon by the Agency in reviewing KCBX’s construction permit application. However, the Board notes that Tables 5 and 6 appear in the record at pages 212-18. Accordingly, the Board grants the motion to supplement the record with Petition Exhibit 10.

Petition Exhibit 11: Letter to KCBX

KCBX Motion

KCBX argues that a December 20, 2012 Letter from Edwin C. Bakowski to KCBX confirms that the Agency received KCBX’s request for an ownership change and updated the pending FESOP application accordingly. Mot. Supp. at 4. KCBX also states that this letter explains that “KCBX is subject to requirements in existing permits for the South Terminal that Illinois EPA issued to DTE.” *Id.* at 5. Thus, KCBX argues that this letter was relied upon or reasonably should have been relied upon by the Agency. *Id.*

Agency Response

The Agency argues that the letter regarding KCBX's pending FESOP application for the South Site is irrelevant to this proceeding. Resp. Supp. at 5. The Agency argues that this pending FESOP does not contain any information regarding the equipment at the North Site that KCBX is seeking to install through the July 23, 2013 permit application. *Id.* Further, the Agency argues that "KCBX is required to comply with the terms of the most current permit issued by the Illinois EPA (in this case the April 18, 2013 construction permit which is already in the Administrative Record) as a matter of law, not because of Mr. Bakowski's December 20, 2012 letter." *Id.* The Agency states that it did not and reasonably should not have relied on the December 20, 2012 letter and thus KCBX's request should be denied. Resp. at 5.

KCBX Reply

KCBX asserts the letter is relevant because it explains that KCBX is subject to requirements in existing permits for the South Terminal issued by the Agency to DTE following transfer of the facility. Reply Supp. at 5. As such, KCBX concludes, it relates to the ongoing obligations of the South Terminal with respect to DTE's construction permit application and any permits issued in response to that application. Reply Supp. at 5.

Board Discussion

The Board is not persuaded that KCBX's obligation to comply with existing permits hinges on the letter attached to the petition as Exhibit 11 or that the Agency relied on this letter to establish that obligation. The Board is also not persuaded that a brief reference to revision of a pending FESOP permit application addresses the requested revision at issue in this appeal. Accordingly, the motion to supplement the record with Petition Exhibit 11 is denied.

Petition Exhibit 12: Letter to KCBX and Attached Construction Permit

KCBX Motion

KCBX argues that a December 20, 2012 letter from Edwin C. Bakowski to KCBX and attached Construction Permit issued to KCBX on December 20, 2012 confirm that the Agency transferred the permit at issue in this appeal to KCBX. Mot. Supp. at 5. KCBX states that the construction permit has the same permit number as the April 18, 2013 permit KCBX attempts to revise in the Request to Revision. *Id.* Therefore, KCBX argues that this letter and attached permit were relied upon or reasonably should have been relied upon by the Agency. *Id.*

Agency Response

The Agency states that, as of the date of the permit application at issue in this appeal, KCBX was operating pursuant to the April 18, 2013 permit (which is already included in the record), not the December 20, 2012 permit. Resp. Supp. at 5. The Agency alleges that the December 20, 2012 permit for the South Site does not contain any information regarding the equipment that KCBX is seeking to install through the July 23, 2013 permit application. *Id.* The

Agency argues that the fact that both the April 18, 2013 permit and December 20, 2012 permit had the same permit number is irrelevant. Resp. at 5. Therefore, the Agency argues that it did not rely on, and reasonably should not have relied on, the December 20, 2012 permit or Mr. Bakowski's letter and thus KCBX's motion should be denied. Resp. at 5-6.

KCBX Reply

KCBX argues that the letter and attached construction permit "confirm the transfer" of a prior version of the existing revised construction permit, under the same permit application number, to KCBX from DTE. Reply Supp. at 5. KCBX maintains the documents are, therefore, relevant to the "ongoing modification of the construction permit," and were before the Agency during the permit application review period. Reply Supp. at 5. Again, KCBX relies on Mr. Dragovich's deposition testimony to contend that prior construction permits and permit applications sharing this construction permit number were before the Agency at the time of its decision here. Reply Supp. at 5-6.

Board Discussion

The Board notes Mr. Dragovich's deposition testimony regarding Agency procedures for permit application files. Based on the description of those procedures, the Board concludes that the Agency either relied upon or should have been relied upon Petition Exhibit 12 in reviewing KCBX's construction permit application. Accordingly, KCBX's motion to supplement the record with that exhibit is granted.

Petition Exhibit 13: Request for Revision

KCBX Motion

KCBX states that while the Agency included the July 23, 2013 Request for Revision in the record (R. at 186), it is not clear whether KCBX included the Conveyor Transfer Points Process Flow Diagram with its Request for Revision. Mt. to Supp. at 5. KCBX argues that a complete copy of the materials provided by KCBX in the Request for Revision should be included in the record, as the document was relied upon or reasonably should have been relied upon by the Agency. Mt. to Supp. at 5.

Agency Response

The Agency states that the Conveyor Transfer Points Process Flow Diagram, which KCBX seeks to include, is already included in the record at pages 184 and 212. Resp. Supp. at 6. The Agency argues that to include another copy of such would cause confusion in the references and page numbers and is unnecessary. Resp. at 6. Therefore, the Agency argues KCBX's motion should be denied.

KCBX Reply

KCBX maintains that although the Request for Revision and Conveyor Transfer Points Process Flow Diagram are both already part of the administrative record, they appear at different locations in the record. Reply Supp. at 6. KCBX adds that it is particularly important for the record to “accurately reflect the contents of the permit application” where, as here, the contents of the permit application are at issue. Reply Supp. at 6. According to KCBX, the Agency alleges that certain data listed in 35 Ill. Adm. Code 201.152 were not included in the Request for Revision, so the record needs to reflect the “full contents” of the Request for Revision. Reply Supp. at 6.

Board Discussion

The Board notes KCBX’s acknowledgement that its Request for Revision and Conveyor Transfer Points Process Flow Diagram are both part of the record. The Board is not troubled that they appear at separate locations in the record and declines to supplement the record with duplicate copies. Accordingly, the motion to supplement with Petition Exhibit 13 is denied.

Petition Exhibit 31: E-mail with Attached FPOP**KCBX Motion**

KCBX also seeks to supplement the record with a November 1, 2013 e-mail from Katherine D. Hodge to Kathryn Pamerter, cc: to Chris Pressnall, with attached revised Fugitive Particulate Operating Program (FPOP). Mot. Supp. at 5. KCBX argues that the e-mail notifies the Agency that a new water cannon system at KCBX’s South Terminal was operational on a full manual and/or limited automated basis. *Id.* Because the attached FPOP is in the record, KCBX argues that the e-mail transmitting it should also be included. *Id.* KCBX also states that the e-mail contains information concerning the operational status of the dust suppression system at KCBX’s South Terminal. *Id.* KCBX argues that because the Agency “gathered information regarding the operation of the South Terminal from inspectors and the general public, so it should have considered information provided by KCBX itself.” *Id.* KCBX further argues that the Agency should have considered additional information provided by KCBX since the Agency apparently considered information collected by inspectors about the operational status of the facility and water cannon system in finding that the South Terminal might violate 35 Ill. Adm. Code 212.301. *Id.* at 5-6. Therefore, KCBX argues that this e-mail was relied upon or reasonably should have been relied upon by the Agency. Mt. to Supp. at 6.

Agency Response

The Agency notes that this e-mail was provided in conjunction with the enforcement action pending in circuit court, People v. KCBX Terminals Co. (13CH24788). Resp. at 6. The Agency has no objection to include this e-mail in the record. Resp. Supp. at 6. However, the Agency objects to including another copy of the November 1, 2013 fugitive particulate matter operating program, which is already included in the record at pages 150-63. *Id.* The Agency argues that, except for the November 1, 2013 e-mail, KCBX’s request should be denied. *Id.*

KCBX Reply

KCBX continues to argue that a copy of the November 1, 2013 fugitive particulate matter operating program (FPOP) should be included in the record along with the November 1, 2013 e-mail. Reply Supp. at 7. According to KCBX, the record should accurately reflect that the November 1, 2013 e-mail and attached FPOP were submitted simultaneously. *Id.*

Board Discussion

The Board agrees with the Agency and declines to supplement the record with a second copy of the November 2013 FPOP. The Board notes that the Agency does not object to supplementing the record with the November 1, 2013 e-mail, which explicitly refers to the “KCBX South FPOP.” Accordingly, the Board grants the motion to supplement the record with the e-mail in Petition Exhibit 31 but denies the motion with respect to the FPOP in that exhibit.

Petition Exhibit 32: Letter dated November 15, 2013**KCBX Motion**

KCBX argues that a letter from Katherine D. Hodge to Kathryn A. Pamerter, pc: to Chris Pressnall, dated November 15, 2013, notified the Agency that the new water cannon system at KCBX’s South Terminal was fully operational. Mot. Supp. at 6. KCBX argues that this letter contains information concerning the operational status of the dust suppression system at the South Terminal. *Id.* KCBX argues that, because the Agency collected information about that site from inspectors and the public, it should have considered the information provided by KCBX itself. *Id.* KCBX further argues that the Agency apparently considered information collected by inspectors about the operational status of the facility and water cannon system in finding that the South Terminal might violate 35 Ill. Adm. Code 212.301. *Id.* Therefore, KCBX argues that this letter was relied upon or reasonably should have been relied upon by the Agency. *Id.*

Agency Response

The Agency notes that this letter was provided in conjunction with the enforcement action pending in circuit court, People v. KCBX Terminals Co. (13CH24788). The Agency has no objection to including the November 15, 2013 letter in the record. Resp.Supp. at 7.

KCBX Reply

Noting the lack of an Agency objection, KCBX offers no reply regarding this document.

Board Discussion

In the absence of any Agency objection, the Board grants the motion to supplement the record with Petition Exhibit 32

Agency Policy

KCBX Motion

KCBX states that it has become aware of an Agency policy during the permit review period to “halt” any action on pending permits issued to facilities that handle petcoke. Mot. Supp. at 6. KCBX states that a press release issued by the Governor’s Office on January 13, 2014 explains that the Agency “halted permit activity for petcoke operations pending a review of their impacts on air, land and water.” *Id.* (citation omitted). Further, KCBX states that Agency Director Lisa Bonnett explained in an audio clip embedded in the online press release that the Agency has permit transactions before it related to petcoke, but that the Governor asked the Agency to “take ‘a time out on permits.’” *Id.* at 7 (citation omitted). KCBX further states that Governor Quinn affirmed the policy in another audio clip imbedded in the January 13 online press release by “confirming that permits are pending but noting that ‘we are not going to let anything go forward until these rules are promulgated.’” *Id.* (citation omitted).

KCBX states that the Agency’s policy regarding petcoke and the direction from the Governor were apparently relied upon by the Agency in deciding to deny the Request for Revision and therefore should be included in the record. Mot Supp. at 7. Additionally, KCBX states that the Agency communicated with the Governor’s Office regarding pending permits at petcoke handling facilities and a related moratorium. *Id.* KCBX states that no documents identifying the conversations with the Governor’s Office are contained in the record and that such documents should be included in it. *Id.*

Agency Response

The Agency first states that, to date, KCBX has not authenticated the January 13, 2014 press release or audio clip. Resp. Supp. at 7. The Agency notes that during depositions, KCBX did not ask Robert Bernoteit and Raymond Pilapil about the audio clip because it had learned that they had not seen the press release. *Id.* The Agency states that KCBX will presumably ask Julie Armitage at her deposition on April 16, 2014, whether she has knowledge of the press release. *Id.* While KCBX has the opportunity to ask during depositions and hearing about the press release and audio clip, the Agency states that they do not constitute a written policy of the Agency. *Id.* The Agency states that it did not rely, and reasonably should not have relied upon, the press release and audio clip. *Id.* Therefore, the Agency argues that KCBX’s request should be denied. *Id.*

Regarding documents of conversation with the Governor’s Office, the Agency states that KCBX chose not to serve any written discovery on the Agency pursuant to the Board’s procedural rules or the Illinois Supreme Court rules. Resp. Supp. at 7. The Agency argues that Paragraph 13 of KCBX’s motion to supplement fails to comply with those discovery rules. *Id.* at 7-8. The Agency states that KCBX is afforded the opportunity during depositions and at hearing to ask questions of the Agency regarding conversations, if any, with the Illinois Governor’s Office. *Id.* at 8. The Agency states that the two persons who made the decision to deny the July 23, 2013 permit application are Julie Armitage and Robert Bernoteit. Resp. at 8. The Agency

argues that KCBX's request to include documents relating to the conversations with the Illinois Governor's Office should be denied. Resp. at 8.

KCBX Reply

Regarding the press release and accompanying audio clip, KCBX first argues that they do not require authentication, as the Agency contends, because they were published by the Illinois Government News network, an official website for the State of Illinois. Reply Supp. at 7, citing <https://www.illinois.gov/news/Pages/Governors-Office.aspx>. KCBX adds that these are the kind of documents typically published on this website, and the Agency does not contend they are not authentic. *Id.* As to the documents' contents, KCBX again asserts that they reflect an understanding between the Governor's Office and the Agency's Director concerning permits such as the one requested in the Request for Revision. *Id.* at 7-8. The Director has authority over the Agency's Bureau of Air, KCBX continues, which was responsible for issuing the permit denial in this case. *Id.* at 8, citing <http://www.epa.state.il.us/about/org/org-chart.html>. KCBX opines that the understanding between the Governor's Office and the Agency's Director apparently was relied upon by the Agency when it decided to deny the Request for Review. *Id.*

As for documents relating to conversations between the Agency and the Governor's Office, KCBX suggests that the Agency appears to argue that the rules of discovery "allow it to avoid its obligation to file a complete Record." Reply Supp. at 8. KCBX adds that the Governor's press release and audio clip make clear that the Governor asked the Agency to "halt permit activity" and that the Agency's Director "acknowledged this request." *Id.* KCBX asserts it is reasonable to conclude that the Agency considered this information in denying the Request for Revision, and that the associated documents should accordingly be included in the record. *Id.*

Board Discussion

The Board is persuaded that the materials subject to this specific request have not been authenticated as part of the Agency's administrative record. These materials do not constitute communication between the parties. Accordingly, KCBX's motion to supplement the record with regard to these materials is denied.

Privilege Log

KCBX Motion

KCBX states that the Agency's privilege log identifies information withheld from the record by citing the deliberative process privilege or the attorney/client privilege. Mot. Supp. At 10-11. KCBX then argues that the Agency ignored the Illinois Supreme Court and appellate court decisions rejecting the existence and application of the deliberative process privilege. *Id.* at 11, citing People ex. rel. Birkett v. City of Chicago, 184 Ill. 2d 521 (1998); Fox Moraine, LLC v. United City of Yorkville, 2011 IL App (2d) 100017 (2011); Thomas v. Page, 361 Ill. App. 3d 484 (2005). KCBX acknowledges that court decisions since Birkett have recognized a limited judicial deliberation privilege but have not extended the privilege beyond the deliberation of judges. Mot. Supp. at 13, n. 1, citing Fox Moraine, 2011 IL App (2d) at ¶ 73). KCBX argues,

therefore, that the Board must reject the Agency's assertion of the deliberative process privilege and order the Agency to include the documents in the Record. Mot. to Supp. at 12-13.

KCBX states that the Agency has also cited the attorney-client privilege as a ground for not including documents listed in the Privilege Log in the record. Mot. Supp. at 13. KCBX argues that the Agency's mere assertion of the privilege is insufficient for the Agency to meet its burden of proving that the attorney-client privilege applies. Mot. to Supp. at 13, citing Lake County Forest Preserve Dist. v. Neil Ostro, et al., PCB 92-80 (Apr. 22, 1993). KCBX states that the Board has found that eight factors need to be proven in order to claim the attorney-client privilege. Mot. Supp. at 13, citing IEPA v. Celotex Corp., PCB 79-145 (Dec. 6, 1984). Further, KCBX states that the Board has held that "the factual basis for Agency decision-making on permits does not result in an expectation of confidentiality." Mot. Supp. at 14, citing Waste Management, Inc. v. IEPA, PCB 84-45, 84-61, 84-68 (Aug. 10, 1984).

KCBX argues that the Agency failed to establish that the documents listed in the Privilege Log are subject to the attorney-client privilege because the Agency has not proven that such documents fall within the criteria established in Celotex. Mot. Supp. at 14. KCBX further argues that the Agency has not demonstrated that any of the requested documents are not or do not contain any of the factual basis for Agency decision-making on the Request for Revision. *Id.* KCBX argues that the documents listed on the Privilege Log are not entitled to any expectation of confidentiality. *Id.* Therefore, KCBX argues that the Board should reject the Agency's assertion of the attorney-client privilege and should order the Agency to include these documents in the record. *Id.* KCBX states that, at a minimum, the Board should conduct an in-camera review of the documents on the Privilege Log to make an independent determination. *Id.*

Agency Response

The Agency notes KCBX's paragraph 17 seeking inclusion of the Privilege Log Document P000002-0000023. Resp.Supp. at 8-9. The Agency incorporates by reference the argument included in its Interlocutory Appeal regarding attorney-client privilege and the deliberative process privilege. *Id.* at 8. The Agency argues that the January 17, 2014 Permit Denial letter governs this permit appeal. *Id.* at 8-9. Thus, the Agency argues that KCBX's request should be denied. *Id.* at 9.

KCBX Reply

KCBX notes that the Board's Hearing Officer "acknowledge[d]" that the issues involved in the Agency's interlocutory appeal of the Hearing Officer Order and those raised by the motion to supplement are related. Reply Supp. at 9. Accordingly, KCBX requests that to the extent the Agency is allowed to incorporate by reference arguments in its interlocutory appeal, the Board also consider all of KCBX's related filings "leading up to and in response to" the interlocutory appeal. *Id.* KCBX adds that documents such as draft permits would indicate the kind of information necessary and available to the Agency to prepare a permit. *Id.*

KCBX requests that the Board either grant the motion to supplement in full or, to the extent the Board upholds any of the Agency's privilege claims, order limited supplementation of

the record. Reply Supp. at 9-10. In the latter instance, KCBX asks the Board to order the Agency to supplement the record with any documents “dealing with factual information regarding the draft permits” and to submit the remaining documents for *in camera* review to “screen out the mental impressions and/or attorney work product documents.” *Id.* at 10.

Board Discussion

The Board above upheld the hearing officer’s April 8, 2014 order denying the Agency’s motion for a protective order. Having affirmed that the Agency failed to establish that privileges including the predecisional deliberative process privilege and the attorney-client privilege apply to the requested production of certain documents, the Board grants the motion to supplement the record with these documents and directs the Agency to include the documents listed in its privilege log in the record.

Additional Documents

KCBX Motion

KCBX argues that, based upon information in the record, the Agency “omitted additional documents directly related to the Request for Revision that contain information relied upon or information that should have been relied upon by Illinois EPA when making its decision.” Mot. Supp. at 7. Specifically, KCBX states that the record contains a sign-in sheet from a meeting with KCBX representatives (R. 183), but the record does not contain any notes taken by Agency staff that attended the meeting. Mot. Supp. at 8.

KCBX also states that the Permit Denial is based in part on observations made by the Division of Air Pollution’s staff. Mot. Supp. at 8, citing R. at 31. While the record contains inspection reports directed to the Agency field staff, there is no other information documenting how the observations were relayed to those reviewing the Request for Revision. Mot. Supp. at 8. KCBX argues that notes from any meetings discussing the inspections or other grounds for denial, as well as any e-mails or other written communications discussing the same, should be included in the record. *Id.*

KCBX also states that the Agency’s Privilege Log contains references to e-mails concerning a draft permit. Mot. Supp. at 8. KCBX alleges that, based on the length of one of those e-mails and length of the existing revised construction permit, one of e-mail appears to contain a draft revised construction permit. *Id.* Because the Agency claimed it needed additional information to issue a revised construction permit, KCBX argues that this draft permit is relevant and should be included in the record. Mt. to Supp. at 8.

KCBX then alleges that the Permit Calculation Sheet in the record (R. at 4-9) “indicates that the permit engineer was prepared to issue a permit, but that decision was abruptly changed.” Mot. Supp. at 8. However, KCBX claimed that the record does not contain any internal Agency deliberations, including any notes or records of meetings related to that decision. *Id.* KCBX argues that those deliberations, whether in the form of notes, e-mails, or other documents, should be included in the record. *Id.* at 8-9.

KCBX states that, upon information and belief, the following additional documents were omitted from the record: (1) notes related to the Agency's review of the Request for Revision; (2) draft permit(s) addressing the activities described in the Request for Revision; and (3) notes taken by the Agency staff during meetings, telephone calls or discussions regarding the Request for Revision and the Agency's decision to grant or deny the Request for Revision. Mot. Supp. at 9. KCBX states that due to these omissions, it attached Deposition Riders to Notices of Deposition issued for Michael Dragovich, Robert W. Bernoteit, Raymond Pilapil, and Joseph Kotas. *Id.* KCBX argues that these Deposition Riders were narrowly drafted and sought only the above-described documents that were omitted from the record. *Id.* KCBX argues that these requested documents were created by the Agency following its receipt of the Request for Revision and in connection with its review. *Id.*

Agency Response

The Agency states that KCBX's motion seeks to supplement the record with documents at issue in the Hearing Officer Order dated April 8, 2014, and the Interlocutory Appeal of that order filed on April 14, 2014. Resp. Supp. at 8. Citing "the extreme time constraints in this Permit Appeal" the Agency incorporated by reference the arguments included in its interlocutory appeal. *Id.* The Agency argues that KCBX's request should be denied. Resp. at 8.

KCBX Reply

KCBX notes that the Board's Hearing Officer "acknowledge[d]" that the issues involved in the Agency's interlocutory appeal of the Hearing Officer Order and those raised by the motion to supplement are related. Reply Supp. at 8. Accordingly, KCBX requests that to the extent the Agency is allowed to incorporate by reference arguments in its interlocutory appeal, the Board also consider all of KCBX's related filings "leading up to and in response to" the interlocutory appeal. *Id.*

Board Discussion

KCBX's motion stated that apparent omissions from the administrative record caused it to attach Deposition Riders to Notices of Deposition. The Agency noted that the motion seeks to supplement the record with documents at issue in the Interlocutory Appeal. Having denied that appeal above, the Board grants KCBX's motion to supplement the record with the additional documents identified in its motion. Accordingly, the Agency is directed to include in the record any documents or other materials described in paragraphs 15 -19 of KCBX's motion to supplement and in Deposition Riders filed with its Notices of Deposition.

ORDER

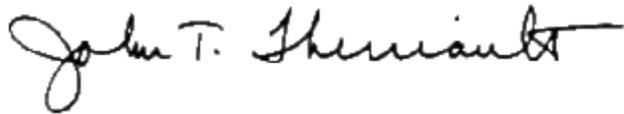
1. The April 8, 2014 hearing officer order is affirmed in its entirety.
2. The Board grants the Agency's motion for leave to file a reply in support of its motion to strike. The Board grants the Agency's uncontested motion to strike

paragraph 51 and Exhibit 30 of KCBX's petition for review. The Board denies the Agency's motion to strike paragraphs 56 and 57 of the petition.

3. The Board grants KCBX's motion for leave to amend its motion to supplement the record. The Board grants KCBX's motion for leave to file a reply in support of its motion to supplement the record. The Board grants KCBX's motion to supplement the record with Petition Exhibit 2, Petition Exhibit 10, Petition Exhibit 12, and Petition Exhibit 32. The Board denies KCBX's motion to supplement the record with Petition Exhibit 9, Petition Exhibit 11, Petition Exhibit 13, and a purported Agency policy. The Board partially grants and partially denies KCBX's motion to supplement the record with Petition Exhibit 31. The Board directs the Agency to include in the record the documents listed in its privilege log. The Board directs the Agency to include in the record any documents or other materials described in paragraphs 15 -19 of KCBX's motion to supplement and in Deposition Riders filed with its Notices of Deposition.

IT IS SO ORDERED.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on April 17, 2014 by a vote of 4-0.



John T. Therriault, Clerk
Illinois Pollution Control Board