

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

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

(SEE PERSONS ON ATTACHED SERVICE LIST)

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board **PETITIONER'S RESPONSE TO RESPONDENT'S MOTION FOR RECONSIDERATION AND MODIFICATION OF ORDER DATED SEPTEMBER 4, 2014**, a copy of which is herewith served upon you.

Respectfully submitted,

KCBX TERMINALS COMPANY,
Petitioner,

Dated: October 1, 2014

By: /s/ Katherine D. Hodge
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CERTIFICATE OF SERVICE

I, Katherine D. Hodge, the undersigned, hereby certify that I have served the attached PETITIONER'S RESPONSE TO RESPONDENT'S MOTION FOR RECONSIDERATION AND MODIFICATION OF ORDER DATED SEPTEMBER 4, 2014 upon:

Mr. John Therriault
Assistant Clerk of the Board
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via electronic mail on October 1, 2014 and upon:

Mr. Bradley P. Halloran
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by depositing said documents in the United States Mail, postage prepaid, in Springfield, Illinois on October 1, 2014 and upon:

Kathryn A. Pamenter, Esq.
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via facsimile and by depositing said document in the United States Mail, postage prepaid, in Springfield, Illinois on October 1, 2014.

/s/ Katherine D. Hodge
Katherine D. Hodge

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**PETITIONER'S RESPONSE TO RESPONDENT'S MOTION FOR
RECONSIDERATION AND MODIFICATION OF ORDER DATED
SEPTEMBER 4, 2014**

NOW COMES Petitioner, KCBX TERMINALS COMPANY ("KCBX" or "Petitioner"), a North Dakota corporation, by and through its attorneys, HODGE DWYER & DRIVER and QUINN EMANUEL URQUHART SULLIVAN LLP, and for its Response to Respondent's Motion for Reconsideration and Modification of Order Dated September 4, 2014 ("Respondent's Motion for Reconsideration"), states as follows:

I. BACKGROUND

On June 19, 2014, the Illinois Pollution Control Board ("Board") issued its Opinion and Order reversing and remanding the Illinois Environmental Protection Agency's ("Illinois EPA" or "Agency") decision to deny KCBX's July 23, 2013 Request for Revision to its Revised Construction Permit ("Request for Revision"). Opinion and Order, *KCBX Terminals Co. v. Illinois EPA*, PCB 14-110 at 57 (Ill.Pol.Control.Bd. June 19, 2014) (permit appeal hereinafter cited as "PCB 14-110"). The Board found that KCBX successfully demonstrated that Illinois EPA's reasons for denial were insufficient and that the Request for Revision does not demonstrate violations of the provisions of the Illinois Environmental Protection Act ("Act") and Board rules. *Id.*

More than a month later, Illinois EPA had not acted in response to the Board's Order, and on July 28, 2014, KCBX filed a Motion for Reconsideration and Modification asking the Board to direct Illinois EPA to issue the revised construction permit immediately or, in the alternative, to find that the June 19, 2014 Order did not constitute final action. Petitioner's Motion for Reconsideration and Modification, PCB 14-110 (Ill.Pol.Control.Bd. July 28, 2014).

On September 4, 2014, the Board denied KCBX's Motion for Reconsideration. However, on its own motion, the Board modified its June 19, 2014 Order to impose a deadline of Wednesday, October 22, 2014, for Illinois EPA to make its determination on remand. Order at 6, PCB 14-110 (Ill.Pol.Control.Bd. Sep. 4, 2014).

On September 17, 2014, Illinois EPA filed a Motion for Reconsideration arguing, inter alia, that "consistency with the requirements of the Illinois Environmental Protection Act (the "Act") and applicable regulations may require the Illinois EPA to provide notice, conduct a public hearing and allow for public comment before it may issue any permit." Respondent's Motion for Reconsideration at 2, PCB 14-110 (Ill.Pol.Control.Bd. Sep. 17, 2014). Respondent's Motion for Reconsideration then requests the Board to reconsider the deadline for Illinois EPA to issue a determination on remand and audaciously proposes a schedule with a permit issuance date of February 3, 2015, which could be extended under certain circumstances. *Id.* at 2, 6-7.

II. INTRODUCTION

There are several reasons that the Board must deny Respondent's Motion. First, Illinois EPA's argument that there "*may*" be a basis in the Act, Illinois EPA regulations, and Illinois EPA policies to provide public notice of a draft permit, conduct another public hearing, and allow for more public comment (a position with which KCBX disagrees), is not an adequate basis for the Board to reconsider its September 4, 2014 Order. Second, the relief requested is

beyond the scope of the Board's September 4, 2014 Order and would require the Board to reconsider its June 19, 2014 Order. Neither is permissible. Third, Illinois EPA may not reopen the Administrative Record ("Record") on remand in light of the Board's findings that information is not missing from KCBX's Request for Revision. Fourth, Illinois EPA engaged in public outreach during the permit application period. The Record contains a fact sheet and hundreds of pages of public comments, *which the Illinois EPA said it considered in rendering its permit decision*. The Board's precedent governing the permit continuum does not allow "do overs." Illinois EPA is not entitled to engage in additional public outreach and to public notice a draft revised construction permit and reopen the Record, via unilateral fiat. Finally, Illinois EPA's proposed schedule unnecessarily and unreasonably delays issuance of the Revised Construction Permit. The Record is closed. The Board found Illinois EPA's denial reasons to be insufficient, so Illinois EPA has no other alternative but to issue a Revised Construction Permit.

III. ILLINOIS EPA DOES NOT PROVIDE A PROPER BASIS FOR THE BOARD TO RECONSIDER ITS SEPTEMBER 4, 2014 ORDER

The Board's procedural rules provide that "[i]n ruling upon a motion for reconsideration, the Board will consider factors including new evidence, or a change in the law, to conclude that the Board's decision was in error." 35 Ill. Admin. Code § 101.902. A motion for reconsideration may be filed "to bring to the [Board's] attention newly discovered evidence which was not available at the time of the hearing, changes in the law or errors in the [Board's] previous application of existing law." *Citizens Against Regional Landfill v. County Board of Whiteside County*, PCB 92-156 at 2 (Ill.Pol.Control.Bd. Mar. 11, 1993) (citing *Korogluyan v. Chicago Title & Trust Co.*, 213 Ill. App. 3d 622, 627, 572 N.E.2d 1154, 1158 (1st Dist. 1991)). Illinois EPA's Motion sets forth no new evidence, no change in the law, and no errors in the

Board's application of the existing law. Accordingly, Respondent's Motion for Reconsideration must be denied.

First, Illinois EPA introduces no new evidence that could lead to the conclusion that the Board's September 4, 2014 Order was in error. The Board was aware of public comments at the time of the September 4, 2014 Order. Specifically, the Southeast Environmental Task Force ("SETF") filed comments focused on procedural issues related to review of the Request for Revision and public notice of a draft permit. Public Comments of the Southeast Environmental Task Force (PC#1), PCB 14-110 (Ill.Pol.Control.Bd. May 6, 2014). The Board acknowledged SETF's comments and its argument on this point in the Board's June 19, 2014 Order on page 24. Therefore, the issue of public participation is not new.

Second, Illinois EPA does not identify any change in law that could lead to the conclusion that the Board's September 4, 2014 Order was in error. Illinois EPA's Public Participation Regulations, 35 Ill. Admin. Code Part 252, and Illinois EPA's Procedures for Permit and Closure Plan Hearings, 35 Ill. Admin. Code Part 166, have not changed since the Board's June 19, 2014 Order.

Third, Illinois EPA does not identify any errors in the Board's previous application of law. Illinois EPA merely argues that issuance of a Revised Construction Permit *may* invoke these regulations and policies. (As discussed in more detail below, Illinois EPA Public Participation Regulations and Illinois EPA Permit Hearing Procedure Regulations do not act to reopen the Record.) At most, this constitutes a claim that the Board's Order *may* be in error, and that does not provide a proper basis for the Board to reconsider its Order. *See* 35 Ill. Admin. Code § 101.902 (where the Board considers "factors including new evidence, or a change in the law, to conclude that the Board's decision *was* in error") (emphasis added). Illinois EPA does

not point to any new facts or change in law, nor does it allege that the Board's September 4, 2014 Order is erroneous in any respect. Therefore, Illinois EPA does not provide a proper basis for the Board to reconsider its September 4, 2014 Order, and Respondent's Motion for Reconsideration must be denied.

IV. ILLINOIS EPA'S REQUESTED RELIEF IS BEYOND THE SCOPE OF THE BOARD'S SEPTEMBER 4, 2014 ORDER AND MAY NOT BE SOUGHT IN RESPONDENT'S MOTION FOR RECONSIDERATION

Illinois EPA did not file a motion for reconsideration of the Board's June 19, 2014 Order. Therefore, it missed its opportunity to move the Board to expand the scope of its remand to allow it to consider information outside the Record (*i.e.* additional public comments and public hearings).

In its June 19, 2014 Order, the Board found that, contrary to Illinois EPA's Denial Letter, the Request for Revision contained the information Illinois EPA claimed was missing. Order at 51, 53, 54, 57, PCB 14-110 (Ill.Pol.Control.Bd. June 19, 2014). In other words, the application contained all the information necessary for Illinois EPA to make a determination. The Board remanded the matter "for additional consideration of the *information in the application* consistent with the order and with the requirements of the Act and applicable regulations...." Order at 57, PCB 14-110 (Ill.Pol.Control.Bd. June 19, 2014) (emphasis added). These findings and instructions limit the Agency's review to the Record. *See Grigoleit Co. v. Illinois EPA*, PCB 89-184, 191 Ill. ENV LEXIS 1022 (Ill.Pol.Control.Bd. Dec. 6, 1991); *aff'd in part, rev'd in part Grigoleit Co. v. IPCB*, 245 Ill. App. 3d 337, 613 N.E.2d 371 (4th Dist. 1993) (where the Board found that "it is implicit in any remand order that the order is limited to only those facts that were before the Agency when it denied the permit" and "[t]o hold otherwise would allow the Agency, in effect, to conduct a de novo permit review on remand").

Illinois EPA asks the Board to reconsider the October 22, 2014 deadline the Board imposed on Illinois EPA on the Board's own motion in the September 4, 2014 Order. Order at 6-7, PCB 14-110 (Ill.Pol.Control.Bd. Sep. 4, 2014). The Board's Order explains that "it modifies its June 19, 2014 order to include a deadline of Wednesday, October 22, 2014, for the Agency's determination on remand." *Id.* at 6. The Board's deadline is the only new issue raised in the September 4, 2014 Order and, thus, the only topic that may be the subject of a motion for reconsideration of the September 4, 2014 Order. However, Illinois EPA's request is not limited to revisiting the deadline. And the only reason Illinois EPA asks the Board to revisit the deadline is because of its other, untimely arguments. Respondent's Motion for Reconsideration would require the Board to revisit its June 19, 2014 Order where its findings and directive defined the scope of the remand.¹ Again, Illinois EPA chose not to move the Board to reconsider the scope of its remand in its June 19, 2014 Order. Therefore, Illinois EPA's current request is neither appropriate nor timely and must be denied.

V. ILLINOIS EPA MAY NOT REOPEN THE RECORD ON REMAND

The Record in this matter is closed. The Board's findings indicate that the Request for Revision was *not* missing information needed for Illinois EPA to make a determination. The Board did not find any defect in the proceeding that would necessitate reopening the Record. Therefore, Illinois EPA cannot reopen the Record to gather additional information in the form of public comments.

¹ As set forth above, the argument for additional public participation was raised to the Board by the SETF, but the Board chose not to expand the scope of its remand to open the Record to accommodate additional public notice, public hearing, and public comment. Nor did the Board identify any deficiencies in Illinois EPA's public outreach during the permit application review period.

Following a permit decision by Illinois EPA pursuant to Section 39 of the Act, 415 ILCS 5/39(a), Illinois EPA must file its *entire* record of its decision with the Clerk of the Board. See 35 Ill. Admin. Code § 105.212(a). The Board's review of Illinois EPA's decision is limited to information submitted to Illinois EPA during the permit application review period, and the Board will not consider information developed after the Agency's decision. *Alton Packaging Corp. v. IPCB*, 162 Ill. App. 3d 731, 516 N.E.2d 275, 114 Ill. Dec. 120 (5th Dist. Sep. 25, 1987). So, once Illinois EPA makes its determination or the statutory review period has run, the record of its decision is closed.²

Allowing Illinois EPA to reopen the Record here to add additional information would, in essence, allow the Agency a second de novo review. In *Grigoleit Co.*, the Board struck all of Illinois EPA's reasons for denying an operating permit except one and remanded the case to Illinois EPA so the State could elicit information to determine compliance with 35 Ill. Admin. Code § 215.301. *Grigoleit Co. v. Illinois EPA*, PCB 89-184, 1991 Ill. ENV LEXIS 1022 (Ill.Pol.Control.BD. Dec. 6, 1991). After declaring a subsequent denial letter null and void, the Board again remanded the matter to Illinois EPA to elicit information to determine compliance with 35 Ill. Admin. Code § 215.301. *Id.* 4*-5*. Rather than focus solely on the provision that was the subject of the remand, Illinois EPA expressed concern over additional regulatory requirements and attempted to elicit information regarding the company's compliance with these

² Illinois EPA attached SETF's June 26, 2014 letter as evidence that the public has exhibited significant interest in KCBX's South Terminal. Respondent's Motion for Reconsideration at 5. However, this letter was not provided to Illinois EPA during the permit application review period. Therefore, it is not part of the Record. Likewise, the argument in SETF's letter for a public hearing and written comment to provide "up-to-date information" ignores the fact that the Record is closed in this matter. Furthermore, the SETF letter continues to mix unadjudicated claims with the permitting transaction, which is prohibited by Board case law. See *ESG Watts, Inc. v. Illinois EPA*, PCB 92-54 at 5 (Ill.Pol.Control.Bd. Oct. 29, 1992).

additional regulatory sections and again denied the permit. *Id. at* *7. The company filed a motion for sanctions against Illinois EPA. The Board explained:

Although we did not explicitly state that our November 29, 1990 mandate was limited in scope, it is implicit in any remand order that the order is limited to only those facts that were before the Agency when it denied the permit. To hold otherwise would allow the Agency, in effect, to conduct a de novo permit review on remand.

Id. at 7*. The Board struck Illinois EPA's citation to the two regulatory sections in Illinois EPA's denial letter. The Board directed Illinois EPA to issue the permit. *Id. at* 13. Upholding the Board's Order, the appellate court found that Illinois EPA's contention that the Act authorized Illinois EPA to take a "fresh approach" to granting a permit on remand from the Board was without merit. *Grigoleit Co. v. IPCB*, 245 Ill. App. 3d 337, 347, 613 N.E.2d 371, 378 (4th Dist. 1993).

Consistent with this holding, the Board has recognized that there are certain instances where its findings may only require a determination and do not necessitate opening the record. For example, in a pollution control facility siting appeal, the Board found that transcripts were not reasonably available to county board members not present at a hearing. *Ash v. Iroquois County Board*, PCB 87-29 at 11 (Ill.Pol.Control.Bd. Jul. 16, 1987). Therefore, the county board members not present at the hearing could not have "considered the evidence." *Id.* The Board remanded the matter to the county board for an additional vote following consideration of the record and emphasized that no further hearings needed to be held for purposes of complying with its Order. *Id. at* 12. Similarly, here, the Board found, contrary to Illinois EPA's claim, that the Request for Revision contained sufficient information for Illinois EPA to make a determination. Therefore, on remand, the Board has given Illinois EPA clear direction to make a determination on the Record before it.

VI. ILLINOIS EPA HAD THE OPPORTUNITY TO PUBLIC NOTICE THE DRAFT PERMIT DURING THE APPLICATION REVIEW PERIOD AND CANNOT NOW REVISIT ITS DECISION NOT TO DO SO

Illinois EPA requests a revised deadline from the Board because, it argues, issuance of a Revised Construction Permit *may* invoke Public Participation Regulations, Permit Hearing Procedure Regulations, and Illinois EPA's Environmental Justice Policies. However, Illinois EPA had the opportunity to determine – and did, in fact, make a determination – regarding the nature and scope of public participation and whether to provide notice of the draft permit during the original permit application review period.

Illinois EPA issued a fact sheet, held a public meeting, and solicited comments but chose not to publicly notice a draft Revised Construction Permit (even though it had one prepared). The nature and scope of public participation during the permit application review period was not at issue in this appeal. Nor did the Board identify any deficiencies regarding the nature and scope of public outreach chosen by Illinois EPA during the permit application review period. As stated before, the Record is closed. The Board should not and cannot countenance Illinois EPA's belated efforts to revisit its public participation decisions and reopen the Record.

Illinois EPA's Public Participation Regulations apply to "[p]ermits for the construction of emission units of public interest at a source." 35 Ill. Admin. Code § 252.102(a)(g). The Director considers factors to determine whether an emission unit is of public interest to determine whether the Public Participation Regulations apply. 35 Ill. Admin. Code § 252.102(b). In addition, Illinois EPA's Environmental Justice Public Participation Policy states that "Illinois EPA will determine the appropriate outreach, if any, based on, among other considerations, the type of permit, potential impact of the project, type of source, and level of interest." Respondent's Motion for Reconsideration, Exhibit B, PCB 14-110 (Ill.Pol.Control.Bd. Sep. 17, 2014).

During the permit application review period here, the Director apparently determined that these public participation regulations did not apply. Despite the lack of statutory or regulatory authority, Illinois EPA then determined that some level of public outreach was justified under its unpromulgated Environmental Justice Public Participation Policy. Illinois EPA developed a fact sheet describing the Request for Revision. R-124-126. The fact sheet provided the public with an opportunity to submit questions to Illinois EPA. R-126. Illinois EPA even asked residents to fill out complaint logs.³ *Id.* The fact sheet also notified interested citizens of an opportunity for a public meeting, which took place on November 14, 2013, at the Eastside United Methodist Church to “discuss and answer questions about the permit request.” R-125. Illinois EPA accepted complaint forms that it incorporated into the Record and referenced in its Permit Denial.

Although it had the opportunity, Illinois EPA apparently chose not to provide notice of the draft permit itself for comment. *See* R-2039 (e-mail from Illinois EPA attorney Mr. Pressnall to Mr. Dragovich instructing him to “hold off” on sending a draft permit to KCBX). On September 19, 2013, Mr. Dragovich circulated a draft permit among Illinois EPA staff. Apr. 30 Tr. at 199-200; R-650-670. This draft permit was prepared prior to Illinois EPA issuing a fact sheet or holding its environmental justice outreach meeting. R-124-126. And it was prepared nearly four months before the Record closed and the Permit Denial was issued on January 17, 2014. R-1. Illinois EPA started receiving calls from the public about the South Terminal shortly

³ Fact Sheet, R-124-R-126. Actively soliciting complaint logs during a hearing to discuss a permit application appears to violate case law prohibiting enforcement during permitting transactions. *See ESG Watts, Inc. v. Illinois EPA*, PCB 92-54 at 5 (Ill.Pol.Control.Bd. Oct. 29, 1992), *aff'd sub nom. Illinois EPA v. IPCB*, 624 N.E.2d 402 (Ill. App. Ct. 1993).

after August 30, 2013. J. Armitage Dep. Tr. at 77-80. KCBX accommodated Illinois EPA's choice of public involvement by granting three extensions of Illinois EPA's deadline for reviewing the Request for Revision. R-18-R-19, R-73, R-177. Even after the environmental justice outreach meeting, Illinois EPA had the opportunity to public notice the permit since KCBX extended the application review period for more than two additional months.

Illinois EPA thus had multiple opportunities to invoke its Public Participation Regulations and chose not to do so. However, Illinois EPA still afforded the public the opportunity to comment: it conducted a public meeting, it solicited and received public comments, and it considered the public comments. Illinois EPA cannot now ignore the fact that the public was provided opportunity for notice and comment during the permit review period.

VII. ADDITIONAL ENVIRONMENTAL JUSTICE OUTREACH IS NOT AUTHORIZED AT THIS STAGE OF THE PROCEEDING

Illinois EPA argues that its Environmental Justice Policy and Environmental Justice Public Participation Policy apply due to the location of the South Terminal in an environmental justice community. Respondent's Motion for Reconsideration at 5, PCB 14-110 (Ill.Pol.Control.Bd. Sep. 17, 2014). Illinois EPA further asserts that if it does not invoke its Public Participation and Permit Hearing Procedure Regulations, as well as its Environmental Justice Policy and Environmental Justice Public Participation Policy, it "*may*" be subject to an administrative complaint under Title VI of the Civil Rights Act of 1964 and/or be in violation of a settlement agreement between Illinois EPA and USEPA Office of Civil Rights. *Id.* at 5-6.

Illinois EPA has everything it needs in the Record that is necessary to make its determination, and it already provided the opportunity for public participation. Nothing has changed since the Board's June 19, 2014 Order, so Illinois EPA's attempt to raise Environmental

Justice Policies as grounds for further delay, regardless of their legal bases or enforceability, is simply an attempt to avoid making the Board-ordered determination. Also, as described above, Illinois EPA could not be in violation of its Public Participation Regulations since they do not give Illinois EPA authority to reopen the Record at this time.

Furthermore, Illinois EPA's Environmental Justice Policy and Environmental Justice Public Participation Policy do not give Illinois EPA authority beyond its Public Participation Regulations to reopen the Record for additional public input. Illinois EPA Environmental Justice Policies alone do not provide the kind of statutory or regulatory predicate for conducting additional public outreach. Therefore, Illinois EPA's Environmental Justice Policies do not independently provide authority to reopen the Record and solicit additional information. *See States Land Improvement Corp. v. Ill. Environmental Protection Agency*, 231 Ill. App. 3d 842; 596 N.E.2d 1164, 173 Ill. Dec. 285 (4th Dist. 1992) (where the court found that Illinois EPA did not have implied power to enact the regulations creating the State Remediation Action Priority List). To the extent that the Environmental Justice Policies fit within Illinois EPA's existing statutory and regulatory scheme, they may be appropriate guidelines for determining how to apply existing law and regulations. However, they do not confer any additional authority on Illinois EPA to reopen the Record or engage in additional public outreach at this time.

Illinois EPA appears to acknowledge the limits of its authority to implement its Environmental Justice Policy. Illinois EPA links authority for its Environmental Justice Policy and Environmental Justice Public Participation Policy to permitting transactions through the location factor in Illinois EPA's Public Participation Regulations at 35 Ill. Admin. Code § 252.102(b)(4). Respondent's Motion for Reconsideration at 5. Likewise, the Environmental Justice Policy explains that Illinois EPA is committing to acting "to the extent it may do so

legally and practically.” Respondent’s Motion for Reconsideration, Exhibit B - Environmental Justice Policy at 1, PCB 14-110 (Ill.Pol.Control.Bd. Sep. 17, 2014).

To summarize, Illinois EPA policy must fit into the existing legal framework. Additional public outreach at this juncture is not authorized by statute, regulation, or Board case law.

Therefore, Environmental Justice Policies alone cannot justify additional public outreach here.

VIII. ILLINOIS EPA’S REQUESTED SCHEDULE UNREASONABLY AND UNNECESSARILY DELAYS ISSUANCE OF THE REVISED CONSTRUCTION PERMIT

The application review period in this matter spanned 178 days – almost twice the length of the statutorily required 90-day permit application review period. *See* 415 ILCS 5/39(a). KCBX granted Illinois EPA three waivers of its permit review deadline to accommodate, among other things, Illinois EPA’s public outreach. R-18-R-19, R-73, R-177. Illinois EPA had its opportunity to engage the public and **in fact** did so, during the permit application review period. However, that opportunity is no longer available because the Record closed on January 17, 2014. The Illinois EPA now seeks to delay issuance of the permit for more than one year past date of its Denial Letter, and 560 days after KCBX filed its routine Request for Revision. Illinois EPA suggests additional delay may be appropriate still. Respondent’s Motion for Reconsideration at 6-7. Reopening the Record at this juncture would unnecessarily and unfairly delay issuance of the Revised Construction Permit.

IX. SINCE THE RECORD IS CLOSED AND ILLINOIS EPA’S DENIAL REASONS WERE REVERSED, ILLINOIS EPA HAS NO ALTERNATIVE BUT TO ISSUE THE PERMIT

The Record is closed. As with any permit denial, in denying KCBX’s permit application, Illinois EPA was required to specify all its reasons for denial, and it may not raise new reasons for the first time before the Board. *Joliet Sand and Gravel Co. v. Illinois EPA*, PCB 86-159

(Ill.Pol.Control.Bd. Feb. 5, 1987). Likewise, Illinois EPA may not develop additional reasons for denial on remand. *See Grigoleit Co. v. Illinois EPA*, PCB 89-184, 1991 Ill. ENV LEXIS 1022 (Ill.Pol.Control.Bd. Dec. 6, 1991). Therefore, since the Board found that all of Illinois EPA's denial reasons were insufficient, Illinois EPA has no other alternative but to issue the revised construction permit to KCBX.

X. CONCLUSION

The Board must deny Respondent's Motion for Reconsideration. Illinois EPA's argument that the Act and Illinois EPA regulations and unpromulgated policies *may* require Illinois EPA to provide public notice of a draft permit, conduct another public hearing, and allow for additional public comment, is not an adequate basis for the Board to reconsider its September 4, 2014 Order. The relief requested is beyond the scope of the Board's September 4, 2014 Order. Illinois EPA may not reopen the Record on remand in light of the Board's findings that information is not missing from KCBX's Request for Revision. Illinois EPA chose the level of public outreach during the permit application period and is not entitled to engage in additional public outreach and to public notice a draft Revised Construction Permit now. Reopening the Record would unnecessarily and unreasonably delay issuance of the Revised Construction Permit. The Record is closed. Illinois EPA's denial reasons were found to be insufficient, so Illinois EPA has no other alternative but to issue a Revised Construction Permit.

WHEREFORE Petitioner, KCBX TERMINALS COMPANY, for the above stated reasons, respectfully prays that the Illinois Pollution Control Board deny Respondent's Motion

for Reconsideration and Modification of Order Dated September 4, 2014, and grant KCBX
TERMINALS COMPANY all other relief just and proper in the premises.

Respectfully submitted,

KCBX TERMINALS COMPANY,
Petitioner,

Dated: October 1, 2014

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

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