

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

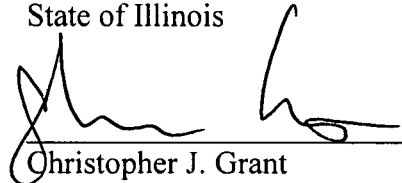
KCBX TERMINALS COMPANY)	
)	
Petitioner,)	
)	PCB No. 11-043
)	
v.)	(Permit Appeal-Air)
)	
)	
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY)	
)	
Respondent.)	

NOTICE OF ELECTRONIC FILING

PLEASE TAKE NOTICE that on the 25th day of February, 2011, the Respondent filed its Response to Motion to Stay, by electronic filing. A True and accurate copy of the document so filed is attached hereto and herewith served upon you.

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By LISA MADIGAN
Attorney General of the
State of Illinois



Christopher J. Grant
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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

RESPONSE TO MOTION TO STAY

Now comes Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY (“Illinois EPA”), by LISA MADIGAN, Attorney General of the State of Illinois, and responds to Petitioners, KCBX TERMINALS COMPANY’s (“KCBX’s”) *Motion to Confirm Automatic Stay of Effectiveness of Federally Enforceable State Operating Permit or, in the alternative, to Request Stay of Effectiveness* (“Motion to Stay”). As further described herein, Respondent does not object to a stay of the FESOP renewal conditions.

While Illinois EPA agrees to the requested stay, it does not agree that the authority cited by Petitioner is either relevant or binding in this case. This is because the earlier Illinois Pollution Control Board (“Board”) cases involved appeals of CAAPP permit conditions¹. While Respondent concedes that the Illinois Administrative Procedure Act (“APA”) controls stays of permit conditions in appeals of FESOP renewals, the same is no longer true for CAAPP Permits. Section 40.2(f) of the Illinois Environmental Protection Act (“Act”), effective June 21, 2010, provides, in pertinent part:

¹ Petitioner cites to *United States Steel Corporation v. Illinois EPA*, PCB 10-23 (Ill.Pol.Control.Bd. Nov. 19, 2009); *In the Matter of: Dynegy Midwest Generation, Inc. (Havana Power Station) v. Illinois EPA*, PCB 06-71 at *7 (Ill.Pol.Control.Bd. Feb. 16, 2006)

- (f) If requested by the applicant, the Board may stay the effectiveness of any final Agency action identified in subsection (a) of this Section during the pendency of the review process. If requested by the applicant the Board shall stay the effectiveness of all the contested conditions of a CAAPP permit. ...Subsection (b) of Section 10-65 of the Illinois Administrative Procedure Act shall not apply to actions under this subsection. 415 ILCS 5/40.2(f) (2010).

Thus, the amendments to Section 40.2 removed certain permits appeal from the automatic stay provisions of the APA, and only applied an 'automatic' stay to *contested* permit conditions, while giving the Board discretion on other provisions of a permit. However, the amended section only mentions CAAPP permits, which are issued under Section 39.5 of the Act, 415 ILCS 5/39.5 (2010).

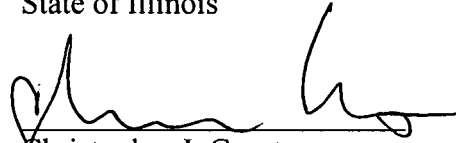
Respondent does not interpret Section 40.2(f) as also applying to FESOP permits, which are issued under Section 39(a) of the Act, 415 ILCS 5/39(a) (2010), and appealed under Section 40 of Act, 415 ILCS 5/40 (2010). Accordingly Respondent agrees that the APA's automatic stay provisions apply to permit conditions related to ongoing activities covered under Illinois EPA operating permits, and that Petitioner's facility continues to be regulated under the previously issued FESOP permit and the relevant construction and operating permits².

² Respondent believes that the question of the scope of the amended Section 40.2 is one of first impression. In the event that the Board, in its discretion, determines that Section 40.2 also incorporates the State's FESOP program, Respondent requests that the Board stay only the contested provisions of the permit at issue.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

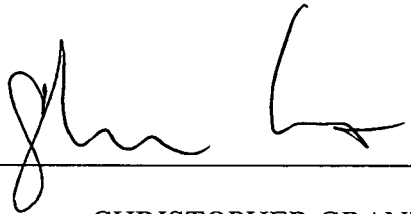
by LISA MADIGAN
Attorney General of the
State of Illinois

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

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CERTIFICATE OF SERVICE

I, CHRISTOPHER GRANT, an attorney, do certify that I caused to be served this 25th day of February, 2011, Respondent's Response to Motion to Stay, and Notice of Filing, upon the persons listed below by placing same in an envelope bearing sufficient postage with the United States Postal Service located at 100 W. Randolph, Chicago, Illinois.

A handwritten signature in black ink, appearing to read "John L.", is written above a horizontal line.

CHRISTOPHER GRANT

Mr. John Therriault
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(by electronic filing)

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KCBX Terminals Company v. Illinois EPA, PCB 11-43