

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

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

(SEE PERSONS ON ATTACHED SERVICE LIST)

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control **PETITIONER'S MOTION TO COMPEL**, a copy of which is herewith served upon you.

Respectfully submitted,

KCBX TERMINALS COMPANY,
Petitioner,

Dated: May 3, 2011

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

Katherine D. Hodge
Edward W. Dwyer
Lauren C. Lurkins
HODGE DWYER & DRIVER
3150 Roland Avenue
Post Office Box 5776
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PETITIONER'S MOTION TO COMPEL

NOW COMES Petitioner, KCBX TERMINALS COMPANY ("KCBX"), a North Dakota corporation, by and through its attorneys, HODGE DWYER & DRIVER, and for its Motion to Compel, states as follows:

1. On December 29, 2010, the Illinois Environmental Protection Agency ("Illinois EPA") issued a Renewed Federally Enforceable State Operating Permit ("Renewed FESOP") to KCBX for KCBX's bulk solids materials terminal located in Chicago, Illinois.
2. On February 1, 2011, KCBX initiated this proceeding by filing with the Illinois Pollution Control Board ("Board") its Petition for Review ("Petition") regarding the Renewed FESOP. Together with the Petition, KCBX filed a Motion to Confirm Automatic Stay of Effectiveness of Federally Enforceable State Operating Permit or, in the Alternative, to Request Stay of Effectiveness.
3. On April 4, 2011, Illinois EPA filed its Record of Decision ("Record") with the Board in this matter.
4. During its review of the Record, KCBX discovered that approximately 45 documents, which were before Illinois EPA when it made its determinations regarding

the Renewed FESOP and, thus, should have been included in the Record, were omitted therefrom. Therefore, on April 28, 2011, KCBX filed with the Board a Motion to Supplement the Record in order to add these documents to the Record. See Petitioner's Motion to Supplement the Record, KCBX Terminals Company v. IEPA (PCB Nos. 10-110 and 11-43) (Ill.Pol.Control.Bd. April 28, 2011).

5. Among the documents Illinois EPA failed to include in the Record, but which were included in KCBX's Motion to Supplement the Record, were the following: 1) the Renewed FESOP itself, which, pursuant to Section 101.512(b)(3) of the Board's rules (as set forth below), is required to be included in the Record; 2) Illinois EPA's June 16, 2010 Project Summary for an Application from KCBX for Renewal of a FESOP, which was attached to Illinois EPA's public notice draft permit; and 3) a September 2, 2010 email from Mr. Terry Steinert at KCBX to Mr. George Kennedy at Illinois EPA forwarding emissions calculations spreadsheets, which, during his discovery and evidence depositions on April 14, 2011, Mr. Kennedy stated he had reviewed in the process of drafting the Renewed FESOP.

6. During the April 14, 2011 discovery and evidence depositions of Mr. Kennedy, Mr. Kennedy referenced additional information which was not included in the Record, including his permit reviewer notes and emissions calculations sheets, and noted that he relied on the same in drafting the Renewed FESOP.

7. Counsel for Illinois EPA has stated that they intend to supplement the Record by providing Mr. Kennedy's permit reviewer notes and emissions calculations

sheets referenced above. To date, however, the Record has not been supplemented with that information.

8. As set forth in Section 105.212(b) of the Board's rules regarding Appeals of Final Decisions of State Agencies, the Record must include the following:

- 1) Any permit application or other request that resulted in the Agency's final decision;
- 2) Correspondence with the petitioner and any documents or materials submitted by the petitioner to the Agency related to the permit application;
- 3) The permit denial letter that conforms to the requirements of Section 39(a) of the Act or the issued permit or other Agency final decision;
- 4) The hearing file of any hearing that may have been held before the Agency, including any transcripts and exhibits; and
- 5) Any other information the Agency relied upon in making its final decision.

35 Ill. Admin. Code § 105.212.

9. Further, in the Board's February 17, 1994 Opinion and Order in the permit appeal of Industrial Salvage, Inc. v. IEPA, PCB Nos. 93-60 and 93-61 (Ill.Pol.Control.Bd. Feb. 17, 1994), the Board stated that it is Illinois EPA's "responsibility to file the complete record that is before it The filing of a partial record places the Board in a difficult situation, causing the Board to be faced with making its decision based upon the incomplete record and pleadings as they stand." Id. at 4. The Board also noted that the petitioner in that matter had not filed a motion to compel the filing of the missing documents. Id. In this case, however, KCBX, in noticing that

Illinois EPA has omitted information from the Record, has filed this Motion to Compel so that the Board may make its decision based on a complete Record.

10. The information referenced by Mr. Kennedy during his depositions, which includes his permit reviewer notes and emissions calculations sheets, constitutes information which Illinois EPA relied upon in making its final permit decisions, and thus, should have been included in the Record filed by Illinois EPA in this matter. Further, the information is relevant and material in this matter. The information, however, was not produced by Illinois EPA as part of the Record, was not produced by Illinois EPA at deposition, was not produced as part of Illinois EPA's discovery responses, and has not been produced to date, despite several requests made by counsel for KCBX for the information. KCBX is materially prejudiced by the omission of this information from the Record, and Illinois EPA's continued delay in supplementing the Record.

WHEREFORE Petitioner, KCBX TERMINALS COMPANY, for the above-stated reasons, respectfully moves the Hearing Officer to grant this Motion to Compel ILLINOIS ENVIRONMENTAL PROTECTION AGENCY to supplement the Record of Decision in this matter to include the information referenced herein, specifically Mr. George Kennedy's permit reviewer notes and emissions calculations sheets, and award KCBX TERMINALS COMPANY all other relief just and proper in the premises.

Respectfully submitted,

KCBX TERMINALS COMPANY
Petitioner,

Dated: May 3, 2011

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

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KCBX:003/Fil/PCB 10-110 and PCB 11-43 Consolidated/Motion to Compel

CERTIFICATE OF SERVICE

I, Katherine D. Hodge, the undersigned, hereby certify that I have served the attached PETITIONER'S MOTION TO COMPEL upon:

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

via electronic mail on May 3, 2011 and upon:

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

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

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

by depositing said documents in the United States Mail, postage prepaid, in Springfield, Illinois on May 3, 2011.

/s/ Katherine D. Hodge
Katherine D. Hodge