

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 KCBX Terminals Company's **RESPONSE TO RESPONDENT'S MOTION TO STRIKE (A) PARAGRAPH 51 AND EXHIBIT 30, AND (B) PARAGRAPHS 56-57 OF KCBX TERMINALS COMPANY'S PETITION FOR REVIEW AND FOR RELATED RELIEF**, a copy of which are herewith served upon you.

Respectfully submitted,

KCBX TERMINALS COMPANY,
Petitioner,

Dated: April 4, 2014

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

Katherine D. Hodge
Edward W. Dwyer
Matthew C. Read
HODGE DWYER & DRIVER
3150 Roland Avenue
Post Office Box 5776
Springfield, Illinois 62705-5776
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CERTIFICATE OF SERVICE

I, Katherine D. Hodge, the undersigned, hereby certify that I have served the attached KCBX Terminals Company's RESPONSE TO RESPONDENT'S MOTION TO STRIKE (A) PARAGRAPH 51 AND EXHIBIT 30, AND (B) PARAGRAPHS 56-57 OF KCBX TERMINALS COMPANY'S PETITION FOR REVIEW AND FOR RELATED RELIEF 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 April 4, 2014 and upon:

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

Division of Legal Counsel
Illinois Environmental Protection
Agency
1021 North Grand Avenue
Post Office Box 19276
Springfield, Illinois 62794-9276

by depositing said documents in the United States Mail, postage prepaid, in Springfield, Illinois on April 4, 2014 and upon:

Kathryn A. Pamenter, Esq.
Christopher J. Grant, Esq.
Assistant Attorney General
Office of the Attorney General
69 West Washington Street, Suite 1800
Chicago, Illinois 60602

via facsimile and by depositing said document in the United States Mail, postage prepaid, in Springfield, Illinois on April 4, 2014.

/s/ Katherine D. Hodge
Katherine D. Hodge

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RESPONSE TO RESPONDENT’S MOTION TO STRIKE (A) PARAGRAPH 51 AND EXHIBIT 30, AND (B) PARAGRAPHS 56-57 OF KCBX TERMINALS COMPANY’S PETITION FOR REVIEW AND FOR RELATED RELIEF

NOW COMES Petitioner, KCBX TERMINALS COMPANY (“KCBX”), a North Dakota corporation, by and through its attorneys, HODGE DWYER & DRIVER (“HD&D”), pursuant to 35 Ill. Admin. Code § 101.500(d), and for its Response to Respondent’s Motion to Strike (A) Paragraph 51 and Exhibit 30, and (B) Paragraphs 56-57 of KCBX Terminals Company's Petition for Review and for Related Relief (“Motion to Strike”), states as follows:

1. As background, KCBX filed its Petition for Review on February 21, 2014. The Illinois Environmental Protection Agency (“Illinois EPA”) now moves to strike three paragraphs and one exhibit from the Petition for Review. KCBX does not contest Illinois EPA’s Motion to Strike Paragraph 51 and Exhibit 30.

2. KCBX does contest Illinois EPA’s Motion to Strike Paragraphs 56 and 57 of the Petition for Review, however. In those paragraphs, KCBX addresses the fact that the September 2013 reports on which Illinois EPA relied to deny the Request for Revision reference KCBX’s fugitive particulate operating program (“FPOP”) in effect at

the time the Request for Revision was filed (“Initial FPOP”).¹ That Initial FPOP appears in the Administrative Record at R-000059 – R-000061.

3. In support of its Motion to Strike, Illinois EPA first notes that the Illinois Attorney General’s Office filed a Complaint for Injunctive Relief and Civil Penalties (“Circuit Court Complaint”) against KCBX, Count II of which relates to the Initial FPOP, and that the Circuit Court Complaint is still pending. See Motion to Strike, ¶2. Illinois EPA includes that Complaint in the Administrative Record. See PCB 14-110 at R-000103 – R-000118 (Ill.Pol.Control.Bd. Mar. 24, 2014).

4. Second, Illinois EPA asserts that the Permit Denial does not cite to Sections 212.310 or 212.312 of the Illinois Pollution Control Board’s (“Board”) fugitive particulate matter regulations, 35 Ill. Admin. Code §§ 212.310 and 212.312, “which set forth the minimum requirements for operating programs and the requirement to submit timely amendments to the Illinois EPA for review, respectively.” Motion to Strike, ¶2.

5. Based on these points, Illinois EPA argues that Paragraphs 56 and 57 should be stricken, and “no discovery or trial testimony should be permitted on the subject matter.” *Id.*

6. As a clarification, the Circuit Court Complaint relates to the Initial FPOP, which was later revised during the permit review period. The current FPOP appears in the Administrative Record at R-000150 – R-000163 (“Revised FPOP”). Notably, Illinois EPA does not attempt to strike the paragraph in KCBX’s Petition for Review related to the Revised FPOP. See Petition for Review, ¶58. It is our understanding that Illinois

¹ Contrary to Illinois EPA’s Motion to Strike, KCBX did not “raise[] alleged deficiencies” in its FPOP. See Motion to Strike, ¶2. Instead, Paragraphs 56 and 57 refer to allegations in a report documenting Illinois EPA’s September 11 and 13, 2013 inspections (“Sept. Inspection Report”) regarding the Initial FPOP.

EPA's Motion to Strike is limited to the paragraphs discussing the allegations in the Sept. Inspection Report regarding the Initial FPOP.

7. Illinois EPA's Motion to Strike appears to suggest a conflict between the enforcement action and the present permit appeal with regard to the Initial FPOP. In addition, Illinois EPA appears to suggest that the Initial FPOP is not relevant to this permit appeal.

8. There is no conflict, as 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 Illinois EPA when assessing the Request for Revision.

9. Illinois EPA 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.

10. In fact, there is no conflict between the Circuit Court Complaint and this permit appeal with regard to the Initial FPOP. The 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. This 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 Initial FPOP, were sufficient to justify that denial. Thus, no reason exists to strike Paragraphs 56 and 57 of the Petition for Review.

11. Further, in its Permit Denial, Illinois EPA claims that Section 9 of the Illinois Environmental Protection Act, 415 ILCS 5/9, and Section 212.301 of the Board's Regulations, 35 Ill. Admin. Code § 212.301, might be violated by the issuance of the permit.

12. Section 212.301 prohibits causing or allowing "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."

13. FPOPs describe, among other things, best management practices used to comply with fugitive particulate matter regulations in 35 Ill. Admin. Code Part 212, Subpart K, including Section 212.301. *See* 35 Ill. Admin. Code § 212.310(e). Thus, FPOPs describe activities that are designed to achieve compliance with Section 212.301, a subject that is at issue in this permit appeal as described above.

14. In addition, Illinois EPA filed KCBX's Revised FPOP for the South Facility as part of the administrative record. *See* Administrative Record, PCB 14-110 at R-000150 – R-000163 (Ill.Pol.Control.Bd. Mar. 24, 2014). Likewise, KCBX's Initial FPOP also appears in the record. *See id.* at R-000116-R-000118. Such an inclusion in the record is an acknowledgment that Illinois EPA considered the FPOPs when making its decision to issue the Permit Denial.

15. Based upon the foregoing, Paragraphs 56-57 of the Petition for Review must not be stricken and discovery or trial testimony related to the FPOP must be permitted.

WHEREFORE Petitioner, KCBX TERMINALS COMPANY, for the above stated reasons, respectfully requests that the Illinois Pollution Control Board consider KCBX's Response to Respondent's Motion to Strike (A) Paragraph 51 and Exhibit 30, and (B) Paragraphs 56-57 of KCBX Terminals Company's Petition for Review and for Related Relief, and deny Illinois EPA's Motion to Strike Paragraphs 56-57 of KCBX Terminals Company's Petition for Review and for Related Relief, and that the Board award KCBX TERMINALS COMPANY all other relief just and proper in the premises.

Respectfully submitted,

KCBX TERMINALS COMPANY,
Petitioner,

Dated: April 4, 2014

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

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