

ILLINOIS POLLUTION CONTROL BOARD
MARCH 25, 2014

KCBX TERMINALS COMPANY,)
)
 Petitioner,)
)
 vs) No. PCB 14-110
) (Permit
ILLINOIS ENVIRONMENTAL) Appeal-Air)
PROTECTION AGENCY,)
)
 Respondent.)

REPORT OF THE PROCEEDINGS had at the hearing on a motion of the above-entitled cause before the Honorable BRADLEY HALLORAN, Hearing Officer, Illinois Pollution Control Board, 100 West Randolph Street, Room 9-040, Chicago, Illinois, on the 1st day of May, 2014, at the hour of 8:45 a.m.

May 1, 2014

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I N D E X

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1 HEARING OFFICER HALLORAN: Good
2 morning, all. My name is Bradley Halloran. I'm
3 the Hearing Officer with the Pollution Control
4 Board. I'm also assigned to this matter entitled
5 KCBX Terminals Company, petitioner, versus IEPA,
6 respondent.

7 Our Docket Number is PCB 14-110.
8 This matter has been continued on record from
9 yesterday April 30th. Today is May 1st
10 approximately 8:45 a.m.

11 The state, the Agency, is in
12 their case in chief. I believe they're ready to
13 call their second witness.

14 MR. GRANT: Yes. Mr. Halloran, we
15 call Mr. Robert Bernoteit.

16 HEARING OFFICER HALLORAN: Thank
17 you, Mr. Grant. Just step up here. I do want to
18 note for the record I'm pleased to announce we
19 have two members of the Board here; Member
20 Zalewski and Member O'Leary.

21 Please raise your right hand and
22 the court reporter will swear you in.

23

24

1 WHEREUPON:

2 ROBERT BERNOTEIT

3 called as a witness herein, having been first duly
4 sworn, deposeseth and saith as follows:

5 D I R E C T E X A M I N A T I O N

6 BY MR. GRANT

7 Q. Mr. Bernoteit, where are you
8 employed?

9 A. I'm currently employed with the
10 Illinois EPA in Springfield, Illinois.

11 Q. What is your current position?

12 A. I am the unit manager for the state
13 and FESOP unit.

14 Q. How long have you been employed with
15 Illinois EPA?

16 A. It will be 22 years today.

17 Q. Have you worked in the Bureau of Air
18 permit section for that entire period?

19 A. Yes, I have.

20 Q. What was your first job with the
21 permit section?

22 A. I was an Environmental Protection
23 Engineer I assigned to the state.

24 Q. What was your responsibility as an

1 **Environmental Protection Engineer I?**

2 A. It was to review permit applications
3 for both state construction and state operating
4 permits.

5 **Q. And what is your position or what**
6 **are your responsibilities right now?**

7 A. Right now my responsibilities are to
8 assign incoming applications for construction
9 permits and operating permits for sources that
10 wish to obtain Federally Enforceable State
11 Operating Permits.

12 **Q. And are you familiar with the**
13 **provisions of the Illinois Environmental**
14 **Protection Act and the Pollution Control Board**
15 **regulations pertaining to air pollution permits**
16 **and air pollution regulations?**

17 A. Yes.

18 **Q. Okay. Can you give us a little**
19 **background on your education?**

20 A. I graduated from the University of
21 Missouri at Rolla in '91 with a bachelors of
22 science in mechanical engineering. I've taken a
23 graduate level course in air pollution at the
24 University of Illinois, Urbana-Champaign and 22

1 years of experience at the Illinois EPA.

2 **Q. What role -- are you familiar with**
3 **the permit application at issue in this case?**

4 A. Yes, I am.

5 **Q. What role have you played in this**
6 **permit application?**

7 A. With respect to the application my
8 involvement really did not begin much before the
9 beginning of December in 2013. However, I did
10 attend one meeting with KCBX in August of 2013
11 where the application was discussed and then I was
12 aware of some things going on with the application
13 throughout the Fall.

14 **Q. Okay. Did you participate in the**
15 **final decision in this permit?**

16 A. Yes, I did.

17 **Q. I wonder if you can turn to page one**
18 **in the record. Do you see page one?**

19 A. Yes.

20 **Q. Is this the permit denial that was**
21 **issued by Illinois EPA on January 17th, 2014?**

22 MR. SWEDLOW: I'll object as
23 leading.

24 HEARING OFFICER HALLORAN: I'm

1 sorry. Repeat the question, please.

2 (Whereupon, the record was read
3 as requested.)

4 MR. SWEDLOW: If the witness is
5 going to say this is his document, then he should
6 ask the witness what is the document.

7 HEARING OFFICER HALLORAN:
8 Overruled. You may proceed, Mr. Grant.

9 BY MR. GRANT:

10 Q. Can you answer the question?

11 A. Yes.

12 Q. Are you familiar with this denial?

13 A. Yes, I am.

14 Q. Did you draft this denial?

15 A. Yes, I did.

16 Q. And are the reasons for denial
17 listed in this permit denial letter?

18 A. Yes, they are.

19 Q. Okay. Are you familiar with
20 Illinois Pollution Control Board regulations at
21 201.152, 201.160(a) and 212.321?

22 A. Yes, I am.

23 Q. Generally, what is 201.152?

24 A. 201.152 spells the minimum

1 information that is required of construction
2 permit applications.

3 **Q. As far as 212.321?**

4 A. That is commonly referred to as the
5 processed weight rule that restricts particulate
6 matter emissions.

7 **Q. What information would you in your
8 role at Illinois EPA want to see to determine
9 whether new emission sources would not cause a
10 violation of Section 201.152?**

11 A. We would generally require
12 information about at a minimum where the new
13 emission unit was going to be placed at the
14 facility. We would want to know where in the
15 process at the source that the new emission unit
16 was going to be placed, the function of the
17 emission unit at the source, we would want to know
18 the amount of material that is going through or
19 being processed by the new piece of equipment and
20 we would certainly want to know an estimation of
21 the emissions from that new emission unit.

22 **Q. Okay.**

23 A. In addition, if there was going to
24 be any air pollution control equipment associated

1 with that new unit, we would want to know
2 information on how the emissions from that unit
3 were to be controlled.

4 **Q. And let me ask you a similar**
5 **question about 212.321. What information would**
6 **you want to see to determine whether new emission**
7 **sources would not cause a violation of 212.321?**

8 A. Certainly we would want to know the
9 emissions coming from the new unit and then we
10 would also want to know the amount of material
11 that is going through the unit so we can input
12 that information into the equation presented in
13 212.321.

14 **Q. If you turn to -- let me give you**
15 **the page number here. Can you turn to page 130 in**
16 **the record. Do you recognize this document?**

17 A. Yes.

18 **Q. And what is the document?**

19 A. It is an April 18th, 2013,
20 construction permit for KCBX Terminals.

21 **Q. And can you tell me the address of**
22 **the facility that the permit covers?**

23 A. It is 10730 South Burley Avenue in
24 Chicago.

1 **Q. And can you turn to page 140. And**
2 **specifically to paragraph (c)1 up at the top of**
3 **the page.**

4 A. Okay.

5 **Q. Do you see the limits for material**
6 **throughput?**

7 A. Yes.

8 **Q. And do you see the limits for tons**
9 **per month and tons per year?**

10 A. Yes.

11 **Q. Do you know how these numbers are**
12 **chosen?**

13 A. The applicant chose those numbers to
14 restrict their annual emissions below. In this
15 case, PSD thresholds.

16 **Q. And would PSD thresholds, if they**
17 **were exceeded, trigger a new set of regulations?**

18 A. Yes, they would. They would trigger
19 BACT, which is Best Available Control Technology.

20 **Q. Are you aware -- speaking of the**
21 **application that was denied on January 17th, are**
22 **you aware that KCBX was not seeking to exceed or**
23 **not seeking to increase their monthly or annual**
24 **material throughput?**

1 A. Yes, I was aware of that.

2 **Q. Does that affect the information**
3 **that you would need to evaluate the new permit**
4 **application in this case?**

5 A. That is certainly a piece of the
6 information that we ask for in applications, but
7 it is not the complete set of information that we
8 would need.

9 **Q. Okay.**

10 A. It is certainly not -- would not be
11 the information that we would need to assess
12 compliance with the applicable rules.

13 **Q. Okay. And, I mean, is it the**
14 **information that you would need, for example, to**
15 **assess or to evaluate compliance with 212.321?**

16 A. You mean the monthly and annual
17 limits?

18 **Q. Yes.**

19 A. There is no way to tell whether a
20 unit would comply with 212.321 based solely on
21 monthly or annual production limits.

22 **Q. In this permit application, did KCBX**
23 **provide sufficient information to demonstrate that**
24 **the installation of 12 new emission units at the**

1 **KCBX site would not cause a violation of 212.321?**

2 A. There was no information provided
3 that we could use to determine that.

4 **Q. Okay. Do you believe that KCBX's**
5 **permit application, that is the application that**
6 **is at issue in this case, satisfies the**
7 **requirements of 201.152?**

8 A. No.

9 **Q. I'm going to ask you to turn to page**
10 **186. Specifically, pages 186 through 204.**

11 A. Okay.

12 **Q. Do you recognize that document?**

13 A. This looks like those pages where
14 what I believe was submitted by KCBX in July of
15 2013 to the best of my recollection.

16 **Q. Okay. Thank you. What type of**
17 **permit is being sought in this application?**

18 A. It appears that they are requesting
19 to revise a previously issued construction permit.

20 **Q. Does it seek to add emission**
21 **sources?**

22 A. Yes. Emission units.

23 **Q. I'm sorry. And based on your**
24 **knowledge of the regulations, would you consider**

1 **these to be new emission units at the south**
2 **facility?**

3 A. Yes.

4 **Q. If you look to page 196 and look to**
5 **the box labeled material usage information, do you**
6 **see that?**

7 A. Yes.

8 **Q. Is information supplied in this**
9 **section important in reviewing an application for**
10 **compliance with these regulations?**

11 A. Yes. Normally, an applicant would
12 provide their process rate information on an
13 hourly basis and we would use that to determine
14 compliance with 212.321.

15 **Q. Why is raw material information for**
16 **new sources important?**

17 A. It is important to gauge the size of
18 the emission unit and we relate that to the
19 emissions from the emission unit. It also is as
20 I've stated necessary to determine compliance with
21 212.321.

22 **Q. Why are maximum rates for new**
23 **sources important and specifically why are maximum**
24 **pounds per hour rates important for evaluating**

1 **permit applications?**

2 A. We normally would presume that is
3 the worst case for emissions is when the equipment
4 is running at its maximum or its capacity.

5 **Q. Can you make a determination for**
6 **compliance with these regulations with information**
7 **from a permit application that does not cover**
8 **these sources?**

9 A. No, that would not be possible.

10 **Q. Can you make a determination on**
11 **compliance without specific information on the**
12 **emission units to be installed?**

13 A. No.

14 **Q. Does page 196 -- does this permit**
15 **application specifically identify the raw**
16 **materials or maximum rates for the new equipment?**

17 A. No, it refers to a table in an
18 initial application, but to my knowledge I do not
19 know what initial application is referred to here.

20 **Q. Okay. And you're saying that as you**
21 **sit here today?**

22 A. Not as I sit here today. It has
23 been discussed -- it has been discussed what
24 tables and where those were located, but I don't

1 know how we could have found those in an initial
2 application. It was a subsequent application to
3 the initial application for this site.

4 **Q. And when you say it's been**
5 **discussed, you mean within Illinois EPA?**

6 A. Within Illinois EPA and with
7 counsel.

8 **Q. You were at the meeting you said on**
9 **August 27th, correct --**

10 A. Yes.

11 **Q. -- of 2013?**

12 A. Yes.

13 **Q. Did KCBX during that meeting**
14 **identify what they meant by the initial**
15 **application?**

16 A. No.

17 **Q. Are you familiar with the Wells**
18 **letter response that was sent by KCBX's counsel to**
19 **Illinois EPA on January 13th, 2014?**

20 A. I have read the letter, yes.

21 **Q. To the best of your recollection,**
22 **does that letter identify what the initial**
23 **application that is referred to in this table was?**

24 A. To the best of my recollection, no,

1 it did not.

2 Q. Okay. To the best of your
3 recollection, at any time between January 23rd,
4 2013, and January 17th, 2014, did KCBX ever notify
5 the permit section as to the identity of the
6 initial application that is referred to in this
7 table?

8 A. No, it did not.

9 Q. I'm sorry. Just to correct the
10 record. Apparently I said January 23rd. I meant
11 July 23rd, 2013, through January 17th, 2014. So
12 same question during that period?

13 A. Yes.

14 Q. Did they identify to the permit
15 section what they meant by initial application?

16 A. During the period in which the
17 application was under review, no, that information
18 was not provided.

19 Q. As you sit here today, and I'm
20 talking specifically about the south site, do you
21 know when the first application for that site was
22 submitted to Illinois EPA by any party?

23 A. The first that I recall any
24 applications for this site was in 2007. I think

1 there might have been permits issued in --
2 submitted in 2003 or 2004 by another company, but
3 I don't recall any involvement that my unit had
4 prior to 2007.

5 **Q. Okay. Would an application --**
6 **Strike that. I'm going to ask you to turn to page**
7 **564 and I'm talking about 564 to 623.**

8 A. Okay.

9 **Q. Do you recognize this document?**

10 A. It appears to be an application
11 for -- actually, it says application for -- no.
12 Construction permit application for a FESOP source
13 for DTE Chicago Fuels Terminal, which was located
14 at the same address as KCBX presently operates.

15 **Q. Is it possible that this permit**
16 **application is the application that KCBX refers to**
17 **as the initial application?**

18 A. It may be possible, yes.

19 **Q. Okay.**

20 A. But it is not the initial
21 application that we received under this
22 application number.

23 **Q. Okay. If you can turn to page 567**
24 **and if you can look at the third paragraph. Can**

1 **you tell what this permit was seeking to add or to**
2 **construct?**

3 A. Yes, it states that DTE proposes to
4 construct four conveyors, 14 storage piles, one
5 100-horsepower air compressor and five
6 15-horsepower light standards.

7 **Q. Does the narrative make any**
8 **reference to ten new conveyors, portable**
9 **conveyors, stacker and a box hopper?**

10 A. No.

11 **Q. If you can turn to pages 602 to 608.**
12 **If you can look through those documents, please?**

13 A. Okay.

14 **Q. And do pages 602 to 608 contain what**
15 **are listed as tables five and table six?**

16 A. Yes. These are labeled table five
17 and table six.

18 **Q. Is it possible that these are the**
19 **tables referred to in the KCBX permit application**
20 **that is at issue in this case?**

21 A. It may be possible, yes.

22 **Q. Did KCBX ever provide information to**
23 **the permit section indicating that these are the**
24 **tables that are referred to in its application?**

1 A. To my knowledge, no.

2 **Q. If you can look through these and my**
3 **question is do these tables, tables five and six,**
4 **contain any information about the ten portable**
5 **conveyors, box hopper and stacker that KCBX was**
6 **seeking to add to the south site?**

7 A. No. And I would not expect that
8 these tables would contain that information
9 because this was an application submitted by a
10 different company almost a year in advance to the
11 application that we had under review last Fall.

12 **Q. Okay. Is the type of information**
13 **that is provided in tables five and six important**
14 **for determining compliance with 212.321 and**
15 **201.152?**

16 A. Well, in my opinion, the information
17 in the tables would be a good example of what we
18 would seek to determine emissions and to assess
19 whether units would comply with Section 212.321.

20 **Q. If you can turn to page 199. And**
21 **look at boxes 31, 32. Thirty-one starts**
22 **explanation of how initial compliance is to be or**
23 **was previously demonstrated, do you see that?**

24 A. Yes.

1 Q. And do you see the response in the
2 application "See narrative section one in initial
3 application"?

4 A. Yes.

5 Q. And box 32 explanation of how
6 ongoing compliance will be demonstrated?

7 A. Yes, I see it.

8 Q. And the response in the application
9 is "See narrative section one in initial
10 application"?

11 A. Okay.

12 Q. Do you see that?

13 A. Yes.

14 Q. If you can turn back to page 567.
15 Is it possible that page 567 is the narrative
16 section one referred to on page 199 responses in
17 boxes 31 and 32?

18 A. Yes.

19 Q. With regard to the ten new portable
20 conveyors, stacker and box hopper sought to be
21 installed by KCBX in this permit application, does
22 the information on page 567 provide sufficient
23 information to explain how initial compliance
24 would be demonstrated or how ongoing compliance

1 **would be demonstrated?**

2 A. It certainly provides how DTE was
3 proposing to demonstrate compliance with the
4 emission units in their application. Again,
5 because we did not know what initial application
6 KCBX referred to we didn't understand that this
7 was what they were referring to.

8 Q. If I ask you to turn to page 192.
9 If you can look to box 39 down towards the bottom
10 of the page.

11 A. Okay.

12 Q. Box 39 says "Does the application
13 include process flow diagrams for the project
14 showing new and modified emission units and
15 control equipment and related existing equipment
16 and their relationship," and do you see where it
17 is checked yes?

18 A. Yes.

19 Q. Was a process flow diagram included
20 in the July 23rd, 2013, permit application?

21 A. No.

22 Q. Can I direct you to page 590. Do
23 you see the document on 590 is labeled conveyor
24 transfer points process flow diagram?

1 A. Yes.

2 **Q. Is it possible that page 590 is the**
3 **process flow diagram that is referred to in box 38**
4 **on page 192 -- Strike that. Box 39 on page 192?**

5 A. I really couldn't tell. You know, I
6 guess anything is possible, but there was no
7 reference in box 38 to any previously submitted
8 flow diagram and while this flow diagram may have
9 met the letter of the regulations in 201.152 it
10 didn't really provide me with much information.

11 **Q. Okay. And I think going back to the**
12 **first page that this particular permit application**
13 **was submitted in 2012, is that correct?**

14 A. The one for DTE?

15 **Q. Yes.**

16 A. Yes.

17 **Q. And in 2012 there was no request to**
18 **add the ten new box hoppers -- or ten new portable**
19 **conveyors, box hopper and stacker that KCBX is**
20 **seeking to add in this construction permit?**

21 A. No, DTE did not request to add that
22 equipment for KCBX.

23 **Q. Okay. During the period from July**
24 **23rd, 2013, through January 17th, 2014, did KCBX**

1 ever supplement the process flow diagram with a
2 diagram that shows the location or
3 interrelationship of the proposed new emission
4 sources with existing emission sources?

5 A. To my recollection, the permit
6 section never received any of that.

7 Q. You're familiar with the Wells
8 letter response that was submitted on January
9 13th, 2014?

10 A. Yes.

11 Q. Was there any process flow diagram
12 or information provided along with that Wells
13 letter response?

14 A. I don't recall seeing one.

15 Q. Do you recall a construction permit
16 application for a fluid coke trial at the KCBX
17 north facility?

18 A. Yes.

19 Q. Do you remember when that was?

20 A. I believe it was late in 2009. I'd
21 say November or December.

22 Q. Did the initial application provide
23 sufficient information to demonstrate compliance
24 with the applicable regulations?

1 A. No, it did not.

2 MR. SWEDLOW: I object. I don't
3 know what this is referring to. I actually don't
4 even know what fluid coke is and if it is not in
5 the record, I don't even know how I can respond to
6 it because it relates to a different facility than
7 the permit at issue.

8 HEARING OFFICER HALLORAN: We might
9 find out. Objection overruled. Mr. Grant, can
10 you tie that in?

11 MR. GRANT: Yes. Should I continue
12 or --

13 HEARING OFFICER HALLORAN: Sure.

14 MR. GRANT: -- respond to it?

15 BY MR. GRANT:

16 **Q. What information was missing from**
17 **that permit application?**

18 A. That application did not address
19 which emission units were involved in this trial.
20 It did not provide any information on processed
21 weight rate information and it did not provide
22 emissions information. It did not provide any
23 maps or diagrams where this trial was to occur.

24 MR. SWEDLOW: Mr. Hearing Officer, I

1 don't know what is being referred to now.

2 HEARING OFFICER HALLORAN: Sir, I'm
3 not done with, Mr. Grant. I appreciate your
4 objection.

5 MR. SWEDLOW: It was another
6 question answered so I wanted to get my --

7 MR. GRANT: What is the objection?

8 MR. SWEDLOW: My objection is that
9 it is not only irrelevant, but it is not part of
10 the record so I have no way to cross examine that.

11 HEARING OFFICER HALLORAN: I was
12 just going to ask Mr. Grant that and your
13 objection is on the record. Mr. Grant, where are
14 we going with this?

15 MR. GRANT: We're not talking about
16 a document in the record. We're talking about his
17 knowledge of the previous experiences with KCBX
18 and the types of information that are required to
19 be submitted to constitute a valid, grantable
20 permit application.

21 HEARING OFFICER HALLORAN: I think
22 that's a little far upfield. I will sustain
23 Mr. Swedlow's objection.

24 MR. GRANT: Just to go further. I'm

1 not trying to argue after the finding, but this
2 goes directly to KCBX's knowledge of what was
3 required by Illinois EPA for them to find that it
4 was in compliance with 212.321, which is directly
5 at issue in this case and 201.152, which is
6 directly at issue in this case. It shows KCBX's
7 knowledge of what was required and we'll continue
8 to go onto show that it was not provided in this
9 application.

10 HEARING OFFICER HALLORAN: It's not
11 in the record so I'm not going to allow it.

12 MR. GRANT: I'm not trying to put a
13 document in the record.

14 HEARING OFFICER HALLORAN: You're
15 asking about a document that is not in the record.
16 Mr. Swedlow has no way to respond properly. I
17 think it is outside the scope. I really do.

18 MR. GRANT: All right.

19 BY MR. GRANT:

20 **Q. Have you ever submitted a notice of**
21 **incompleteness to Illinois EPA or -- I'm sorry.**
22 **From Illinois EPA to KCBX?**

23 A. Yes, I have issued a notice of
24 incompleteness to KCBX.

1 **Q. And did the notice of incompleteness**
2 **list the information that you believed was missing**
3 **from the permit application?**

4 A. Yes.

5 **Q. And was that sent to Mr. Terry**
6 **Steinert?**

7 A. I don't recall who was addressed in
8 the underlying.

9 **Q. In the underlying permit application**
10 **where the notice of incompleteness was submitted,**
11 **did you have dealings with Mr. Terry Steinert?**

12 MR. SWEDLOW: Same objection. We're
13 just talking about this other permit application
14 that is also not in the record in more abstract
15 terms. It is the exact same testimony. He is
16 just taking out that reference.

17 MR. GRANT: There has been a lot of
18 testimony in this case about notice of
19 incompleteness and yesterday Mr. Kolaz on the
20 stand testified that Illinois EPA should have sent
21 a notice of incompleteness. Why was no notice of
22 incompleteness submitted? It is directly relevant
23 to the testimony in this case.

24 HEARING OFFICER HALLORAN: I still

1 find it outside the scope. So I will sustain
2 Mr. Swedlow's objection. I don't think it is
3 really relevant.

4 MR. GRANT: Can I have one second?

5 BY MR. GRANT:

6 Q. Mr. Bernoteit, you testified that
7 you were at a meeting on August 27th, 2013,
8 related to this case, correct?

9 A. Yes.

10 Q. And can you tell me what the purpose
11 of that meeting was?

12 A. There were multiple topics
13 discussed. One of which involved relation of the
14 north and south facilities and how they were to be
15 permitted, what sort of operating permit KCBX was
16 going to seek in the future to operate both
17 sources. There was some talk about some of the
18 upgrades that KCBX was doing at their south plant.
19 There was some discussion about the processing of
20 the application. We talked about environmental
21 justice outreach and I believe one of the things
22 that Mr. Dragovich asked was he was asking for
23 help on the application to Mr. Steinert. He was
24 wanting more information concerning the equipment

1 addressed in the application.

2 Q. When you say by the application, you
3 mean the application in this case?

4 A. Yes.

5 Q. Are you familiar with the notice of
6 incompleteness procedure?

7 A. Yes, I am.

8 Q. When does a notice of incompleteness
9 need to be sent out?

10 A. It needs to be sent out within 30
11 days of the Agency receiving an application.

12 Q. And this application was -- the
13 application in this case was submitted on July
14 23rd, 2013, is that correct?

15 A. Yes.

16 Q. If you were to send a notice of
17 incompleteness for this permit application, would
18 it have had to have been sent out or -- sent out
19 by August 23rd?

20 A. I believe August 22nd.

21 Q. Okay. Why didn't you send out a
22 notice of incompleteness for missing information
23 on this permit application?

24 A. I wasn't involved in the application

1 at that time, but it is my understanding that we
2 were trying to setup this meeting for several
3 weeks and during the first 30 days we knew we were
4 going to meet with the applicant. So as a
5 courtesy to them we decided not to -- my
6 understanding is we just did not decide to seek
7 sending an NOI as a courtesy because we knew we
8 were going to meet with the applicant.

9 **Q. If you were to send out a notice of**
10 **incompleteness, what would have been the effect on**
11 **the permit file?**

12 A. It would have closed the file.

13 **Q. So --**

14 A. It would have been similar to a
15 denial.

16 **Q. Okay. Were you involved in a permit**
17 **appeal of the KCBX north site FESOP?**

18 A. Yes.

19 **Q. Were you deposed in that case?**

20 A. Yes, I was.

21 MR. SWEDLOW: Same objection related
22 to the other objection. The deposition or the
23 permit appeal from the north site FESOP, although
24 it involves the same company, is not part of this

1 record. So I would have no ability to
2 cross-examine this witness on what might have
3 happened in some case that I wasn't involved in
4 and isn't at issue in this permit appeal.

5 MR. GRANT: Mr. Dwyer and Ms. Hodge
6 were directly involved in it. I'm sure they can
7 provide information on what was happening. The
8 relevance of this issue is that KCBX's entire case
9 rests on the fact that the emission sources
10 they're to add at the south site are currently
11 permitted at the north site and, therefore,
12 because this equipment is currently permitted,
13 Illinois EPA must think it's okay and should --
14 there is no reason to deny installation of this
15 same equipment at the south site. Their entire
16 case rests on that and how they became currently
17 permitted is directly relevant to the issue of
18 moving this stuff and installing them at the south
19 site.

20 HEARING OFFICER HALLORAN: Wasn't
21 there an objection yesterday about that?

22 MR. SWEDLOW: Yes, and you sustained
23 that objection.

24 HEARING OFFICER HALLORAN: I think

1 Mr. Dwyer made it and I stated that somehow or
2 another the north and south facility are
3 intertwined so I allowed it to go.

4 MR. SWEDLOW: You didn't allow the
5 extent of the litigation that was involved in that
6 permit appeal to be part of this report because it
7 isn't part of this record. So I guess you
8 overruled it at the first part and granted it at
9 the second part.

10 MR. GRANT: That's not true.

11 MR. SWEDLOW: If I may briefly
12 respond to our whole case being pinned on the fact
13 that EPA thought it was okay. Our whole case
14 isn't pinned on the fact that these were permitted
15 at the north facility. Our case is that these
16 reasons for denial were manufactured after the
17 permit had been determined to be granted based on
18 the information that was provided and that
19 decision was based on an impermissible -- on
20 impermissible grounds.

21 It doesn't matter. Although it
22 is true that these were permitted conveyors at the
23 north facility, but that is not why these grounds
24 for denying the permit are incorrect. So we're

1 not pinning our whole case on anything. The fact
2 that these were permitted at north is a fact. The
3 fact that there was some litigation where he was
4 deposed on some other permit appeal is not part of
5 this record.

6 HEARING OFFICER HALLORAN:
7 Mr. Grant?

8 MR. GRANT: Their argument in their
9 testimony, their contents of their permit appeal
10 itself which is a record with the Board, make
11 continue reference to the same equipment permitted
12 at the north site and it is -- we're just moving
13 this. We're just relocating this same permit --
14 this permitted equipment. Moving it down.
15 Therefore, it would be absolutely unreasonable.
16 Illinois EPA has all the information it needs on
17 this equipment because it granted a FESOP. All
18 through the record in this case. All through
19 their testimony. All through their permit appeal.

20 HEARING OFFICER HALLORAN: Does this
21 involve the initial application comment,
22 Mr. Grant?

23 MR. GRANT: It possibly could. I
24 would also like to point out that KCBX put the

1 north site FESOP permit into the record in this
2 case. Also, as far as the testimony on this, you
3 allowed me to ask Mr. Kolaz about this procedure,
4 about multiple depositions, contested litigation,
5 all that sort of stuff. You allowed that to
6 happen. I'm not planning on doing that. What I'm
7 planning on doing is asking Mr. Bernoteit about
8 the sufficiency of the information that was
9 provided for the FESOP granted to the north site.

10 HEARING OFFICER HALLORAN: How far
11 are you going to go with this?

12 MR. GRANT: Really it's just a
13 sufficiency of the information.

14 HEARING OFFICER HALLORAN:
15 Mr. Swedlow?

16 MR. GRANT: And why the FESOP was
17 granted because the fact that the FESOP was
18 granted for this equipment for the north site is
19 the basis of their case.

20 HEARING OFFICER HALLORAN:
21 Mr. Swedlow?

22 MR. SWEDLOW: I can't tell how far
23 he is going to go. I'm not withdrawing my
24 objection. So I don't have any --

1 HEARING OFFICER HALLORAN: Your
2 objection is overruled. I'll give you latitude,
3 Mr. Grant.

4 MR. GRANT: I appreciate it. Thank
5 you, Mr. Halloran.

6 BY MR. GRANT:

7 Q. I think the last thing is were you
8 **deposed in this case?**

9 A. Yes.

10 Q. **And that case didn't involve a**
11 **permit denial letter, did it?**

12 A. No.

13 Q. **It involved permit conditions, is**
14 **that correct?**

15 A. That is my recollection, yes.

16 Q. **Do you recall why those permit**
17 **conditions were put in?**

18 A. I don't recall which permit
19 conditions were the subject of the appeal.

20 Q. **Okay. Do you recall if in the**
21 **initial application, in your opinion, KCBX**
22 **submitted sufficient information on the equipment?**

23 MR. SWEDLOW: I'm going to make an
24 objection as calling for an expert opinion on a

1 case that was already litigated.

2 MR. GRANT: It's not an expert
3 opinion.

4 MR. SWEDLOW: I'll object as a lay
5 opinion because he said "in your opinion" and I
6 don't know if he means as an expert or as a
7 layperson, but if it is a layperson he can't
8 render an opinion.

9 MR. GRANT: I can alter the question
10 to say based on your recollection.

11 HEARING OFFICER HALLORAN: Thank
12 you, Mr. Grant.

13 BY MR. GRANT:

14 **Q. Based on your recollection, did KCBX**
15 **submit sufficient information in its initial**
16 **permit application for the north site FESOP?**

17 A. Based on my recollection the
18 information that we would have required in this
19 case for that same equipment was not submitted
20 with the FESOP renewal that was at issue in 2011.

21 **Q. After the permit appeal was filed,**
22 **do you recall meeting with KCBX in terms of to**
23 **resolve the matter?**

24 A. Yes.

1 **Q. Did KCBX then provide some**
2 **additional information on the equipment and the**
3 **layout of the site?**

4 A. Yes.

5 **Q. And did Illinois EPA subsequently**
6 **grant the FESOP permit?**

7 A. Yes.

8 **Q. In this case, we now know or we now**
9 **assume based on communications with KCBX that the**
10 **equipment covered by this permit application**
11 **sought to be installed at the south site is**
12 **equipment coming from the north site, do you agree**
13 **with that?**

14 A. In the cover letter to the July
15 application, it is stated that the equipment may
16 be relocated from the north site. I believe
17 Mr. Dragovich exchanged e-mails with Mr. Steinert
18 and Mr. Steinert indicated that it was equipment
19 being relocated from the north.

20 **Q. Has KCBX since the date of that**
21 **e-mail offered a meeting to sit down to provide**
22 **additional information on the sources that it is**
23 **seeking to install at the south site and to**
24 **explain the locations of the equipment where it**

1 **would be situated on the south site?**

2 A. My recollection is that Mr. Steinert
3 attempted to setup a conference call in early
4 November. I was going to be out of the office the
5 first two weeks in early November. So I was not
6 available to sit down with the call.

7 **Q. Do you know if a call took place?**

8 A. I have no recollection whether a
9 call took place.

10 **Q. Has KCBX appealed other permits that**
11 **you were responsible for?**

12 A. Yes.

13 **Q. Approximately how many?**

14 A. This may be the fifth.

15 **Q. If you can go to page 538. Do you**
16 **recognize this document?**

17 A. Yes, it's the FESOP for the north
18 facility.

19 **Q. And do you see -- one second. Do**
20 **you see the reference on the first page, page 538,**
21 **do you see the reference to ten portable**
22 **conveyors?**

23 A. Yes.

24 **Q. Assuming this is the equipment that**

1 **KCBX plans to or seeks to install at the south**
2 **site, do you presently have sufficient information**
3 **about those ten portable box hoppers to prove to**
4 **you that there would be no violation of 201.152 or**
5 **212.321?**

6 MR. SWEDLOW: I think you meant to
7 say conveyors.

8 MR. GRANT: Am I doing that again?

9 MR. SWEDLOW: I don't know. I don't
10 remember you doing it before.

11 MR. GRANT: It was equipment versus
12 material before. Thank you.

13 BY MR. GRANT:

14 **Q. With regard to the ten portable**
15 **conveyors down on the equipment list, do you see**
16 **that? Do you presently have sufficient**
17 **information on these ten portable conveyors**
18 **assuming these are the conveyors sought to be**
19 **installed?**

20 A. Based on just looking at the permit?

21 **Q. And based on your knowledge of the**
22 **north site FESOP and the information provided with**
23 **the north site FESOP. Do you have sufficient**
24 **information to determine whether the installation**

1 **at the south site would not cause a violation of**
2 **201.152 or 212.321?**

3 A. No, we would have to look deeper in
4 the file to determine whether that information
5 resides in the file for KCBX north.

6 **Q. If you can turn to page four and I**
7 **want you to look at pages four through nine in the**
8 **administrative record. Can you identify this**
9 **document?**

10 A. This is the calculation sheet that
11 Mr. Dragovich prepared.

12 **Q. Is it specific to a certain site?**

13 A. It is specific to the KCBX south
14 site.

15 **Q. Would this same permit calculation**
16 **sheet have been used for the site even under prior**
17 **ownership?**

18 A. It may have.

19 **Q. But you didn't create this document,**
20 **correct?**

21 A. No.

22 **Q. What is your understanding of permit**
23 **analysts and how they make use of this document?**

24 A. They all have their own ways of

1 reviewing a permit and we've tried to standardize
2 a template for the calculation sheet, but many
3 times especially if it is a revised permit they
4 will build upon their previous review of an
5 application.

6 **Q. Will you look to the last page,**
7 **which is page nine. If you can look at the two**
8 **paragraphs that are on page nine with the**
9 **provision that you did not create this document,**
10 **but as the head of this area of the permit**
11 **section, what is your understanding of the meaning**
12 **of those two paragraphs?**

13 A. Well, they appear to be in conflict.

14 **Q. Okay.**

15 A. But it seems to me that the first
16 two sentences of the first paragraph could have
17 been taken from Mr. Dragovich's previous review of
18 this application in April of 2013.

19 MR. SWEDLOW: I'm going to object as
20 wild speculation and/or hearsay because
21 Mr. Dragovich was here yesterday and I asked him
22 questions. The state chose not to. He is saying
23 it could have been something he did.

24 HEARING OFFICER HALLORAN:

1 Sustained.

2 BY MR. GRANT:

3 **Q. What is Mr. Dragovich's role in the**
4 **final permit approval?**

5 A. He typically has a very limited role
6 in the final approval. He makes recommendations
7 to me as a unit manager whether the permit should
8 be granted, denied or rejected.

9 **Q. So, to confirm, he does not make the**
10 **final decision?**

11 A. He does not make the final decision.

12 **Q. One second. I'd like you to turn to**
13 **page 30. Are you familiar with this document?**

14 A. Yeah, this is what the Agency
15 commonly refers to as a Wells letter.

16 **Q. Did you write this Wells letter?**

17 A. Yes, I did.

18 **Q. What is the purpose of the Wells**
19 **letter?**

20 A. The purpose of the Wells letter is
21 to inform the applicant that we are considering
22 things outside of their application in order to
23 make a decision on their application.

24 **Q. Without sending a Wells letter, are**

1 **you able to consider any information that is not**
2 **contained in the permit application?**

3 A. No, we're not supposed to.

4 **Q. Does this Wells letter -- in this**
5 **Wells letter, did you request additional**
6 **information?**

7 A. We did not request additional
8 information, but we provided the applicant an
9 opportunity to respond to the information
10 contained in the documents that we referred to.

11 **Q. And is that contained in the letter**
12 **itself?**

13 A. Yeah, it is the third paragraph.

14 **Q. If you can turn to page 11 and the**
15 **document I'm talking about is pages 11 through 16.**
16 **If you can take a look at that.**

17 A. Okay.

18 **Q. Is this the response to the Wells**
19 **letter? Is it your understanding that this is the**
20 **response to the Wells letter that was submitted on**
21 **behalf of KCBX by its attorneys?**

22 A. Yes.

23 **Q. And have you read it before today?**

24 A. Yes.

1 Q. Did you read it prior to January
2 17th --

3 A. Yes.

4 Q. -- 2014? Thank you. Does this
5 letter provide any information regarding the
6 emission characteristics, site layout, handling
7 processes or other information necessary to
8 evaluate the application for compliance with
9 212.321?

10 A. I do not see that information in
11 this letter.

12 Q. Same question with regard to
13 201.152?

14 A. No, it does not.

15 Q. Same question with regard to
16 201.160(a)?

17 A. No.

18 Q. As you sit here today, do you
19 believe that KCBX has provided sufficient
20 information on the emission characteristics of the
21 conveyors, box hopper and stacker now that KCBX
22 seeks to install at the south site?

23 A. No, it does not.

24 Q. Do you presently have sufficient

1 **information to grant the permit application?**

2 A. No, I do not.

3 **Q. Are you willing to consider another**
4 **application containing this information?**

5 A. Yes.

6 MR. GRANT: That's all I have.

7 HEARING OFFICER HALLORAN:

8 Mr. Swedlow, do you need a minute or two?

9 MR. SWEDLOW: Nope.

10 HEARING OFFICER HALLORAN: Cross.

11 C R O S S E X A M I N A T I O N

12 BY MR. SWEDLOW

13 **Q. You indicated at the beginning of**
14 **your direct examination that your involvement**
15 **began at the beginning of December 2013, is that**
16 **correct?**

17 A. Yes.

18 **Q. Was it on December 5th?**

19 A. That is the first time that I recall
20 picking up the application, yes.

21 **Q. Were you told at that time or should**
22 **I say instructed to deny the permit application**
23 **when you picked up the file?**

24 A. I was instructed to draft the Wells

1 letter.

2 **Q. Were you also instructed at that**
3 **same time to deny the permit application?**

4 A. I asked Ms. Armitage whether she
5 thought it would be wise for me to go ahead and
6 draft the denial letter at the same time and she
7 indicated that I should.

8 **Q. So if I understand your testimony**
9 **correctly, the first time you picked up the file**
10 **was December 5th, you were instructed to draft a**
11 **Wells letter and draft a denial, is that correct?**

12 A. Yes.

13 **Q. So before you ever actually looked**
14 **at the file, you had already been instructed to**
15 **draft both a Wells letter and a denial, is that**
16 **correct?**

17 A. Yes.

18 **Q. If you look at 650 of the record, do**
19 **you see that?**

20 A. Yes.

21 **Q. Mike Dragovich was the permit**
22 **analyst assigned to analyze this file, is that**
23 **correct?**

24 A. Yes.

1 **Q. So he was responsible for the file**
2 **from July 23rd when the permit application was**
3 **submitted until December 5th when you took it with**
4 **instructions to issue a Wells letter and draft a**
5 **denial at that point, is that correct?**

6 A. Mr. Brodsky was the acting FESOP
7 manager prior to December 2nd, 2013. I was the
8 acting permit section manager at that time. So I
9 did not have day-to-day involvement with the
10 application.

11 **Q. You said Mr. Brodsky, is that**
12 **correct?**

13 A. Yes.

14 **Q. Starting at 651 is a draft granting**
15 **of the permit at issue here that was created by**
16 **Mike Dragovich and reviewed by Mr. Brodsky, his**
17 **supervisor, do you see that?**

18 MR. GRANT: Is there foundation for
19 that question? I'm going to object.

20 BY MR. SWEDLOW:

21 **Q. Let me read you a sentence from the**
22 **cover letter. "I have a draft ready that was only**
23 **reviewed by Valeriy Brodsky," do you see that?**

24 A. Yes.

1 **Q. Did Valeriy Brodsky review this**
2 **draft granting of the permit?**

3 A. I don't have knowledge of that other
4 than what is written in the e-mail.

5 **Q. When you started your review of the**
6 **file on December 5th, did you consider one way or**
7 **another Mr. Dragovich's supervisor Mr. Brodsky had**
8 **reviewed the provisional granting of the permit?**

9 A. On December 5th, I was
10 Mr. Dragovich's supervisor.

11 **Q. And I'm not trying to confuse you**
12 **with time periods, but we're talking about on**
13 **September 19th when Mr. Dragovich forwarded his**
14 **draft grant of the permit. At that point in time,**
15 **Mr. Brodsky was his supervisor, correct?**

16 A. Yes.

17 **Q. And you were not reviewing this file**
18 **at that point, were you?**

19 A. No, I was not.

20 **Q. When you started reviewing the file**
21 **was December 5th --**

22 A. Yes.

23 **Q. -- with the instructions to draft a**
24 **Wells letter and a denial of the permit?**

1 A. Yes.

2 Q. At that point when you started your
3 review of the file, did you consider the fact that
4 at the time the original granting of the permit
5 was drafted Mr. Brodsky had also reviewed that?

6 A. No, I did not consider that
7 Mr. Brodsky reviewed that.

8 Q. You were asked several times today
9 about references to the initial application, do
10 you recall that?

11 A. Yes.

12 Q. And you said it was possible that
13 what was being referred to was the DTE
14 application, do you recall that as well?

15 A. Yes.

16 Q. You don't know one way or another as
17 to whether or not Mr. Dragovich knew exactly that
18 it was that, the DTE initial application?

19 A. I don't know.

20 Q. You didn't ask him, did you?

21 A. No.

22 Q. You didn't review his testimony from
23 yesterday, did you?

24 A. May I correct?

1 **Q. Yes. I'm sorry.**

2 A. On or around December 5th, I asked
3 Mr. Dragovich about the 220 form and specifically
4 under the raw material information section and he
5 indicated that he did not understand what that
6 form indicated.

7 **Q. The 220 form?**

8 A. Yes.

9 **Q. Have you looked at that today in the**
10 **record?**

11 A. Yes.

12 **Q. Where is it or if you can just**
13 **describe it by something other than 220 I can**
14 **probably find it.**

15 A. Page 196.

16 **Q. Are you saying where it says "See**
17 **tables five and six in initial application"?**

18 A. Yes, I asked him after I noticed
19 that the form was blank except for that, do you
20 understand what this means? Was there any
21 information on the raw material usage? And he
22 said, no, he doesn't understand what this -- what
23 this table meant.

24 **Q. Did you ask him if he understood**

1 what that table meant either on September 19th
2 when he drafted the granting of the permit or when
3 he did his permit calculations that start at
4 record number four?

5 A. No, I did not ask him on September
6 19th.

7 Q. Did he know that your instructions
8 on December 5th were to draft both a Wells letter
9 and a permit denial?

10 A. I mentioned that to him.

11 Q. And that's when he told you he
12 didn't understand what this meant, is that
13 correct?

14 A. It was after I asked him about the
15 lack of information on this page.

16 Q. So in the same conversation you
17 asked him and told him that you were granting --
18 you were drafting a denial, is that right?

19 A. It may have been the same
20 conversation or it may have been a conversation
21 that I had not long after the first conversation
22 when --

23 Q. You had already been --

24 A. -- I picked up the file.

1 MR. GRANT: I object. He is
2 stepping on Mr. Bernoteit's answer. I think
3 Mr. Bernoteit is entitled to have time to answer.

4 HEARING OFFICER HALLORAN: I agree.

5 MR. SWEDLOW: I'm sorry.

6 HEARING OFFICER HALLORAN:
7 Sustained.

8 BY MR. SWEDLOW:

9 Q. Go ahead. You can complete any
10 answer that is incomplete.

11 A. Would you repeat the question?

12 THE COURT REPORTER: I got the
13 answer.

14 MR. SWEDLOW: Okay.

15 BY MR. SWEDLOW:

16 Q. If you can turn to record site 204.
17 That page refers in a couple places to the initial
18 application, which I think you testified is
19 possible to be the most recent DTE application?

20 A. It is possible that KCBX was
21 referring to that.

22 Q. But you don't know one way or the
23 other?

24 A. I don't know one way or the other.

1 When I read initial application, in my mind that
2 is the first application that was submitted.

3 **Q. And the first time you read initial**
4 **application was after you had been instructed to**
5 **draft both the Wells letter and the permit denial,**
6 **is that right?**

7 A. Yes.

8 **Q. Look at the very next page of the**
9 **letter. Do you know what that is?**

10 MR. GRANT: Objection. Can he have
11 time to take a look at the next page of the
12 record? This is harassing.

13 MR. SWEDLOW: I wanted him to know
14 why he was looking at the next page of the record.

15 HEARING OFFICER HALLORAN: I think
16 if we can just slow down a bit. Thank you.

17 BY MR. SWEDLOW:

18 **Q. Do you know what that is?**

19 A. Page 205 appears to be the section
20 one that is referred to from the September 2012
21 DTE application.

22 **Q. What is possible was the initial**
23 **application?**

24 A. It was possibly referred to.

1 **Q. Did you create the record for**
2 **production in this permit appeal?**

3 A. No, I didn't.

4 **Q. Do you know who did?**

5 A. I believe it was Jim Morgan.

6 **Q. Do you know why page 204 and 205 are**
7 **right next to each other?**

8 A. No, I don't.

9 **Q. Do you know if this was from**
10 **someone's file where it was right next to each**
11 **other?**

12 A. No, I don't.

13 **Q. Have you ever produced a file for a**
14 **permit appeal?**

15 A. Yes, I have.

16 **Q. Do you produce files from people's**
17 **working files within that context?**

18 A. What do you mean by a working file?

19 **Q. Is it possible that this is Mike**
20 **Dragovich's pieces of paper that he was using when**
21 **he reviewed this permit application and**
22 **provisionally granted it for his recommendation?**

23 A. I do not know what Mr. Dragovich
24 reviewed.

1 **Q. This was not from your file as far**
2 **as you know?**

3 A. There is only one file and that is
4 the application file.

5 **Q. I'm saying -- excuse me. For the**
6 **record in this case, did you produce these project**
7 **narrative pages?**

8 A. No, I didn't.

9 **Q. Did you ever look at the project**
10 **narrative?**

11 A. I may have in 2012.

12 **Q. Did you look at it in the context of**
13 **your review of the file starting on December 5th?**

14 A. No.

15 **Q. If you turn a few more pages, that**
16 **process flow diagram?**

17 A. Which page?

18 **Q. I'm sorry. R212. That is figure**
19 **one that was possibly referred to in the permit**
20 **application for this case, is that right?**

21 A. It may have been what was -- let me
22 step back. I don't recall a process flow diagram
23 being referred to in the KCBX application.

24 **Q. And on your direct examination, you**

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1 **were asked whether a reference to figure one in**
2 **the initial application might have been figure one**
3 **from the DTE application and what my question is**
4 **is this the figure one that it might have been?**

5 A. Mr. Grant did not ask me about a
6 reference to figure one. He asked me on the 628
7 form box 38 whether a flow diagram had been
8 submitted with this application describing new and
9 modified emission units and then he asked me about
10 this 2012 figure one.

11 MR. GRANT: Objection for the
12 record. It was a different page in the record.
13 It was in the full application. It wasn't in
14 this.

15 MR. SWEDLOW: That's my point is
16 that these pieces of things that were referenced
17 are right next to the application in the record
18 that the Illinois Environmental Protection Agency
19 produced and I'm trying to explain why flipping
20 hundreds of pages isn't necessary because the
21 record has the application and then everything
22 that was referenced.

23 BY MR. SWEDLOW:

24 **Q. So somebody was able to put it all**

1 together and what I'm trying to figure out is if
2 that somebody was you on December 5th or if that
3 somebody was Mike Dragovich when he actually
4 reviewed the file?

5 A. No. What I reviewed was what was
6 submitted beginning July 23rd, 2013, up until
7 December 5th of 2013.

8 Q. And you did not compile any
9 additional information that would have been within
10 that same construction permit file in your review,
11 did you?

12 A. No, I did not compile any additional
13 information that had been previously submitted.

14 Q. So on the --

15 A. That was outside the scope of our
16 review at that time.

17 Q. But let's go back to the permit
18 application that you did review then. Page 191.
19 Question three asks "Does this application request
20 a revision to an existing construction permit
21 issued by the BOA?" The box is checked yes and
22 then a permit number is listed, do you see that?

23 A. Yes.

24 Q. Does that provide the Agency

1 **information that it could access relating to the**
2 **existing construction permit and those files?**

3 A. It provides a request to the Agency
4 to reopen the application under that number and to
5 add the equipment being sought in this application
6 to that previously issued permit.

7 Q. Before when you were being asked
8 questions on direct examination, you indicated
9 that all permit analysts have their own way of
10 doing things, but some of them go back to the last
11 version or permit application within a
12 construction permit, do you recall that?

13 A. Yes.

14 Q. Does this give the analyst the
15 ability to go back into his files for this
16 construction permit and see what is there?

17 A. He may have the ability to go back
18 and look at what DTE submitted previously, but
19 there was no information concerning the ten
20 portable conveyors, the box hopper and the stacker
21 that was being relocated from the north to the
22 south --

23 Q. And when you say --

24 A. -- under this application, under

1 this number.

2 **Q. And when you say no information, are**
3 **you referring to the fact that including other**
4 **things that you've already testified to that the**
5 **manufacturer was not identified?**

6 A. The manufacturer is not necessarily
7 information that we need. The information that we
8 needed was the hourly process rate information for
9 the new equipment and the emissions from the new
10 equipment.

11 **Q. Let me make sure I write that down.**
12 **So it's the hourly process information?**

13 A. Yes.

14 **Q. And what was the other?**

15 A. The hourly emission rate information
16 for the new equipment.

17 **Q. Is it your testimony that the**
18 **manufacturer is not information you need to**
19 **adequately assess whether a violation would result**
20 **from these emission units being installed on the**
21 **site?**

22 A. It does not provide much valuable
23 information to the permit section.

24 **Q. Does the serial number?**

1 A. No, it does not.

2 **Q. Would you deny a permit --**

3 A. That information could be
4 information that our field section may look at to
5 just match up equipment to permits.

6 **Q. But you don't need it to approve a**
7 **permit for portable conveyors, do you?**

8 A. Not necessarily, no.

9 **Q. But what you do need according to**
10 **your testimony today is hourly process**
11 **information, is that right?**

12 A. Yes.

13 **Q. You testified earlier over objection**
14 **with respect to your involvement in the north**
15 **FESOP permit, do you recall that?**

16 A. Yes.

17 **Q. Were you involved in the process of**
18 **analyzing that permit application?**

19 A. I was involved in drafting the
20 permit.

21 **Q. And for the ten portable conveyors,**
22 **one box hopper and one stacker that are at issue**
23 **in this permit appeal, is it your testimony that**
24 **when you granted that permit, that hourly process**

1 **information was provided with respect to those**
2 **pieces of equipment that were permitted at north?**

3 A. The north FESOP was a renewal of a
4 previously issued permit. When we do a renewal,
5 particularly when the rules haven't changed in
6 between issuance of the permit, we would not
7 necessarily go back and review compliance piece by
8 piece with old rules.

9 **Q. My question is when you worked on**
10 **granting the permit for the north FESOP that**
11 **included the equipment at issue, did you have**
12 **hourly process information for these pieces of**
13 **equipment?**

14 A. No. And I did not request that
15 information because as I stated this was renewal
16 of a previously issued permit. We presume that
17 that information had been requested and reviewed
18 in prior reviews. The rules had not changed. We
19 presumed that that equipment was still in
20 compliance. We had no indication from the field
21 staff that there had been any problems at the
22 north site. So, therefore, we had no reason to
23 believe that there was a problem with compliance
24 with 212.321 for that equipment in 2011 at the

1 north site.

2 **Q. Is it your testimony today that**
3 **somewhere in the file for the north FESOP is**
4 **hourly process information for the equipment at**
5 **issue on this appeal?**

6 A. I presume at some point that
7 information had been provided to the Agency for
8 the north site. Whether it was a construction
9 permit -- whether it was old operating permits,
10 whether it was in the FESOP, initial FESOP
11 application, that information should have been
12 contained in our file somewhere.

13 **Q. And because it was in your file**
14 **somewhere for an older application related to the**
15 **same site, you felt like you could rely on that**
16 **information already in your files when you granted**
17 **the permit for these pieces of equipment for the**
18 **FESOP, isn't that correct?**

19 A. Again, we weren't going piece by
20 piece for the units because this was a renewal and
21 there was no indication of any problems at the
22 north site. So we had no reason to believe that
23 they were operating out of compliance at the time
24 of renewal in 2010 and, again, in 2011.

1 **Q. Was the hourly emission information**
2 **submitted and analyzed by you with respect to the**
3 **FESOP application at north covering these pieces**
4 **of equipment?**

5 A. I did not review that information in
6 processing a renewal of a previously issued FESOP.

7 **Q. Are you aware of whether or not a**
8 **notice of incompleteness was ever sent to KCBX for**
9 **this permit?**

10 A. No. There was no NOI sent.

11 **Q. You know that there wasn't, is that**
12 **correct?**

13 A. I know that there wasn't.

14 **Q. It is the obligation of the Agency**
15 **to send a notice of incompleteness within the**
16 **first 30 days, correct?**

17 A. There is no obligation to send an
18 NOI.

19 **Q. If an NOI is going to be sent, it**
20 **must be sent within 30 days of the application**
21 **being filed, is that correct?**

22 A. Yes.

23 **Q. And if it is not sent, that means**
24 **that the application is deemed filed, isn't that**

1 **correct?**

2 A. No, it is not.

3 **Q. What happens if it is not sent?**

4 A. If it is not sent and we still don't
5 have the right information, we could deny the
6 permit.

7 **Q. Maybe you misunderstood the question**
8 **that I asked. If you do not send a notice of**
9 **incompleteness within the first 30 days of the**
10 **permit application being filed, it is then under**
11 **Section 158 deemed filed, is it not?**

12 A. That is not my understanding of 158.

13 **Q. Can I hand you what is marked as**
14 **Petitioner's Exhibit 3 and will you read 158 into**
15 **the record, please?**

16 A. "Application shall not be deemed to
17 be filed until the applicant has submitted all
18 information and completed application reforms,
19 completed -- I'm sorry -- by Section 201.152 or
20 201.157 of this subpart, whichever is applicable,
21 and the procedures adopted and effective pursuant
22 hereto. Provided however that if the Agency fails
23 to notify the applicant within 30 days after
24 filing of a purported application, that the

1 application is incomplete and of the reasons the
2 Agency deems it incomplete the application shall
3 be deemed to have been filed as of the date of
4 such purported filing."

5 **Q. Thank you. You can keep reading if**
6 **you think the rest will inform the answer to the**
7 **question.**

8 A. "The applicant may treat the
9 Agency's notification that an application is
10 incomplete as a denial of the application for
11 purposes of review pursuant to Section 40 of the
12 act.

13 **Q. Okay. Can I take that piece of**
14 **paper back?**

15 A. (Handing.)

16 **Q. So based upon your read of Section**
17 **158, I think you testified on direct that a notice**
18 **of incompleteness is like a denial, is that**
19 **correct?**

20 A. It is treated as a denial for
21 purposes of appeal to my understanding.

22 **Q. And if you don't send a notice of**
23 **incompleteness within the first 30 days, then that**
24 **application is to be deemed filed under 158, isn't**

1 **that right?**

2 A. That is what 158 says, but I don't
3 know what deemed to be filed means.

4 **Q. And you're not an attorney, are you?**

5 A. No, I'm not.

6 **Q. And the fact that you're not an**
7 **attorney I think you testified during your**
8 **deposition means that the response to the Wells**
9 **letter was not analyzed by you, was it?**

10 A. No, it was not analyzed by me.

11 **Q. So all of the arguments made in the**
12 **January 13th response to the Wells letter were**
13 **left to be considered by someone other than you,**
14 **is that correct?**

15 A. Yes.

16 **Q. And the Wells letter is not a notice**
17 **of incompleteness, is it? It's a different -- it**
18 **is a different kind of letter and notice to an**
19 **applicant, is that right?**

20 A. Yes. As I testified previously, the
21 purpose of the Wells letter is to inform the
22 applicant that we were looking at information
23 outside of their application to make a
24 determination on their application.

1 **Q. But you indicated that it somehow**
2 **requested additional information?**

3 A. No, I indicated that it provided the
4 applicant an opportunity to respond to the
5 documents referenced by the Wells letter.

6 **Q. The Wells letter didn't request**
7 **hourly process information on the pieces of**
8 **equipment at issue, did it?**

9 A. No.

10 **Q. Not generally or specifically, did**
11 **it?**

12 A. No.

13 **Q. It didn't request hourly emissions**
14 **information for the equipment at issue, did it?**

15 A. No.

16 **Q. Not generally or specifically?**

17 A. No.

18 MR. SWEDLOW: Just take a minute to
19 see if I'm done.

20 HEARING OFFICER HALLORAN: We can go
21 off the record for a second.

22 (Whereupon, a break was taken
23 after which the following
24 proceedings were had.)

1 HEARING OFFICER HALLORAN: Back on
2 the record.

3 BY MR. SWEDLOW:

4 Q. I think you testified on direct
5 examination that you did attend a meeting with
6 KCBX on August 27th, 2013, is that correct?

7 A. Yes.

8 Q. And at that meeting did KCBX discuss
9 the approach for its requested permit of these
10 pieces of equipment, meaning revising the existing
11 construction permit for the site?

12 A. I don't recall that.

13 Q. You don't recall one way or the
14 other?

15 A. I don't recall one way or the other.

16 Q. Was Mr. Dragovich at the meeting?

17 A. Yes.

18 Q. Did you actually request any
19 additional information orally or in writing from
20 KCBX?

21 A. Me personally?

22 Q. Yes.

23 A. No.

24 Q. Did you personally express any

1 concerns regarding the permitting application
2 approach that KCBX was taking on August 27th?

3 A. I don't recall.

4 Q. You also attended another meeting
5 with KCBX on December 5th, 2013, did you not?

6 A. Yes.

7 Q. That meeting was in the morning?

8 A. It was mid-morning until mid
9 afternoon.

10 Q. You also said that you met -- you
11 also said that you met with Julie Armitage on that
12 same date and were instructed to draft the Wells
13 letter and also draft the denial of the permit, is
14 that correct?

15 A. Yes.

16 Q. Was that in between sessions that
17 you were meeting with KCBX or was it after the
18 meeting with KCBX?

19 A. It was after the meeting with KCBX.

20 MR. SWEDLOW: I'd like to hand the
21 witness our supplement to the record, which hasn't
22 been ruled on.

23 HEARING OFFICER HALLORAN: You may.

24 MR. GRANT: Can I see what he is

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1 talking about and is this the document that was
2 filed on Monday.

3 MR. SWEDLOW: Yes.

4 MR. GRANT: Okay. We object to
5 this. It is not in the record and, frankly, it
6 contains a lot of information that is covered by
7 settlement privilege. The meeting that is
8 involved with that and the presentations that were
9 made during that were all agreed to by the parties
10 and, in fact, at the request of KCBX's attorneys
11 that no information discussed or provided at that
12 meeting could be used for any other purpose, but
13 for settlement.

14 HEARING OFFICER HALLORAN: For
15 preliminary -- first off, I took it -- was it
16 yesterday or --

17 MR. GRANT: The offer of proof.

18 HEARING OFFICER HALLORAN: Offer of
19 proof. That's how I'm going to accept it today.
20 So you may proceed. Do we have the offer of
21 proof?

22 MR. GRANT: Let me find it. Thank
23 you.

24 MR. SWEDLOW: Before I hand this to

1 you, before the proffer, I'm going to ask
2 questions and then I'll indicate on the record
3 when the proffer starts. That's how we did it
4 last time.

5 HEARING OFFICER HALLORAN: That's
6 fine.

7 BY MR. SWEDLOW:

8 Q. Did KCBX describe to you the dust
9 suppression system at the site on December 5th,
10 2013?

11 MR. GRANT: I'm going to object.
12 This is part of the settlement discussions that
13 were agreed to by the parties only for that
14 purpose. So if we're not -- are we in the offer
15 of proof now?

16 MR. SWEDLOW: No.

17 MR. GRANT: This is not --

18 HEARING OFFICER HALLORAN: Let's put
19 this in the offer of proof.

20 MR. SWEDLOW: Okay. If I can
21 briefly respond to this objection, though, because
22 I wanted to do it separately.

23 HEARING OFFICER HALLORAN: Okay.

24 MR. SWEDLOW: In the opening

1 statement, there was a reference to the fact that
2 the IEPA in this permit considered the November 1
3 dust suppression plan, which was explained at this
4 meeting to this witness who is in permitting and I
5 think you called him the head of this section. So
6 if he had it in his mind and it was considered
7 before January 17th, 2013, when the permit was
8 denied, I don't understand how the information
9 that was actually considered could be considered
10 communicated only for settlement purposes.

11 HEARING OFFICER HALLORAN: Okay.
12 Your query is on the record and we're going to go
13 into the offer of proof right now.

14 MR. SWEDLOW: Thank you.

15 HEARING OFFICER HALLORAN:
16 Mr. Grant, do you need a brief response before?

17 MR. GRANT: Yes. What he is
18 planning on getting into is discussions that were
19 held at this meeting, not what was submitted on
20 November 1, 2013, and also that was not submitted
21 to Mr. Bernoteit. It was not put into the permit
22 file. It was submitted from one lawyer to another
23 lawyer, from KCBX's lawyer to Ms. Pamenter. He
24 may be aware of it. I guess if we put it in the

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1 record, I don't have any problem with him asking
2 questions about that specific November 1 document,
3 but as far as the additional information, the
4 presentation that was made at the settlement
5 meeting on December 5th, that can't be -- you
6 can't get into that and I guess I'd also have to
7 make an objection because even in an offer of
8 proof we have three of the triers of fact in this
9 case in the room at this point. I'm glad they're
10 here, but getting into this material, even through
11 an offer of proof, I think is prejudicial and I
12 really have a problem with the fact that they
13 asked for settlement privilege and now are trying
14 to violate it. I have a real problem with that.

15 HEARING OFFICER HALLORAN: Okay. I
16 think if it was a jury, you might have a better
17 argument, but -- okay. Here on in we're in the
18 offer of proof. So noted.

19 MR. SWEDLOW: Thank you.

20 BY MR. SWEDLOW:

21 **Q. Was the current dust suppression**
22 **system described to you and the Agency on December**
23 **5th, 2013?**

24 A. What do you mean by the current dust

1 suppression system?

2 **Q. Do you have an understanding of what**
3 **dust suppression system means?**

4 A. Yes.

5 **Q. Do you have an understanding as to**
6 **what an FPOP is?**

7 A. An FPOP is a term that I heard for
8 the first time on December 5th. I normally refer
9 to what that is as a fugitive dust operating
10 program.

11 **Q. Fugitive dust operating program?**

12 A. Yes.

13 **Q. Was the fugitive dust operating**
14 **program for the KCBX south described to you on**
15 **December 5th?**

16 A. It was talked about in the meeting,
17 but I did not have a copy of it in the meeting.

18 **Q. What does the fugitive dust**
19 **operating program describe generally if that's the**
20 **term that you use?**

21 A. In general, it describes how a
22 source -- it describes their plan for controlling
23 their fugitive dust.

24 **Q. Did KCBX describe to you their plan**

1 **for controlling fugitive dust on December 5th,**
2 **2013?**

3 A. I recall discussion about that, yes.

4 **Q. Did they describe it to you?**

5 A. Yes, there was a long description
6 and discussion about that.

7 **Q. Did you see pictures of the water**
8 **cannons?**

9 A. Yes.

10 **Q. Did you see pictures of the street**
11 **sweeper?**

12 A. Yes.

13 **Q. Did you see pictures of the water**
14 **trucks?**

15 A. Yes.

16 **Q. Did the capacity for water and its**
17 **application get described to you and the Agency at**
18 **that meeting?**

19 A. Yes, but I don't recall what the
20 capacity for the water is.

21 **Q. Do you recall if the radius of each**
22 **cannon and its water applying capabilities were**
23 **described to you?**

24 A. It may have been.

1 **Q. Do you recall if the ability to**
2 **apply surfactant was described to you?**

3 A. It may have been.

4 **Q. Do you recall if the best management**
5 **practices for pile grooming was described to you?**

6 A. I don't recall that.

7 **Q. Did you consider any of this**
8 **information after you were told to draft the**
9 **permit denial?**

10 A. No, I did not.

11 **Q. Did you consider any of this**
12 **information for purposes of determining whether or**
13 **not a violation of the Illinois Protection Act may**
14 **result from the transfer of this equipment from**
15 **north to south?**

16 A. Would you repeat that question,
17 please?

18 **Q. Did you consider any of this**
19 **information when you were determining whether or**
20 **not a violation of the Illinois Environmental**
21 **Protection Act might result from the transfer of**
22 **this equipment from KCBX north to KCBX south?**

23 A. I certainly thought about it and I
24 thought it would have been nice to have that

1 information in the application file, but there was
2 nothing in the application to relate the new
3 conveyors to the dust suppression system.

4 **Q. But that information was provided to**
5 **you and your title is -- what is your title?**

6 A. My title is FESOP unit manager.

7 **Q. Are you in permitting?**

8 A. Yes.

9 **Q. Did you sign yourself into that**
10 **meeting as permits?**

11 A. Yes.

12 **Q. So that information was conveyed to**
13 **you more than a month before you issued the**
14 **denial, is that correct?**

15 A. My understanding is that I was not
16 to consider that outside of that meeting.

17 **Q. Why were you not to consider that**
18 **outside of the meeting?**

19 A. My understanding is your client
20 requested that.

21 **Q. You were not to consider what was**
22 **actually happening at the site at the time of the**
23 **permit denial?**

24 A. I did not know that that was

1 happening at the site. They had discussed their
2 plans and I did not know how their plans fit into
3 operation of these new conveyors.

4 **Q. Did you consider sending a site**
5 **inspector out to the site to look at it before you**
6 **denied the permit?**

7 A. I do not request inspections.

8 **Q. Do you consider inspections when**
9 **you're determining whether to grant or deny a**
10 **permit?**

11 A. In this case, we did because we
12 referenced the inspection reports in the Wells
13 letter.

14 **Q. You were told to reference the**
15 **inspection reports in the Wells report, correct?**

16 A. Yes.

17 **Q. You didn't know to identify those**
18 **before you were told to do that?**

19 A. No.

20 **Q. Did you identify any of the**
21 **information that was included in the Wells letter**
22 **yourself?**

23 A. No.

24 **Q. Did you exercise any analytical**

1 **discretion when you reviewed the file before**
2 **determining that the permit should be denied?**

3 MR. GRANT: I'm going to object on
4 the basis of vagueness. What does he mean by
5 analytical discretion?

6 BY MR. SWEDLOW:

7 Q. **Did you have any decision to grant**
8 **the permit after you were told to draft the denial**
9 **letter?**

10 A. I don't know that I had any
11 discretion to move forward with a construction
12 permit. However, when I picked up the file, I
13 noticed that there was information that we needed
14 in order to actually go forward with a permit.

15 Q. **But you had already been instructed**
16 **before you picked up the file to draft the denial**
17 **letter, is that correct?**

18 A. I had been instructed to draft the
19 Wells letter and I asked Ms. Armitage whether I
20 should go ahead and work on a denial at the same
21 time.

22 Q. **And maybe instruction is the wrong**
23 **word.**

24 A. It was my thought that since we're

1 sending a Wells letter that we may be headed down
2 the road to denial.

3 **Q. She told you to draft the Wells**
4 **letter. You asked if you should also draft the**
5 **denial and she said yes, is that correct?**

6 A. Yes.

7 HEARING OFFICER HALLORAN: Are we
8 still in the offer of proof or are you going to be
9 redirecting him?

10 MS. PAMENTER: Can we go off the
11 record for a second?

12 MR. GRANT: Yes.

13 HEARING OFFICER HALLORAN: Off the
14 record.

15 (Whereupon, a break was taken
16 after which the following
17 proceedings were had.)

18 HEARING OFFICER HALLORAN: We can go
19 back on the record. Just for the record it is
20 approximately 10:45. You may proceed, Mr. Grant.

21 MR. GRANT: I'm within the offer of
22 proof at this point?

23 HEARING OFFICER HALLORAN: Correct.

24 Thank you.

1 MR. GRANT: Okay.

2 R E D I R E C T E X A M I N A T I O N

3 BY MR. GRANT

4 Q. Mr. Bernoteit, was the information
5 provided to you at the December 5th meeting with
6 KCBX, that same information, was it ever submitted
7 to Illinois EPA's permit section as a supplement
8 to the permit application?

9 A. No.

10 Q. Did you keep copies of the slides
11 from the December 5th presentation?

12 A. No. I believe I returned the copies
13 to KCBX.

14 Q. Okay. And that was at the end of
15 the meeting?

16 A. Yes.

17 MR. GRANT: That's all I have on the
18 offer of proof.

19 HEARING OFFICER HALLORAN: Thank
20 you. We're off the offer of proof.

21 BY MR. GRANT:

22 Q. Mr. Bernoteit, you stated that you
23 attended the August 27th, 2013, meeting along with
24 Mike Dragovich with KCBX to discuss permit issues?

1 A. Yes.

2 **Q. And I think you also stated that**
3 **Mr. Dragovich requested some information from**
4 **KCBX --**

5 A. Yes.

6 **Q. -- at that meeting?**

7 A. Yes.

8 **Q. If you can turn to page 182. Is it**
9 **your understanding that this is the information**
10 **that was provided by KCBX in response to**
11 **Mr. Dragovich's request?**

12 A. That is my understanding.

13 **Q. Does this information sufficiently**
14 **identify the throughput and emission**
15 **characteristics of the equipment sought to be**
16 **permitted?**

17 A. No, it does not. However, we were
18 hoping to go back into the KCBX north files to
19 match up this equipment with applications that had
20 been previously submitted. It is my understanding
21 that we were unable to match this information with
22 anything that had been previously submitted.

23 **Q. Did you -- at any time, did you**
24 **instruct Mike Dragovich to not contact KCBX?**

1 A. I'm aware that Mr. Dragovich was
2 instructed not to contact KCBX after the first
3 week in September. I don't recall if it was me
4 that instructed him or whether it was counsel that
5 instructed him.

6 **Q. What was the reason that he was**
7 **instructed not to contact KCBX?**

8 A. On or about August 30th, there was a
9 dust storm which blew black dust from what I
10 understand was the KCBX south site and there were
11 investigations being conducted at that time in
12 preparation for an enforcement case against the
13 facility.

14 **Q. Is it the policy of the Illinois EPA**
15 **that all inquiries on the permit application have**
16 **to be made through counsel when there are**
17 **enforcement issues?**

18 A. It is my understanding of our
19 procedures that when we know that a source is
20 under enforcement that we need permission from our
21 attorneys before we are to be in contact with the
22 applicant or the source.

23 **Q. One second. As of December 5th,**
24 **2013, do you recall on that day what the decision**

1 **deadline was for this permit?**

2 A. I believe it was on or around
3 December 20th.

4 **Q. Was it -- based on permit section**
5 **policy, was it in accordance with your policy to**
6 **begin drafting a denial letter two weeks before a**
7 **decision deadline or approximately two weeks?**

8 A. Not normal to do that. Normally
9 when we send a denial, it is usually close to the
10 deadline for the application. In this case
11 because there was a short turnaround between when
12 we were going to send the Wells letter and
13 presumably the denial on or around the 20th of
14 December I wanted to make sure that my management
15 and the attorneys were okay with the language in
16 the draft denial.

17 **Q. After December 5th, 2013, did you**
18 **review the construction permit application?**

19 A. I picked it up and reviewed it on
20 the 5th, I believe. Maybe the 6th, but it was no
21 earlier than the afternoon of the 5th of December.

22 **Q. Okay. Let's turn to page 567. Are**
23 **you there?**

24 A. Yes.

1 **Q.** Looking at the project narrative on
2 page 567, even if you knew -- if you had known to
3 refer to this page as the initial permit
4 application, would this information have provided
5 sufficient data regarding the ten additional
6 conveyors, one box hopper and one stacker? Just
7 to supplement we're talking about the equipment to
8 be permitted in the permit appeal issue?

9 A. Are you talking about the whole
10 narrative or just page 567?

11 **Q.** Just page 567. Does that provide
12 sufficient information regarding the emission
13 sources sought to be permitted in this case?

14 A. No.

15 MR. GRANT: That's all I have.

16 HEARING OFFICER HALLORAN: Thank
17 you, Mr. Grant. Mr. Swedlow?

18 R E C R O S S E X A M I N A T I O N

19 BY MR. SWEDLOW

20 **Q.** Can you turn to page 784 of the
21 record?

22 A. Seven what?

23 **Q.** 784. These are your notes?

24 A. Yes.

1 **Q. These are your notes from the**
2 **meeting with KCBX on August 27th, 2013?**

3 A. Yes.

4 **Q. You testified earlier that you**
5 **didn't know whether or not the conveyors were**
6 **coming from the north site, is that correct?**

7 A. Based on the letter of July -- that
8 was received on July 23rd, 2013, that letter
9 indicated that they may be coming from the north
10 site.

11 **Q. You didn't read that letter until**
12 **December 5th, 2013, did you?**

13 A. That is correct.

14 **Q. But as of August 27th, 2013, several**
15 **months before you first read the letter, your**
16 **notes say portable conveyors from north site, 11**
17 **total, to be moved to Burley Avenue south site, do**
18 **you see that?**

19 A. Yes.

20 **Q. Does that refresh your recollection**
21 **as to whether or not you actually knew that the**
22 **conveyors were coming from the north site of KCBX**
23 **to the south site of KCBX?**

24 A. It appears that I knew that, yes.

1 **Q. When you said it's your**
2 **understanding that the Agency couldn't match up**
3 **the conveyors, hopper and stacker, did you try to**
4 **match it up after the August 27th meeting?**

5 A. No, I did not.

6 **Q. So it's not your personal**
7 **understanding one way or another on that, is it?**

8 A. I believe Mr. Dragovich has informed
9 me within the last week or so that he attempted to
10 find that information in the north files.

11 **Q. You did not attempt to find that**
12 **information in the north files?**

13 A. No.

14 **Q. You didn't attempt to find that**
15 **information in the north files on December 5th**
16 **when you started to review the file for the first**
17 **time, did you?**

18 A. No, I did not.

19 MR. SWEDLOW: I don't know how we do
20 this. I want to use the privilege log that was
21 produced by the Attorney General for this case.
22 Do I have to put a designation on it?

23 MR. GRANT: Subject to a motion for
24 reconsideration. What time is it?

1 HEARING OFFICER HALLORAN: Exactly.

2 MR. SWEDLOW: He is going to let him
3 go in one minute.

4 HEARING OFFICER HALLORAN: You can
5 argue it is --

6 MR. SWEDLOW: I'm not going to say
7 reveal the thing that -- I'm not going to make him
8 waive a privilege that is still being asserted
9 regardless of whether it is correct or not. I
10 just want to get some information about items on
11 the privilege log.

12 HEARING OFFICER HALLORAN: I'm
13 comfortable with that.

14 MR. GRANT: Sure.

15 MR. SWEDLOW: I'm handing you what
16 is a privilege log. I don't know if you've ever
17 seen that before or if you know what a privilege
18 log is.

19 MR. GRANT: Just for a second. Is
20 that in the record?

21 MR. DWYER: I believe it is in the
22 record.

23 MR. GRANT: Can you give me the page
24 number?

1 MR. DWYER: We're trying to find it.
2 It is in the record based upon the Board order of
3 April 17th. Now, there are documents that the
4 state has withheld that were listed on the
5 privilege log and those are the subject of the
6 motion for reconsideration, but the log pursuant
7 to the Board's April 17th order was directed to be
8 supplemented to the record and I apologize. I
9 can't find it.

10 MR. GRANT: Is there a page number
11 on the bottom of yours or is that a copy of the
12 privilege log?

13 MR. SWEDLOW: This is just a service
14 copy of the privilege log.

15 MR. GRANT: I'm not trying to delay
16 things. Believe me.

17 MR. SWEDLOW: This is the service
18 copy. This is going to be pretty straightforward.

19 MR. GRANT: Do you mind if I just
20 stand close to you?

21 MS. HODGE: I have a copy.

22 MR. SWEDLOW: Let's go off the
23 record for just one second.

24

1 (Whereupon, a break was taken
2 after which the following
3 proceedings were had.)

4 HEARING OFFICER HALLORAN: We're
5 back on the record.

6 BY MR. SWEDLOW:

7 Q. I've handed you a copy of a document
8 that has at the top of it KCBX Terminals Company
9 v. Illinois EPA Privilege Log of Illinois EPA, do
10 you see that?

11 A. Yes.

12 Q. It lists -- the easiest way to sort
13 through this is it lists date of document. I want
14 you to look at the document that has a date of
15 document of 11/14/2013, do you see that?

16 A. 11/14, yes.

17 Q. You previously testified on direct
18 examination that it was possible that the permit
19 application that was being referred to in KCBX's
20 2013 permit application was the DTE permit
21 application which is part of this record, do you
22 recall that?

23 A. Yes.

24 Q. The only information I have on this

1 document that I'm referring to is that you are the
2 author and you sent it to Julie Armitage, Chris
3 Pressnall, B. Frost, V. Brodsky, and M. Dragovich
4 and the description of the document says "E-Mail
5 re DTE permit application and KCBX April 2013
6 permit application," do you see that?

7 A. Yes.

8 Q. Is it also possible that in this
9 e-mail you successfully identified the fact that
10 the initial application being referenced was the
11 DTE permit application?

12 A. I don't recall what was written in
13 this e-mail.

14 Q. Is it possible based on the
15 description that you're reading that the KCBX
16 April 2013 permit application was successfully
17 correlated by you with the DTE permit application?

18 A. I don't know.

19 Q. Is it possible?

20 MR. GRANT: Object. Anything is
21 possible.

22 MR. SWEDLOW: I totally agree with
23 that, but you asked him seven or eight questions
24 in a row.

1 MR. GRANT: I know. It's an
2 objection for the record. He can answer.

3 HEARING OFFICER HALLORAN:
4 Overruled.

5 BY MR. SWEDLOW:

6 Q. Using the same understanding of is
7 it possible as you used when you were asked a
8 series of questions on direct examination today,
9 I'm asking you is it possible that you already
10 successfully connected the DTE permit application
11 with the KCBX permit application because they're
12 both listed here in the description of the
13 document?

14 A. The application that KCBX submitted
15 in July of 2013 came in under the same application
16 number that was started by DTE.

17 MR. SWEDLOW: I have no further
18 questions.

19 HEARING OFFICER HALLORAN: Thank
20 you. Mr. Grant?

21 MR. GRANT: Nothing.

22 HEARING OFFICER HALLORAN: Thanks.
23 You may step down, sir. We can go off the record
24 for a second.

1 (Whereupon, a discussion was had
2 off the record.)

3 HEARING OFFICER HALLORAN: We're
4 back on the record. And I do want to note that
5 there are no members of the public here nor were
6 there any this morning. Right now it is about
7 11:05. The Agency is going to put on their fourth
8 witness, I believe, and, Ms. Armitage, if you can
9 raise your right Mr. Brickey will swear you in.

10 MS. PAMENTER: Thank you,
11 Mr. Halloran.

12 WHEREUPON:

13 JULIE ARMITAGE
14 called as a witness herein, having been first duly
15 sworn, deposeth and saith as follows:

16 D I R E C T E X A M I N A T I O N

17 BY MS. PAMENTER

18 **Q. Please state your full name and**
19 **spell your last name for the record?**

20 A. Julie K. Armitage, A-R-M-I-T-A-G-E.

21 **Q. Let's talk about your education and**
22 **I'm going to go through some of this quickly due**
23 **to some time constraints that we're aware of. You**
24 **graduated from Bradley University in 1985 with a**

1 **bachelor of science in finance, correct?**

2 A. Correct.

3 **Q. And then thereafter you attended**
4 **Southern Illinois University School of Law**
5 **graduating in 1988, is that right?**

6 A. Yes.

7 MR. SWEDLOW: I'm going to object as
8 leading.

9 HEARING OFFICER HALLORAN: This is
10 preliminary. Overruled.

11 MS. PAMENTER: These are foundation
12 questions. I can ask them obviously as direct
13 questions if that's the preference.

14 HEARING OFFICER HALLORAN: No.
15 Objection overruled.

16 MR. SWEDLOW: I still have to make
17 my objection.

18 HEARING OFFICER HALLORAN: I
19 understand.

20 MR. SWEDLOW: Can I preserve that
21 objection for this background section?

22 HEARING OFFICER HALLORAN: Yes. And
23 the record will reflect as such.

24

1 BY MS. PAMENTER:

2 Q. Following graduation, you went to
3 work with the Illinois Attorney General's Office
4 in the Asbestos Litigation Bureau for
5 approximately two years, is that right?

6 A. Yes.

7 Q. After working at the Illinois
8 Attorney General's Office, what agency did you
9 join?

10 A. The Illinois Environmental
11 Protection Agency.

12 Q. When was that?

13 A. March 1st, 1990.

14 Q. And then what position did you start
15 at with the Illinois Environmental Protection
16 Agency?

17 A. I started as an air enforcement
18 attorney.

19 Q. What period of time did you serve in
20 that role?

21 A. From merely as an air enforcement
22 attorney? From March of '90 until around November
23 of '93.

24 Q. Generally, what were your duties and

1 **responsibilities as an air enforcement staff**
2 **attorney?**

3 A. The lion's share of the work
4 pertained to working with the bureau regarding
5 compliance and enforcement matters and pursuing
6 certain matters -- referring certain of those
7 matters to the Attorney General's Office for
8 formal enforcement action. I also worked on
9 regulatory relief matters including adjusted
10 standards, site specific variances, provisional
11 variances. I also provided in-house legal counsel
12 including relating to permitting matters.

13 **Q. After 1993, did you accept or get a**
14 **different position with the Illinois Environmental**
15 **Protection Agency?**

16 A. Yes.

17 **Q. What is that position?**

18 A. Around November 1st of '93, I became
19 the manager of the air enforcement unit.

20 **Q. How long did you serve in that**
21 **position with the Illinois Environmental**
22 **Protection Agency?**

23 A. I served in that position up through
24 August 1st of 2013.

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Q. While serving as the manager of the Illinois Environmental Protection Agency's air enforcement unit, did you have other roles at the same time with the Agency?

A. I did. Anywhere from two to three roles at a time. So for the period November 2000 or so to January of 2007 I also served as the manager of the Bureau of Air compliance section and for the period -- for almost a year period in 2003 I also served as the manager of the air regulatory unit and for the period -- like an 18-month period, again, I believe in October of '11 -- wait. No. Yeah, October of '11 until early '13 I was acting -- the Agency's acting chief legal counsel.

Q. Can you explain the difference between the Illinois EPA's air enforcement unit, the air regulatory unit and air compliance unit all of which you served within over a certain period of time that you've just described?

A. Yes. The predominant function of the air enforcement unit is to work with the bureau to further compliance and enforcement matters. The predominant function of the air

1 regulatory unit is to work with the bureau to --
2 on regulatory proceedings. The predominant
3 function of the compliance section is to work with
4 all sections in the bureau furthering, identifying
5 noncompliance. So working with the permit section
6 for any non-compliance identified in permitting
7 transactions with the field section furthering any
8 non-compliance identified during inspections with
9 modelers and planners for any noncompliance. They
10 would identify and, of course, working --
11 furthering any violations identified through
12 records or reports reviewed by the compliance
13 section.

14 **Q. Generally, can you describe your**
15 **duties and responsibilities when you were serving**
16 **as a manager within these three units? If you**
17 **need to take them separately, you can.**

18 A. When I served as manager of the
19 regulatory unit, I merely oversaw the activities
20 of those regulatory attorneys. When I served as
21 manager of the enforcement unit, I both had my own
22 case load and managed the enforcement attorneys.
23 When I served as manager of the compliance
24 section, I oversaw all of the compliance and

1 enforcement related responsibilities of the entire
2 Bureau of Air.

3 **Q. How many people did you generally**
4 **oversee or supervise as manager within these**
5 **particular units?**

6 A. It varied from time to time.
7 Typically six to eight enforcement attorneys.
8 Typically on the order of six regulatory
9 attorneys. Anywhere from six to maybe ten or
10 twelve compliance people.

11 **Q. Now, when you were serving as**
12 **manager in these roles, I mean, were you solely**
13 **supervising other people or were you doing**
14 **additional work?**

15 A. Always doing additional work with
16 the exception of the regulatory matters for those
17 matters given the nature of what they were. Given
18 my limited period of time during which I had
19 supervisory authority, I never developed my own
20 case load. I simply oversaw their case load, but
21 that is vastly different from my experience in the
22 enforcement management position and the compliance
23 management position.

24 **Q. So while you were serving as the**

1 **manager of the air enforcement unit and as the**
2 **manager of the air compliance unit, did you have**
3 **your own case load?**

4 A. Yes.

5 **Q. Can you describe what your duties**
6 **and responsibilities were in terms of your own**
7 **case load in those two units?**

8 A. As an enforcement attorney, again, I
9 either -- I was in addition to -- I both managed
10 and handled in-house legal counsel activities,
11 compliance matters that were going through the
12 Section 31 process or whatever process that is a
13 prerequisite to a referral to the AG's office. I
14 also managed and participated in matters that were
15 referred to the AG's office. Reviewing legal
16 documents prepared by the AG's office,
17 participating in settlement negotiations,
18 participating in legal proceedings. I also
19 participated in and oversaw regulatory relief type
20 proceedings. Again, the adjusted standard site
21 specific provisional variances and I participated
22 in and oversaw permitting related activities where
23 we were providing in-house counsel.

24 In the compliance role it was

1 similar to, but slightly different from
2 enforcement in that not -- most compliance
3 matters, but not all matters involve attorneys or
4 involved the legal department. So I was
5 necessarily responsible for all compliance
6 reviews, all compliance determinations, all
7 compliance interpretations regardless of whether
8 we needed the involvement of legal and in that
9 role of compliance section manager, we necessarily
10 participated in anything the lawyers were doing
11 whether it be a regulatory relief type matter,
12 whether it be an enforcement related matter,
13 whether it be a permitting related matter
14 because -- and as manager of the compliance
15 section, I was responsible for all compliance and
16 enforcement activities of the Bureau of Air.

17 **Q. Starting on August 1st, 2013, what**
18 **position did you start to serve in?**

19 A. August 1st, 2013?

20 **Q. Yes.**

21 A. I became the chief of the Bureau of
22 Air.

23 **Q. Are you still --**

24 MS. PAMENTER: Can we take a break?

1 HEARING OFFICER HALLORAN: Sure.

2 (Whereupon, a break was taken
3 after which the following
4 proceedings were had.)

5 HEARING OFFICER HALLORAN: We're
6 back on the record.

7 BY MS. PAMENTER:

8 **Q. Ms. Armitage, are you continuing to**
9 **serve in the position of chief of the Bureau of**
10 **Air with the Illinois Environmental Protection**
11 **Agency?**

12 A. Yes.

13 **Q. What are your duties and**
14 **responsibilities as chief of the Bureau of Air?**

15 A. I oversee the air pollution control
16 program for the Illinois Environmental Protection
17 Agency for the State of Illinois. I am
18 responsible for a significantly -- first, a
19 significant budget on the order of \$75 million.
20 I'm responsible for approximately 250 staff. I
21 oversee compliance activities, modeling
22 activities, monitoring activities, permitting
23 activities, inspection activities and on the
24 stationary source side of things I also oversee

1 mobile source activities.

2 **Q. As an air enforcement staff**
3 **attorney, what was your involvement with respect**
4 **to the air permit applications?**

5 A. I oftentimes was called upon to
6 provide in-house counsel to the permit section.
7 It ranged from assisting them in interpretations
8 that they either wanted made for them or they
9 wanted assurances that they had made the
10 appropriate determination. We participated in
11 matters that we believed would be of significant
12 interest. We provided counsel on matters that we
13 believed could form the basis for appeal. We
14 provided in-house counsel on matters that were the
15 subject of appeal. We were called upon by the
16 permit section on a daily basis to provide them
17 assistance in myriad regards.

18 **Q. As manager of the air enforcement**
19 **unit, the air regulatory unit and the air**
20 **compliance unit during that timeframe, what was**
21 **your involvement with air permit applications?**

22 A. Always the same.

23 **Q. Okay. As chief of the Bureau of**
24 **Air, what has been your involvement with air**

1 **permit applications generally? We'll talk about**
2 **KCBX's application specifically in a little bit.**

3 A. It is different and lesser in the
4 sense that for the first time in my entire career,
5 which spans on the order of 20 years, I no longer
6 serve in a legal capacity. Therefore, I am no
7 longer in a position to officially tender legal
8 advice to them, but I still interact with them
9 frequently because I oversee that entire section
10 and am responsible for the decisions of that
11 section.

12 **Q. Can you quantify the number of air**
13 **permit applications that you've been involved with**
14 **during the last 20 years while at the Illinois**
15 **EPA?**

16 A. It would be significant. It would
17 have to be in the hundreds of transactions just
18 given the number of years that it spanned and the
19 fact that nearly on a daily basis somebody was
20 posing some sort of question to me personally
21 and/or my staff from the -- on a permitting
22 related question.

23 **Q. Are you familiar with section nine**
24 **of the Illinois Environmental Protection Act?**

1 A. Yes.

2 **Q. What is it?**

3 A. It is -- it is really a couple of
4 things. It is a statutory prohibition against air
5 pollution. It is also the enabling legislation
6 for the better part of the air pollution control
7 regulations.

8 **Q. How are you familiar with that**
9 **section of the act as it relates to your work?**

10 A. The better part of the compliance
11 and enforcement work relates back to section nine
12 of the act.

13 **Q. How is that the case?**

14 A. Again, it is the enabling
15 legislation for the Pollution Control Board's
16 regulations. So virtually every time we are
17 dealing with a Pollution Control Board regulation
18 we are dealing with section nine of the act. Any
19 time there is a violation of one of the Pollution
20 Control Board's regulations, there necessarily is
21 a violation of section nine. Then separately
22 again it is the statutory prohibition against air
23 pollution. So many times considering I have
24 historically dealt in the world of air pollution

1 control, someone who is causing air pollution is
2 necessarily causing a violation of section nine of
3 the act.

4 **Q. While working at the Illinois**
5 **Environmental Protection Agency, have you only**
6 **worked in the Bureau of Air?**

7 A. Short of my tenure as acting chief
8 legal counsel, I have only served in the Bureau of
9 Air.

10 **Q. Are you familiar with Section**
11 **212.301 of the Board's regulations?**

12 A. Yes.

13 **Q. What is it?**

14 A. It is a regulatory provision that
15 prohibits visible emissions from a source.

16 **Q. And how are you familiar with that**
17 **section of the Board's regulations?**

18 A. Based on my tenure in the Bureau of
19 Air and based on the fact that over the course of
20 time -- well, a fair number of sources in Illinois
21 are subject to 212.301. So over the course of
22 time I've seen inspections referencing 212.301,
23 I've seen violation notices referencing 212.301,
24 I've seen -- I've participated in conversations

1 regarding 212.301. So it is a provision that
2 arises with some frequency.

3 **Q. While --**

4 A. I've also seen it in permitting.
5 Sorry. I've also seen it on the face of permits
6 as well.

7 **Q. While working at the Illinois EPA**
8 **for the last approximately 20 years, what has been**
9 **your involvement in air compliance issues relating**
10 **to section nine of the act and Section 212.301 of**
11 **the Board's regulations?**

12 A. I'm sorry. Can you repeat that?

13 **Q. Absolutely. While working at the**
14 **Illinois EPA for the last approximately 20 years,**
15 **what has been your involvement in air compliance**
16 **issues relating to section nine of the act and**
17 **Section 212.301 of the Board's regulations?**

18 A. Like I said, I've seen it with a
19 fair amount of frequency simply because it is --
20 it applies to so many of the sources that we
21 regulate, so many of the sources that we permit,
22 so many of the sources that we inspect, so many of
23 the sources for which we receive records and
24 reports and review those reports. It is hard to

1 tally the number of times that I have come across
2 the provision. I think it's hundreds of times.

3 **Q. It's difficult to quantify?**

4 A. It's difficult to quantify.

5 **Q. Are you familiar with KCBX Terminals**
6 **Company?**

7 A. Yes.

8 **Q. Are you aware KCBX has two**
9 **facilities?**

10 A. I am, yes.

11 **Q. Can we agree that when we're**
12 **referring to the north site that is KCBX's**
13 **facility located at 3259 East 100th Street,**
14 **Chicago, Illinois and that the south site if we're**
15 **referring to that that is KCBX's facility located**
16 **at 10730 South Burley Avenue in Chicago?**

17 MR. SWEDLOW: I'm going to renew my
18 objection. We're not in background anymore. So
19 I'm going to object as leading.

20 HEARING OFFICER HALLORAN:
21 Overruled. You may continue.

22 BY THE WITNESS:

23 A. Yes.

24

1 BY MS. PAMENTER:

2 Q. I'm just trying to come to agreed
3 terminology.

4 A. Yes.

5 Q. Do you know whether KCBX has a
6 permit to operate the south site?

7 A. They do not have an operating
8 permit, but I believe they have authorization to
9 operate the facility in construction permits or
10 permits that have been issued to them.

11 Q. If a facility is permitted, do you
12 believe it is still required to comply with the
13 Illinois Environmental Protection Act and the
14 Board's regulations?

15 A. Yes, it is quite clear from the
16 Pollution Control Board regs that the existence of
17 a permit is no defense to violation of the act
18 except for the requirement to have a permit.

19 Q. Let's turn to page R186 and I
20 believe there should be a copy of the
21 administrative records before you in two binders,
22 do you have that?

23 A. 186?

24 Q. First, I'm just asking you if you

1 **have the two binders.**

2 A. I have the two binders.

3 **Q. Okay. And then let me know when**
4 **you're at page R186.**

5 A. Yes, I'm at 186.

6 **Q. And what is this?**

7 A. It is the application for
8 construction permit dated July 23rd, 2013, that
9 forms the basis for the appeal that is at issue.

10 **Q. Who is the cover letter addressed**
11 **to?**

12 A. Robert Bernoteit.

13 **Q. Do you know Mr. Bernoteit?**

14 A. I do.

15 **Q. What section within the Bureau of**
16 **Air does Mr. Bernoteit work in?**

17 A. The permit section. The Bureau of
18 Air permit section.

19 **Q. Is it typical for permit**
20 **applications to be sent to the permit section or**
21 **Mr. Bernoteit specifically?**

22 A. It is typical for applications for
23 permit regardless of the type to go to --
24 applications for some sort of air permit

1 regardless of type to go to the Bureau of Air
2 permitting section, yes.

3 **Q. Why?**

4 A. It is usually the only -- it is the
5 way that we ensure that the section that processes
6 those applications is in receipt of those
7 applications.

8 **Q. If you look still on page 186, there**
9 **is a re line, do you see that?**

10 A. Yes.

11 **Q. And the re line says "Request for**
12 **revision to revise construction permit," do you**
13 **see that?**

14 A. I do.

15 **Q. Are there regulations for a request**
16 **for revision?**

17 A. There are not.

18 **Q. Does Illinois EPA to your knowledge**
19 **have a request for revision form?**

20 A. Not to my knowledge.

21 **Q. Can you turn for me to page R191,**
22 **and let me know when you're there.**

23 A. I'm here.

24 **Q. Okay. Specifically on the number**

1 **three -- box three on that page, do you see that?**

2 A. Yes.

3 **Q. That box asks "Does this application**
4 **request a revision to an existing construction**
5 **permit issued by the BOA, correct?**

6 A. Yes.

7 **Q. And what does BOA refer to?**

8 A. Bureau of Air.

9 **Q. And what response is given by KCBX**
10 **to box three?**

11 A. They've checked the yes box.

12 **Q. By checking this box, does a**
13 **construction permit application get treated**
14 **differently by the Illinois EPA?**

15 A. No, the application is treated the
16 same. It just tells us that the source has been
17 the subject of previous construction permitting
18 applications and determinations by us.

19 **Q. So was -- with respect to this**
20 **construction permit application, was the Illinois**
21 **EPA required to ensure that the request for which**
22 **KCBX was seeking authorization complied with the**
23 **act and the Board regulations?**

24 A. Yes.

1 **Q. Let's turn back to R186. What was**
2 **KCBX seeking through the July 23rd, 2013,**
3 **construction permit application?**

4 A. They were seeking to construct ten
5 conveyors, a stacker and a hopper. They were
6 seeking an application -- they were seeking a
7 construction permit to construct the ten
8 conveyors, a hopper and a stacker.

9 **Q. In your role as chief of the Bureau**
10 **of Air, do you typically get copies of**
11 **construction permit applications upon their**
12 **submission to the Illinois EPA?**

13 A. No, I do not.

14 **Q. In your role as chief of the Bureau**
15 **of Air, are you responsible for conducting the**
16 **initial review of the construction permit**
17 **application for completeness?**

18 A. No, I am not.

19 **Q. Do you consider any calculations**
20 **within the construction permit application?**

21 A. No.

22 **Q. Who would perform those duties in**
23 **that initial phase?**

24 A. Whomever the assigned engineer is

1 and I suppose perhaps the manager may play some
2 role in it, but I would have nothing to do with
3 that.

4 **Q. When did you first become aware of**
5 **KCBX's July 23rd, 2013, construction permit**
6 **application?**

7 A. Shortly after its receipt.

8 **Q. Why were you apprised of this**
9 **application shortly after July 23rd, 2013?**

10 A. The Illinois EPA is a source who
11 receives -- well, particularly, the Bureau of Air
12 receives federal funding that subjects us to Title
13 VI of the Civil Rights Act. That puts us in a
14 position where we necessarily need to have an
15 environmental justice policy. We do have such a
16 policy. The policy is generally designed to
17 ensure environmental equity and to ensure that
18 there is no disproportionate impact to Illinois
19 residents from Agency determinations and we also
20 try to encourage public participation in our
21 environmental determinations. To that end, we
22 have a policy and a public participation procedure
23 which spells out that for every permitting
24 transaction, regardless of type, regardless of

1 bureau, that is received by the Agency we upon
2 receipt of the application assess whether the
3 source filing the application is located in a
4 potential EJ area.

5 To the extent that it is, we
6 necessarily develop a public outreach plan for
7 every one of those facilities. The plans run
8 varied in type depending upon the source where it
9 is located and a number of things. In this
10 instance, KCBX is located in a potential area --
11 EJ area. Thus we necessarily needed to have a
12 public outreach plan. I as bureau chief
13 necessarily have to see and approve of every
14 public outreach plan.

15 So it was in that context that
16 fairly shortly after receipt of this application I
17 learned of the facility. I'll always learn of
18 applications shortly after receipt where again the
19 facility is located in an EJ area because we need
20 to quickly formulate what our public outreach plan
21 may look like and quickly discern at what
22 intervals we're going to do, whatever it is that
23 we are proposing to do regarding public outreach.
24 We have to do all this quickly because there are

1 statutory deadliness by which we need to make
2 permitting determinations.

3 **Q. Does this apply -- does this**
4 **environmental justice policy only apply to the**
5 **Bureau of Air?**

6 A. No, it applies to all three bureaus
7 and all different sorts of permitting
8 transactions.

9 **Q. And do you know when this policy**
10 **started?**

11 A. I can't tell you the precise date
12 when we commenced practice. We have been
13 endeavoring to commence this practice for a period
14 of time and as time has moved on we have just
15 refined the practice and become more in depth at
16 employing it. Certainly we were -- we were
17 embodying it at the time of receipt of the
18 application in July 2013. It is my recollection
19 that we were doing so well before that period in
20 time.

21 **Q. But your timeframe just to refresh**
22 **my recollection as chief of the Bureau of Air**
23 **started on what date?**

24 A. August 1st of 2013.

1 **Q. Are you aware of whether an initial**
2 **meeting was held between KCBX and the Illinois**
3 **Environmental Protection Agency regarding the**
4 **construction permit application?**

5 A. I believe there was one held.

6 **Q. Do you know approximately when that**
7 **was held?**

8 A. I want to say that it was somewhat
9 give or take within the first 30 days or so.

10 **Q. Did you attend?**

11 A. I did not attend the meeting, no.

12 **Q. Do you know whether the Illinois**
13 **Environmental Protection Agency's environmental**
14 **justice policy was discussed at that meeting?**

15 A. I believe that it was.

16 **Q. After that meeting, which you said**
17 **occurred within the approximately 30 days after**
18 **the July 23rd, 2013, construction permit**
19 **application was submitted, give or take a day or**
20 **two, when did you next get involved with KCBX's**
21 **construction permit application?**

22 A. Sometime approximate to an August
23 30th, 2013, wind event that seemed to have caused
24 air pollution in the vicinity of KCBX.

1 **Q. How did you learn of that?**

2 A. I became aware of it through --
3 through any number of ways. The Agency became
4 aware of this any number of ways. I know for sure
5 that I received a communication from the Attorney
6 General's Office regarding the event. Certainly I
7 received calls from NGO's regarding the event.

8 **Q. And just to stop you right there.**

9 **For the record, what does --**

10 A. Non-governmental organizations. I
11 received -- we at the Agency received calls from
12 citizens, from -- we received comments -- comments
13 I guess from local political representatives.
14 That's largely how I became aware of it.

15 **Q. As a result of receiving those**
16 **telephone calls and comments, what did you do?**

17 A. I requested that the field
18 operations section conduct an inspection.

19 **Q. When you say inspections, is that of**
20 **the KCBX south?**

21 A. KCBX south facility, yes.

22 **Q. Why did you request that an**
23 **inspection be conducted of the KCBX south facility**
24 **in -- are we talking early September at this**

1 **point?**

2 A. Yes.

3 **Q. In early September of 2013?**

4 A. I wanted them to take a look at the
5 compliance status of the facility and I had
6 several thoughts that were running through my
7 head. We needed to know what the facility's
8 compliance status was to know whether we needed to
9 do anything compliance or enforcement-wise. We
10 needed to know what the facility's compliance
11 status was because we were in the process of
12 putting together a public outreach plan and we
13 needed to know how that might factor into the
14 plan. If nothing else, in terms of timing and
15 information that we would provide and also I knew
16 that we had a pending permitting transaction and
17 that the facility in the context of that
18 transaction would necessarily have to provide
19 information showing that it does not cause a
20 violation -- would not cause a violation of the
21 applicable act and provisions of the act in the
22 regulations.

23 **Q. After the September 5th inspection,**
24 **were additional inspections required by you or**

1 **requested by you?**

2 A. Yes. There were two additional
3 inspections in September and there I believe were
4 two additional inspections in November.

5 **Q. Can you turn to R1428, please.**

6 A. What was the number again?

7 **Q. R1428. Let me know when you're**
8 **there.**

9 A. I'm there.

10 **Q. Did you prepare and send the**
11 **original e-mail dated September 12th, 2013, at**
12 **6:05 p.m.?**

13 A. I did.

14 **Q. The first line reads "Counsel for**
15 **KCBX phoned in high wind notice," do you see that?**

16 A. I do.

17 **Q. Who is the counsel for KCBX that is**
18 **being referred to?**

19 A. Kathy Hodge.

20 **Q. And the send line of the e-mail**
21 **reads "Allegedly, north is sufficiently**
22 **controlled, but south plant is struggling," do you**
23 **see that?**

24 A. I do.

1 **Q. What are the references to north and**
2 **south in your e-mail in that sentence?**

3 A. The KCBX north site and the KCBX
4 south site.

5 **Q. Why did you write in your e-mail**
6 **based on the telephone call from Katherine Hodge**
7 **that KCBX's south plant was struggling?**

8 A. Because she said that they were
9 struggling.

10 **Q. Did she give you any indication as**
11 **to what the south plant was struggling with?**

12 A. Struggling to ensure that they
13 didn't cause an emissions impact offsite.

14 **Q. As a result of counsel for KCBX**
15 **giving you a high wind notice and advising you**
16 **that KCBX's south plant was struggling, did you**
17 **require additional inspections be conducted in**
18 **September?**

19 A. Yes.

20 **Q. How did the September inspections**
21 **relate to KCBX's construction permit application?**
22 **The additional one. I know we've already talked**
23 **about September 5th. I'm referring to the**
24 **additional inspections.**

1 A. Again, I wanted to see what the
2 compliance status of the facility was because,
3 again, this source in the context of the
4 permitting transaction would be obligated to prove
5 up that it -- or tend to prove that it would not
6 cause a violation of the act and regs and what I
7 wanted to see was what, if any, feedback would
8 come back from the field by way of an inspection.

9 **Q. In your September 12th, 2013,**
10 **e-mail, I believe it is R1428, is that right, do**
11 **you have it in front of you still?**

12 A. This e-mail, yes.

13 **Q. Okay. You state that you wanted to**
14 **see drafts of the September inspection reports, is**
15 **that correct?**

16 A. Yes.

17 **Q. Did you, in fact, review drafts of**
18 **the September inspection report?**

19 A. I believe I did, yes.

20 **Q. Can you turn to R1305 to R1327,**
21 **please. I'm sorry. Let me know when you're**
22 **there.**

23 A. I'm here.

24 MR. SWEDLOW: What page?

1 MS. PAMENTER: We're starting on
2 1305.

3 BY MS. PAMENTER:

4 Q. Are you familiar with the document
5 that is at R1305?

6 A. Yes, I am.

7 Q. What is your understanding of the
8 document that is at R1305?

9 A. It is a draft report of inspections
10 conducted on September 11th and 13th and it is a
11 draft that bears my comments.

12 Q. And whose draft inspection report is
13 this?

14 A. Joe Kotas.

15 Q. Why did you provide comments on the
16 draft inspection reports that are at pages R1305
17 to R1327?

18 A. To ensure -- to ensure their -- to
19 ensure their adequacy.

20 Q. Have you been to KCBX's south site?

21 A. I have not.

22 Q. So then what is the nature of the
23 comments that you're providing to the draft
24 inspection report?

1 A. Let me -- perhaps it would be best
2 to characterize the nature. I will run you
3 through a couple of the comments and tell you what
4 I was thinking at the time.

5 **Q. And let --**

6 A. No.

7 **Q. No, I think that would be hopeful.**
8 **Let's start on page R1308. Unless you have**
9 **something you want to describe prior to R1308.**

10 A. No.

11 **Q. So let's start on R1308. Can you**
12 **tell me when you're there?**

13 A. I'm there.

14 **Q. If you can go to the fifth paragraph**
15 **on that page that starts "in general," do you see**
16 **that?**

17 A. I do.

18 **Q. Why did you make these comments to**
19 **the draft September inspection report?**

20 A. Well, there is a few reasons.
21 Mostly it speaks to the nature of the information
22 on the page. So, for example, I circled the
23 90-acre site because as I had noted on the first
24 page of the inspection I believed that that might

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1 not be accurate. I believed that it might be an
2 80-acre site based on information that I had
3 received from counsel for KCBX. So I just wanted
4 this to be accurate. In terms of the next
5 sentence, a lot of construction is taking place.
6 That is just not a very meaningful sentence to me.
7 So my comment there says "Like what?" The point
8 being please articulate what construction you're
9 seeing because a lot of construction tells those
10 of us in Springfield and really anyone who would
11 review this report very little.

12 In terms of the -- there is a
13 comment that comes up rail unloading terminal. He
14 noted they are building another rail unloading
15 terminal. My question there was it says -- is it
16 addressed by some existing permit? Is this
17 perhaps addressed as part of a pending application
18 for permit? So what I wanted addressed was
19 whether this does or does not need a permit and
20 whether they have or do not have one -- possess
21 one or don't possess one, have one pending or not
22 and then in terms of the water spray system I
23 struck the word extensive because extensive
24 doesn't do anything for a reader in terms of

1 describing the nature of the water spray system.

2 I needed to have details on the
3 water spray system so that I could know precisely
4 what did they have at the site, what they were
5 actually using at the site, how they were using
6 it, whether they were using it, when they were
7 using it and then, of course, related back to
8 several things not the least of which is for
9 purposes of today the permitting transaction where
10 we would need to, again, look at whether the
11 facility had tendered sufficient information to
12 ensure that it would not cause a violation of the
13 act or regs.

14 **Q. Okay. Let's take a look at another**
15 **example. R1310, if you can turn your --**

16 A. Did you say R1310?

17 **Q. Yes. I'm sorry.**

18 A. Yes.

19 **Q. At the top of the page, the comment**
20 **is to delete the word excellent, do you see that?**

21 A. Yes.

22 **Q. And that is describing PM capture**
23 **efficiency, is that right?**

24 A. Yes.

1 **Q. At least as written on this page?**

2 A. Yes.

3 **Q. Why was your comment to delete that**
4 **word?**

5 A. Again, similar to what I've said
6 about other comments I made. Excellent does not
7 tell me -- it does not provide me any specific
8 detail regarding the PM capture efficiency.
9 Again, I need to know what is controlling what,
10 how so and then I need -- I need and more
11 importantly engineers at the IEPA need information
12 from which they can independently assess the
13 efficiencies and excellent just doesn't get us
14 there.

15 **Q. Can you turn to R1311, please, and**
16 **let me know when you're there.**

17 A. I'm there.

18 **Q. There's a carryover paragraph at the**
19 **top and then there are three paragraphs below. So**
20 **I'm looking at the paragraph right before the**
21 **words exit interview. Are you there?**

22 A. Yes.

23 **Q. Your comment is to delete that**
24 **entire paragraph, correct?**

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1 A. Well, I'm not entirely convinced
2 that I wanted the entire paragraph deleted. I'm
3 just pretty sure I just wanted the last portion of
4 it. As such because the first part of it I read
5 to say that the source represented that the water
6 spray system they were installing at the south
7 plant was built based on knowledge they had gained
8 at the northern plant.

9 It wasn't entirely clear to me
10 whether it was the source's conclusion or our
11 conclusion that the south plant's water system
12 would be superior in design and accomplish the
13 goals of fugitive PM control and, again, if that
14 was to be our position, then, one, we don't put --
15 it is our policy at the IEPA we do not put
16 conclusory statements, opinion statements, that
17 sort of thing into the body of inspection reports,
18 for among other things, FOIA purposes. We don't
19 want to have to deal with redacting them. The
20 other thing is there was no information there that
21 would factually support what the design was or
22 wasn't, what it would or wouldn't accomplish. So,
23 again, what I was seeking was very fact specific
24 information and elimination of mere

1 characterizations that were not substantiated in
2 any way.

3 **Q. In your response, you referenced**
4 **FOIA. What is that?**

5 A. Freedom of Information Act.

6 **Q. You said you may have to redact**
7 **documents as a result of FOIA. What does that**
8 **mean?**

9 A. So Illinois EPA as a public agency
10 possesses much in the way of documentation.
11 Parties can obtain -- individuals can obtain
12 information from us by way of the Freedom of
13 Information Act process. They submit a request
14 and they may ask for copies or to come in and view
15 documents in our possession. Before we provide
16 documents for reviewing or release documents --
17 copies of documentation, we necessarily review all
18 documents to make sure there is no claims of trade
19 secret by sources or other claims of
20 confidentiality sources.

21 We also review it to make sure
22 that there is no opinions, conclusions or not that
23 would -- that would properly be withheld from
24 review. So to that end inspectors and others who

1 prepare written documents are trained to know not
2 to write certain things into the body of the
3 documents.

4 Those sorts of statements are to
5 go on -- on -- typically isolated pieces of paper
6 at the end of documents where a person who is
7 charged with redacting can readily know that here
8 is a page that perhaps contains such opinions and
9 then necessarily deal with them. It is hard for
10 our screening department, who is not necessarily
11 conversant on the various work of the various
12 bureaus, to look through volumes of documents, to
13 look through permit applications, to look through
14 inspection reports, to look through compliance
15 reports, to look through whatever it is they might
16 be having to screen and identify this information.

17 There is a volume of information
18 they need to be able to move through and you may
19 have to have some familiarity to even spot what
20 could potentially be a piece of information that
21 is appropriately to be withheld from disclosure.
22 So there are at least a few reasons why I
23 suggested that he edit that passage out.

24 **Q. When you say "edit that passage**

1 out," I want to make sure I'm clear. Are you
2 suggesting after the word Walker that there should
3 be a period there?

4 A. That's what it looks to me like I am
5 suggesting that.

6 Q. And this is your note?

7 A. Yes.

8 Q. Can you turn to R1316, please.

9 A. Yes.

10 Q. And what do you believe this page to
11 be?

12 A. It is the last page of Mr. Kotas's
13 report for his September 11th and 13th
14 inspections. This is actually the sort of page
15 that we do put conclusions, opinions and whatnot
16 on. But here I have yet another edit and the
17 concern is not so much for the fact that he has an
18 opinion there, that this -- that the installation
19 of 43 to 44 galvanized steel towers with water
20 cannons is being installed and would improve
21 fugitive PM control tremendously, but that it is
22 not documented.

23 There is no information here
24 that follows this that indicates whether, when and

1 how those particular cannons would accomplish that
2 and what is -- and so that is what I would expect
3 him to put there. If you're going to have that
4 sort of statement there, it necessarily has to be
5 followed with information.

6 **Q. Now, looking at the top of page**
7 **R1316. I just want to clarify. Does it state a**
8 **page number at the top of that page?**

9 A. Eleven.

10 **Q. If you look back to the prior page,**
11 **is there a page number on the top of that page?**

12 A. Ten.

13 **Q. And then so flipping two pages**
14 **forward to R1317, is this a page number on top of**
15 **that page?**

16 A. Yes, 12.

17 **Q. So do you know or consider the R1316**
18 **to be a standalone page for -- as you were**
19 **describing for the FOIA purposes?**

20 A. Yes.

21 **Q. And how do you know that?**

22 A. Because that's the page that is
23 different from all the other pages prior to the
24 7.0. That page is actually marked "Confidential."

1 For Agency Use Only." Then it says "7.0
2 conclusions, recommendations and other comments."

3 Q. Okay. Can you turn to R58 and stay
4 on R1316, if you wouldn't mind?

5 A. R58?

6 Q. Yes, please. And let me know when
7 you're there.

8 A. Yes.

9 Q. Are you -- I guess let me ask a
10 foundational question. Can you start on page R40?

11 A. Yes, I'm there.

12 Q. What is the document that starts on
13 R40, please?

14 A. This appears to be the final version
15 of the report for the inspections conducted on
16 September 11th and 13th, 2013, by Joe Kotas.

17 Q. And then going back to R58, is that
18 page part of this inspection report?

19 A. Yes.

20 Q. Now, at the top of R58, the words
21 "Confidential. For Agency Use Only" are crossed
22 out, do you see that?

23 A. I do.

24 Q. Do you know why?

1 A. Given the FOIA policy. I think it
2 is because there are no -- well, I tend to think
3 it is because the FOIA department concluded that
4 this page was not of the same type that this 7.0
5 was. I think they concluded this wasn't the
6 typical page that includes conclusions,
7 recommendations and other comments. I think they
8 saw this as a page that was a releaseable page.
9 So I think that's -- that appears to be a FOIA
10 marking up at the top, that R014 or whatever that
11 marking is. I'm not entirely certain who marked
12 that out, but clearly somebody did not think this
13 was a page that gets withheld. Maybe they did. I
14 don't know.

15 MR. SWEDLOW: I'm just going to
16 object as to calling for speculation to who made
17 that mark, what it is and why it was made.

18 HEARING OFFICER HALLORAN: We're on
19 the record page 58?

20 MR. SWEDLOW: Yes, I think the
21 witness testified that she doesn't know, but then
22 said I think that's someone from FOIA, but I don't
23 know.

24 HEARING OFFICER HALLORAN: Anything

1 in response, Ms. Pamentor?

2 MS. PAMENTER: A, I think the
3 witness has answered unfortunately, but with
4 respect to it I'm happy to ask another question to
5 see if we can reach a clarification.

6 HEARING OFFICER HALLORAN: Okay.

7 BY MS. PAMENTER:

8 Q. Ms. Armitage, looking at the top
9 after the word confidential that has been marked
10 out, have you seen -- let me strike that.

11 Have you seen conclusions,
12 recommendation pages before where the words
13 "Confidential. For Agency Use Only" has been
14 marked out?

15 A. No, this would not be standard.

16 Q. It is not?

17 A. It is not typical to have that
18 swiggled out, no.

19 Q. Okay.

20 MS. PAMENTER: Mr. Halloran, just to
21 follow up, I'm going to withdraw my earlier
22 question that was objected to and I may come back
23 to it at a further time --

24 HEARING OFFICER HALLORAN: Okay.

1 MS. PAMENTER: -- for the record.

2 BY MS. PAMENTER:

3 Q. So, if I can, when we turn to these
4 pages taking a look at R1316 and R58, do these
5 correspond to the same inspection report?

6 A. 1316 and --

7 Q. R58.

8 A. Yes, these appear to be the last
9 pages on the inspection reports for the September
10 11th and 13th inspections. One is on the back of
11 the draft report and the other page is on the back
12 of the final report and the one thing I will add
13 is that considering that the R58 page has the
14 attachments listed on that page, that's the page
15 that in the ordinary course is -- would be a page
16 that signals it would be released.

17 Q. So let's backup. You are -- we're
18 on page R58, correct?

19 A. Yes.

20 Q. And you're referring close to the
21 bottom half of the page on R58?

22 A. Correct.

23 Q. And there is a section there that
24 starts with attachments?

1 A. One through eight.

2 **Q. And then there is a box checked?**

3 A. Yes.

4 **Q. In your experience with the Illinois**
5 **Environmental Protection Agency, does the**
6 **attachment information get released?**

7 A. Yes. So that it is clear to
8 somebody whether there are or not attachments and
9 what they might be able to think and ensure if
10 they're interested, but they can receive copies of
11 those if -- those attachments if they were not
12 necessarily included with the report itself when
13 they received it or viewed it.

14 **Q. So based upon your observation that**
15 **that attachment section is included on page R58,**
16 **is that a reason why the "Confidential. For**
17 **Agency Use Only" might be crossed out?**

18 A. It is, yes.

19 MR. SWEDLOW: Same objection. The
20 witness has already testified she doesn't know why
21 or who crossed this out and we keep circling
22 around saying maybe you can speculate if I point
23 you to other pages.

24 HEARING OFFICER HALLORAN: I think

1 we're finished with that. Overruled. You can
2 stay.

3 BY MS. PAMENTER:

4 Q. Again, where I started with this
5 we're taking a look at R1316 and R58. You're on
6 both those pages?

7 A. Yes.

8 Q. The conclusion section is different
9 from the draft on R1316 to the final version on
10 R58, is that right?

11 A. Yes. Certainly, yes, it is.

12 Q. Do you have any knowledge as to why
13 the conclusions on page R58 are different from the
14 draft on R1316?

15 A. Nope.

16 Q. Did you write the conclusions that
17 are set forth on page R58?

18 A. No.

19 Q. Do you know who did write the
20 conclusions that are on page R58?

21 A. Seemingly, Joe Kotas since he is the
22 author of the report.

23 Q. Okay. Were you one of the
24 individuals at the Illinois Environmental

1 **Protection Agency who made the decision as to**
2 **whether to grant or deny KCBX's construction**
3 **permit application?**

4 A. I am.

5 **Q. And was that decision to grant or**
6 **deny?**

7 A. Deny.

8 **Q. Okay. And going back to R1305 to**
9 **R1327. Let me know when you're there, please?**

10 HEARING OFFICER HALLORAN: R1327?

11 MS. PAMENTER: Yes.

12 HEARING OFFICER HALLORAN: Thank
13 you.

14 BY MS. PAMENTER:

15 **Q. Are you there?**

16 A. Yes, I'm just making sure what we
17 have here.

18 **Q. Okay.**

19 A. Okay. Yes.

20 **Q. We've established that the**
21 **handwritten comments on these pages are yours, is**
22 **that correct?**

23 A. Correct.

24 **Q. Have you considered both the draft**

1 **and final versions of the September inspection**
2 **reports prior to January 2014 in making your**
3 **decision to deny KCBX's construction permit**
4 **application?**

5 A. Yes.

6 MR. SWEDLOW: I guess I have an
7 objection, but just clarification. We established
8 that the comments on what page was it?

9 MS. PAMENTER: The pages between
10 1305 and 1327. I had asked that question earlier
11 that those are her handwritten comments.

12 MR. SWEDLOW: Okay.

13 MS. PAMENTER: I can ask further
14 questions.

15 MR. SWEDLOW: No, I didn't know we
16 established that these --

17 BY MS. PAMENTER:

18 **Q. Please turn to R1318.**

19 A. Yes.

20 **Q. Just let me know when you're there.**

21 A. I'm there.

22 **Q. What is that?**

23 A. That appears to be another draft
24 inspection report for the inspections conducted on

1 September 11th and 13th by Joe Kotas and it
2 appears to be a draft copy of comments of mine.

3 **Q. So starting on page 1318 there are**
4 **handwritten comments on there, is that your**
5 **handwriting?**

6 A. Yes.

7 **Q. And turning to page R1319, please,**
8 **are you there?**

9 A. Yes, I'm at 1319.

10 **Q. The last paragraph you'll see there**
11 **is a sentence "They are currently installing a**
12 **major new system consisting of 44 pole mounted**
13 **water cannons," do you see that?**

14 A. I do.

15 **Q. And the comment -- excuse me -- the**
16 **phrase "a major new system consisting of" appears**
17 **to be crossed out, do you see that?**

18 A. Yes.

19 **Q. Is that your comment?**

20 A. Yes.

21 **Q. Why did you make that comment?**

22 A. For reasons similar to those that I
23 described before. It is not informative. It is a
24 characterization without any specificity. So,

1 again, what I am looking for is specific detail.
2 How many cannons, what do they do, where do they
3 do it, how do they do it, when do they do it. A
4 bland characterization is not useful to a reader.

5 **Q. Can you turn to page R1322.**

6 A. Yes, I'm there.

7 **Q. I see some explanation points on**
8 **that page, is that right?**

9 A. Yes, you do.

10 **Q. Why do you have explanation points**
11 **next to your comment on that page?**

12 A. My comment -- well, the explanation
13 marks and comments there pertains to the sentence.
14 He said he provided throughput numbers to Emilio
15 Salas and my comment was "Yes, and where is
16 Salas's info and report?" I wanted to know where
17 the report that contained this throughput
18 information was and the explanation marks
19 indicated that I wanted it right away.

20 **Q. And who is Emilio Salas?**

21 A. He is another Bureau of Air
22 inspector. He is actually one of the inspectors
23 that did the September 5th inspection at the KCBX
24 south plant.

1 Q. Okay. So based upon your testimony
2 regarding R1305 to R1327, are these your
3 handwritten comments to these draft inspection
4 reports?

5 A. Yes.

6 Q. Had you considered both the draft
7 and final versions of the September inspection
8 reports in making your decision to deny KCBX's
9 construction permit application in January 2014?

10 A. I did.

11 Q. Did your comments impact your
12 decision of whether to grant or deny the
13 construction permit application?

14 A. They did not.

15 MS. PAMENTER: Mr. Halloran, I don't
16 know what the plans are with respect to a lunch
17 break, but this would work in terms of a break or
18 I'm happy to continue.

19 HEARING OFFICER HALLORAN: Let's go
20 off the record for a minute, please.

21 (Whereupon, a break was taken
22 after which the following
23 proceedings were had.)

24 HEARING OFFICER HALLORAN: We're

1 back on the record. I've decided we're going to
2 take a lunch and we'll be back in the room by 1:10
3 and hopefully start by 1:15. Mr. Swedlow, you
4 have a comment?

5 MR. SWEDLOW: Yes, the Illinois
6 Pollution Control Board as I understand it had
7 their periodic meeting today and ruled on the -- I
8 think it was a motion for reconsideration.

9 HEARING OFFICER HALLORAN: Did they
10 do the motion for supplement, too?

11 MR. DWYER: Yes.

12 HEARING OFFICER HALLORAN: Did they
13 rule on it?

14 MR. DWYER: Yes.

15 MR. SWEDLOW: And I think the
16 Illinois Environmental Protection Agency's motion
17 was denied and ours was granted with respect to
18 this. So we're hoping to get the items listed on
19 the privilege log and any other responsive
20 documents specifically related to Ms. Armitage so
21 that we can finish the questioning today based on
22 the information we're entitled to get now.

23 HEARING OFFICER HALLORAN: All
24 right. Do they have the hardcopy up yet?

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1 MR. SWEDLOW: I've been sitting here
2 with you so I don't know.

3 MR. DWYER: It's not posted yet so
4 I'm not sure.

5 HEARING OFFICER HALLORAN: Let's see
6 what we can do. Let's come back here by 1:10 or
7 so. Thank you.

8 (Whereupon, a break was taken
9 after which the following
10 proceedings were had.)

11 HEARING OFFICER HALLORAN: We're
12 back on the record. I forgot to mention we are
13 still under a continuing motion to exclude
14 witnesses and that also includes not talking to
15 counsel during breaks or lunch. So I would
16 suggest don't even sit with them. They can buy
17 you lunch, but don't talk with them. Thank you.
18 We're off the record.

19 (Whereupon, a break was taken
20 after which the following
21 proceedings were had.)

22 HEARING OFFICER HALLORAN: We're
23 back on the record. We just took a lunch break.
24 It is approximately 1:15 and I want to note that

1 again there is still no members of the public
2 here. It is my understanding I have -- the Board
3 just discussed a ruling from their 11:00 Board
4 meeting. They had on the agenda and I guess --
5 the long and short of it they denied the Agency's
6 motion for reconsideration and that involved the
7 privilege log and they granted petitioner's second
8 motion to supplement the record. I don't know if
9 you had time to peruse these or not?

10 MS. PAMENTER: I haven't seen the
11 order at all because I was in another room. As
12 you know, I'm in the middle of a direct
13 examination.

14 HEARING OFFICER HALLORAN: Correct.

15 MS. PAMENTER: So I haven't seen the
16 order at all at this point to be honest.

17 HEARING OFFICER HALLORAN: That's
18 the long and short of it. Mr. Grant, have you
19 seen it?

20 MR. GRANT: I have not, but I think
21 Mr. Petti has.

22 MR. PETTI: Do you really want my
23 comments on it?

24 HEARING OFFICER HALLORAN: No, I

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1 just want to make sure you guys are aware of it.

2 MR. PETTI: We're aware of it. I
3 think we should leave it at that.

4 HEARING OFFICER HALLORAN: Ms.
5 Pamenter, are you still under oath?

6 THE WITNESS: Yes.

7 HEARING OFFICER HALLORAN: Thank
8 you.

9 MR. SWEDLOW: So we don't have to --
10 so that we can close the record today. Based on
11 the ruling KCBX is requesting a copy of all the
12 documents that were previously withheld based upon
13 this assertion of privilege and predetermination
14 protection including, but not limited to the
15 documents that are listed on the privilege log
16 which are clearly somewhere and already paginated.

17 HEARING OFFICER HALLORAN: Okay.
18 Ms. Pamenter? Mr. Grant?

19 MR. GRANT: Do you want me to
20 respond?

21 MS. PAMENTER: Sure. As I said, I
22 really haven't seen this order because I'm in the
23 middle of a direct examination.

24 HEARING OFFICER HALLORAN: I

1 understand.

2 MS. PAMENTER: I honestly can't
3 speak to it.

4 MR. GRANT: As far as the additional
5 materials, I just met with Beth Wallace who is the
6 bureau chief who did actually have a chance to
7 skim through the order to see what it is. She has
8 a call in for Matt Dunn and we will discuss it
9 with Illinois EPA management as well before coming
10 up with a response.

11 HEARING OFFICER HALLORAN: This is
12 the motion to supplement or the privilege log?

13 MR. GRANT: It's the privileged
14 materials.

15 HEARING OFFICER HALLORAN: Okay.

16 MR. GRANT: So we don't have a
17 response to it today. They will not be produced
18 today until we've had a chance to talk to
19 management and Matt Dunn was out when she called
20 him. So they will not be produced today.

21 HEARING OFFICER HALLORAN: I guess
22 we'll have to continue this on record. I mean,
23 the Board has ordered for you to produce them.
24 I'm not sure where you can go.

1 MR. GRANT: We're reviewing our
2 options, number one. Number two, there was no
3 timeframe listed in either the original order or
4 in the denial of our motion to reconsider. I
5 think just applying the rule of reason, we have a
6 reasonable time to evaluate and decide what our
7 next step is.

8 HEARING OFFICER HALLORAN: As far as
9 a reasonable time, I mean it is also -- it is
10 known that this is a time driven matter. It has
11 been time --

12 MR. GRANT: It is not -- the
13 timeframe that we're operating under was not set
14 by anything that the state did. We don't think --

15 HEARING OFFICER HALLORAN: No, it's
16 statutory.

17 MR. GRANT: I understand. But as
18 far as being, you know, not being able to file a
19 response to their motion to supplement the record
20 that was served on us at Friday at 4:30 --

21 HEARING OFFICER HALLORAN: That's
22 one issue. We were talking about the privileged
23 material.

24 MR. GRANT: As far as the privileged

1 material, we think it's an extremely serious issue
2 and we think we need to discuss it with
3 management. As far as what our options are, we're
4 not going to produce them today. We're not going
5 to produce them today until we've had a chance to
6 review this with management.

7 HEARING OFFICER HALLORAN: Okay.

8 MR. GRANT: The presence of the
9 attorney/client privilege of Illinois EPA between
10 its attorneys and people working on permits is a
11 very serious issue and simply because KCBX decided
12 to push us along with late filed motions and
13 everything else we don't think is sufficient
14 justification for us to allow the attorney/client
15 privilege that exists within the agency and within
16 the Attorney General's Office in the Agency to be
17 interrupted.

18 So we need time to review that
19 and decide what our options are. We're sorry that
20 the Board had a meeting today. We're sorry we
21 didn't conclude yesterday with the hearing, but,
22 you know, the fact is we have to have time to
23 review that with management before we produce
24 privileged material.

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1 HEARING OFFICER HALLORAN:

2 Understood. Mr. Swedlow?

3 MR. SWEDLOW: And the brief response
4 for the record would be that that was the argument
5 made and rejected that it was privileged and
6 protected from production in the first round and
7 then it was filed as a motion for reconsideration
8 that was rejected in the second round. So it's
9 already been considered and rejected as privileged
10 twice. I have no doubt that it is a serious
11 matter except that KCBX every day that this permit
12 denial extends in the sense this is a contested
13 issue the Illinois Environmental Protection Agency
14 wins because we don't have a permit to move these
15 portable conveyors to the south.

16 So we're stuck in a position
17 where we either have to agree that the record
18 becomes final for the Board -- for the Illinois
19 Pollution Control Board to make its determination
20 on without the information that we've been twice
21 determined entitled to or we have to continue to
22 not have our permit granted or considered whether
23 it should have been granted or not. So we lose
24 and the Agency wins simply by failing to follow

1 the ruling of the Illinois Pollution Control Board
2 that this information is not protected from
3 production. I don't know how the Hearing Officer
4 is supposed to solve that problem.

5 HEARING OFFICER HALLORAN: I can't,
6 but I appreciate your comments. Mr. Petti?

7 MR. PETTI: I was going to say we're
8 not saying it's not coming. We're saying people
9 are looking at it. We cannot in this room once it
10 goes to our chief and the people above us that
11 need to make the decision that need to confer with
12 the client who is the EPA and let them know what
13 happened just come in here and say what we're
14 going to do without hearing from them. We've had
15 this for less than an hour. Give us time to
16 review it, inform people and then we'll have a
17 decision one way or the other. That's all we're
18 saying.

19 HEARING OFFICER HALLORAN: On the
20 issue on the motion to supplement, same reasoning?
21 It's a little different posture at this point.

22 MR. GRANT: You mean as far as -- I
23 think the Board again --

24 HEARING OFFICER HALLORAN: The

1 second motion to supplement.

2 MR. GRANT: The one we got on
3 Monday. I mean, I'm not going to argue it here.
4 The Board has already ruled. But as far as what
5 our position is we will certainly object to the
6 entry of material that is covered by settlement
7 privilege that is clearly covered we believe by
8 settlement privilege. Is there anything we can do
9 about it right now? I believe there is -- the
10 documents are there. All we can really do I think
11 at this point is object and preserve the record.

12 HEARING OFFICER HALLORAN: All
13 right. Fair enough? All right. I'm glad that's
14 all on the record. Ms. Pamentter, you may continue
15 with your direct. Thank you.

16 MS. PAMENTER: Thank you.

17 BY MS. PAMENTER:

18 Q. Before we took the lunch break we
19 were talking about the September inspection
20 reports and let me just back up just for --
21 because it's been an hour. There has apparently
22 been a lot going on in that last hour.

23 So we've talked about August and
24 your involvement with respect to this construction

1 permit application and we've been talking about
2 then September and your involvement with regard to
3 this construction permit application and part of
4 that concerned the September inspections that were
5 conducted and we've also been discussing the
6 September inspection reports, is that right?

7 A. Yes.

8 Q. Okay. And right before we left on
9 the break we had been discussing your comments to
10 the draft inspection report, do you recall that?

11 A. Yes.

12 Q. Okay. Did you also maintain copies
13 of at least certain final inspection reports
14 regarding the KCBX site?

15 A. Yes.

16 Q. Did you make notes on those copies
17 of the final inspection reports as well to your
18 recollection?

19 A. I don't know. I may have. I can't
20 quite recall.

21 Q. Let me ask you this then. Is there
22 a way to tell the difference between a final
23 inspection report and a draft inspection report?

24 A. Yes.

1 **Q. Okay. Let's turn to R1339, if you**
2 **would, and let me know when you're there.**

3 A. I'm sorry. What was the number
4 again?

5 **Q. 1339, please. Are you there?**

6 A. I am.

7 **Q. What is the document that starts on**
8 **R1339, please?**

9 A. It is the final inspection report
10 for the September 11th and 13th inspections
11 conducted by Joe Kotas.

12 **Q. How do you know this is a final**
13 **inspection report?**

14 A. It bears managerial initials.

15 **Q. And are those the initials next to**
16 **the from that is there and then also in the middle**
17 **of the page?**

18 A. Yes.

19 **Q. Okay. Take a look at R1330 to**
20 **R1382, please. That range.**

21 A. 1330 to, what, 82?

22 **Q. Yes, please. Thank you. Have you**
23 **flipped through those pages?**

24 A. I'm flipping.

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Q. Okay.

A. Okay.

Q. In the range of R1330 to 1382, are these copies of final inspection reports?

A. 1330 to 1382?

Q. Correct.

A. Yes, it does appear so.

Q. And, again, is that based on the fact that there are initials on the first page of the various inspection reports that are contained within that range?

A. Correct.

Q. Okay. And so are the notes that are included on the documents within this range notes to drafts or notes on your final -- on your copy of the final inspection reports notes to yourself?

A. Notes on the final. Notes to me.

Q. We've been talking about your involvement in KCBX's construction permit application in September of 2013. Is there any time requirement by when the Illinois EPA must act on a construction permit application?

A. Within 90 days unless it's a permit that needs to go to public notice and/or hearing

1 and unless the decisional deadline has been
2 waived.

3 **Q. Is the construction permit**
4 **application that is at issue in this case, would**
5 **that be pursuant to the 90-day deadline or the**
6 **additional timeframe that you referenced?**

7 A. It would be subject to the 90-day
8 deadline.

9 **Q. Is that pursuant, again, to a**
10 **statute?**

11 A. Yes.

12 **Q. Can that time period be extended,**
13 **the 90-day time period?**

14 A. Yes. It's not uncommon for those
15 deadlines to be extended by the applicant by way
16 of what we call a waiver of decisional deadline.

17 **Q. Okay. So if KCBX filed its**
18 **construction permit application on July 23rd,**
19 **2013, does that mean Illinois EPA needed to act on**
20 **that application on or before October 23rd, 2013?**

21 A. Yes. Absent waivers, we needed to
22 act.

23 **Q. Did Illinois EPA grant or deny the**
24 **construction permit application on or before**

1 **October 23rd, 2013?**

2 A. We did not.

3 **Q. Can you please turn to page R177**
4 **and let me know when you are there.**

5 A. I'm there.

6 **Q. Do you know what the document is**
7 **that is on R177?**

8 A. Yes, it is a communication to Bob
9 Bernoteit of the permit section from Kathy Hodge
10 on behalf of KCBX south. It is a waiver of
11 decisional deadline for 30 days to November 20th.

12 **Q. So the new deadline pursuant to the**
13 **October 18th letter is now November 20th, 2013, is**
14 **that right?**

15 A. Correct.

16 **Q. And you stated that this letter is**
17 **addressed to Mr. Bernoteit. What section is he**
18 **in?**

19 A. The permit section of the Bureau of
20 Air.

21 **Q. Did the Illinois EPA conduct any**
22 **inspections of KCBX's south facility in November**
23 **of 2013?**

24 A. We did.

1 **Q. What was the purpose of those**
2 **inspections?**

3 A. Again, to assess compliance status.

4 **Q. And how did that relate to the**
5 **construction permit application?**

6 A. In the context of the permit
7 application, the source would have been obligated
8 to prove that it would not cause a violation of
9 the act or regs. The point of the inspection was
10 to see what, if any, information existed that
11 might bear on compliance status that could
12 potentially factor into a permitting
13 determination.

14 **Q. You stated that the Illinois EPA**
15 **originally had until October 23rd, 2013, to grant**
16 **or deny the permit application and then KCBX**
17 **extended the deadline to November 20th, 2013. As**
18 **of -- and flipping back and forth between the**
19 **dates, but as of October 23rd, 2013, had the**
20 **Illinois EPA conducted environmental justice**
21 **outreach relating to KCBX's construction permit**
22 **application?**

23 A. No.

24 **Q. And you testified earlier that**

1 **environmental justice outreach was needed to be**
2 **done with respect to KCBX's construction permit**
3 **application?**

4 A. Yes.

5 **Q. Did the Illinois EPA conduct**
6 **environmental justice outreach relating to KCBX's**
7 **construction permit application?**

8 A. We did.

9 **Q. Do you know approximately when that**
10 **was completed?**

11 A. I believe it was November 14th of
12 2013.

13 **Q. At the environmental justice**
14 **outreach, what was the citizens response, if you**
15 **know, with respect to the construction permit**
16 **application?**

17 A. It was a great deal of concern
18 expressed for the pending permitting transaction.
19 Citizens were concerned that as the plant existed
20 at that time it was causing violations of the act
21 and regs. Specifically, it was causing offsite
22 air pollution. They were concerned -- they
23 expressed concerns that they were being impacted
24 at home, at school, on the playgrounds, they were

1 being impacted inside and outside their homes,
2 they were being impacted -- their cars were being
3 impacted, their windows needed to be closed, their
4 patio furniture was dirty, their potato salad was
5 contaminated. Let's see. They were -- there were
6 concerns for respiratory and cardiac type issues.
7 There was concern for eye irritation. There was a
8 great deal of concern for the facility and they
9 were concerned that it would potentially only be
10 exacerbated if additional units were allowed to be
11 brought to the site.

12 **Q. And when you say additional units,**
13 **are you referring to the equipment at issue here?**

14 A. The equipment at issue and the
15 application for permit. So the concern was for
16 the addition of the conveyors, the ten conveyors,
17 the hopper and the stacker for which an
18 application for permit was pending.

19 **Q. Pursuant to KCBX's October 18th,**
20 **2013, letter which is R177, the Illinois EPA had**
21 **until November 20th to grant or deny the**
22 **construction permit application, correct?**

23 A. Yes.

24 **Q. Did the Illinois EPA do so before**

1 **that date?**

2 A. No, we did not.

3 **Q. Why not?**

4 A. We received yet another waiver.

5 **Q. Okay. Let's turn to R73, please.**

6 **And let me know when you're there.**

7 A. I'm here.

8 **Q. What is the document that is at R73?**

9 A. It is another communication to Bob
10 Bernoteit of the Bureau of Air permit section. It
11 is dated November 19th. It is from Kathy Hodge on
12 behalf of KCBX south and it is yet another waiver
13 of the decisional deadline.

14 **Q. And you've previously testified that**
15 **the original construction permit application was**
16 **addressed to Mr. Bernoteit and the first waiver**
17 **letter was also addressed to Mr. Bernoteit, is**
18 **that right?**

19 A. Yes.

20 **Q. And what as a result of this letter**
21 **was the new deadline for the Illinois EPA with**
22 **regards to this construction permit application?**

23 A. December 20th became the new
24 deadline.

1 **Q. Okay. Are you familiar with the**
2 **term Wells letter?**

3 A. I am.

4 **Q. What is your understanding of that**
5 **term?**

6 A. It is a term of art used at the
7 Illinois EPA for a particular communication that
8 we provide to applicants for permits where we
9 intend to consider materials that go beyond the
10 four corners of the application. In such
11 communications, we list those items outside the
12 application that we might consider in making our
13 determination and we afford the applicant the
14 opportunity to address those documents, the
15 concerns at hand by a particular period of time.

16 **Q. As a result of the November**
17 **inspections and the November 14th environmental**
18 **outreach meeting, did the Illinois EPA issue a**
19 **Wells letter to KCBX?**

20 A. We did.

21 **Q. Can you turn to R30, please, and**
22 **again let me know when you're there.**

23 A. I'm there.

24 **Q. Is this -- let me just ask you.**

1 **What is this document at R30?**

2 A. This is what we would call a Wells
3 letter. It is a letter to KCBX from the acting
4 permit section manager Ray Pilapil and it provides
5 notice that we intend to consider information
6 contained within our files that are outside the
7 construction permit application in making our
8 determination on their pending application for
9 construction permit.

10 **Q. Did you have any involvement in the**
11 **preparation of this letter that is at R30?**

12 A. I was aware of it, yes, and I may
13 have seen a draft of it and may have even
14 commented on it.

15 **Q. Did you have any involvement in**
16 **terms of determining -- Strike that. I'm sorry.**

17 **If you look at the first**
18 **paragraph of the letter at R30, do you see that?**

19 A. I do.

20 **Q. And there is a sentence that starts**
21 **"specifically," do you see that?**

22 A. Yes.

23 **Q. And it references -- well, let me**
24 **just do it this way. The Illinois EPA intends to**

1 consider information collected by the Illinois EPA
2 as part of the inspections conducted by the
3 Illinois EPA Bureau of Air's Field Operations
4 Section on September 5th, September 11th,
5 September 13th, November 6th and November 19th and
6 approximately 50 citizen pollution complaint
7 forms, do you see that?

8 A. I do.

9 Q. Did you have any involvement in the
10 inclusion of those references in this letter?

11 A. I did. I conveyed to Bob Bernoteit
12 who had -- who at that time was the assigned
13 analyst manager in the permit section. He was no
14 longer serving in the capacity of the permit
15 section manager, but he was nonetheless a manager.
16 He was the assigned analyst manager and I conveyed
17 to him will that we needed to include the
18 inspection reports and the citizen complaints in
19 this Wells letter.

20 Q. To your knowledge, had Mr. Bernoteit
21 had any opportunity to review the inspection
22 reports or the citizen complaint forms?

23 A. Unlikely.

24 MR. SWEDLOW: I'll object to that.

1 Calls for speculation unless there is some basis
2 that she would be able to know what he looked at
3 since she just testified.

4 HEARING OFFICER HALLORAN: Ms.
5 Pamenter?

6 MS. PAMENTER: I can rephrase the
7 question. That's fine. I'm happy to do that.

8 Actually, I'm going to strike
9 the question. I may come back to it later, but
10 it's not necessary.

11 HEARING OFFICER HALLORAN: Okay.

12 BY MS. PAMENTER:

13 **Q. Did you instruct Mr. Bernoteit to**
14 **prepare a draft denial of the permit application**
15 **in sometime early December of 2013?**

16 A. I did.

17 **Q. Why?**

18 A. For a few reasons. There was no
19 reason -- I wasn't certain whether -- let me put
20 it this way. First, we were looking at a December
21 20th decisional deadline. Second, the -- based on
22 what had and had not been provided to us
23 historically by the source in the context of this
24 permitting transaction and others, I did not

1 necessarily know that we would receive the
2 information that we needed from them in the
3 timeframe before a decisional deadline and lastly
4 I did not -- I had serious question as to whether
5 even if the facility responded with information
6 that would be deemed responsive by us, whether
7 they could actually address all of our concerns.

8 **Q. So you stated that the Illinois**
9 **EPA's decision to grant or deny the construction**
10 **permit application in this timeframe was December**
11 **20th, 2013, is that right?**

12 A. Yes.

13 **Q. Did the Illinois EPA grant or deny**
14 **the construction permit application on or prior to**
15 **December 20th of 2013?**

16 A. No.

17 **Q. Why not?**

18 A. We received yet another waiver of
19 the decisional deadline.

20 **Q. Can you turn to R22, please, and let**
21 **me know when you're there?**

22 A. I'm there.

23 **Q. What is the document at R22?**

24 A. This is a letter from Kathy Hodge on

1 behalf of KCBX. It is directed to Ray Pilapil and
2 it is the first of two responses to our Wells
3 letter. It essentially says three things. One,
4 it expresses frustration with the Wells letter and
5 with the posture the Agency had taken and it also
6 requests an additional timeframe to respond to the
7 Wells letter and it lastly extends the IEPA's
8 decisional deadline.

9 **Q. And what is the new decisional**
10 **deadline according to the letter?**

11 A. January 20th.

12 **Q. And you stated that this letter is**
13 **addressed to Raymond Pilapil, is that right?**

14 A. Yes.

15 **Q. What section does Raymond Pilapil**
16 **work within?**

17 A. He is the -- he is within the Bureau
18 of Air permit section.

19 **Q. Is that the same section that**
20 **Mr. Bernoteit works within?**

21 A. Correct.

22 **Q. So up until this point the**
23 **correspondence that has come in from KCBX**
24 **regarding the construction permit application has**

1 **gone to the permit section?**

2 A. Yes, as it should on a permitting
3 transaction.

4 **Q. You said that the new deadline was**
5 **January 20th, 2014, and I just want to clarify.**
6 **Was that a federal holiday?**

7 A. If the 20th fell on a Monday, then,
8 yes, I think it was the Martin Luther King
9 holiday.

10 **Q. Mm-hmm. So then for Illinois EPA's**
11 **purposes, would it need to grant or deny the**
12 **construction permit application on the Friday**
13 **before?**

14 A. We thought it would be prudent to do
15 so as to not run into any arguments as to whether
16 we made the decision within the requisite
17 timeframe.

18 **Q. And that's unless an additional**
19 **extension were provided?**

20 A. Correct.

21 **Q. After December 18th, 2013, did KCBX**
22 **submit a response to the Illinois EPA to the**
23 **December 10th, 2013, Wells letter?**

24 A. Yes.

1 **Q. Can you turn to page R11, please.**

2 A. I'm here.

3 **Q. What is the document that starts at**
4 **R11?**

5 A. It is the second of two responses to
6 the Agency's December 10th Wells letter. It is
7 from Kathy Hodge on behalf of KCBX to Ray Pilapil
8 acting manager of the Bureau of Air permit
9 section.

10 **Q. Between December 10th, 2013, when**
11 **the Wells letter was issued and January 13th,**
12 **2014, the date of KCBX's response to that letter,**
13 **did the Illinois EPA contact KCBX to discuss the**
14 **construction permit application?**

15 A. No, we did not.

16 **Q. Why not?**

17 A. Because it is not our practice to
18 contact someone once we have notified them that we
19 intend to consider materials outside the record or
20 outside the application for permit. Whatever the
21 permit application would be. Rather, we seek all
22 materials to be reduced to writing so that we have
23 writings for purpose of the administrative record.

24 **Q. Did KCBX grant an extension of the**

1 **January 20th, 2014, deadline?**

2 A. It did not.

3 **Q. So on January 17th, 2014, what**
4 **action did the Illinois EPA take with regard to**
5 **KCBX's construction permit application?**

6 A. We issued a denial.

7 **Q. Now, you previously stated that you**
8 **were involved in the decision to deny the**
9 **construction permit. When did you make that**
10 **decision to deny the construction permit**
11 **application?**

12 A. The final decision was made once we
13 had -- to my mind, the final decision was made on
14 the day we signed and mailed the denial letter.

15 **Q. But you stated that you had asked**
16 **Mr. Bernoteit to prepare a permit denial letter in**
17 **early December, is that right?**

18 A. Correct. But we had not at that
19 point in time made what would ultimately become
20 our final decision. Rather, I was just having him
21 prepare documentation so that we would not
22 encounter any time constraints, but we did not
23 prejudge the matter.

24 **Q. With respect to the construction**

1 **permit application, were you focused on the**
2 **information contained within its four corners or**
3 **on outside issues?**

4 A. For me, I was focused on information
5 outside the application.

6 **Q. Why did you determine that the**
7 **construction permit application should be denied**
8 **generally?**

9 A. It is largely based on the
10 information that I had considered outside of -- it
11 was based on two things. One, I was aware from
12 the permit section that they did not have and
13 never did receive what they needed for their
14 purposes and I was aware of -- and I was aware of
15 information set forth in inspection reports and
16 citizen complaints that that caused me to believe
17 that the facility was of concern and had failed to
18 make the requisite showing that it would not cause
19 a violation of the act or regs.

20 **Q. And what was the permit application**
21 **seeking approval of?**

22 A. It was seeking to add ten conveyors,
23 a hopper and a stacker.

24 **Q. Can you turn to R1, please. What is**

1 the document that starts at R1?

2 A. The permit denial.

3 Q. You stated that inspections were
4 conducted in September 2013 and also that
5 inspection reports were prepared and we've
6 discussed those a little bit when going through
7 the history of this. Let's turn to R164, please.
8 When you're there, can you tell me what the
9 document is that starts at page R164?

10 A. It is the September 5th inspection
11 report.

12 Q. Is this the final version?

13 A. Yes. Yes.

14 Q. Why do you know it's the final
15 version?

16 A. It bears the initials of managers.

17 Q. Okay. Did the September 5th, 2013,
18 inspection and the corresponding report contribute
19 to your denial decision?

20 A. I'm sorry. Can you ask that again?

21 Q. Yes. Did the September 5th, 2013,
22 inspection and the corresponding report contribute
23 to your denial decision?

24 A. Yes.

1 **Q. How?**

2 A. Well, what it told me was we had a
3 facility who was a source of fugitive particulate
4 matter. It told me that -- this alone told me we
5 had a facility that was a source of fugitive
6 particulate matter that at the time of this
7 inspection the extent of the -- the means by which
8 they would control their fugitive emissions was
9 rather limited. One of the largest means by which
10 they had to control their fugitive emissions was a
11 water suppression system consisting of six rain
12 birds and a water wagon and it told me that as the
13 site existed at the time those means wouldn't even
14 take care of the storage piles.

15 It also suggested to me that the
16 facility perhaps was not attending to its -- to
17 its fugitive emissions in an adequate sense not
18 just because it had a limited amount of equipment
19 by which to control fugitive emissions, but also I
20 believe this is the report that indicates that the
21 equipment that was at the site at the time that
22 KCBX purchased it from DTE hadn't been maintained
23 by KCBX during the period of time since purchase.
24 So for on the order of nine or ten months what

1 little equipment was there hadn't been maintained.

2 **Q. And how did that relate then to the**
3 **new -- how did your concerns then relate to the**
4 **new equipment that KCBX was looking to install at**
5 **the south site?**

6 A. The concerns was as follows. The
7 facility -- the facility seemed as though it had
8 unlimited means by which to control existing
9 fugitive emissions. The question in my mind was
10 whether if they -- if things remained status quo
11 in terms of emissions control, whether the
12 addition of more fugitive emission sources, such
13 as the conveyor, the stacker and the hopper,
14 whether that wouldn't exacerbate the situation and
15 really the question in my mind was whether the
16 facility would begin to be able to make the
17 necessary showing that it wouldn't cause a
18 violation of the act and regs if what it had and
19 what it did was as was described in this September
20 5th report.

21 **Q. Let's turn to page R40, please.**
22 **What is the document that starts at page R40?**

23 A. That is the final inspection report
24 for the September 11th and 13th inspection.

1 **Q. Did the September 11th and September**
2 **13th inspections and the corresponding draft and**
3 **final reports contribute to your denial decision?**

4 A. Yes.

5 **Q. How?**

6 A. This particular report gave me
7 further insight into the nature of the site. It
8 had at that time eight piles of material. I
9 believe five of them were coal. Three of them
10 petcoke. These piles varied in size from 20 feet
11 in height to 60 feet in height and they were very
12 wide and they were very long. Piles anywhere from
13 say 250 by 150 to -- actually, one of the smallest
14 ones is probably -- 250 by 150, 200 by 100 up to
15 say 500 by 600. These were significantly sized
16 piles. The inspection report tells me that they
17 necessarily complied with the applicable
18 provisions, the applicable 212 regulations.
19 Specifically 212.301, which prohibit visible
20 emissions beyond the property line to comply with
21 that by way of a fugitive dust program. The
22 significance of the fugitive dust program is not
23 the existence of the piece of paper, but the
24 measures contained therein.

1 **Q. And we'll talk about -- I want to**
2 **skip -- we'll talk about the fugitive dust program**
3 **in a minute. I want to stick with this report.**
4 **How did this concern your -- how did you take this**
5 **into consideration with respect to the new**
6 **equipment that KCBX was seeking to install?**

7 A. The concern, again, was if the
8 facility was either actually or threatening to
9 cause either a nuisance situation and/or was
10 threatening or actually causing a violation of
11 212.301. At the time of these inspections the
12 question was whether adding equipment wouldn't
13 exacerbate. So the question was if -- in my mind,
14 information at hand was struggling to show how
15 they could comply with as they sat there. The
16 question is how they would begin to make the
17 necessary showing in the permit application and --
18 yeah.

19 **Q. Were inspections conducted at the**
20 **site in November of 2013?**

21 A. Yes.

22 **Q. Were any inspections conducted in**
23 **December 2013 or January 2014 of the south site,**
24 **to your knowledge?**

1 A. Not that I know of.

2 Q. Was the November inspection report
3 then the most recent -- excuse me. Was the
4 November inspection and the November inspection
5 report then the most recent ones that existed when
6 you determined that the KCBX construction permit
7 application should be denied?

8 A. Yes.

9 Q. So would the November inspection and
10 inspection reports carry more weight than the
11 September ones for you?

12 A. Yes, I looked at the most recent in
13 time inspections.

14 Q. Okay. We'll talk about those in a
15 second. You brought up fugitive operating
16 programs. So let's spend a little bit of time on
17 that. Can you turn the page to R59, please.

18 What is the document that starts
19 at R59 -- it starts at R59 and goes to R61?

20 A. Did you ask what is it?

21 Q. Yes.

22 A. It is a copy of the fugitive dust
23 plan for DTE Fuels, KCBX's South predecessor.

24 Q. Do you know whether KCBX utilized

1 **this operating program for any period of time?**

2 A. Yes, our inspectors were told that
3 from the point that KCBX purchased the DTE
4 facility, the south facility, from DTE it utilized
5 DTE's fugitive program from that point until KCBX
6 south created an interim fugitive dust -- what
7 they called an interim fugitive dust plan in
8 October of 2013.

9 **Q. Let's turn to R1197, please.**

10 A. What was the number again?

11 **Q. 1197. And when you get there, can**
12 **you tell me what the document is from R1197 to**
13 **R1208?**

14 A. I believe this is what I referenced
15 as the interim October fugitive dust plan as
16 prepared by KCBX south -- that was prepared by
17 KCBX for the south plant. Yes, that's what it is.

18 **Q. Did Illinois EPA receive a revised**
19 **operating program after October 1st, 2013?**

20 A. We did.

21 **Q. Can you turn to page R150.**

22 A. Yes.

23 **Q. What is the document that starts at**
24 **page R150?**

1 A. This is the most current version of
2 the fugitive dust plan for KCBX south.

3 **Q. After November 1st, 2013, did**
4 **Illinois EPA receive a further revised operating**
5 **program from KCBX regarding the south site?**

6 A. We did not.

7 **Q. So when you were considering the**
8 **denial -- excuse me -- when you were considering**
9 **whether to grant or deny KCBX's construction**
10 **permit application in January of 2014, was it your**
11 **assumption that the November 1st, 2013, operating**
12 **program was the program that controlled for KCBX**
13 **south?**

14 A. Yes.

15 **Q. And as such did you -- was it**
16 **your -- did you -- I'm sorry -- Strike that.**

17 **As a result, did you believe**
18 **that the November 1st operating program would**
19 **govern with respect to the new equipment that KCBX**
20 **was seeking to install at the site?**

21 A. Yes.

22 **Q. Can you turn to page R1209 and the**
23 **range is R1209 to 1219, please?**

24 A. I'm there.

1 **Q. Are you familiar with those pages?**

2 A. Yes.

3 **Q. Which operating program is located**
4 **at pages R1209 to R1219?**

5 A. I believe it's the interim October
6 operating program.

7 **Q. And are your -- whose handwriting is**
8 **included on this document?**

9 A. Mine.

10 **Q. Did you rely upon your notes to the**
11 **October 1st operating program when making the**
12 **decision to grant or deny KCBX's construction**
13 **permit application?**

14 A. No, I had gravitated over to the
15 latest iteration of their fugitive plan.

16 **Q. Can you turn to page R915, please.**

17 A. I'm there.

18 **Q. I'm not. One second. What is the**
19 **document that is included on R915? Let me start**
20 **this way. What is the date of the e-mails that**
21 **are included on document R915?**

22 A. They're e-mails from October 22nd of
23 2013.

24 **Q. Prior to the start of your testimony**

1 today, and I'm going to give you a long range of
2 numbers, did you review R915, R1192 to R1208,
3 R1220 to R1225, R1227 to 1231 and R1253 to R1254?

4 A. I believe so, yes.

5 Q. And are the documents at those pages
6 e-mails similar to the document that is at R915?

7 A. Yes.

8 Q. Is it possible that there may be
9 notes on those pages as well?

10 A. Yes.

11 Q. Do you recall what the general
12 subject matter was with respect to those e-mails
13 and notes from October?

14 A. Fugitive emissions control.

15 Q. With respect to what operating
16 program?

17 A. Fugitive dust operating program.

18 Q. And I'm trying to figure out which
19 one. Is it the DTE program or the October program
20 or the November program?

21 A. The interim October program.

22 Q. So that would be KCBX's October 1st,
23 2013, operating program for fugitive particulate
24 control?

1 A. Correct.

2 **Q. You previously stated that you had**
3 **gravitated to the November 1st, 2013, operating**
4 **program with respect to your decision to grant or**
5 **deny the construction permit application. So did**
6 **you consider the handwritten comments to the**
7 **October 1st program in the e-mails with comments**
8 **to the October 1st program in making the**
9 **determination to grant or deny KCBX's construction**
10 **permit application?**

11 A. No.

12 **Q. Why not?**

13 A. Since in this listing of documents
14 that you're talking about pertained to the October
15 fugitive program and they had a more recent
16 program, I didn't see the relevance. I gave them
17 the benefit of the most recent fugitive program
18 that they had.

19 **Q. Did you consider DTE's operating**
20 **program for the south site which KCBX relied upon**
21 **during its ownership period up until October 1st,**
22 **2013?**

23 A. No.

24 **Q. And that's with respect to making**

1 **your determination to grant or deny the**
2 **construction permit application?**

3 A. Correct. I didn't rely on that.

4 **Q. Did you review other facilities**
5 **fugitive dust plans, regulations from outside the**
6 **State of Illinois and other related documents at**
7 **any point in time between July 23rd, 2013, and**
8 **January 17th, 2014?**

9 A. Yes, I did.

10 **Q. Can you turn to R847, please, and**
11 **let me know when you're there.**

12 A. Yes.

13 **Q. What is the document that begins at**
14 **R847?**

15 A. It is a California rule that applies
16 to petcoke storage handling and transport.

17 **Q. Can you also turn to R1433.**

18 A. Yes.

19 **Q. And what is the document that starts**
20 **at R1433?**

21 A. It is the fugitive dust control plan
22 for the BP Whiting refinery in Indiana.

23 **Q. Is this one of the other facilities**
24 **fugitive dust plans that you reviewed?**

1 A. Yes, it is.

2 **Q. Prior to your testimony today, did**
3 **you review the other facilities fugitive dust**
4 **plans, various regulations from outside the State**
5 **of Illinois and related documents that are**
6 **included in the administrative record?**

7 A. I did.

8 MS. PAMENTER: And for the sake of
9 trying to move this along I'm going to give some
10 page numbers as opposed to having her go through
11 each one and then I'll make -- I'll ask her
12 questions.

13 HEARING OFFICER HALLORAN: I think
14 you just did that. Mr. Swedlow, any problem?

15 MR. SWEDLOW: If it's for the sake
16 of moving along, let's try it and maybe I'll
17 object afterwards.

18 HEARING OFFICER HALLORAN: Okay.

19 BY MS. PAMENTER:

20 **Q. So pages R847 to R911, R916 to 917,**
21 **R919 to R1187, R1385 to R1427 and R1433 to R1624.**
22 **Did you review those pages prior to your testimony**
23 **today?**

24 A. Yes.

1 **Q. And are those pages to the best of**
2 **your knowledge and ability the other facilities**
3 **fugitive dust plans, various regulations from**
4 **outside the State of Illinois and the related**
5 **documents that you reviewed?**

6 **A. They are.**

7 **Q. Okay. When did you review the other**
8 **facilities fugitive dust plans, the various**
9 **regulations and the other related documents that**
10 **are included in those pages, if you recall?**

11 **A. Sometime after August 30th --**
12 **sometime after August 30th -- sometime between**
13 **August 30th and December 5th, December 10th. You**
14 **know, early December.**

15 **Q. Did you rely upon the other**
16 **facilities fugitive dust plans, the various**
17 **regulations and other related documents in your**
18 **determination as to whether to grant or deny**
19 **KCBX's construction permit application?**

20 **A. No.**

21 **Q. Okay. So we previously established**
22 **that you looked at the November 1st, 2013,**
23 **operating program, is that right, in terms of your**
24 **consideration of KCBX's construction permit**

1 **application?**

2 A. Correct.

3 **Q. Are you aware of whether KCBX**
4 **changed its dust control systems at the south site**
5 **between July 23rd, 2013, and January 17th, 2014?**

6 A. I am.

7 **Q. What was --**

8 MR. SWEDLOW: Can I -- I want to
9 move this along, but -- I'll only request that you
10 just tell me -- you listed dozens of pages. I
11 don't know what you're saying she did rely on and
12 what she didn't. Whatever she says I can accept
13 as her testimony, but I could not write down all
14 those numbers of everything that was not
15 considered and everything that was considered.
16 Can you just read that?

17 MS. PAMENTER: I can clarify. Sure.
18 With respect --

19 MR. SWEDLOW: You can just tell me.

20 MS. PAMENTER: Do you want the pages
21 again?

22 MR. SWEDLOW: When you said -- if it
23 is okay with the Hearing Office.

24 HEARING OFFICER HALLORAN: That's

1 fine.

2 MR. SWEDLOW: Whatever pages you did
3 say she relied on, just read those and I'll write
4 them down and whatever pages you said she didn't
5 rely on, read those and I'll write them down
6 because I can't flip through so many books.

7 MS. PAMENTER: It's fair. The
8 reason why I did it this way was to move it along.

9 MR. SWEDLOW: Just tell me.

10 MS. PAMENTER: There are zero pages
11 that she said she relied upon in this listing.
12 Zero that she relied upon.

13 UNIDENTIFIED SPEAKER: The e-mails
14 you list in large blocks.

15 MS. PAMENTER: Do you want me to go
16 off the record?

17 HEARING OFFICER HALLORAN: Off the
18 record.

19 (Whereupon, a break was taken
20 after which the following
21 proceedings were had.)

22 HEARING OFFICER HALLORAN: We're
23 back on the record. You may proceed.

24

1 BY MS. PAMENTER:

2 Q. So we were beginning to talk about
3 the November 1st, 2013, operating program that you
4 indicated you relied upon with respect to making
5 your determination to grant or deny.

6 Are you aware of whether KCBX
7 changed its dust control systems at the south site
8 between July 23rd, 2013, and January 17th, 2014?

9 A. Yes, I am aware that they added some
10 additional things out there. Yes.

11 Q. Do you know the general nature of
12 the change with respect to the water cannons?

13 A. Yes.

14 Q. And what is that?

15 A. I believe they added a 42 cannon
16 water system. They also added a met station and
17 they also added a surfactant system.

18 Q. Did KCBX's November 1st operating
19 program provide any actual data regarding KCBX's
20 operations of its dust control systems at its
21 south site?

22 A. It did not.

23 Q. Does KCBX's November 1st operating
24 program state the capabilities of the water cannon

1 **system at the south site?**

2 A. In some regards, yes.

3 **Q. Did you receive -- Strike that.**

4 **Let's turn to page R647, please. I'm also**

5 **simultaneously or contemporaneously going to have**

6 **you look at the letter that is at R648 as well.**

7 **Let me know when you've done that.**

8 A. I've read it.

9 **Q. Who are the e-mail and the letter**
10 **addressed to?**

11 A. The e-mail is addressed to you from
12 Kathy Hodge and the letter is likewise addressed
13 to you from Kathy Hodge.

14 **Q. This is different than from the**
15 **construction permit application cover letter and**
16 **the waiver letters in terms of who it was**
17 **addressed to, is that correct?**

18 A. Correct. This is addressed to you
19 as the attorney for the enforcement action.

20 **Q. And the other letters were addressed**
21 **to whom?**

22 A. Varying members of the permit
23 section.

24 **Q. Do you recall receiving or reviewing**

1 **either the e-mail or the letter prior to January**
2 **17th, 2014?**

3 A. I don't know that I saw Kathy's
4 e-mail to you nor this letter to you. I do know I
5 saw the fugitive dust plan dated 11/1.

6 **Q. That would have been attached to the**
7 **November 1st e-mail, is that right?**

8 A. Yes.

9 MR. SWEDLOW: I'm sorry. Are you
10 talking about this November 1st e-mail to you?

11 MS. PAMENTER: Right.

12 MR. SWEDLOW: Okay.

13 BY MS. PAMENTER:

14 **Q. Sitting here today, have you**
15 **reviewed the letter and the e-mail?**

16 A. Yes.

17 **Q. Had you done so back in January,**
18 **would either or -- sitting here today, would**
19 **either the e-mail or the letter have impacted your**
20 **decision as to whether to grant or deny the**
21 **construction permit application?**

22 A. The letter or the e-mail itself, no.
23 The attachment -- the fugitive plan itself, yes.

24 **Q. Okay.**

1 A. This letter and e-mail, no.

2 **Q. Okay. Let's go to the attachment**
3 **then. What did KCBX intend to do over the winter**
4 **months with its water cannon system?**

5 A. Not utilize it. Preserve it from --
6 what page is the fugitive dust plan at?

7 **Q. It starts at page R150.**

8 A. I'm sorry. I'm behind you. Hang on
9 here. There is a footnote. In response to your
10 question what they would do with the water cannon
11 system in the winter, there is a footnote.

12 "Permanent fixed water cannon systems are
13 typically drained and shutdown from November 1st
14 through March 31st to protect against freeze
15 damage. However, KCBX will continue to use it
16 after November 1st and until freezing conditions
17 require its shutdown."

18 **Q. And just for the record that is on**
19 **R153, that is footnote three?**

20 A. Yes.

21 **Q. Prior to January 17th, 2014, were**
22 **you advised regarding whether KCBX's water cannon**
23 **system was actually operated during December 2013**
24 **and January 2014?**

1 A. No.

2 Q. Based on KCBX's November 1st
3 operating program, what did you assume then
4 regarding the operations of the water cannon
5 system at KCBX's south site during December 2013
6 and January 2014?

7 A. The assumption based on the footnote
8 and the fugitive program would be that it would be
9 down.

10 Q. Can you turn to page R156.
11 Specifically, I'm going to have you take a look at
12 paragraphs two and three on that page. Based on
13 those paragraphs, was the water cannon system the
14 method for controlling fugitive emissions from
15 conveyors and stackers?

16 A. Well, what I can tell you is this.
17 It is not entirely clear to the Agency what the
18 means of control for the permit -- the equipment
19 that was proposed in the permitting transaction
20 would be nor what it was for the equipment as it
21 already existed at the site.

22 The program as set forth in
23 these -- in this 11/1 fugitive plan is very
24 nondescript. It is difficult for us to know -- it

1 is difficult for us to understand precisely what
2 materials are received by what means at the site,
3 where -- where conveyors would be located, where
4 drop points on conveyors would be, where materials
5 would be -- how materials would be handled and how
6 they would be stored and the significance of that
7 is it is difficult for us to understand what the
8 precise means were for the control of emissions
9 from conveyors, from the drop points, the transfer
10 points, from the handling and from the proposed
11 hopper and stacker and the same is true of the
12 sources that were already there.

13 What we need to understand is
14 precisely where the emission points are, precisely
15 what emission controls are on those points, the
16 precise means by which the controls are utilized.
17 If we're using water systems, are the water
18 systems dedicated? Are the water systems -- what
19 is the frequency of use of any one water system?
20 What is the rate at which a water system is
21 applied? And I can go on and on. In fact, we can
22 go through -- particularly through as it pertains
23 to the permitting transaction through B, which is
24 bulk solid material handling; D, which is bulk

1 solid material loading and, G, which is the
2 program generally described and discuss what is
3 there and what arguably isn't there, but at the
4 end of the day we do not have anything in hand
5 and, mind you, but for the fact that IEPA said it
6 would consider this fugitive plan which was
7 outside of the application for permit there was
8 nothing in the permit application itself that
9 spoke to how the facility equipment, the
10 conveyors, the stacker and the hopper for which
11 they sought the permit, there was nothing in that
12 application that spoke to how it would comply
13 with, among other things, 212.301 and 9(a).

14 We took it upon ourselves to say
15 "Hey, we've going to look at the fugitive dust
16 plan." We looked at this November 1st fugitive
17 dust plan. We couldn't discern from it what was
18 being done with the existing equipment much less
19 the equipment for which the application for permit
20 was sought.

21 We also took it upon ourselves
22 to look at the inspection reports with the same
23 eye. What is it that is in there that might tell
24 us what it is that the facility does.

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1 So, for example, with the
2 conveyors alone, again, we needed to understand
3 what material -- what type of material, would it
4 be coke or coal, and how much material would move
5 along the conveyors. We needed to understand if
6 the conveyors -- and by what means they would be
7 received because that all speaks to emissions.

8 And then we would need to
9 understand how those emissions would be
10 controlled. We would need to know what the
11 moisture content of the material is that would be
12 received and then processed by way of the
13 conveyors. And there was just no -- nothing that
14 spoke to what the moisture content would be. We
15 would need to know what the feed rate was going to
16 be as it went through. I do tend to think that
17 these conveyors may be three quarters enclosed,
18 but that is not to say that they still don't pose
19 a fugitive emissions point. If you aren't choke
20 feeding or even if you are, material can still
21 fall out.

22 That material that falls out
23 needs to have housekeeping and more water systems
24 applied to it. We don't have anything on that.

1 We also need to know where all the various
2 handling points and drop points are throughout
3 this conveying process. We need to know where it
4 ends up. Ultimately it's going to be in a storage
5 pile somewhere, but we are struggling to
6 understand in all regards what the equipment is,
7 where it is, what the controls that are going to
8 apply to it. We understand that there are 42
9 cannons that have been installed at the facility,
10 but I tend to think that those were -- it is not
11 entirely clear to me. Are those specific just to
12 storage piles or would they potentially be
13 utilized on the conveyors, the hopper or the
14 stacker? To the extent --

15 **Q. To that point -- I don't mean to**
16 **interrupt. To that point, we were talking about**
17 **paragraphs two and three on page R156 and I**
18 **believe that this indicates you said that you had**
19 **read it that the water cannon system would apply**
20 **to the box hoppers and the conveyors, do you see**
21 **that?**

22 A. Yes.

23 **Q. Okay. And then also within that**
24 **paragraph it refers to the availability of a water**

1 truck, is that correct?

2 A. Yes.

3 Q. Did the statement that the water
4 truck may also be used for spot or supplemental
5 control of fugitive emissions and the statement
6 that the portable cannon attached to the water
7 truck is available for control at these transfer
8 points provide you with sufficient information?

9 A. No.

10 Q. Can you turn to page R155 and
11 specifically -- yes, it's the footnote on that
12 page, do you see that?

13 A. Yes.

14 Q. There is the second sentence "Water
15 from a spray bar on the box hopper may be used as
16 conditions warrant to control fugitive particulate
17 emissions at the hopper and along the conveying
18 system," do you see that?

19 A. Yes.

20 Q. Did this footnote provide you with
21 sufficient information regarding how fugitive
22 emissions from box hoppers would be controlled at
23 the site?

24 A. No. No. In fact, it is not even a

1 commitment to use it. In fact, what I had noticed
2 at the time was that it didn't even say will be
3 utilized as conditions warrant. It only indicates
4 that it may be utilized as conditions warrant and
5 then, again, we're back into is -- are the
6 controls that they have at the site, because they
7 do have some control measures at the site, what do
8 those -- what do those controls run to? Are those
9 controls merely operable or do they actually
10 operate and on what frequency do they operate and
11 how do they operate? We need all the detail and,
12 again, the relationship between this and the
13 permitting transaction is that the means by which
14 you demonstrate compliance is 212.301, is the
15 fugitive dust plan. The fugitive dust plan houses
16 the emissions control practices that you have at
17 the site.

18 So we need to have a complete
19 understanding of what it is that your measures are
20 so that we can then ensure that they necessarily
21 demonstrate compliance with 212.301. Also what we
22 need to understand is what are the emission units,
23 what are the controls on them, what is the
24 frequency with which they're used, precisely how

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1 are they used so that we then can say -- and also,
2 of course, we need to know throughput and moisture
3 content and things like that so we can
4 determine -- and this would not be me doing this.
5 This would be the permit analyst.

6 They have to be able to
7 ascertain by way of calculation -- actually, the
8 facility should tender this in its application and
9 then we would independently review it. They have
10 to be able to ascertain by way of calculation what
11 the emissions consequence from what the fugitive
12 emissions consequence is in a quantified fashion
13 from any particular unit and then what the
14 significance of any emissions control is like what
15 percentage efficiency are we going to assign to
16 that particular means of control?

17 And once that is assigned we
18 need to understand with which frequency that
19 control operates because just because a particular
20 device could, if utilized, afford a particular
21 efficiency if it is not utilized or it's utilized
22 a fraction of the time, then you have to alter the
23 reduction in emissions that is afforded by way of
24 use of the control device or the control measure.

1 So this fugitive program, to me,
2 was a very pivotal part of an assessment of what
3 the facility's compliance status was relative to
4 212.301 at a minimum. It also potentially bore on
5 whether it would be able to -- whether it would be
6 in compliance with 9(a) or whether it would not
7 have enough means in place and it would be
8 threatening and unable to demonstrate that it was
9 going to comply with the prohibition against
10 statutory air pollution.

11 **Q. Did the Illinois Attorney General's**
12 **Office complaint for injunctive relief and civil**
13 **penalties filed against KCBX on November 4th that**
14 **is in the record contribute to your denial**
15 **decision at all?**

16 A. It did.

17 **Q. How?**

18 A. It evidenced that there was, indeed,
19 concern for compliance with the prohibition
20 against air pollution and that we needed to ensure
21 that the facility made the showing that it was
22 obligated to make in the context of the permitting
23 transaction.

24 **Q. You previously stated that the**

1 **Illinois EPA conducted inspections of the KCBX**
2 **south site in November 2013, correct?**

3 A. Yes.

4 **Q. Let's turn to R31, please. What is**
5 **the document that starts at page R31?**

6 A. It is the final inspection report.

7 **Q. And for what dates? Can you tell**
8 **me?**

9 A. Yeah. The final inspection report
10 dated November 27th, for the November 6th and
11 19th, 2013, inspections by Joe Kotas.

12 **Q. Did the November 2013 inspections**
13 **and the corresponding reports contribute to your**
14 **decision to deny the construction permit**
15 **application?**

16 A. They did.

17 **Q. How?**

18 MR. SWEDLOW: What page are we on?

19 MS. PAMENTER: Thirty-one.

20 BY THE WITNESS:

21 A. What I could see from this report
22 was that there was -- the facility had installed
23 42 cannons. They were operable, but not
24 necessarily operating. The facility had -- it

1 mentioned that they were in the process of
2 installing a surfactant system, but I do not
3 believe based on this report that it was yet
4 capable of operating and it had installed a met
5 system and I believe based on this report that was
6 capable of being operated manually, but was not
7 interfaced with the water cannon system and so, in
8 total, I could see that they had some equipment
9 that could further the purpose of emission
10 control, but it was not clear to me that indeed it
11 was yet -- well, that it was, in fact, being
12 operated or that it was even capable of being
13 operated. Clearly the water cannons would be a
14 good -- would be a means by which -- perhaps a
15 significant means by which you could address at
16 least some of the emissions consequence from the
17 source.

18 Certainly the surfactant system
19 would be the same. The surfactant system is
20 something that could potentially even be utilized
21 in the winter maybe more so even than the water
22 system and the met system was significant in that
23 if it was interfaced and automated then we could
24 -- we could envision a system where operators

1 would be left out of the decision as to when the
2 system was going to function and the met station
3 could be programmed such that the cannons wouldn't
4 necessarily go off.

5 However, again, we're at the
6 place where IEPA does not have any information on
7 what the practice was going to be with this system
8 even once automated.

9 BY MS. PAMENTER:

10 **Q. In your response, are you -- I just**
11 **want to clarify. Are you referring to the**
12 **existing conveyors, box hoppers and stackers at**
13 **the title or the -- or are your concerns that**
14 **you're referring to relating to the new equipment**
15 **that KCBX was seeking to install at the site?**

16 A. The concerns would be twofold. They
17 would relate to what is already there and they
18 would relate to what is proposed to be put in as
19 well.

20 **Q. Okay. Did the Illinois EPA receive**
21 **citizen complaint forms?**

22 A. We did.

23 **Q. Did the citizen complaint forms**
24 **contribute to your decision to deny the**

1 **construction permit application?**

2 A. They did.

3 **Q. How?**

4 A. They evidenced concern for and/or
5 actual offsite impact by the facility.

6 **Q. Did you seek to verify any of that**
7 **information?**

8 A. No, we did not. That is something
9 that would occur in the context of compliance or
10 enforcement. But, in this instance, it just gave
11 me a reason to believe that it is something that
12 we needed to be cognizant of as we did our
13 permitting determination and apprise the facility.
14 To the extent they didn't already know, but even
15 the inspections report suggests that there may
16 have been some awareness of some of these
17 complaints on the part of the facility, but we
18 wanted to ensure that they realized that the
19 public was suggesting that there was an offsite
20 impact from the facility.

21 So to the point they really
22 needed to ensure that they made the requisite
23 showing in the permitting transaction that they
24 would not cause a violation of the act or regs,

1 wouldn't cause a violation of 9(a), wouldn't cause
2 a violation of 212.301, wouldn't cause a violation
3 of anything else that might be otherwise
4 applicable and there would seem to be evidence
5 that suggested that perhaps they would now and
6 perhaps would in the future have an issue.

7 **Q. Would you expect a citizen to refer**
8 **to conveyors, box hoppers or stackers on a citizen**
9 **complaint form?**

10 A. No.

11 **Q. Did you receive correspondence from**
12 **either elected officials or any not-for-profit**
13 **organizations relating to this matter?**

14 A. We did.

15 **Q. Did that -- just for the record**
16 **that's at R29, R119 and R172. Did that**
17 **correspondence contribute to your decision to deny**
18 **the construction permit application at all and if**
19 **you want to look at it, let me know. I can refer**
20 **you to the pages.**

21 A. R29. What were the others?

22 **Q. R119 and R172.**

23 A. And your question was whether --

24 **Q. That contributed at all to your**

1 **decision?**

2 A. They did.

3 **Q. How?**

4 A. They further evidenced the existing
5 concern for the site as it existed at the time and
6 expressed concern for the pending permitting
7 transaction and in particular the concern was for
8 the adverse impact that the facility was arguably
9 having on the local community.

10 **Q. But did you verify any of the**
11 **information in that correspondence?**

12 A. No, we would not do that in the
13 context of this transaction.

14 **Q. You stated that on January 13th,**
15 **2014, the Illinois EPA received correspondence**
16 **from KCBX's counsel in response to the Wells**
17 **letter. I'm going to have you turn to page R11**
18 **again and let me know when you're there.**

19 A. I'm there.

20 **Q. Did that January 13th, 2014,**
21 **correspondence contribute to your decision to deny**
22 **the construction permit application?**

23 A. Well, what I would say is it did not
24 address the concerns as expressed in the Wells

1 letter. It did not provide any information
2 responsive to the concerns. It did not make any
3 showing of proof as to how the facility would not
4 violate the act or regs. So it certainly did not
5 dissuade the concerns that we had.

6 **Q. Did the KCBX -- excuse me. Did KCBX**
7 **include any emission control logs for the south**
8 **site with its January 13th, 2014, letter?**

9 A. No.

10 **Q. Did KCBX include any information on**
11 **the actual dust controls and then the actuals used**
12 **with respect to their conveyors, box hoppers or**
13 **stackers already at the south site --**

14 A. No.

15 **Q. Let me finish the question for the**
16 **court reporter -- with the January 13th, 2014,**
17 **letter?**

18 A. No.

19 **Q. Did KCBX include any information on**
20 **the actual dust controls that it would utilize**
21 **with respect to the new conveyors, box hopper or**
22 **the stacker that it is seeking to install at the**
23 **south site with the January 13th, 2014, letter?**

24 A. No.

1 **Q. Did KCBX include any information in**
2 **or with the January 13th, 2014, letter as to**
3 **whether it operated the water cannon system during**
4 **freezing temperatures between November 1st, 2013,**
5 **and January 12th, 2014?**

6 A. No.

7 **Q. As such, did you believe it had been**
8 **operating the water cannon system during that time**
9 **period?**

10 A. No.

11 **Q. Why not?**

12 A. Because the fugitive dust plan
13 indicated that that would not be the practice.

14 MS. PAMENTER: I don't have any
15 further questions at this time.

16 HEARING OFFICER HALLORAN: Thank
17 you, Ms. Pamenter. Mr. Swedlow?

18 C R O S S E X A M I N A T I O N

19 BY MR. SWEDLOW

20 **Q. Ms. Armitage, you testified that you**
21 **have been with the Illinois Environmental**
22 **Protection Agency for 24 years, is that right?**

23 A. Yes.

24 **Q. And I think you testified that 23 of**

1 **those years were spent in enforcement?**

2 A. Yes.

3 **Q. Is enforcement a separate and**
4 **distinct function from permitting?**

5 A. Yes.

6 **Q. You've been a practicing or licensed**
7 **attorney in Illinois for 24 years as well, is that**
8 **right?**

9 A. No. Longer.

10 **Q. I'll just say longer than 24 years?**

11 A. I've only been with the Agency since
12 '90. I've been an attorney since '88.

13 **Q. Are you familiar with the regulatory**
14 **or decisional case law that requires enforcement**
15 **and permitting to be treated separately by the**
16 **Illinois Environmental Protection Agency?**

17 A. I'm familiar with the case law. I
18 struggle with the word separately.

19 **Q. Did you consider the fact that**
20 **enforcement and permitting are two separate**
21 **functions within the Illinois Environmental**
22 **Protection Act when you made the decision to deny**
23 **this permit?**

24 A. What I considered was the facility

1 needed to show that it would not cause a violation
2 of the act or regs.

3 **Q. I'm asking a slightly different**
4 **question. Did you consider the fact that**
5 **permitting and enforcement are two separate**
6 **functions of the Illinois Environmental Protection**
7 **Agency when you decided to deny this permit**
8 **application?**

9 A. What I would say is that is
10 something that attorneys at the IEPA would
11 consider.

12 **Q. Are you an attorney at the IEPA?**

13 A. No. I happen to be an attorney. I
14 do not practice law at the IEPA anymore.

15 **Q. If I understand correctly, then all**
16 **of the communications that you have with Agency**
17 **personnel would not be protected under an**
18 **attorney/client privilege just because of the fact**
19 **that you're on that communication, is that right?**

20 MS. PAMENTER: Objection. Calls for
21 a legal conclusion.

22 HEARING OFFICER HALLORAN: Yeah.
23 You know what, I think it is beyond the scope of
24 direct. So I sustain.

1 MR. SWEDLOW: The agreement between
2 the parties was that the witness would be
3 presented once and that witness would be subject
4 to both our direct, which was not limited at all
5 in scope by their direct, and cross at the same
6 time.

7 HEARING OFFICER HALLORAN: That was
8 two and a half days ago. Ms. Pamenter?

9 MS. PAMENTER: I actually agree with
10 Mr. Swedlow with regard to this response.
11 Ms. Armitage was included on their amendment to
12 their witness disclosures. So I do agree with
13 that. I still lodge my objection with respect to
14 the question nevertheless.

15 HEARING OFFICER HALLORAN: Okay.
16 Your objection one more time.

17 MS. PAMENTER: Yes. That she is
18 being asked to give a legal conclusion.

19 HEARING OFFICER HALLORAN: She may
20 answer. Overruled.

21 BY THE WITNESS:

22 A. I'm sorry. What did you ask me?

23 BY MR. SWEDLOW:

24 Q. **You did not serve any legal role**

1 **with respect to any correspondence regarding any**
2 **aspect of this permit and permit appeal, did you?**

3 A. Not that I recall. Anything
4 after -- I became the chief of the Bureau of Air
5 as of August 1st. From August 1st forward, I was
6 not serving in a legal capacity. There could have
7 been, I suppose, a window between when the
8 transaction rolled and August 1st, but to my
9 knowledge, and in that window, I was an attorney,
10 but I'm not aware that I was necessarily even
11 aware of nor involved in the transaction at that
12 point in time.

13 **Q. You're the one who made the final**
14 **decision and I think you said it was on January**
15 **17th, 2014, to deny this permit application, is**
16 **that right?**

17 A. I believe it was the decision -- I
18 believe it was the collaborative decision. I
19 believe that I bore most of the responsibility for
20 the decision.

21 **Q. Collaborative between who and who**
22 **and who?**

23 A. Ray Pilapil as acting manager of the
24 permit section who was signatory to the

1 transaction; Mike Dragovich, the assigned permit
2 engineer; Bob Bernoteit in two capacities, as both
3 Mike's manager and for a period of time the acting
4 manager of the permit section and then me as
5 bureau chief.

6 **Q. What role did Ray Pilapil play in**
7 **the role to deny the permit?**

8 A. He was the signatory.

9 **Q. Did he make a decision or did he**
10 **sign it?**

11 A. He signed it.

12 **Q. Did he have anything to do with the**
13 **decision?**

14 A. He did not participate in
15 discussions to my knowledge, no.

16 **Q. So he is not part of that**
17 **collaborative process other than to simply have**
18 **signed the letter, is that correct?**

19 A. Correct.

20 **Q. Mike Dragovich was the permit**
21 **analyst assigned to this permit application, is**
22 **that correct?**

23 A. Yes.

24 **Q. Did you review any of his**

1 **calculation when he was analyzing the file?**

2 A. No.

3 **Q. Did you question any of those?**

4 A. No.

5 **Q. Did you speak to him and ask him**
6 **what information he felt he needed?**

7 A. I never spoke to Mike at all.

8 **Q. Are you aware of any information**
9 **that he communicated as the permit analyst that he**
10 **would need to complete his technical evaluation of**
11 **the application?**

12 A. What I know is somewhere between
13 Mike and Bob, though, it is not entirely clear to
14 me who was saying or doing or thinking exactly
15 what, between the two of them there were certain
16 pieces of information that they thought were
17 lacking in the application for permit.

18 **Q. Did you spend any time or can you**
19 **now explain to me any different than they did what**
20 **information was lacking and why they needed that**
21 **information?**

22 A. I'm under the impression that --
23 which part of the lack are we focusing on?

24 **Q. You just said that between Bob and**

1 Mike that they identified some information that
2 was lacking and what I'm trying to find out is do
3 I need to ask you about your analysis of the
4 lacking information that they've already testified
5 about?

6 A. I did not cover the areas that they
7 covered.

8 Q. Did you look at the permit to
9 determine what information was already in the
10 existing permit with respect to moisture content
11 of the material to be handled at the site?

12 A. No.

13 Q. Do you know one way or another what
14 information is already within the permit regarding
15 moisture content for the coal and petcoke to be
16 handled at this site?

17 A. Not exactly, no.

18 Q. Did you look at the permit to
19 determine what throughput limits apply to this
20 site both on a monthly and annual basis?

21 A. I know what the allowable limits had
22 initially been. I had seen those.

23 Q. And those still apply to the site to
24 this day, isn't that correct?

1 A. Correct.

2 **Q. Do you have any evidence that is**
3 **substantiated regarding a violation of the**
4 **throughput limits on a monthly or annual basis**
5 **with respect to the KCBX --**

6 A. No.

7 **Q. Do you have any substantiated**
8 **evidence regarding any exceedance of the emission**
9 **limits for the KCBX south facility?**

10 MS. PAMENTER: Objection.
11 Relevance.

12 MR. SWEDLOW: I will be happy to
13 stipulate that emissions are not relevant to this,
14 but I think that they are.

15 HEARING OFFICER HALLORAN:
16 Overruled. You may proceed.

17 BY THE WITNESS:

18 A. Can you --

19 BY MR. SWEDLOW:

20 **Q. Do you have any evidence that you**
21 **considered that was substantiated with respect to**
22 **any violations by KCBX's South facility of the**
23 **emission limitations placed on this site by their**
24 **permit?**

1 A. No.

2 Q. Do you believe it to be a potential
3 threat, a violation of the act, to be a source of
4 fugitive particulate matter?

5 A. Can you repeat that question?

6 Q. Yes. In your direct testimony, you
7 said that one of your concerns is that the KCBX
8 south facility could be a source of fugitive
9 particulate matter?

10 A. Mm-hmm.

11 Q. Is that a violation of the act?

12 A. No.

13 Q. KCBX, as all bulk handling storage
14 facilities, is permitted to be a source of
15 fugitive particulate matter, isn't that correct?

16 A. Yes, it is.

17 Q. With respect to all of the citizens
18 complaints that you said you've considered as part
19 of your determination to deny the permit, are any
20 of these citizens complaints substantiated or
21 adjudicated violations of any section of the
22 Illinois Environmental Protection Act or
23 regulations?

24 A. No.

1 **Q. Did you come to any conclusion as to**
2 **what information KCBX could possibly supply in**
3 **response to these citizens complaints that would**
4 **satisfy you as the decisionmaker on this permit?**

5 A. There were -- there was information
6 that I believed they could provide that certainly
7 would have -- certainly could have served to
8 minimize my concerns. It may have even been able
9 to alleviate some of my concerns.

10 **Q. And maybe I can short circuit this**
11 **rather than looking at each of the citizens**
12 **complaints. All of the citizens complaints, the**
13 **letters from a senator and a congressman and other**
14 **politicians and environmental activist groups, all**
15 **of that stuff taken together contributed to your**
16 **decision to deny the permit because it satisfied**
17 **for you a concern with respect to the site that**
18 **perhaps there could be an issue with respect to**
19 **compliance, is that correct?**

20 A. Mm-hmm.

21 **Q. Is that a yes?**

22 A. Yes.

23 **Q. But none of that information,**
24 **letters from politicians or environmental groups**

1 **or citizens complaints, actually constitute any**
2 **adjudicated violation of any sections of the act**
3 **or its regulations, is that correct?**

4 A. Correct.

5 **Q. Were you invited to a meeting with**
6 **KCBX on December 5th, 2013?**

7 A. I don't know if I was invited. I
8 know I didn't attend. It was a meeting between
9 KCBX and the Agency. So I --

10 **Q. Do you know of the meeting I'm**
11 **talking about?**

12 A. Mm-hmm.

13 **Q. But you don't know if you were**
14 **invited or not, is that what you said?**

15 A. It's a peculiar question. It is
16 a -- it was a meeting between the IEPA and KCBX.
17 It involved the Bureau of Air, the -- it was an
18 enforcement meeting. It involved the compliance
19 section, the enforcement section. I believe I had
20 representatives from other sections. The air
21 quality planning section and the permitting
22 section as well. And so given that it was a
23 meeting involving my bureau and persons within my
24 employ I guess I always have an invitation to be

1 there, but whether somebody actually gave me an
2 invitation or not, I don't know.

3 **Q. You don't remember whether KCBX**
4 **specifically invited you to the meeting?**

5 A. It seems odd to me that I would get
6 an invitation to a compliance and enforcement
7 meeting, but, no, I don't.

8 **Q. Why does that seem odd to you when**
9 **you're the head of the Bureau of Air?**

10 A. Sources don't necessarily invite
11 anyone to a meeting. We just have meetings and
12 then sources decide who they will bring and the
13 state decides who it will bring, but there is no
14 invitations to such things. So I'm not -- I'm
15 struggling with this invitation concept.

16 **Q. Counsel for KCBX did contact you**
17 **directly and speak to you directly about certain**
18 **wind events and other circumstances relating to**
19 **their south facility, did they not?**

20 A. Yes.

21 **Q. So it isn't uncommon for this what**
22 **you're calling a source to communicate directly**
23 **with you as the head of the Bureau of Air, is it?**

24 A. Their counsel communicated with me,

1 yes.

2 Q. But you just don't recall one way or
3 the other whether you were specifically invited to
4 this meeting?

5 A. No, I don't.

6 Q. Do you recall having a conversation
7 with Bob Bernoteit after the meeting ended --

8 A. I do.

9 Q. -- regarding the Wells letter and
10 the drafting of the denial?

11 A. Yes.

12 Q. Did you speak with Bob Bernoteit
13 about the information that was communicated at
14 that meeting?

15 A. No.

16 Q. You indicated in your direct
17 testimony that what you were most concerned with
18 was not the words on the paper for the fugitive
19 dust plan, but what was actually happening at the
20 site to control dust, is that right?

21 A. Yes. What the actual emission
22 controls that were in place were, yes.

23 Q. And because of that you didn't
24 consider the fugitive dust control plan that had

1 **been permitted at the time of the transaction when**
2 **the site went from DTE's ownership to KCBX's**
3 **ownership for purposes of denying the permit, is**
4 **that right?**

5 A. I don't even know what you mean by
6 permitted.

7 Q. **This facility was permitted and that**
8 **fugitive particulate operating program was part of**
9 **the permit, isn't that correct?**

10 A. I don't know that that's the case.

11 Q. **You don't know that the site was**
12 **permitted as a -- under the construction permit to**
13 **operate as a facility that it was operating at on**
14 **the date that KCBX purchased it?**

15 MS. PAMENTER: I object. I don't
16 believe that was actually what she said. Maybe
17 that's what she was going to correct.

18 MR. SWEDLOW: That's what I'm
19 asking. Yeah.

20 HEARING OFFICER HALLORAN: You can
21 have at it. Thanks.

22 MS. PAMENTER: Okay.

23 BY THE WITNESS:

24 A. I know that DTE was issued a

1 construction permit by us, but I thought that you
2 suggested something to me about the fugitive plan
3 being permitted.

4 BY MR. SWEDLOW:

5 **Q. Was KCBX assigned that construction**
6 **permit when it purchased the facility?**

7 A. The construction permit that had
8 been issued to DTE was ultimately transferred
9 to -- we issued it to KCBX south.

10 **Q. And at that time I think we've**
11 **already identified and we can go back there was a**
12 **fugitive particulate operating program?**

13 A. The DTE facility had one, yes.

14 **Q. But you didn't consider that to**
15 **determine whether KCBX was in compliance at the**
16 **time of your permit decision in this case, isn't**
17 **that correct?**

18 A. Correct. I had moved from that
19 dated plan. I started with that plan. From
20 receipt of the transaction, I first looked at the
21 DTE plan because that was the plan that the
22 facility was saying they were using. Then I
23 gravitated to the 10/26 plan during the pendency
24 of the transaction because that was the one they

1 said they were using. Then I gravitated to the
2 11/1 plan because that's the one they said they
3 were using.

4 **Q. And so the most current fugitive**
5 **dust plan is the one that you considered when you**
6 **denied the permit?**

7 A. Yes.

8 **Q. And what you wanted to know was**
9 **whether or not dust was being controlled at the**
10 **site? Actually, I think you said rather than the**
11 **words on the paper, is that right?**

12 A. Yes, I wanted to know that dust was,
13 in fact, being controlled and the facility was
14 demonstrating compliance with the act and the
15 regs, yes.

16 **Q. And you sent inspectors out to**
17 **inspect the facility five times over the course of**
18 **September through November, is that right?**

19 A. Yes.

20 **Q. Was there anything preventing you**
21 **from sending inspectors out 10 times or 20 times**
22 **during that period?**

23 A. Resource limitations.

24 **Q. Other than resource limitations?**

1 A. No.

2 Q. Was there anything that prevented
3 you from sending inspectors out from November 19th
4 through January 17th?

5 A. No.

6 Q. In the collaborative decision to
7 deny this permit, I think we've identified that it
8 was Mike Dragovich, Bob Bernoteit and you. Was
9 there anyone else who was actually involved in the
10 collaborative decision?

11 A. No.

12 Q. Are you aware that Mike Dragovich
13 drafted a permit granting document and made that
14 recommendation after his supervisor looked at the
15 grant?

16 A. I am aware that he had a permit
17 drafted, yes.

18 Q. Did he contribute to the
19 collaborative decision after the point at which he
20 had recommended granting the permit?

21 A. I believe he may have. Again, it's
22 not entirely clear to me the extent to which he
23 and Bob were communicating and the extent to which
24 he and Bob were discussing any -- any of the

1 informational deficiencies that they had
2 identified relative to that application that was
3 pending.

4 **Q. Bob was definitely involved in the**
5 **collaborative decision, though, is that correct?**

6 A. Yes.

7 **Q. I'm going to hand you what is part**
8 **of the supplemental record at Exhibit I. It is**
9 **not in your binder.**

10 MS. PAMENTER: I'm sorry. Can
11 you -- which Exhibit I are you referring to?

12 MR. SWEDLOW: I.

13 MS. PAMENTER: Okay. And I just
14 want to state for the record this is an exhibit
15 that was included in the second motion to
16 supplement that was filed -- excuse me -- served
17 on us at 4:15 p.m. on Monday the day before we
18 were starting trial at 9:00 a.m.

19 We were not provided -- we did
20 not have the opportunity to file a response with
21 respect to the second motion to supplement the
22 record because we were simply sitting in trial for
23 two straight days. So we're going to preserve our
24 objection for appellate purposes now with respect

1 to the use of any of the exhibits that were
2 attached to the motion -- the second motion to
3 supplement with the understanding that the Board
4 has issued a ruling, but I do want to preserve the
5 objection with respect to all of those exhibits
6 and any testimony given at this hearing relating
7 to those exhibits or the subject matter therein
8 whether given previously in an offer of proof or
9 is now outside an offer of proof.

10 HEARING OFFICER HALLORAN: Have you
11 heard from Mr. Matthew Dunn yet or from your
12 Agency any kind of decision what is going to
13 happen?

14 MR. GRANT: I think the
15 communication would have to come through
16 Mr. Petti.

17 MR. PETTI: I can answer.

18 MS. PAMENTER: We can take a break
19 and call if you would like us to, but we've all
20 been sitting here.

21 MR. PETTI: First of all, this --

22 MS. PAMENTER: Do you want to go off
23 the record?

24 MR. SWEDLOW: I want him to respond

1 to the objection on the record.

2 HEARING OFFICER HALLORAN: Yeah.

3 It's on the record, sir.

4 MR. PETTI: That's fine. We're
5 dealing with two different issues. There is the
6 privilege documents issue that went to management
7 and is being discussed amongst management and the
8 client back at our offices and on the phone, I
9 presume. I don't have anything further to offer
10 than I had before on that. I think her objection
11 is separate from the privileged document issue and
12 we're back into this supplemental --

13 HEARING OFFICER HALLORAN: I think
14 we all know that and I asked have you had any
15 decision from management regarding the
16 supplemental order?

17 MR. PETTI: Regarding the
18 supplemental --

19 MS. PAMENTER: And just to clarify
20 we're discussing -- the discussions internally are
21 with respect to the privileged portion of the
22 order that I understand was issued today.

23 HEARING OFFICER HALLORAN: Okay.

24 MS. PAMENTER: With regard to the

1 second motion to supplement, those documents I
2 don't understand -- I don't believe that there are
3 discussions that are going on internally with
4 regard to it. I simply wanted to preserve the
5 objection for appellate purposes at this point
6 since we're going -- this is the first time we're
7 talking about the documents since the order has
8 been issued. So I feel that I need to preserve
9 the objection.

10 HEARING OFFICER HALLORAN: Earlier
11 you were talking about filing a motion for
12 reconsideration and that hasn't been brought up in
13 the last two and a half hours.

14 MS. PAMENTER: This is the first
15 time that the documents that are the subject of
16 the second motion --

17 HEARING OFFICER HALLORAN: I
18 understand that.

19 MS. PAMENTER: The first time this
20 is --

21 HEARING OFFICER HALLORAN: I can see
22 what could happen. All right. Your objection is
23 noted. Mr. Swedlow, you may proceed. Just so I
24 understand this is outside the offer of proof

1 you're objecting, correct?

2 MS. PAMENTER: I'm simply preserving
3 the objection because I understand that the order
4 has been issued.

5 HEARING OFFICER HALLORAN: All
6 right.

7 MS. PAMENTER: Right.

8 BY MR. SWEDLOW:

9 Q. If you turn to in Exhibit I the
10 fourth page which is a map with a bunch of circles
11 on it, do you see that?

12 A. I'm sorry. Which page?

13 Q. The fourth page of Exhibit I it is
14 entitled KCBX South Terminal Overview?

15 A. I'm with you.

16 Q. Do you recognize that as a map of
17 the KCBX south facility?

18 A. It's labeled as such.

19 Q. Have you ever seen a map of the KCBX
20 south facility?

21 A. I have.

22 Q. Does that look like a map of the
23 KCBX south facility?

24 A. Sure.

1 **Q. I'm asking -- I'm asking whether it**
2 **looks like one to you or not. I don't know what**
3 **you mean by sure.**

4 **A. What I would say is this. When I**
5 **look at this, if it wasn't labeled as KCBX South**
6 **Terminal Overview, it doesn't look like anything**
7 **to me. I just see circles and zone listings.**

8 **Q. Do you have an understanding as to**
9 **what these circles represent?**

10 **A. No.**

11 **Q. Do you recall any references in the**
12 **inspection reports to the 42 cannon supplemental**
13 **water system for dust suppression that was being**
14 **installed by KCBX?**

15 **A. Yes, I do.**

16 **Q. But you don't recognize this as a**
17 **depiction of that water system?**

18 **A. I've never seen this depiction**
19 **before, no.**

20 **Q. Did you talk to Bob Bernoteit about**
21 **the information that was conveyed to him about the**
22 **dust suppression system at the site on December**
23 **5th?**

24 **A. No, we intentionally did not have**

1 that conversation because this information was
2 provided in the context of an enforcement meeting
3 so we intentionally did not consider this
4 information.

5 **Q. Why did you send somebody in charge**
6 **of permitting who was reviewing this file for the**
7 **permit if it was an enforcement meeting?**

8 A. Because for all compliance and
9 enforcement matters at the IEPA they are done as a
10 team. For conservation purposes, we assigned to
11 the team the people who are familiar with the
12 facility. In this instance, the person or persons
13 who would have been familiar with the facility at
14 that time it would have been Bob Bernoteit and/or
15 Mike Dragovich. We wouldn't reinvent the wheel.
16 However, we would have tried to keep -- we were
17 trying to keep matters in their particular --
18 their particular little bins. We were trying to
19 keep enforcement separate from the permitting
20 transaction, separate from legislative matters
21 that were going on, separate from emergency
22 rulemaking, separate from the prospect of a
23 potential general regulatory development prospect
24 all of which would have related to the KCBX south

1 facility. So, no, Bob and I did not talk after
2 the meeting about this Exhibit I at all.

3 **Q. I think the question was why would**
4 **you send the person in charge of the permit review**
5 **to a meeting if you were trying to keep**
6 **enforcement and permitting separately?**

7 A. Because he was the person familiar
8 with the facility. So we just -- we do that with
9 some frequency and then tell people to try to keep
10 things compartmentalized. It's no different than
11 Katie is both the attorney assigned to this appeal
12 and the attorney that was assigned to enforcement.
13 I mean, the state has limited resources and that's
14 how we end up setting things up, but it wasn't
15 send him in with the intention of bringing
16 information out.

17 And, in fact, what is
18 interesting to me is if this is something the
19 facility had wanted us to consider, it needed --
20 it is not on us to put things into your
21 application for permit. It is on the facility to
22 put things into the application for permit and
23 into the record. So if there was something in
24 this Exhibit I that we should have considered, it

1 should have come in and so I know that it is
2 coming across as if we were perhaps considering
3 things we shouldn't have, frankly, we didn't
4 necessarily have to consider the 11/1 FPOP, but I
5 thought that actually it would potentially be
6 beneficial to say "Hey, I'm considering this.
7 Understand I'm considering this because you didn't
8 tender it to the permit section and you didn't
9 even speak to the point at all to the permit
10 section."

11 **Q. Okay. So you decided to consider**
12 **the 11/1 FPOP even though it was submitted to**
13 **permitting --**

14 A. I knew of the FPOP.

15 **Q. If I can just finish my question.**

16 A. Yes.

17 **Q. You decided to consider it even**
18 **though it wasn't submitted to --**

19 A. FPOP.

20 **Q. Can I --**

21 A. I did. Yes, I'm answering your
22 question. I did.

23 **Q. Okay. I wasn't -- that was not the**
24 **question.**

1 A. I thought you said I decided to
2 consider the FPOP. Yes, I did.

3 **Q. What we're here to decide and the**
4 **information we're here to decide is whether or not**
5 **the Board -- excuse me -- the IEPA either**
6 **considered or should have considered certain**
7 **information. I think I understand your testimony**
8 **for why you did not consider it, but I'm trying to**
9 **establish on behalf of my client that you should**
10 **have and I think I understand your argument as to**
11 **why you think you should not have.**

12 MS. PAMENTER: I object on two
13 bases. First, the question is confusing, but,
14 second, I don't believe that is why we are here.
15 The question here is not to make a determination
16 as to what the Illinois EPA relied upon or should
17 have relied upon. The question before the Board
18 is whether the applicant submitted sufficient
19 information with its construction permit
20 application to demonstrate there would be no
21 violations of the act or the regulations if the
22 construction permit application were granted. The
23 Illinois EPA initially said no and the Board is
24 reviewing that decision. I believe that is the

1 question that is at issue here.

2 MR. SWEDLOW: If I can briefly
3 respond from today's order. The Board finds that
4 the slides submitted in Exhibit I were before the
5 Agency during its review of KCBX's request and
6 that the Agency either relied upon or should have
7 relied upon them in reviewing that request and it
8 is that that I'm trying to identify. Whether she,
9 in fact, did rely upon them or whether Bob
10 Bernoteit, who has already testified, should have
11 relied upon them. So I think that is the issue
12 that is being presented. So I guess we just
13 disagree, but am I allowed to ask the question?

14 HEARING OFFICER HALLORAN: You are.

15 MS. PAMENTER: And I'm allowed to
16 object.

17 HEARING OFFICER HALLORAN: You did.
18 I appreciate it. It's on the record. Overruled.
19 You may proceed, Mr. Swedlow.

20 BY MR. SWEDLOW:

21 Q. Bob Bernoteit was involved in the
22 collaborative decision to deny the permit, is that
23 correct?

24 A. Yes.

1 Q. And your goal in investigating the
2 information that you had available to you was to
3 determine what were the actual dust suppression
4 methods being used at the site at the time you
5 denied the permit, is that correct?

6 A. That was a goal.

7 Q. But you had never seen any of the
8 information that is disclosed in this Power Point,
9 is that right?

10 A. No.

11 Q. Did Bob Bernoteit communicate to you
12 information regarding how the dust suppression
13 works in freezing conditions?

14 A. No.

15 Q. Did he discuss to you the complete
16 coverage of water dust suppression for the entire
17 site during nonfreezing conditions?

18 A. No.

19 Q. Did he discuss with you how the
20 bottom dump system worked?

21 A. No.

22 Q. Did he discuss with you the typical
23 inbound transportation modes that would include
24 rail car delivery and river barge?

1 A. No.

2 Q. Did he discuss with you the volumes
3 of inbound and outbound shipments by month for
4 January through October of 2013?

5 A. No.

6 Q. Did he discuss with you the dust
7 mitigation system overview that was communicated
8 to him at this meeting?

9 A. No.

10 Q. He didn't talk to you about the
11 surfactant and encrusting product additions?

12 A. No.

13 Q. Did he talk to you about the
14 existing surfactant and encrusting product
15 application mechanisms?

16 A. No.

17 Q. Did he talk to you about spray bars
18 on the conveyors transfer points?

19 A. No.

20 Q. Did he talk to you about the number
21 of water trucks at the site?

22 A. No.

23 Q. Did he show you the picture of the
24 water truck that is included in this presentation?

1 A. No.

2 MS. PAMENTER: Objection. Lack of
3 foundation. We haven't established that
4 Mr. Bernoteit was permitted to keep the
5 presentation slides that were presented at the
6 December 5th meeting so as to be able to show
7 Ms. Armitage a copy of the slides.

8 MR. SWEDLOW: Is that relating to
9 the picture of the water truck?

10 MS. PAMENTER: You're referring to
11 Exhibit I. Excuse me. Mr. Swedlow is referring
12 to Exhibit I with regard to this questioning. My
13 objection was lack of foundation as it has not
14 been established that the Illinois EPA was
15 permitted to keep the slides following the close
16 of the meeting.

17 MR. GRANT: One second.

18 MR. SWEDLOW: I'll withdraw the
19 question of whether you saw the picture of the
20 water truck and I'll continue on.

21 HEARING OFFICER HALLORAN: Okay.
22 Withdrawn.

23 BY MR. SWEDLOW:

24 **Q. Was the truck wheel wash described**

1 to you after the December 5th meeting?

2 A. No.

3 Q. What about the street sweepers?

4 A. No.

5 Q. Were the technological aspects of
6 the cannon control system described to you?

7 A. No.

8 Q. Were the automation aspects of the
9 cannon control system described to you?

10 A. No.

11 Q. Was the water capacity of the cannon
12 control system described to you?

13 A. No.

14 Q. Was the weather system monitoring
15 data and collection system described to you?

16 A. No.

17 Q. Was the formal training of the
18 employees for dust management described to you?

19 A. No.

20 Q. Was the best management practice of
21 choke feeding described to you?

22 A. No.

23 Q. Was the best management practice of
24 pile management and grooming described to you?

1 A. No.

2 Q. Or daily weather forecasting?

3 A. No.

4 Q. Or when and if the operations at the
5 site would be suspended because of the potential
6 for fugitive dust?

7 A. No.

8 Q. Was the fact that there is reduced
9 traffic during winter operations described to you
10 in the context of dust mitigation?

11 A. No.

12 Q. Was the fact that inactive piles are
13 treated before the onset of freezing conditions
14 discussed with you after the December 5th meeting?

15 A. No. We're still on this Exhibit I?

16 Q. I'm not on Exhibit I. I'm asking
17 you about information. I'm looking at Exhibit I,
18 but I'm not saying did you get this Power Point.
19 I'm asking you if the words that I'm saying or the
20 topics covered by those were discussed with you
21 and Bob Bernoteit after the December 5th meeting
22 with KCBX?

23 A. No.

24 Q. I want to go back to some of the

1 edits you made to the early September 2013
2 inspection reports. You ordered those inspections
3 to take place as soon as possible after you
4 learned of potential concerns of the site, is that
5 right?

6 A. Yes.

7 Q. If we turn back to R1305. JKA's
8 comments, those are your comments, right? That's
9 what that signifies?

10 A. Yes.

11 Q. So on page 1307 there is a big X
12 through control systems and there is a description
13 of 43-44 new 65 foot towers with water spray,
14 water truck, which identifies two 8,000 gallon
15 water trucks, a street sweeper --

16 A. Where are we again?

17 Q. On 1307.

18 A. Oh, 1307.

19 Q. There is a description here under
20 control systems for under construction 43-44 new
21 water towers with water spray and then it
22 identifies those as four and six-inch water lines
23 capable of 175 feet and 200 feet radius water
24 spray, do you see that?

1 A. Mm-hmm.

2 Q. And the next describes a water truck
3 with two 8,000 gallon water trucks dedicated to
4 the site?

5 A. Yes.

6 Q. And then there's a street sweeper
7 identified, do you see that?

8 A. Yes.

9 Q. And then there is spray cars
10 identified?

11 A. The street sweeper, is that --

12 Q. Right underneath water truck. It
13 says street sweeper.

14 A. Yes.

15 Q. Underneath that it says spray bars?

16 A. Correct. Yes.

17 Q. Underneath that it says truck wash?

18 A. Yes.

19 Q. And below that it says surfactant,
20 do you see that?

21 A. Yes.

22 Q. You put an X through this because
23 you didn't think this information belonged in the
24 inspection report, is that right?

1 A. I put an X on it because I did not
2 believe as it was presented that it was useful to
3 me.

4 **Q. But it is information about the**
5 **anticipated dust suppression systems at this site,**
6 **isn't that correct?**

7 A. Yes, it is some information about
8 the dust suppression systems.

9 **Q. So prior to deleting it from the**
10 **inspection report, you did consider that these**
11 **notes were taken by the inspector, is that right?**

12 A. Yes.

13 **Q. On the next page, we discuss the**
14 **fact that you deleted extensive as a descriptive**
15 **word before extensive water spray system, do you**
16 **recall discussing that?**

17 A. Yes.

18 **Q. And you felt that wasn't appropriate**
19 **for the inspection report, but you did still**
20 **consider the fact that the inspector thought of**
21 **the system as extensive, didn't you?**

22 A. I'm sorry. Can you say that again?

23 **Q. His subjective observation that the**
24 **new system would be extensive was something you**

1 **still considered, right?**

2 A. Yes.

3 Q. Because you didn't think he was
4 biased in favor of KCBX when considering the new
5 water spray system, did you?

6 A. I didn't have that sort of
7 consideration as to whether he was biased or
8 unbiased towards KCBX.

9 Q. I think you testified that this
10 would be a subjective judgment about the water
11 spray system that wasn't appropriate for an
12 inspection report, is that right?

13 A. Right. I like more descriptive,
14 meaningful information.

15 Q. But you have never been to the site
16 to see the water spray system yourself, have you?

17 A. No.

18 Q. And he has been to the site several
19 times?

20 A. Correct.

21 Q. On the next page under new water
22 spray system construction, it was previously
23 described as a major new system and you deleted
24 the word major I think for the same reason, is

1 **that right?**

2 A. Yes.

3 **Q. But you still considered the fact**
4 **that the inspector thought of the system as major**
5 **when he wrote up his notes from the inspection?**

6 A. Yes. Although really what was
7 resonating in my head was -- I mean, he has 44
8 written there, but what always was resonating in
9 me through the decisional deadline, even as I sit
10 here today, was it was 42 new water cannons had
11 been added. That is what was in my head more so
12 than this characterization of major, extensive or
13 expensive or anything else.

14 **Q. Under the plant source section and**
15 **then continuing on page 1310 the inspector**
16 **characterized the systems for dropping material as**
17 **having excellent particulate matter capture**
18 **efficiency and you deleted the word excellent, do**
19 **you recall discussing that on direct?**

20 A. I do.

21 **Q. But you still considered the fact**
22 **that the inspector considered the systems**
23 **excellent at particulate matter capture**
24 **efficiency, didn't you?**

1 A. I would say more what I considered
2 was that there was no assigned deficiency there.

3 **Q. With respect to edits that you made**
4 **to page 1311, there was a discussion as to whether**
5 **or not the statement as such it should be superior**
6 **in design and accomplish the goal of fugitive**
7 **particulate matter control of stock piles,**
8 **roadways and transfer points whether that**
9 **statement was a statement that Walker made or**
10 **whether that was an observation that was being**
11 **made by the inspector, is that right?**

12 A. Mm-hmm.

13 **Q. Did you specifically confirm with**
14 **the inspector as to whether or not that was his**
15 **statement or Walker's statement?**

16 A. No.

17 **Q. You just deleted it, is that right?**

18 A. These were suggested edits.

19 **Q. If it was correct that the person**
20 **who had visited the site believes that the new**
21 **system was, in fact, accomplishing the goal of**
22 **fugitive particulate matter control for stock**
23 **piles, roadways and transfer points, would that**
24 **reduce your concern that there would be a**

1 **potential violation of the act?**

2 A. No, the belief alone would not
3 suffice. If his belief had been -- if along with
4 a belief there was an attendant, explanation and
5 showing, then we would have something, but I don't
6 just accept I believe, something that doesn't
7 suffice.

8 **Q. Even if it is your own inspector who**
9 **believes it?**

10 A. Correct. A statement that I believe
11 somebody this, that or the other thing does not
12 suffice for a demonstration of compliance.

13 **Q. Neither would it satisfy a**
14 **demonstration of violation, isn't that correct?**

15 A. Correct. But the demonstration
16 wasn't to be made by us in the context of the
17 permitting transaction. The demonstration was to
18 be made by KCBX and I am not aware that there was
19 such a demonstration in the application for
20 permit.

21 **Q. But you didn't limit your review of**
22 **materials only to the application for permit. In**
23 **fact, you specifically rejected information that**
24 **was outdated by the time you made your denial,**

1 didn't you?

2 A. Correct.

3 Q. With respect to the next sentence
4 that you edited here, it says "It appeared that
5 they are working diligently to apply water
6 throughout the plant," do you see that?

7 A. Where are we again?

8 Q. It's the next thing that you struck
9 from the report.

10 A. Okay. I'm with you.

11 Q. Did you consider the fact that the
12 inspector it appeared to him that KCBX was working
13 diligently to apply water throughout the plant?

14 A. I'm sorry. What was your --

15 Q. Did you consider in your ultimate
16 denial of the permit the fact that when the
17 inspector was on site it appeared to him that KCBX
18 was working diligently to apply water throughout
19 the plant?

20 A. No.

21 Q. In the confidential for Agency use
22 only section on 1316, you initially deleted the
23 inspector's observation regarding the elaborate
24 fugitive particulate matter control project, the

1 **observation that, quote, this will improve**
2 **fugitive particulate matter control tremendously,**
3 **do you see that?**

4 A. Mm-hmm.

5 **Q. Did you consider the fact that that**
6 **was the view of the inspector you sent to the site**
7 **when you denied the permit ultimately?**

8 A. I actually share the view that a 43
9 to 44 cannon system at the plant could, if
10 utilized in a prescribed fashion, serve to control
11 emissions from the plant. The point is there was
12 no representation with supported information here
13 that, indeed, the system was being utilized nor
14 when, whether or how and more importantly not only
15 did the inspector not have the information, but at
16 the end of the day it wasn't in the permit
17 application either.

18 **Q. We've already gone through the fact**
19 **that you're trying to consider the most recent**
20 **information and, in fact, considered the**
21 **inspection reports from November in your decision**
22 **to ultimately deny the permit, is that correct?**

23 A. Yes.

24 **Q. And I think did you speak directly**

1 **to the inspector about the November inspections?**

2 A. Not that I recall.

3 **Q. Because in this inspection report**
4 **and I'm looking at page 33 of the record --**

5 A. Page 33.

6 **Q. What the inspector records according**
7 **to Mike Estadt who testified in this appeal -- it**
8 **says "Estadt stated that the water cannon system**
9 **is now capable of applying water suppression," did**
10 **you have an understanding that it wasn't capable**
11 **of applying water suppression?**

12 A. No, I had the understanding that
13 merely because it is capable of applying
14 suppression does not mean that, indeed, it is
15 applying suppression and even if it is capable and
16 it is applying, I did not see where we had in-hand
17 information as to the precise nature of the
18 application. When it is applied, at what
19 frequency, at what rate, et cetera. I still -- I
20 don't even -- when I quickly looked at your
21 Exhibit I, I don't know that it was even in that.

22 **Q. At the bottom here, it says "Estadt**
23 **had an operator start the water cannon system"?**

24 A. Mm-hmm.

1 **Q. Did you talk to the inspector about**
2 **what happened when he started the water cannon**
3 **system?**

4 A. No, I merely read that same passage
5 here and, again, it speaks to the fact that the
6 system is capable of being used. It is capable of
7 being started. It was started while we were
8 there. That still does not mean that it was being
9 operated and even if it was being operated it did
10 not mean that it was being operated at a
11 particular frequency and that would necessarily be
12 of concern.

13 **Q. At the end it says "Estadt showed**
14 **the data obtained from their wind gauge during a**
15 **high wind event on November 17th, 2013," did you**
16 **see that?**

17 A. Which paragraph are we in?

18 **Q. The very end of the report. R35.**

19 A. Yes.

20 **Q. It says "Estadt showed the data**
21 **obtained from their wind gauge during a high wind**
22 **event on 11/17/13," do you see that?**

23 A. Mm-hmm.

24 **Q. Does that mean to you their wind**

1 **gauge was working on 11/17/13?**

2 A. Yes. Although I'm not clear on
3 whether the wind gauge and -- I think they had
4 maybe a barometric gauge. They had a few things
5 on the met system I'll call it and I believe that
6 this report says that everything wasn't fully
7 interfaced so it wasn't necessarily all 100
8 percent automated.

9 **Q. The next sentence says "Wind gusts**
10 **exceeding 50 miles per hour were recorded," do you**
11 **see that?**

12 A. Mm-hmm.

13 **Q. Then it says "The water cannons were**
14 **cycling and in operation during the event which**
15 **brought precipitation as well," do you see that?**

16 A. Mm-hmm.

17 **Q. Does that mean to you that the water**
18 **cannons were actually operational cycling on that**
19 **date?**

20 A. Yes, that's what it says.

21 **Q. You said that you relied upon the**
22 **fact that the Attorney General had filed an**
23 **enforcement action against KCBX as one of the**
24 **bases for denying the permit, is that correct?**

1 A. It is something that I considered.
2 I would not say that that was a basis for denial.

3 **Q. You considered it how then?**

4 A. I considered it in the sense that it
5 to my mind served as -- it further evidenced that
6 there may have been an existing air pollution
7 concern and that is why I suggested that we send a
8 Wells letter to notify KCBX that we were going to
9 consider things outside the order particularly we
10 were going to consider whether the facility as it
11 existed may be imposing environmental concerns as
12 evidenced by the citizens complaints and the
13 Attorney General's formal complaint. We were also
14 going to consider the information in the
15 inspection reports.

16 **Q. Do you believe that anything in the**
17 **inspection reports, the fact that the Attorney**
18 **General had filed an enforcement action or any of**
19 **the citizen complaints constitute any adjudicated**
20 **or determined violation of any provision of the**
21 **act by KCBX?**

22 A. No.

23 **Q. But you think collectively they**
24 **identified that there is an environmental concern**

1 **with respect to the site, is that correct?**

2 A. Yes.

3 **Q. Do you believe that an accumulation**
4 **of information that identifies environmental**
5 **concern at the site is a justification to deny a**
6 **permit?**

7 MS. PAMENTER: Objection. Calls for
8 a legal conclusion.

9 MR. SWEDLOW: This is the person who
10 denied the permit so I don't know who else to ask.

11 HEARING OFFICER HALLORAN:
12 Overruled. You may answer if you're able.

13 BY THE WITNESS:

14 A. No. What I -- what we signaled to
15 KCBX in the Wells letter was that these documents
16 suggest you have a concern, please speak to that
17 concern and please ensure that you speak to
18 compliance with among other things 212.301 and we
19 did that because we simply did not have
20 information in the application that on its face
21 showed that the facility would not cause a
22 violation of the act or regs and not only did the
23 application in and of itself not show that the box
24 hoppers and conveyors and stackers would not cause

1 a violation of the act or regs, information that
2 was available suggested that the facility before
3 the addition of the equipment was already a
4 problem.

5 So we wanted the source to take
6 the opportunity to give us information that would
7 show how it is that it is going to demonstrate
8 compliance with the act and regs. Show that it
9 won't violate the act and regs.

10 **Q. If the site already was a problem,**
11 **is that a question that you would assign to**
12 **permitting or enforcement within the Bureau of**
13 **Air?**

14 A. It is a problem -- it is something
15 that is assigned to enforcement, but it is
16 something that we make, among others, the permit
17 section aware of because the fact of the matter is
18 the only permit in the Bureau of Air that can
19 issue to a noncompliant source is a Clean Air Act
20 permit where you can put the source on a
21 compliance schedule. All other permits issued are
22 required to be issued based upon a showing of
23 compliance.

24 **Q. But before there is an adjudicated**

1 **violation, the site is in compliance with all of**
2 **its permits obligations, is it not?**

3 MS. PAMENTER: Objection. Calls for
4 a legal conclusion.

5 HEARING OFFICER HALLORAN: Overruled
6 again. You may answer.

7 BY THE WITNESS:

8 A. What was your question again?

9 BY MR. SWEDLOW:

10 **Q. Before there is an adjudicated**
11 **violation, there is no established violation of**
12 **any provision of the act, is there?**

13 A. No.

14 MR. SWEDLOW: If you can just give
15 me one minute.

16 HEARING OFFICER HALLORAN: Off the
17 record.

18 (Whereupon, a break was taken
19 after which the following
20 proceedings were had.)

21 HEARING OFFICER HALLORAN:
22 Mr. Swedlow?

23 MR. SWEDLOW: I just have a couple
24 more questions.

1 BY MR. SWEDLOW:

2 Q. With respect to the first inspection
3 of the series of inspections that you requested
4 the inspections portion of IEPA to conduct, if we
5 can turn back to 165.

6 A. Yes.

7 Q. This has a narrative from Emilio
8 Salas, do you see that?

9 A. Yes.

10 Q. I think in the comments you were
11 asked on direct you put some explanation points
12 after something that Emilio Salas was supposed to
13 get to you, do you recall that?

14 A. Mm-hmm.

15 Q. Those were throughput data reports
16 that he obtained from KCBX, is that right?

17 A. Yes.

18 Q. Did you review those?

19 A. I saw this box here, this box
20 containing throughput information.

21 Q. Did you ask for a fuller report or
22 was this satisfactory for you to determine that no
23 violations of the throughput limitations existed
24 at KCBX south?

1 MS. PAMENTER: I'm just going to
2 object. I'm not sure that was her testimony
3 earlier today on the subject. So to the extent it
4 was, I just want the objection noted.

5 MR. SWEDLOW: You're not sure what
6 was? I just don't know how to respond to the
7 objection.

8 MS. PAMENTER: I don't believe your
9 question is what she testified to today.

10 MR. SWEDLOW: I can restate the
11 question.

12 HEARING OFFICER HALLORAN: Thank
13 you.

14 BY MR. SWEDLOW:

15 Q. Ms. Armitage, you testified about
16 comments that you made to a draft inspection
17 report and you put explanation marks after the
18 comment, do you recall that being called out to
19 you?

20 A. Yes.

21 Q. And that was with respect to Emilio
22 Salas providing you throughout information, is
23 that right?

24 A. Yes.

1 Q. Okay. Now, separate from what you
2 said on direct, I'm going to ask you a different
3 question. Is the information contained in the
4 final report satisfactory for you to establish
5 that no throughput limitation violations were
6 being committed at the KCBX south facility?

7 A. I don't know whether it is.

8 Q. Above the tables, it says in the end
9 of the first paragraph it says "We saw no sign of
10 dust blowing anywhere, but the potential for
11 emissions during drier weather still persists," do
12 you see that?

13 A. Where above the tables?

14 Q. At the end of the first paragraph
15 under the inspection narrative.

16 A. Yes, I see where you are.

17 Q. Did you consider the fact that at
18 the first inspection that you ordered to be done
19 as soon as possible that there was no sign of dust
20 blowing anywhere at the site at that time?

21 A. Yes.

22 Q. Previously on direct you testified
23 about the fact that there was some question about
24 the maintenance of the existing water cannon at

1 the time of acquisition, the ones that existed, do
2 you recall that?

3 A. Yes.

4 Q. At the very end of this report it
5 says "According to KCBX, the existing water
6 cannons did not require maintenance during this
7 time" and then it says "During this inspection, we
8 observed the rain guns in operation, but not the
9 water wagon," do you see that?

10 A. I do see that.

11 Q. Did the fact that the inspector
12 actually observed the water cannons or rain guns
13 in operation satisfy you with respect to the
14 maintenance concerns you had?

15 A. No.

16 Q. What further follow up did you
17 either do yourself or ask the inspectors to do
18 regarding the maintenance concerns that you had?

19 A. I did no further follow up nor did I
20 ask them to do any further follow up.

21 MR. DWYER: The only remaining
22 questions that I have relate to the documents that
23 we have yet to get. So if we can have those, then
24 I can ask questions about the documents that were

1 previously withheld based upon privilege.

2 HEARING OFFICER HALLORAN: You're
3 going to ask questions about documents you don't
4 have?

5 MR. SWEDLOW: I would like to look
6 at them. I don't want to close my direct
7 examination. So I guess can we try one more time
8 for a response from the Agency on whether we're
9 going to get --

10 MR. PETTI: The response is the same
11 as before. We don't have them right now. I don't
12 have anything further.

13 HEARING OFFICER HALLORAN: Thank
14 you, Mr. Petti.

15 MR. SWEDLOW: There may be another
16 way to get it.

17 BY MR. SWEDLOW:

18 **Q. Do you recall being deposed in this**
19 **case?**

20 A. Yes.

21 **Q. There was a deposition rider**
22 **attached to your deposition notice, do you recall**
23 **that?**

24 A. Yes.

1 **Q. Did you gather documents and provide**
2 **them to your counsel for production based on that**
3 **rider?**

4 A. Yes.

5 **Q. When did you provide those documents**
6 **to your counsel? Maybe this can help narrow it**
7 **down. Was it sometime after you received the**
8 **deposition rider and before the deposition**
9 **started?**

10 A. I gathered the documents before the
11 deposition. I did not bring them with me to the
12 deposition. I did not -- I had not given them to
13 counsel I don't think until after the deposition
14 is when they took possession of them.

15 MR. SWEDLOW: So just for the record
16 it is the documents responsive to the deposition
17 rider as well as the documents previously
18 collected and logged. Those documents that were
19 provided after the deposition have not yet been
20 logged and provided. Either logged or provided to
21 KCBX. So I guess we'd like to just hold this
22 deposition open and keep the witness under the
23 continuing to testify oath until we get a
24 resolution of that issue.

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1 HEARING OFFICER HALLORAN: Well, the
2 resolution may not come for a while. They
3 indicated they may file an appeal, I guess. So --

4 MS. PAMENTER: If I can just clarify
5 because now we're talking about something new. So
6 the order that was issued today concerns a motion
7 for reconsideration attached to which were
8 specific e-mails, certain specific e-mails that
9 contain redacted sections. That is a specific set
10 of documents.

11 Today's order did not concern --
12 let me rephrase this. Today's order also
13 concerned the second supplement -- excuse me. The
14 second motion to supplement the record. It is my
15 understanding and, again, I haven't read the
16 order, but it is my understanding that's it. That
17 is what the order was about was our motion for
18 reconsideration to which there was a specific set
19 of documents attached that we claimed privilege
20 and a separate second motion to supplement the
21 record.

22 HEARING OFFICER HALLORAN: Okay.

23 MS. PAMENTER: So he is now talking
24 about documents with respect to a deposition rider

1 which is not the subject of today's order.

2 HEARING OFFICER HALLORAN: But
3 didn't the motion for reconsideration -- are you
4 talking about Ms. Armitage's rider?

5 MS. PAMENTER: I'm sorry. I
6 apologize, Mr. Halloran.

7 HEARING OFFICER HALLORAN: I don't
8 have the order in front of me. So you're arguing
9 the motion for reconsideration today?

10 MS. PAMENTER: I have a copy. I can
11 get a copy out if you'd like me to in terms of
12 what -- regarding our motion for reconsideration.
13 We went through the documents that were on the
14 privilege log and we produced some of those
15 unredacted, which are included in the second
16 supplement to the administrative record and there
17 was a small subset of documents that we kept
18 redacted.

19 HEARING OFFICER HALLORAN: Okay.
20 What subset? What did it relate to?

21 MS. PAMENTER: The privilege log.
22 The privilege log.

23 HEARING OFFICER HALLORAN: Okay.

24 MS. PAMENTER: Originally. So the

1 motion for reconsideration was only with regard to
2 the e-mails that are attached to the motion for
3 reconsideration. I do have a copy I'm happy to
4 hand up if that is helpful.

5 HEARING OFFICER HALLORAN: For the
6 order?

7 MS. PAMENTER: The motion for
8 reconsideration, yes.

9 HEARING OFFICER HALLORAN: Well, I
10 can't really do anything about it now.

11 MS. PAMENTER: Sure.

12 HEARING OFFICER HALLORAN: But I
13 appreciate the offer.

14 MS. PAMENTER: Now -- what is being
15 discussed now is the deposition rider to Julie
16 Armitage's notice of deposition.

17 HEARING OFFICER HALLORAN: Okay.
18 That's what I was asking about.

19 MS. PAMENTER: That is not part of
20 today's order. It is not.

21 HEARING OFFICER HALLORAN: That's
22 what I was getting back to. As I recall in the
23 motion for reconsideration, the state agency
24 brought up the fact, too, that I think Julie

1 Armitage's name is in there in the rider. So it
2 basically tried to roll it all into one and the
3 Board order said we considered the state's
4 arguments in their motion to -- what was it? An
5 interlocutory appeal, I believe, at that time when
6 the state had Julie Armitage's --

7 MS. PAMENTER: And --

8 HEARING OFFICER HALLORAN: And the
9 Board order said "We considered the state's
10 arguments."

11 MS. PAMENTER: Yes. And as a result
12 of that and you heard Ms. Armitage testify today
13 and I was made -- we were off the record, but I
14 had to redo all of the pages of the other fugitive
15 dust plans, the other regulations, the related
16 documents, her notes with respect to the October
17 1st operating program and Ms. Armitage testified
18 that those were all hers. So if you want me to go
19 through and have her testify --

20 HEARING OFFICER HALLORAN: No.

21 MS. PAMENTER: -- with everything
22 that she produced with respect to the deposition
23 rider that is included in the administrative
24 record I can do that today, but that will take

1 some time and I've tried to address this and this
2 is part -- where this goes to is there is a
3 pending motion to compel and we filed a response
4 and you indicated on Tuesday that you were going
5 to take that with the case. That is what this
6 concerns, but not the motion for reconsideration.

7 HEARING OFFICER HALLORAN: Okay.
8 That's what this concerns, the motion?

9 MR. SWEDLOW: Both. It's the
10 documents that we'd like that we're waiting --
11 that are either going to be produced or not from
12 the privilege log and we need to know whether or
13 not the documents that are responsive to the rider
14 have been produced. I know that some information
15 from her files have been produced, but this asks
16 for three categories. Certain notes, certain
17 drafts and other notes. And I don't know if that
18 has been produced to us or not.

19 HEARING OFFICER HALLORAN: I
20 remember you saying that.

21 MR. SWEDLOW: And there was no
22 response.

23 MS. PAMENTER: I guess my response
24 simply with respect to that is the obligation

1 under the April 17th order was for the Agency to
2 supplement the record. There was no requirement
3 in that order for there to be any written
4 confirmation or a breakdown with regard to which
5 parts of the record correspond to which section --
6 which deposition rider. I mean, we have four.
7 Ms. Armitage testified at length today with regard
8 to the sections of the supplement that concerned
9 her. If I have to go through all of it to show
10 what corresponded to Ms. Armitage, I suppose I can
11 do that, but from what -- again, I can pull the
12 April 17th order. My understanding of what --

13 HEARING OFFICER HALLORAN: Are you
14 talking about my order or the Board's order?

15 MS. PAMENTER: The Board's order --

16 HEARING OFFICER HALLORAN: Okay.
17 Because I have one the same day.

18 MS. PAMENTER: -- was to supplement
19 the record with those documents and so --

20 MR. SWEDLOW: My question is whether
21 or not the documents that are responsive to the
22 deposition rider have been produced. I know that
23 some documents that relate to Ms. Armitage have
24 been produced, but the rider asks for three

1 categories of documents and if the state can
2 simply represent that those documents have been
3 produced already, then we don't have any issue
4 with the rider.

5 MS. PAMENTER: Right. I'm not going
6 to make any more representations or perceived
7 representations in this case. This is not a
8 request for production of documents where you go
9 through and you also do a verification. That is
10 not what this is. You file the administrative
11 record. To the extent supplements are ordered to
12 be filed, you do so and that is what has been done
13 here.

14 HEARING OFFICER HALLORAN: Okay. It
15 sounds like based on if you're not going to make a
16 representation that everything has been turned
17 over, it sounds like you have to go back to your
18 office and do a list to see what has been turned
19 over pursuant to the rider or the order of April
20 17th. You suggested that earlier.

21 MS. PAMENTER: I didn't suggest
22 that. I don't believe that there is a requirement
23 in the order for us to do any type of
24 verification. So I did not suggest that at all.

1 HEARING OFFICER HALLORAN: But the
2 state has turned over everything that the order
3 has asked for?

4 MS. PAMENTER: I need to refer with
5 my client before making a representation with
6 regard to this. It's not required.

7 HEARING OFFICER HALLORAN: To the
8 best of their belief.

9 MS. PAMENTER: I've been instructed
10 that I am permitted to say that to the best of the
11 Agency's knowledge that the documents responsive
12 to Ms. Armitage's deposition rider have been
13 included in the administrative record and
14 supplements with the understanding that certain of
15 those pages do contain redacted information
16 because it is stated on there they're related to
17 other cases as I recollect. I haven't gone
18 through every page.

19 HEARING OFFICER HALLORAN: I'm fine
20 with that. Mr. Swedlow?

21 MR. SWEDLOW: Yeah, I'm fine with
22 that. So the only open issue is can we set some
23 deadline at least for decision so we can either
24 close this record or not on when the Agency will

1 decide whether they're going to produce the
2 documents responsive to this order today or not?
3 Maybe tomorrow morning at 11:00?

4 MR. PETTI: If we have an
5 opportunity to have an interlocutory appeal on
6 that and it gives us a certain amount of time to
7 file it, I don't think that the Hearing Officer's
8 order at a hearing can trump whatever the rule is.

9 HEARING OFFICER HALLORAN: Wait.

10 MR. PETTI: All I know is that that
11 rule is out there.

12 HEARING OFFICER HALLORAN: Wait a
13 minute.

14 MR. SWEDLOW: I'm not suggesting the
15 Hearing Officer trump anything. The Board issued
16 an order today saying the motion for
17 reconsideration on this issue is denied and the
18 information should be produced.

19 The two arguments that have been
20 presented is there is no time limit on that and we
21 might have some other appellate rights, both of
22 which are fine. You don't have to order them to
23 do anything. We have to know whether or not we're
24 going to agree to close the record because they're

1 not or they're going to give them to us and we can
2 finish the cross-examination. It's one or the
3 other and we should just do that by tomorrow. Not
4 that they have to give up a right. They're to
5 tell us we're not getting them until we do
6 something.

7 HEARING OFFICER HALLORAN: They're
8 saying they can't or won't.

9 MR. SWEDLOW: Well, if they're
10 saying they won't, I just want to know that so we
11 know whether to close the record or make our
12 request on the record for Ms. Armitage to be still
13 under oath and we're not finished with our
14 examination.

15 HEARING OFFICER HALLORAN: Yeah. I
16 think it's going to have to be the latter,
17 Mr. Swedlow.

18 MR. PETTI: I can't give you a
19 definitive answer. I can give you a deadline by
20 11:00 tomorrow. I can't determine what Illinois
21 EPA is going to direct the client and I can't
22 determine what my boss is going to direct. So
23 it's hard for me to do that while I'm sitting
24 here.

1 MR. SWEDLOW: Then our request would
2 be that Ms. Armitage be considered under oath and
3 not permitted to talk about her testimony until we
4 finish her examination.

5 HEARING OFFICER HALLORAN: Okay.
6 But we have to close the record. I mean, I don't
7 know how much time the state is going to take.
8 The Board has to make a decision.

9 MS. PAMENTER: June 19th is the
10 date.

11 HEARING OFFICER HALLORAN: May 19th.

12 MS. PAMENTER: June 19th.

13 HEARING OFFICER HALLORAN: And they
14 need at least 30 days and there is some holidays
15 in there.

16 MR. SWEDLOW: I don't know if it is
17 within our control to say "Don't rule until we can
18 close the record or not." I also am struggling
19 with trying to figure out how we can win a motion
20 to get information and then simply not get it and
21 have the record closed without us having that
22 information because then the rules of discovery
23 don't seem to apply anymore.

24 HEARING OFFICER HALLORAN: I don't

1 know. We can meet back here tomorrow at 1:00 to
2 see if anything has been resolved. That means
3 Ms. Armitage would have to stay another day or,
4 you know, reconvene next Monday, but, again, that
5 cuts in -- that will leave you 12 hours maybe to
6 do a post-hearing brief. I don't know. Let's go
7 off the record for a second.

8 (Whereupon, a break was taken
9 after which the following
10 proceedings were had.)

11 HEARING OFFICER HALLORAN: We're
12 back on the record. We just took a break trying
13 to decide what to do, but we're going to reconvene
14 and this hearing will be continued on record
15 tomorrow May 2nd in Room 2-025 at the James R.
16 Thompson Building and I would ask, Ms. Armitage,
17 you're still under oath and not to discuss any of
18 the testimony with any of the attorneys or
19 whatnot. Anyway, thank you so much and see you
20 tomorrow.

21
22
23
24

May 1, 2014

1 STATE OF ILLINOIS)
2) SS.
3 COUNTY OF COOK)
4

5 I, Steven Brickey, Certified Shorthand
6 Reporter, do hereby certify that I reported in
7 shorthand the proceedings had at the trial
8 aforesaid, and that the foregoing is a true,
9 complete and correct transcript of the proceedings
10 of said trial as appears from my stenographic
11 notes so taken and transcribed under my personal
12 direction.

13 Witness my official signature in and for
14 Cook County, Illinois, on this _____ day of
15 _____, A.D., 2014.

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