

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

KCBX TERMINALS COMPANY, )

Petitioner, )

v. )

ILLINOIS ENVIRONMENTAL )  
PROTECTION AGENCY, )

Respondent. )

PCB No. 14-110  
(Air Permit Appeal)

NOTICE OF ELECTRONIC FILING

To: *Via Facsimile*  
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*Via Email*  
Bradley P. Halloran  
Hearing Officer  
Illinois Pollution Control Board  
James R. Thompson Center, Suite 11-500  
100 W. Randolph Street  
Chicago, Illinois 60601

PLEASE TAKE NOTICE that on the 23rd day of April, 2014, the Respondent's Response to Petitioner's Motion in Limine Regarding "Citizen Complaint Forms" and Other Written and Oral Complaints Received by Illinois EPA was filed with the Illinois Pollution Control Board, a true and correct copy of which is attached hereto and is hereby served upon you.

ILLINOIS ENVIRONMENTAL PROTECTION  
AGENCY

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DATE: April 23, 2014

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

KCBX TERMINALS COMPANY,	)	
	)	
<b>Petitioner,</b>	)	
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v.	)	<b>PCB No. 14-110</b>
	)	<b>(Air Permit Appeal)</b>
<b>ILLINOIS ENVIRONMENTAL</b>	)	
<b>PROTECTION AGENCY,</b>	)	
	)	
<b>Respondent.</b>	)	

**RESPONDENT’S RESPONSE TO PETITIONER’S MOTION IN LIMINE REGARDING**  
**“CITIZEN COMPLAINT FORMS” AND OTHER WRITTEN AND ORAL**  
**COMPLAINTS RECEIVED BY ILLINOIS EPA**

KCBX Terminals Company (“KCBX”) seeks an order of the Hearing Officer excluding “any and all evidence, references to evidence, testimony or argument relating to ‘citizen complaint forms’ or written complaints from elected officials and representatives of non-governmental organizations *that are contained in the Administrative Record*, as well as any ‘oral complaints,’ e.g., telephone calls from elected officials, citizens and representatives of non-governmental organizations.” (Petitioner’s Motion in Limine Regarding “Citizen Complaint Forms” and Other Written and Oral Complaints Received by Illinois EPA (“KCBX Motion in Limine”) at p. 1 (emphasis added).) KCBX admits that the citizen complaint forms and correspondence from elected officials and representatives of non-governmental organizations are included in the Administrative Record that was filed with the Illinois Pollution Control Board (“Board”) on March 24, 2014. (KCBX Motion in Limine at pp. 1, 4 and 5.) In addition, KCBX admits that Julie K. Armitage, Chief of the Bureau of Air, testified during her discovery deposition that she relied upon the citizen complaint forms and correspondence in the decision-making process to deny KCBX’s construction permit application. (KCBX Motion in Limine at p. 3.) KCBX cites no case law to support striking documents from the Administrative Record

through a motion in limine. Similarly, KCBX's enforcement action and due process arguments should be considered by the Board following completion of the scheduled hearing. Accordingly, KCBX's Motion in Limine should be denied.

**BACKGROUND RELEVANT TO KCBX MOTION IN LIMINE**

On July 23, 2013, KCBX filed a construction permit application with the Illinois Environmental Protection Agency ("Illinois EPA") seeking to install ten conveyers, one box hopper and one stacker – each a new emission unit – at its facility located at 10730 South Burley Avenue, Chicago, Illinois (the "South Site"). (Administrative Record at R000186.) On December 10, 2013, the Illinois EPA issued a so-called "Wells Letter" to KCBX, advising KCBX that it intended to consider information outside the permit application, including inspection reports, the Complaint for Injunctive Relief and Civil Penalties filed on November 4, 2014, and citizen pollution complaint forms. (*Id.* at R000030.) On January 13, 2014, KCBX submitted its response to the December 10, 2013 letter to the Illinois EPA, and included a section regarding the citizen complaint forms. (*Id.* at R000011-R000016.) On March 24, 2014, the Illinois EPA filed the Administrative Record, including correspondence from Senator Durbin and Congresswoman Kelly (*id.* at R000029), a separate letter from Congresswoman Kelly (*id.* at R000172-R000173), correspondence from the Chicago Legal Clinic (R000119-R000120) and numerous citizen complaint forms (R000222-R000537). These documents were relied upon in the Illinois EPA's decision to deny KCBX's construction permit application. (Transcript of Discovery Deposition of Julie K. Armitage ("Armitage Discovery Deposition"), a true and correct copy of the relevant pages of which are attached hereto as Exhibit A, at p. 35, lines 9-21; p. 67, lines 19-24; p. 72, lines 16-20; p. 81, lines 1-20.) On January 17, 2014, the Illinois EPA issued the Permit Denial which was expressly based in part upon the "citizen complaint forms."

(Administrative Record at R000001-R000003 (See Permit Denial Reason No. 3 on page R000002.)

**ARGUMENT**

**I. KCBX's Request to Exclude the Citizen Complaint Forms, Certain Correspondence and Oral Complaints is not the Proper Subject of a Motion in Limine**

Rule 105.212(b) of the Board's Procedural Rules provides as follows:

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

35 Ill. Adm. Code 105.212(b); *see also AmerenEnergy Resources Generating Co. v. Illinois Environmental Protection Agency*, PCB No. 14-41, 2014 WL 1218325 at \* 8 (March 20, 2014) ("the Board's decision in a permit appeal . . . must be based on the entire record before the Agency.") Pursuant to 35 Ill. Adm. Code 105.212(b)(5), the Illinois EPA properly included the citizen complaint forms, correspondence from Senator Durbin and Congresswoman Kelly and correspondence from the Chicago Legal Clinic in the Administrative Record, because the Illinois EPA relied upon those documents in denying KCBX's permit application. (Armitage Discovery Deposition at p. 35, lines 9-21; p. 67, lines 19-24; p. 72, lines 16-20; p. 81, lines 1-20.)

Utilizing the term “evidence,” KCBX seeks to have the citizen complaint forms, correspondence from Senator Durbin and Congresswoman Kelly and correspondence from the Chicago Legal Clinic “excluded” from consideration in this Permit Appeal. (*See, e.g.*, KCBX Motion in Limine at p. 1.) Yet, to have documents “excluded” from the Administrative Record, KCBX was required to file a motion to strike such documents with the Board. Section 101.610 of the Board’s Procedural Rules does not provide a hearing officer with authority to strike documents from the Administrative Record. 35 Ill. Adm. Code 101.610; *see also AmerenEnergy*, 2014 WL 1218325 at \*1 (the Board determined a motion to strike a portion of the Administrative Record). Because the citizen complaint forms, correspondence from Senator Durbin and Congresswoman Kelly and correspondence from the Chicago Legal Clinic are properly included in the Administrative Record and no motion to strike was filed, KCBX’s Motion in Limine as to those documents must be denied.<sup>1</sup>

In addition, Sections 101.626(a) and (b) provide that, “[t]he hearing officer may admit evidence that is material, relevant, and would be relied upon by prudent persons in the conduct of serious affairs. . . . When the admissibility of evidence depends upon a good faith argument as to the interpretation of substantive law, the hearing officer will admit the evidence.” 35 Ill. Adm. Code 101.626(a) and (b). During her discovery deposition, Ms. Armitage testified regarding numerous telephone calls following an August 30, 2013 dust event at or near the South Site. (Armitage Discovery Deposition at pp. 76-80.) Thereafter, the Illinois EPA conducted inspections of the South Site in September 2013 and conducted a public meeting in November 2013. (Administrative Record at R000040 and R000125.) The telephone calls on or about August 30, 2013 served as the basis for the Illinois EPA’s careful consideration of KCBX’s

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<sup>1</sup> To the extent KCBX’s Motion in Limine is interpreted as a motion to strike, the motion should be denied as the Illinois EPA included the documents in the Administrative Record, having relied on them in making the decision to deny KCBX’s construction permit application. 35 Ill. Adm. Code 105.212(b)(5).

construction permit application, and as such are material, relevant and would be relied upon by prudent persons in the conduct of serious affairs. 35 Ill. Adm. Code 101.626. KCBX contends that the Hearing Officer must exclude “oral complaints, e.g., telephone calls from elected officials, citizens and representatives of non-governmental organizations” because the prejudicial impact is outweighed by the probative value of such evidence. (KCBX Motion in Limine at pp. 3-5.) KCBX does not, though, describe any prejudicial impact that may result from the introduction of the oral complaints in evidence. Applying Section 101.626 of the Board’s Procedural Rules, KCBX’s Motion in Limine as to the “oral complaints” must be denied.

**II. KCBX’s Enforcement Action and Due Process Arguments Must Be Determined by the Board Following a Hearing**

“The question *before the Board* in permit appeal proceedings is whether the applicant proves that the application, as submitted to the Agency, demonstrated that no violation of the Environmental Protection Act . . . or rules under the Act would have occurred if the requested permit had been issued.” *Community Landfill Co. et al. v. Illinois Environmental Protection Agency*, PCB No. 01-170, 2001 WL 1598272 at \*2 (Dec. 6, 2001) (emphasis added). Rule 101.502 of the Board’s Procedural Rules provides that, “[t]he hearing officer has the authority to rule on all motions that are not dispositive of the proceeding.” 35 Ill. Adm. Code 101.502.

KCBX contends that the citizen complaint forms constitute unadjudicated allegations of past noncompliance that must be the subject of an enforcement action. (KCBX Motion in Limine at pp. 5-6.) None of the cases upon which KCBX relies in asserting this contention, though, concerned a motion in limine seeking to exclude from consideration documents in the Administrative Record or telephone calls that served as the basis for the Illinois EPA’s actions in considering a permit application, including issuing a “Wells Letter.” In *ESG Watts, Inc. v. Illinois Environmental Protection Agency*, PCB No. 42-54, 1992 WL 331222 (Oct. 29, 1992),

*Centralia Environmental Services, Inc. v. Illinois Environmental Protection Agency*, PCB No. 89-170, 1990 WL 204152 (Oct. 25, 1990) and *Waste Management, Inc. v. Illinois Environmental Protection Agency*, PCB No. 84-45, 1984 WL 37819 (Oct. 1, 1984), the Board determined whether the Illinois EPA's denial of certain permits was proper based upon the entire Administrative Record and following completion of a hearing. Similarly, in this case, the Board should be presented with the entire Administrative Record and hearing transcript before it determines whether the Illinois EPA's denial of KCBX's construction permit application constituted a substitute enforcement action as KCBX contends and which Illinois EPA denies.

Similarly, KCBX asserts that it was denied due process by not being provided "an opportunity to rebut" the citizen complaint forms.<sup>2</sup> (KCBX Motion in Limine at p. 7.) Unlike in *Wells Manufacturing Co. v. Illinois EPA*, 195 Ill. App. 3d 593 (1st Dist. 1990), on which KCBX relies, the Illinois EPA issued the December 10, 2013 "Wells Letter" to KCBX, expressly advising KCBX that it intended to consider information outside the construction permit application, including the citizen complaint forms. (Administrative Record at R000030.) KCBX submitted a response to the Illinois EPA on January 14, 2014. (*Id.* at R000011.) In addition, in *AmerenEnergy*, the Board recognized:

The Board is, therefore, not persuaded by AERG's claim that denying the motion to strike would deny it due process. *See* Mot. at 8. AERG plainly has notice that the internal memorandum is part of the record, and AERG will be able to challenge it in this proceeding. *See IEPA v. PCB*, 115 Ill. 2d at 70, 503 N.E.2d at 345 (noting that "safeguards of a due process hearing are absent" from permit process "until the hearing before the Board). Accordingly, AERG will receive all the process it is due. *See, e.g.,*

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<sup>2</sup> Pursuant to a Freedom of Information Request submitted by KCBX, the Illinois EPA provided KCBX with a copy of the citizen complaint forms referenced in the December 10, 2014 Wells Letter. The Illinois EPA redacted the identifying information (e.g., names, addresses, telephone numbers) from such citizen complaint forms in accordance with its interpretation of the Freedom of Information Act. On February 14, 2014, KCBX filed a Request for Review with the Illinois Attorney General's Office of the Illinois EPA's decision to redact the citizen complaint forms of the identifying information. To date, no determination has been made regarding the Request for Review.

*Lyon v. Department of Child & Family Services*, 209 Ill. 2d 264, 277, 807 N.E.2d 423, 433 (due process clause requires opportunity to be heard at a meaningful time and in a meaningful manner).

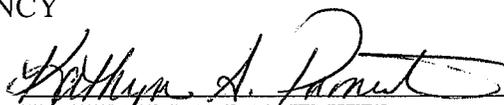
2014 WL 1218325 at \*9. Based on the foregoing, the Board should consider KCBX's due process argument following the completion of hearings on the Permit Appeal.

**CONCLUSION**

In its Motion in Limine, KCBX seeks to "exclude" documents from the Administrative Record. KCBX, though, failed to file a motion to strike such documents from the Administrative Record with the Board, and the documents were properly included in the Administrative Record pursuant to 35 Ill. Adm. Code 105.212(b). Similarly, KCBX seeks to "exclude evidence of oral complaints" that the Illinois EPA received. However, the oral complaints are material, relevant and would be relied upon by prudent persons in the conduct of serious affairs. 35 Ill. Adm. Code 101.626. Moreover, KCBX's enforcement action and due process arguments should be considered by the Board following completion of the hearing in this matter and its receipt of the entire record. Accordingly, KCBX's Motion in Limine should be denied.

ILLINOIS ENVIRONMENTAL PROTECTION  
AGENCY

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**EXHIBIT A**



1 A No, I do not know.

2 Q And do you know by whom the document was  
3 completed?

4 A I have reason to believe it would have been  
5 completed by Mike Dragovich.

6 Q And so, if we go to the next document that  
7 you've tabbed, if you could just tell me what page of  
8 the record that is.

9 A Oh, R29.

10 Q Okay. And tell me what that document is,  
11 Julie?

12 A This is a letter to the IEPA Director,  
13 Director Bonnett from Senator Durbin and Congresswoman  
14 Kelly expressing -- well, that's what it is.

15 Q Did that -- tell me then what in that letter  
16 you -- you relied upon or based your opinion on with  
17 respect to the insufficient information in the  
18 application in relation to potential or threatened 9 A  
19 violation?

20 A This letter was speaking to the concern for  
21 the air pollution in the facility.

22 Q Okay. And, when you say concerns, does --  
23 does the letter identify what those concerns are?

24 A It touches upon them, yes.

1 the complaint?

2 A Yes.

3 Q Okay. And then can you tell me the next  
4 document that you tabbed as a document that you relied  
5 upon in preparing your opinion?

6 A Well, I tabbed R116.

7 Q And what is that?

8 A That is the earliest Fugitive Dust Plan that  
9 KCBX was utilizing.

10 Q Okay. And if you would look, does that appear  
11 to be an exhibit that was attached to the complaint that  
12 you tabbed earlier?

13 A Yes.

14 Q Okay. And, when you say earlier, just so  
15 we're all clear, is it your understanding that would  
16 have been the plan in effect in approximately September  
17 of 2013?

18 A Correct.

19 Q And then let's go to the next document in the  
20 record that you've identified as having relied upon.  
21 And what is that document?

22 A It's R119. It is a letter to Illinois EPA's  
23 Office of Community Relations from Keith Harley of the  
24 Chicago Legal Clinic.

1 Q But for what other purposes?

2 A For -- for purposes -- one relevant purpose  
3 was for purposes of compliance and enforcement. So Joe  
4 was looking at these documents or at least looking to  
5 these concepts for purposes of conducting his inspection  
6 and --

7 Q Yeah. Julie, that's fine. Let's go to the  
8 next document that you have tabbed in the record. And  
9 just, if you could, for the record, tell me what page it  
10 is and what is the document?

11 A This is another inspection of the Illinois  
12 EPA. It's R164. It has a report date of March 9 of  
13 2013.

14 Q What was the date of the inspection?

15 A September 5th of 2013.

16 Q Okay. And then the next document that you  
17 tabbed is?

18 A A November 15th letter. It's R172. It's  
19 dated November 15th. It's a letter to Director Bonnett  
20 from Congresswoman Kelly.

21 Q For that one, again, Julie, before today have  
22 you seen that letter?

23 A Yes.

24 Q Okay. And do you recall when you first saw

1 A Yes.

2 Q Okay. And -- and the bureau there implements  
3 that or do all bureaus implement that?

4 A The entire agency implements it.

5 Q And so then, after the cover letter, Julie,  
6 is the application. And so you indicated that you were  
7 aware of it within the first 30 days because of the  
8 internal Environmental Justice Policy. When did you  
9 next look at it, if at all?

10 A The conversation next turned to the fact that  
11 there was, on August 30th, 2013, a dust event.. In that  
12 southeast Chicago pocket. And that the emissions from  
13 KCBX had arguably caused use and air pollution.

14 Q Let me just stop you. You say the event  
15 occurred and arguably caused air pollution. From whom  
16 did you receive that information?

17 A We actually received that information from --  
18 from any number of people.

19 Q Okay. Well -- and I want to ask you a little  
20 bit more about that. You say we, but when did you first  
21 become aware of that? I mean obviously it's on or after  
22 August the 30th?

23 A Right. It was. I -- I'm trying to remember  
24 what day of the week August the 30th was, but it was

1 very proximate to the event.

2 Q Okay.

3 A It was characterized as the blackout event.

4 Q It was characterized as a blackout event by?

5 A By persons who had been in the vicinity at the  
6 time. So, for example, we did hear from -- we heard  
7 from citizens. We actually heard from the Attorney  
8 General's Office. We heard from the media. We heard  
9 from -- from public officials. I mean on behalf of  
10 their constituents. Calls started coming in very  
11 quickly relative to that August 30th event.

12 Q Okay. When you say we, I want to make sure  
13 that I understand. Are these written complaints that  
14 you received or someone else at the agency received?

15 A We did not receive the whole -- we -- to my  
16 recollection, we did not receive much in the way of  
17 written complaints in the traditional fashion proximate  
18 to the incident.

19 Q So I want to understand this. When you say we  
20 received, were these calls to the agency from these  
21 various individuals?

22 A Yes.

23 Q Or entities?

24 A Yeah.

1 Q And did those come to you or someone else at  
2 the agency?

3 (Pause.)

4 MR. DWYER: I mean if we start with the citizens,  
5 who fielded the calls from the citizens?

6 (Pause.)

7 MS. PAMENTER: If you know.

8 MR. DWYER: If you know.

9 THE DEPONENT: Yeah. I think the calls were having  
10 a tendency to go into either of our AG type contacts.

11 Q Who would that be?

12 A Shawnda Williams. Brad Frost may or may not  
13 -- who is our community relations person. He may or may  
14 not have taken calls. As I say, I, myself took at least  
15 one call from the Attorney General's Office.

16 Q Okay.

17 A I believe Mark Wells.

18 Q Who called you from the Attorney General's  
19 Office?

20 A I took a call from Mark Wells.

21 Q Okay.

22 A Our press person was receiving calls.

23 Q From?

24 A From --

1 Q From citizens and --

2 A I think largely from media outlets.

3 Q Okay.

4 A I think our legislative liaisons were quickly  
5 taking calls from -- particularly from local officials.

6 Q And let's go back. I want to talk through  
7 this so I understand. If you know, what -- what was the  
8 nature of the citizens calls? What were they -- were  
9 they asking the agency to do something?

10 A I think early on it was expressing concern for  
11 air pollution impact, bulk terminal handling.

12 Q And what about the media inquiries -- what was  
13 the nature of their inquiries?

14 A A similar expression of concern for the impact  
15 of the facility on that southeast Chicago area.

16 Q And I think that you said elected officials?

17 A Yes.

18 Q And, when you say elected officials, can you  
19 tell me more specifically -- elected officials from the  
20 state, from the city, from the county?

21 A We had the -- there were aldermen contacting  
22 us. We had various state officials contacting us.  
23 State legislators. Congresswoman Kelly's office  
24 contacted us at some point as did Durbin's office. We

1 also had nongovernmental organizations calling us as  
2 well.

3 Q And what organizations were those, if you  
4 recall, Julie?

5 A Sure. Fairly early on Keith Harley of Chicago  
6 Legal Clinic wrote us, but the rest of the calls were  
7 -- arrived from the NRD.

8 Q Natural Resources Defense Counsel?

9 A Uh-huh.

10 Q And did you take that call or do you know who  
11 did?

12 A The legislative office took the call.

13 MR. DWYER: Okay. I just need about three minutes  
14 to take a short break.

15 (Short recess was taken.)

16 MR. DWYER: Okay. Let's go back on the record.

17 Q Julie, we talked through the documents that  
18 you indicated that you reviewed and relied upon in  
19 preparing the opinion that was presented.

20 MS. PAMENTER: And just to clarify have we gone  
21 through all of the documents? I want to make sure.

22 MR. DWYER: You are right. Let's get this  
23 finished. There is one more document that you have or  
24 two.

1 Q What is the next document in the record that  
2 you've tabbed as a document or documents you relied  
3 upon in preparing your opinion.

4 THE DEPONENT: Okay. So it's all of the -- I want  
5 to make sure -- it's the complaint. So assuming that  
6 they are running straight through then R222 through  
7 R537.

8 Q Okay. And Julie --

9 A Are these numbered correctly?

10 MS. PAMENTER: Yes.

11 THE DEPONENT: It's that number (indicates)?

12 MS. PAMENTER: Uh-huh.

13 THE DEPONENT: All right.

14 MR. DWYER: So tell me again that page range that  
15 it includes?

16 A It's R222 through R537.

17 Q And is it your understanding that those are  
18 copies of -- well, of what I will characterize as  
19 citizen complaints?

20 A Correct.

21 Q And, Julie, before today had you reviewed  
22 those documents?

23 A Yes.

24 Q Okay. And directing your attention to those

**CERTIFICATE OF SERVICE**

I, KATHRYN A. PAMENTER, an Assistant Attorney General, do certify that I caused to be served this 23rd day of April, 2014, the attached Notice of Electronic Filing and Respondent's Response to Petitioner's Motion in Limine Regarding "Citizen Complaint Forms" and Other Written and Oral Complaints Received by Illinois EPA upon (a) Edward W. Dwyer, Katherine D. Hodge and Matthew C. Read *via facsimile* and (b) Bradley P. Halloran *via email*.

  
KATHRYN A. PAMENTER