

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

KCBX TERMINALS COMPANY,)
)
Petitioner,)
)
v.)
)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

PCB No. 14-110
(Air Permit Appeal)

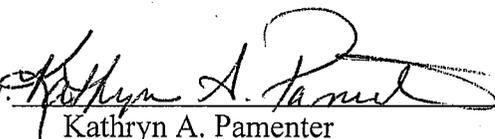
NOTICE OF ELECTRONIC FILING

To: *Via Facsimile*
Katherine D. Hodge
Edward W. Dwyer
Matthew C. Read
Hodge Dwyer & Driver
3150 Roland Avenue
Springfield, IL 62705

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 14th day of April, 2014, the Respondent's Objection to KCBX Terminals Company's Motion for Protective Order Regarding Respondent's Witness Disclosure 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

By: 
Kathryn A. Pamerter
Christopher J. Grant
Assistant Attorneys General
Environmental Bureau
69 W. Washington St., 18th Floor
Chicago, IL 60602
(312) 814-0608
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DATE: April 14, 2014

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

RESPONDENT'S OBJECTION TO KCBX TERMINALS COMPANY'S MOTION FOR PROTECTIVE ORDER REGARDING RESPONDENT'S WITNESS DISCLOSURE

Respondent, Illinois Environmental Protection Agency, for its Objection to KCBX Terminals Company's Motion for Protective Order Regarding Respondent's Witness Disclosure, hereby states as follows:

1. On July 23, 2013, KCBX Terminals Company ("KCBX") submitted a construction permit application to the Illinois Environmental Protection Agency (the "Illinois EPA") for approval to install ten conveyers, one box hopper and one stacker at its site located at 10730 South Burley Avenue, Chicago, Illinois ("South Site"). (Administrative Record at R000186, R000187.) Michael Estadt, the operations manager at the South Site, executed the July 23, 2013 construction permit application. (*Id.* at R000190, R000194.) Upon information and belief, Terry Steinert assisted in the preparation of the July 23, 2013 construction permit application.

2. On December 10, 2013, the Illinois EPA notified KCBX through correspondence that the Illinois EPA intended to consider information outside the "four corners" of the July 23, 2013 construction permit application in determining whether to grant or deny such permit application (the "December 10, 2013 Letter"). (*Id.* at R000030.)

3. On January 13, 2014, Katherine D. Hodge responded to the December 10, 2013 Letter on behalf of KCBX (the "January 13 Hodge Letter"). (A true and correct copy of the January 13 Hodge Letter is included in the Administrative Record at R000011-R000016 and is attached hereto as Exhibit A.) The July 23, 2013 construction permit application and the January 13 Hodge Letter constitute KCBX's two substantive submissions to the Illinois EPA at issue in this Permit Appeal.

4. On January 17, 2014, the Illinois EPA denied KCBX's July 23, 2013 construction permit application.

5. On February 21, 2014, KCBX filed its Petition for Review of the Illinois EPA's denial of KCBX's July 23, 2013 construction permit application.

6. KCBX has advised that it does not intend to waive the 120-day deadline for the Illinois Pollution Control Board (the "Board") to issue its decision in this Permit Appeal. 415 ILCS 5/40 (2012). Accordingly, on March 25, 2014, a Hearing Officer Order was entered scheduling the hearing in this matter on April 29, 2014, and ordering the close of discovery on or before April 18, 2014.

7. On April 4, 2014, the Illinois EPA filed its Witness Disclosure in compliance with the March 25, 2014 scheduling order. The Witness Disclosure listed Katherine D. Hodge as a fact witness that the Illinois EPA "may" call at the April 29, 2014 hearing.

8. On April 8, 2014, KCBX filed its Motion for Protective Order Regarding Respondent's Witness Disclosure, specifically with respect to the listing of Katherine D. Hodge.

9. On April 9, 10 and 11, 2014, KCBX took the depositions of Michael Dragovich, Robert Bernoteit, Raymond Pilapil and Joseph Kotas, each an employee of the Illinois EPA. The depositions on April 9 and 10 occurred in Springfield, Illinois.

10. To date, the Illinois EPA has not issued a Notice of Deposition to Katherine D. Hodge or served a subpoena to compel Katherine D. Hodge's testimony at the April 29, 2014 hearing. The Illinois EPA is scheduled to take the deposition of Michael Estadt and Terry Steinert on April 14, 2014 at 1:00 pm and April 15, 2014 at 10:00 am, respectively. As of the filing of this Objection, the Illinois EPA is uncertain of whether Mr. Estadt or Mr. Steinert had any involvement in the preparation of the January 13 Hodge Letter. Accordingly, KCBX's Motion for Protective Order Regarding Respondent's Witness Disclosure is premature and should be denied at this time.

11. Alternatively, KCBX's Motion for Protective Order Regarding Respondent's Witness Disclosure should be denied because, based on the Administrative Record, Katherine D. Hodge was the sole preparer of KCBX's response to the December 10, 2013 Letter.¹ By serving in a capacity typically held by a consultant, Katherine D. Hodge placed herself in this matter and is the proper person to answer questions regarding the January 13 Hodge Letter.

12. KCBX's citation to *Citizens Against Regional Landfill v. The County Board of Whiteside County et al.*, PCB 92-156, 1993 WL 70394 (Feb. 25, 1993) supports the inclusion of Katherine D. Hodge on the Illinois EPA's Witness Disclosure as a fact witness that the Illinois EPA "may" call at the April 29, 2014 hearing, particularly depending upon the information learned during the depositions of Mr. Estadt and Mr. Steinert. In *Whiteside County*, the Board cited its December 17, 1992 order stating:

The Board orders that the deposition of Mr. Barrett [Whiteside County's attorney of record in the case] be allowed for a minimum amount of time determined by the hearing officer, presumably not more than two hours, tomorrow morning at the time scheduled for the beginning of the hearing in this matter. At the conclusion of the deposition, the hearing officer shall convene the regular hearing.

¹ According to the January 13 Hodge Letter, no persons at KCBX received a copy of the letter. The only persons cc:d on the January 13 Hodge Letter were Christopher R. Pressnall and James Morgan, attorneys with the Illinois EPA. (See Administrative Record at R000016.)

The decision of whether to require or admit testimony by Mr. Barrett is left to the discretion of the hearing officer, based upon his evaluation of the deposition.

1993 WL 70394 at *4. Only after the conclusion of Mr. Barrett's deposition did the hearing officer determine that the movant "had not demonstrated that the information was not available from other sources and that Mr. Barrett's testimony was necessary to the proceedings." *Id.* To the extent that the Illinois EPA serves Katherine D. Hodge with a subpoena to testify at the April 29, 2014 hearing, the procedure utilized in the *Whiteside County* case may be applied.²

13. The Illinois EPA recognizes the Board's reluctance in requiring an attorney of record to testify. 1993 WL 70394 at *6-*7. Based upon the Administrative Record, though, Katherine D. Hodge was the sole preparer of the January 13 Hodge Letter that responded to the Illinois EPA's December 10, 2013 Letter.

Based upon the foregoing, the Illinois EPA respectfully requests that the Hearing Officer deny KCBX's Motion for Protective Order Regarding Respondent's Witness Disclosure and grant such other relief as the Hearing Officer deems proper.

ILLINOIS ENVIRONMENTAL PROTECTION
AGENCY

By:



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² KCBX also cites *Vazquez v. Central States Joint Board*, No. 04C1798, 2009 WL 1530709 (N.D. Ill. June 1, 2009), *In re Marriage of Baumgartner*, 890 N.E.2d 1256 (Ill. App. Ct. 2008), *Kilpatrick v. First Church of the Nazarene*, 538 N.E.2d 136 (Ill. App. Ct. 1989), which involved subpoenaed depositions of attorneys of record in the respective cases. To date, Katherine D. Hodge has not been subpoenaed for deposition in the above-referenced Permit Appeal. In addition, none of the cited cases concerned attorneys of record who executed a substantive response to a so-called *Wells* letter.

EXHIBIT A



HODGE DWYER & DRIVER

ATTORNEYS AT LAW

KATHERINE D. HODGE
E-mail: khodge@hddattorneys.com

January 13, 2014

VIA ELECTRONIC MAIL

Mr. Raymond E. Pilapil
Acting Manager
Permit Section, Bureau of Air
Illinois Environmental Protection Agency
1021 North Grand Avenue East
Post Office Box 19276
Springfield, Illinois 67294-9276

RE: Response to December 10, 2013 Letter
Notice of Intent to Consider Citizen Complaints and IEPA Inspection Reports in
Review of Construction Permit Application/Permit No. 07050082
KCBX Terminals Company
10730 South Burley Avenue
Chicago, Illinois 60617
Facility I.D. 031600GSF

Dear Mr. Pilapil:

I am writing on behalf of my client, KCBX Terminals Company ("KCBX"), in response to your letter dated December 10, 2013 ("Letter"). By letter dated December 18, 2013, KCBX requested an extension of time to respond to "the additional information" that the Illinois EPA intended to consider in making a factual decision regarding the Construction Permit Application referenced above. And, on December 20, 2013, Illinois EPA granted KCBX's request for an extension of time. KCBX sincerely appreciates your cooperation in this matter.

As a preliminary matter, KCBX has had the opportunity to review the additional information provided by Illinois EPA, which consists of: Reports of Inspections on September 5, 11, and 13, November 6 and 19, 2013, and Citizen Complaint Forms received from Illinois EPA, with letter dated December 17, 2013. We assume that these documents, along with the cited Complaint for Injunctive Relief and Civil Penalties filed by the Illinois Attorney General on November 4, 2013, and the Violation Notices (L-2013-01304 and L-2013-01305) issued by the

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R-000011

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Illinois EPA's Bureau of Land, contain all of the additional information, outside of the permit record, to be considered. Please let us know if there is any other additional information upon which the Illinois EPA intends to rely that is outside of the permit record.

Background

As set forth in KCBX's July 23, 2013 application requesting the Revision to the Revised Construction Permit No. 07050082 ("Application"), KCBX is requesting the relocation of ten (10) Portable Conveyors, one (1) Box Hopper, and one (1) Stackér (collectively "Equipment"), from KCBX's North location in Chicago to KCBX's South location in Chicago. Application for Revision to the Revised Construction Permit No. 07050082, dated July 23, 2013. Also, as set forth in the Application, KCBX is not requesting any changes to the annual and monthly throughput limitations and/or the emission limitations in the Revised Construction Permit, and/or to the related testing, monitoring, recordkeeping and reporting requirements. Similarly, KCBX is not requesting any changes to any other applicable requirements in the Revised Construction Permit.

The Illinois Environmental Protection Agency ("Illinois EPA" or "Agency") previously permitted the construction and operation of the Equipment at KCBX North, most recently in the FESOP issued on April 18, 2013, and KCBX currently uses the Equipment at KCBX North to relocate coal and petroleum coke to and from staging piles. KCBX would use the Equipment for exactly the same purpose at KCBX South. Moreover, KCBX has advised the Illinois EPA on multiple occasions that it intends to operate KCBX North and KCBX South as a single source, and has filed applications, which have been pending for approximately one year, so as to effectuate single source status for permitting purposes.

Standard for Issuance

As you know, the Illinois Environmental Protection Act provides that "it shall be the duty of the [Illinois EPA] to issue such a permit [to construct, install or operate] upon proof by the applicant that the facility, equipment, vehicle, vessel, or aircraft will not cause a violation of this Act or of regulations hereunder." 415 ILCS 5/39(a). Accord 35 Ill. Admin Code 201.160(a) (as to construction permits).

Your Letter implies that the Agency is concerned that moving the Equipment at issue from KCBX North to KCBX South would cause a violation of the Act or regulations. For the reasons set forth below, KCBX respectfully disagrees and urges the Agency to issue the requested revision to the Revised Construction Permit.

Illinois EPA May Not Rely on Alleged Violations of the Act as a Basis to Deny the Permit

First, Section 39(a) provides that the Agency may, when determining whether to grant a permit, "consider *prior adjudications* of noncompliance with this Act by the applicant that involved a release of a contaminant into the environment." 415 ILCS 5/39(a) (Emphasis added.)

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An "adjudication" occurs only after notice and an opportunity for all parties to present evidence, and a court of competent jurisdiction or the Board renders finding of a non-compliance. This indicates that the claims of all the parties have been considered and set at rest.

Board and Illinois Appellate Court decisions have made it clear that the Agency is prohibited from denying a permit on the basis of alleged violations of the Act (or regulations promulgated thereunder). In *Environmental Protection Agency v. Pollution Control Board*, 252 Ill. App. 3d 828, 624 N.E.2d 402, 404 (3rd Dist. 1993), the court upheld a Board order that found the Agency had improperly denied permits solely on the basis of alleged violations of the Act. The Court noted with approval the Board's finding that "procedures for permit denial and enforcement of the Act are separate and distinct." *Id.* at 404. See also *Wells Manufacturing v. Illinois Environmental Protection Agency*, 195 Ill. App. 3d 593, 552 N.E.2d 1074, 1078 (1st Dist. 1990) (Court held that it was improper for the Agency to deny an applicant a permit based upon alleged violations of the Act.) In *Wells*, the Court noted: "Common sense dictates that a refusal to renew an operating permit on the basis that the applicant *may* be violating section 9(a) of the Act (Ill. Rev. Stat. 1985, ch. 111 1/2, par. 1009(a)) should be subject to the same or similar standards as those used to deny an operating permit because the applicant is actually charged with violating section 9(a)." *Id.* at 1078. It is clear that in rendering its permit decisions, the Agency must rely upon facts, not unproven allegations, vague supposition, and mere conjecture.¹

From the above, it is clear that the Agency may not rely on allegations that KCBX has violated the Act – whether such allegations are made in: a) Illinois Attorney General's November 4, 2013 Complaint; b) the Inspection Reports compiled by the Bureau of Air; c) the Bureau of Land's Violation Notices; and/or d) in "pollution complaint forms" – as a basis to deny the Permit. Each of these documents that is now being considered by the Agency, as referenced in the Agency's Letter, constitutes allegations, no more. Further, as demonstrated below, neither individually nor in the aggregate does any "information" contained in these documents demonstrate that granting the application requesting the Revision to the Revised Construction Permit No. 07050082, i.e. for the relocation of certain equipment from KCBX North to KCBX South, would cause a violation of Sections 9 and 39.2 of the Illinois Environmental Protection Act, and/or 35 Ill. Adm. Code Part 212, Subparts K and U.

Authorizing KCBX to Relocate the Equipment from KCBX North to KCBX South will Not Cause a Violation of the Act or Regulations

Second, granting KCBX's application to relocate the Equipment from its North facility to its South facility will not lead to a violation of the Act or of the regulations. As noted above, Illinois EPA granted a FESOP on April 18, 2013, allowing the operation of the Equipment at KCBX's North location, which is located approximately 1 1/2 miles north of KCBX South.

¹ Effective January 1, 2004, Section 39(a) of the Act was amended to authorize the Agency to consider "prior adjudicated violations" in making its determinations on permit applications. See P.A. 93-0575. This amendment in no way altered the prohibition in *Wells et al.* cited herein against the Agency relying upon allegations of violations of the Act or regulations, to make its permit determinations.

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(Again, the two sites are a single source for purposes of air permitting.) Thus, Illinois EPA has already determined that the operation of the Equipment at KCBX North would not cause a violation of the Act or regulations; otherwise, Illinois EPA would not have been able to grant the FESOP. KCBX North personnel currently use the Equipment to relocate product to and from staging piles at the North site. In its Application, KCBX does not propose to modify the Equipment or how it is used. KCBX South personnel would use the Equipment in exactly the same way it is used at KCBX North. There is nothing about the operations at KCBX South that would support a conclusion that the use of the Equipment at KCBX South would somehow cause a violation of the Act or regulations, especially when the Illinois EPA has already determined that the operation of the same Equipment at KCBX North, for the same purpose, is not a concern.

Moreover, as discussed on multiple occasions with Illinois EPA personnel, since acquisition in December 2012, KCBX has made significant investments in, and implemented a number of dust suppression improvements at, KCBX South, including pile management procedures and surfactant application capability. KCBX also designed and installed an advanced, programmable water cannon system to even further control dust emissions, which system commenced operation in early November 2013. The new system consists of forty-two oscillating water cannons mounted on sixty-foot high poles that operate on a computer-controlled, pre-programmed schedule to apply up to 1,800 gallons of water per minute to the entire storage area at the site. This system at KCBX South is at least as robust as the water spray system in place at KCBX North, where Illinois EPA already has concluded that the Equipment can operate with no concern.

The Factual Allegations in the Documents and Legal Actions Referenced by Illinois EPA do Not Support Denying KCBX's Request to Relocate the Equipment from KCBX North to KCBX South

Third, no factual allegations in the documents referenced by Illinois EPA would support a finding that moving the Equipment from KCBX North to KCBX South will result in a violation of the Act.

- Inspection Reports

The Inspection Reports referenced in your Letter do not justify Illinois EPA denying KCBX's request to relocate the Equipment from KCBX North to KCBX South.

The reports of the Illinois EPA inspections that occurred on September 5, 2013, November 6, 2013, and November 19, 2013, do not allege any emissions of particulate matter at KCBX South. Thus, the information contained in these inspection reports supports the conclusion that Illinois EPA should grant the Permit application.

The reports of Illinois EPA inspections on September 11 and 13, 2013, do allege some air emissions, but the fact that some emissions may have occurred is irrelevant – Illinois law and the facility's permit authorize some emissions, e.g. of up to 10% opacity as determined in

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accordance with 35 Ill. Admin. Code 212.107. The alleged emissions are reported as minor and sporadic, and there are no allegations in these reports that would support the conclusion that any emissions at the facility were present "in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, to health, or to property, or to unreasonably interfere with the enjoyment of life or property" so as to cause "air pollution," and thus a violation of Section 9(a) of the Act. See 415 ILCS 5/3.115, 9(a). More specifically, there are no facts alleged that would support the conclusion that moving the Equipment from KCBX North to KCBX South will lead to a violation of the Act or the Regulations. This is especially true given that these inspections occurred before the improved water cannon system at KCBX South became operational in November 2013, as noted above.

Also, while the reports of the initial inspections (i.e., September 5, 11, and 13, 2013) allege certain deficiencies in the fugitive particulate operating program ("FPOP") at KCBX South, such alleged deficiencies are not a sufficient basis for a permit denial. First, they are allegations of legal noncompliance, which allegations Illinois EPA cannot consider when deciding whether to grant or deny the Permit application. Second, even assuming (for argument) that there were deficiencies in the FPOP, on November 1, 2013, KCBX provided an updated FPOP for KCBX South, with Figure 1 that contained considerable enhancements. Also, on November 1, 2013, KCBX notified the Illinois EPA that the new cannon system at KCBX South (referenced above), which included 42 cannons, was operational on a full manual and/or limited automated basis. In fact, the Illinois EPA's reports of the inspections conducted on November 6 and 19, 2013, specifically reference and describe the new water cannon system installed and in operation at the site as well as other other improvements. Importantly, these subsequent inspection reports do not include any allegations of violations.

Thus, the Illinois EPA may not rely upon the cited Inspection Reports as a basis to deny the relocation of the Equipment from KCBX North to KCBX South.

- Complaint Forms

Likewise, the pollution complaint forms ("Complaint Forms") referenced in your Letter do not justify Illinois EPA denying KCBX's request to relocate the Equipment from KCBX North to KCBX South. Again, Illinois EPA may not rely on allegations that KCBX has violated the Act as a basis to deny the Permit.

Further, in summary, the Complaint Forms include only general and vague comments of emissions of particulate matter in the area, and are lacking in any specific facts related to and/or descriptions of events, locations, dates, times, etc. In fact, many of the forms have no information at all in the section related to a description of an event, i.e., that section of the forms are blank.

The Illinois Pollution Control Board has held that in order to properly plead a Section 9(a) violation a complaint must set forth specific facts regarding the alleged injury or interference caused by the contaminant, including the dates of the injuries allegedly caused and

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to whom. Opinion and Order, PCB No. 08-96, *United City of Yorkville v. Hamman Farms*, slip op. at 21 (Oct. 16, 2008). The plaintiff must also plead ultimate facts on the dates or identify the "frequency and duration of the alleged [violation] and the nature and extent of the allegedly resulting interference." *Id.* Thus, even if the Illinois EPA could rely upon mere allegations of violations, the Complaint Forms, in total, contain no specific facts that would support even a valid allegation or claim of a Section 9(a) violation, and certainly provide no basis to deny the relocation of the Equipment from KCBX North to KCBX South.

- Complaint filed by the Illinois Attorney General

The Complaint for Injunctive Relief and Civil Penalties filed by the Illinois Attorney General on November 4, 2013 (Complaint) contains two counts of mere allegations, without specific facts, that KCBX violated Section 9(a) of the Illinois Environmental Protection Act ("Act") 415 ILCS 5/9(a), and 35 Ill. Admin. Code §§ 210.310, 312. As set forth above, the Illinois EPA may not rely on alleged violations as a basis to deny the permit.

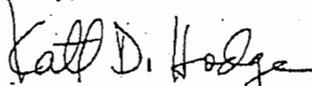
- Violation Notices issued by the Bureau of Land

Similarly, the Violation Notices (L-2013-01304 and L-2013-01305), issued by the Illinois EPA's Bureau of Land, contain mere allegations that KCBX (and KM Railways, LLC) violated certain provisions of the Act and regulations, claiming, again without specific facts, that Pile #8 "has been determined to be a waste." Illinois EPA may not rely on alleged violations as a basis to deny the permit.

Conclusion

The current deadline for Illinois EPA to grant the Permit application is January 20 2014. For all of the reasons set forth above, pursuant to Section 39(a), the Illinois EPA must issue the requested revision to the Revised Construction Permit No. 07050082 requested by KCBX by that date.

Sincerely,


Katherine D. Hodge

KDH:amb

pc: Christopher R. Pressnall, Esq. (via electronic mail)
James Morgan, Esq. (via electronic mail)

CERTIFICATE OF SERVICE

I, KATHRYN A. PAMENTER, an Assistant Attorney General, do certify that I caused to be served this 14th day of April, 2014, the attached Notice of Electronic Filing and Respondent's Objection to KCBX Terminals Company's Motion for Protective Order Regarding Respondent's Witness Disclosure upon (a) Edward W. Dwyer, Katherine D. Hodge and Matthew C. Read *via facsimile* and (b) Bradley P. Halloran *via email*.


KATHRYN A. PAMENTER