

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

KCBX TERMINALS COMPANY,)

Petitioner,)

v.)

ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)

Respondent.)

PCB No. 14-110
(Air Permit Appeal)

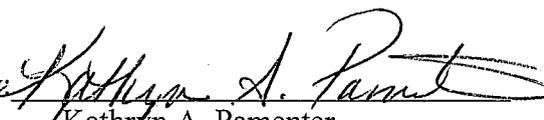
NOTICE OF ELECTRONIC FILING

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 23rd day of April, 2014, the Respondent's Response to Petitioner's Second Motion in Limine Regarding Fugitive Dust Plans, A/K/A "Fugitive Particulate Operating Programs" 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
Robert Petti
Assistant Attorneys General
Environmental Bureau
69 W. Washington St., 18th Floor
Chicago, IL 60602
(312) 814-0608
(312) 814-5388
(312) 814-2069

DATE: April 23, 2014

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

RESPONDENT'S RESPONSE TO PETITIONER'S SECOND MOTION IN LIMINE REGARDING FUGITIVE DUST PLANS, A/K/A "FUGITIVE PARTICULATE OPERATING PROGRAMS"

Respondent, Illinois Environmental Protection Agency, for its Response to Petitioner's Second Motion in Limine Regarding Fugitive Dust Plans, a/k/a "Fugitive Particulate Operating Programs" (the "Second Motion in Limine"), hereby states as follows:

The factual statements in KCBX Terminals Company's ("KCBX") fugitive particulate matter operating programs regarding KCBX's dust suppression controls at the site are relevant to the Permit Appeal due to the citations to 415 ILCS 5/9 and 35 Ill. Adm. Code 212.301 in the January 17, 2014 Permit Denial. Julie K. Armitage, Chief of the Bureau of Air, testified during her discovery deposition that she relied upon KCBX's fugitive particulate matter operating programs in the decision-making process to deny KCBX's construction permit application. (Exhibit A at pp. 67-68.) Further, in response to KCBX's Deposition Riders to Ms. Armitage's Notice of Deposition, the Illinois Environmental Protection Agency (the "Illinois EPA") supplemented the Administrative Record on April 22-23, 2014 with, among other things, Ms. Armitage's notes on fugitive particulate matter operating programs, copies of other facilities' fugitive particulate matter operating programs and a copy of certain California regulations regarding fugitive particulate matter. Accordingly, the Illinois EPA does not object to testimony

or argument relating to documents contained in the Administrative Record that concern fugitive particulate matter operating programs.

Notwithstanding the foregoing, though, the Permit Denial does not set forth Sections 212.309, 212.310 or 212.312 of the Illinois Pollution Control Board's ("Board") fugitive particulate matter regulations, 35 Ill. Adm. Code 212.309, 212.310, 212.312, as bases for the denial. (*Id.*) As such, the Illinois EPA may not attempt to rely upon such regulations at the hearing in this Permit Appeal. *West Suburban Recycling and Energy Center, L.P. v. Illinois Environmental Protection Agency*, PCB Nos. 95-119 and 95-125, 1996 WL 633368 at *12 (Oct. 17, 1996) ("[t]he Illinois Supreme Court itself has held that Section 39(a) requires that each denial point be supported by identification of the specific provisions in the Act or Board regulations that the Agency believes may be violated if the permit were to issue"). Similarly, whether KCBX's fugitive particulate matter operating program is sufficient or adequate is not at issue before the Board in this Permit Appeal.¹

¹ Specifically, KCBX's failure to maintain and amend a current fugitive particulate matter operating program regarding its own operations at the site between December 20, 2012 and October 1, 2013, as alleged in the enforcement action pending before the Circuit Court of Cook County, and the sufficiency of the November 1, 2013 fugitive particulate matter operating program are not at issue in this Permit Appeal.

Based upon the foregoing, the Illinois EPA does not object to the Hearing Officer's entry of an Order allowing testimony or argument regarding fugitive particulate matter operating programs and related documents contained in the Administrative Record; provided, that the Board does not determine in this Permit Appeal the sufficiency or adequacy of KCBX's fugitive particulate matter operating programs which is at issue before the Circuit Court of Cook County.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

BY: 

Kathryn A. Pamenter

Christopher J. Grant

Robert Petti

Assistant Attorneys General

69 W. Washington Street, Suite 1800

Chicago, IL 60602

(312) 814-0608

(312) 814-5388

(312) 814-2069

EXHIBIT A

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 Is that a two-page letter?

2 A Yes.

3 Q And then the next document that you tabbed or
4 identified earlier as a document you relied upon is?

5 A It is the November 1st submission of the -- of
6 the -- of what I will call the revised fugitive
7 particulate operating program.

8 Q Okay. And in terms of that document, Julie,
9 what -- I might get this question right one of these
10 times -- what information in there did you review in
11 determining that the information provided by the
12 application was not sufficient to demonstrate that if a
13 permit were issued that it would not cause a violation
14 of the Act, in particular 9 A?

15 A Again, it's more about what wasn't here than
16 what was here..

17 Q Okay.

18 A So we looked at everything that was here to
19 see what it -- what it accomplished in terms of fugitive
20 control. And -- and as to what's here -- the concern
21 was still for enough specificity so that we could
22 understand precisely what was being done at -- at what
23 intervals and by whom and to what end. Then, on top of
24 that, there was -- is the issue of were there things --

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 Second Motion in Limine Regarding Fugitive Dust Plans, A/K/A "Fugitive Particulate Operating Programs" upon (a) Edward W. Dwyer, Katherine D. Hodge and Matthew C. Read *via facsimile* and (b) Bradley P. Halloran *via email*.


KATHRYN A. PAMENTER