

**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**

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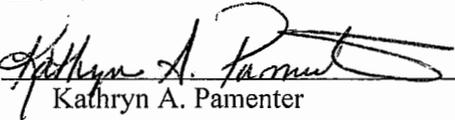
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PLEASE TAKE NOTICE that on the 16th day of May, 2014, Respondent Illinois Environmental Protection Agency's Post-Hearing Brief was filed with the Illinois Pollution Control Board, a true and correct copy of which is attached hereto and is hereby served upon you.

ILLINOIS ENVIRONMENTAL PROTECTION  
AGENCY

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<b>PROTECTION AGENCY,</b>	)	
	)	
<b>Respondent.</b>	)	

**RESPONDENT ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S  
POST-HEARING BRIEF**

Respondent, the Illinois Environmental Protection Agency (the "Illinois EPA"), pursuant to the Hearing Officer's March 25, 2014 Order, submits its Post-Hearing Brief to the Illinois Pollution Control Board (the "Board").

**INTRODUCTION**

KCBX Terminals Company ("KCBX") operates a bulk materials terminal for petroleum coke and coal on approximately 80 acres located at 10730 South Burley Avenue, Chicago, Illinois (the "South Site"). On July 23, 2013, KCBX filed a construction permit application seeking to add twelve new emission units to the South Site to achieve the material handling and throughput rates that KCBX envisioned for the South Site but was not meeting as of that date. The Illinois EPA initially considered granting the application. Due to a high wind event that blew petroleum coke and coal dust into the neighborhood adjacent to the South Site and KCBX's counsel's subsequent notification to the Illinois EPA that the South Site was struggling to control emissions from its operations, the Illinois EPA more closely considered KCBX's permit application. The Illinois EPA conducted inspections, held an environmental justice outreach meeting, reviewed written complaint forms and considered KCBX's Operating Program for

Fugitive Particulate Control. In December 2013, the Illinois EPA issued a so-called "Wells Letter" to KCBX, providing KCBX the opportunity to submit additional information in support of its construction permit application. In its January 2014 response, KCBX chose not to provide any information addressing the Illinois EPA's concerns. On January 17, 2014, the Illinois EPA issued a Permit Denial letter to KCBX regarding its construction permit application.

In its Post-Hearing Brief, KCBX seeks to shift its burden to the Illinois EPA to show that a violation occurred. In doing so, KCBX misapprehends the case law establishing that the permit applicant has the burden of proof in a permit appeal, and actual violations must be pursued in an enforcement action. In addition, KCBX incorrectly asserts that the Illinois EPA was required to issue a notice of incompleteness, and having failed to do so, that the Illinois EPA may not rely upon Section 201.152 of the Board regulations in its permit denial. Further, KCBX fails to satisfy its burden of proving that it provided sufficient information to the Illinois EPA between July 23, 2013 and January 17, 2014 that demonstrated Sections 9, 39(c) and 39.2 of the Illinois Environmental Protection Act (the "Act") and 35 Ill. Adm. Code 201.152, 201.160(a), 212.301 and 212.321 would not be violated if KCBX were authorized to install twelve new emission units at the South Site. Nothing in the record, the hearing testimony or KCBX's Post-Hearing Brief warrants a reversal of the Illinois EPA's denial determination on January 17, 2014. Because KCBX has failed to satisfy its burden of proof in this Permit Appeal, the Illinois EPA's January 17, 2014 Permit Denial of KCBX's construction permit application must be affirmed.

### **BACKGROUND**

#### **I. Prior Permit Applications and Permits Concerning the South Site.**

Prior to December 20, 2012, DTE Chicago Fuels Terminal, LLC ("DTE") operated a bulk materials terminal for petroleum coke, coal and salt at the South Site. (*See, e.g.*, R1711;

April 29 Tr. at p. 19, lines 9-11, 15-17.) On February 13, 2008, the Illinois EPA issued a Joint Construction and Operating Permit to DTE. (R1631.) On February 2, 2009, DTE submitted a Joint Construction and Operating Permit Application and a request for the issuance of a Federally Enforceable State Operating Permit ("FESOP") to the Illinois EPA (the "February 2009 Application"). (R1626-R1627.) The February 2009 Application sought to construct additional portable conveyors, stackers and a rail car unloading system at the South Site. (R1626.) On May 21, 2009, the Illinois EPA issued a "Joint Construction and Operating Permit – NSPS Source" to DTE. (R1711.) On September 17, 2012, DTE submitted (a) a construction permit application seeking to construct additional portable conveyors, stackers, storage piles and diesel generators at the South Site and (b) updated information relating to its FESOP application (the "September 2012 Application") to the Illinois EPA. (R563.) On December 18, 2012, the Illinois EPA issued a "Construction Permit – NSPS and NESHAP Source – Revised" to DTE. (R699.)

On December 20, 2012, KCBX acquired the South Site from DTE, and the Illinois EPA issued a "Construction Permit – NSPS and NESHAP Source – Revised" to KCBX for the South Site, reflecting the ownership change. (April 29 Tr. at p. 19, lines 9-11, 15-17; R624-R625.) On March 11, 2013, KCBX filed a "Supplement to Pending Construction Permit Application" corresponding to two 779 bhp diesel generators for the South Site (the "March 2013 Application"). (R1739.) On April 18, 2013, the Illinois EPA issued a "Construction Permit – NSPS and NESHAP Source – Revised" to KCBX for the South Site (the "April 2013 Permit"), which rearranged some of the equipment identification numbers, corrected inconsistencies in the generator listing from the prior permit and repurposed two of the portable conveyors to fixed conveyors. (R130; April 29 Tr. at p. 144, line 16 – p. 145, line 14.) The April 2013 Permit

includes material throughput limits of 1,100,000 tons/month and 11,000,000 tons/year. (R140.) KCBX had chosen to restrict its annual emissions below Prevention of Significant Deterioration (“PSD”) thresholds so as to not trigger Best Available Control Technology (“BACT”) requirements. (May 1 Tr. at p. 11, lines 1-19.) The FESOP portion of the February 2009 Application and September 2012 Application remains pending.

## **II. KCBX’s July 23, 2013 Construction Permit Application.**

On July 23, 2013, KCBX submitted a construction permit application to Robert W. Bernoteit in the Permit Section of the Illinois EPA, seeking authority to install ten additional portable conveyors, one additional box hopper and one additional stacker at the South Site, each a new emission unit.<sup>1</sup> (R186-R204; R190 (boxes 17-19); April 29 Tr. (T. Steinert testimony) at p. 192, lines 13-23.) Except for a Conveyor Transfer Points Process Flow Diagram that DTE had prepared (*see id.* at R184), KCBX admits that it did not attach any tables or supporting documents to its construction permit application. (Petitioner’s Post-Hearing Brief at p. 4 (citing R186-R204); Petitioner’s April 7, 2014 Motion to Supplement the Record at p. 5 and Exhibit F thereto.) KCBX submitted the application to “achieve the material handling and throughput rates envisioned for the facility. . . .” (R187.) KCBX envisioned 1.13 million tons/month and 11.25 million tons/year of materials handled through the South Site. (R139; *see also* R140.) Michael Estadt, KCBX’s Operations Manager, confirmed that KCBX needed more equipment at the South Site to achieve the envisioned material handling and throughput rates which were not being met as of July 23, 2013. (April 29 Tr. at p. 66, line 20 – p. 67, line 9; p. 132, lines 1-19.)

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<sup>1</sup> KCBX refers to its July 23, 2013 construction permit application as a “Request for Revision to Revised Construction Permit” and answered “yes” to question 3 of the Construction Permit Application for a FESOP Source form, “[d]oes this application request a revision to an existing construction permit issued by the BOA?” (R186; R191.) The Illinois EPA does not treat an application requesting a revision to an existing construction permit differently than an original construction permit application. (May 1 Tr. (J. Armitage testimony) at p. 112, line 11 – p. 113, line 18.)

The Illinois EPA's deadline to grant or deny KCBX's July 23, 2013 construction permit application was October 23, 2013, unless KCBX provided an extension. (May 1 Tr. (J. Armitage testimony) at p. 157, line 18 – p. 158, line 22.)

On August 27, 2013, at KCBX's request, the Illinois EPA met with KCBX to discuss the construction permit application and KCBX's pending application for a FESOP. (R183; May 1 Tr. (R. Bernoteit testimony) at p. 29, line 10 – p. 30, line 1.) During the August 27, 2013 meeting, the Illinois EPA advised KCBX that it would need to conduct environmental justice outreach regarding KCBX's construction permit application. (April 29 Tr. (T. Steinert testimony) at p. 201, lines 9-17.) Julie Armitage, the Chief of the Bureau of Air at the Illinois EPA since August 1, 2013, testified that the Illinois EPA's environmental justice policy

is generally designed to ensure environmental equity and to ensure that there is no disproportionate impact to Illinois residents from Agency determinations and we also try to encourage public participation in our environmental determinations. To that end, we have a policy and a public participation procedure which spells out that for every permitting transaction, regardless of type, regardless of bureau, that is received by the Agency we upon receipt of the application assess whether the source filing the application is located in a potential EJ area. To the extent that it is, we necessarily develop a public outreach plan for every one of those facilities.

(May 1 Tr. at p. 102, lines 17-22; p. 115, line 8 – p. 116, line 7.) On September 3, 2013, KCBX sent the Illinois EPA a list of the new conveyors, stacker and box hopper and corresponding identification numbers that were not model or serial numbers, but rather were created by KCBX. (R182; April 29 Tr. (T. Steinert testimony) at p. 199, line 8 – p. 200, line 5.)

On or about August 30, 2013, the Illinois EPA received telephone calls from citizens, elected officials, not-for-profit organizations and the Illinois Attorney General's Office, regarding a "wind event that seemed to have caused air pollution in the vicinity of KCBX." (May 1 Tr. (J. Armitage testimony) at p. 118, line 16 – p. 119, line 14.) As a result, the Illinois

EPA conducted an inspection of the South Site on September 5, 2013. (*Id.* at p. 119, line 15 – p. 120, line 22.) On September 12, 2013, counsel for KCBX contacted the Illinois EPA to “phone[] in high wind notice” because the South Site was “struggling” to control emissions from its existing operations. (*Id.* at p. 121, line 5 – p. 122, line 13; R1428.) KCBX had 60,000 tons of petroleum coke and 300,000 tons of coal at the South Site as of September 11, 2013. (R32.) As a result of KCBX’s operational issues, the Illinois EPA conducted additional inspections of the South Site. (May 1 Tr. (J. Armitage testimony) at p. 122, line 14 – p. 123, line 8.)

On September 19, 2013, Michael Dragovich, the permit analyst at the Illinois EPA assigned the July 23, 2013 construction permit application, circulated a draft permit for internal review. (R650.) Mr. Dragovich advised Chris Pressnall, an Illinois EPA attorney, that “[y]ou may have to check with Brad Frost for EJ [environmental justice] issues. On September 5, 2013, I was notified . . . that there are citizen complaints about dust.” (*Id.*) On October 2 and 10, 2013, Mr. Dragovich circulated a revised construction permit for review, concerned that the statutory review period would expire on October 17, 2013. (R671; R2093.) On October 10, 2013, Mr. Pressnall responded that Mr. Dragovich should “hold off on sending a draft to the company for review,” as separate enforcement and permitting concerns existed regarding the South Site. (R2093.) As of October 18, 2013, the Illinois EPA had not conducted the environmental justice outreach relating to KCBX’s construction permit application, about which KCBX was advised during the August 27, 2013 meeting. (May 1 Tr. (J. Armitage testimony) at p. 160, line 14 – p. 161, line 4; April 29 Tr. (T. Steinert testimony) at p. 201, lines 9-17.) On October 18, 2013, pursuant to correspondence from counsel for KCBX to Mr. Bernoteit in Illinois EPA’s Permit Section, KCBX extended the statutory review period for KCBX’s construction permit application until November 20, 2013. (R177.)

Between October 18, 2013 and November 20, 2013, the Illinois EPA conducted a multi-media inspection at the South Site, held an environmental justice outreach meeting regarding the construction permit application, at which the area citizens voiced their concerns about the additional equipment that KCBX was seeking to install at the South Site, and received written citizen complaints. (R31; R85; May 1 Tr. (J. Armitage testimony) at p. 159, line 21 – p. 160, line 13; *id.* at p. 160, line 14 – p. 162, line 18; R222-R537.) In addition, on November 1, 2013, KCBX submitted its Operating Program for Fugitive Particulate Control for the South Site to the Illinois EPA, though not to the Illinois EPA's Permit Section. (R150-R163; R647.) This Operating Program replaced the former dust control plan for the South Site because it did not accurately depict the South Site as of November 1, 2013. (April 29 Tr. (M. Estadt testimony) at p. 72, line 20 – p. 74, line 1.) On November 19, 2013, counsel for KCBX notified Mr. Bernoteit that KCBX was extending the statutory review period for KCBX's construction permit application until December 20, 2013. (R73.)

On December 10, 2013, the Illinois EPA sent KCBX a Wells Letter, advising KCBX that the Illinois EPA would be considering the September 5, September 11, September 13, November 6 and November 19 inspections and various citizen pollution complaint forms in its review of KCBX's July 23, 2013 construction permit application. (R30; May 1 Tr. (J. Armitage testimony) at p. 164, lines 1-20.) Ms. Armitage explained:

what we signaled to KCBX in the Wells letter was that these documents suggest you have a concern, please speak to that concern and please ensure that you speak to compliance with among other things 212.301 and we did that because we simply did not have information in the application that on its face showed that the facility would not cause a violation of the Act or regs and not only did the application in and of itself not show that the box hoppers and conveyors and stackers would not cause a violation of the Act or regs, information that was available suggested that the facility before the addition of the equipment was already a problem. So we wanted the source to take the opportunity to give us information that would show how it is that it is going to demonstrate compliance

with the Act and regs. Show that it won't violate the Act and regs.

(May 1 Tr. at p. 257, line 14 – p. 258, line 9.) The December 10, 2013 letter referenced Sections 9 and 39.2 of the Act and 35 Ill. Adm. Code Part 212, Subparts K and U, which includes 35 Ill. Adm. Code 212.301. (R30.) The December 10, 2013 letter also indicated that KCBX should submit its response, if any, prior to December 18, 2013, due to the December 20, 2013 statutory review period deadline. (*Id.*)

On December 18, 2013, KCBX submitted an initial response to the December 10, 2013 letter to Raymond Pilapil, an Acting Manager in the Permit Section of the Illinois EPA, extending the December 20, 2013 statutory review period deadline to January 20, 2014 (a federal holiday). (R18-19.) On January 13, 2014, KCBX submitted its second response to the December 10, 2013 letter to Mr. Pilapil. (R11-R16.) KCBX did not further extend the statutory review period deadline. (May 1 Tr. (J. Armitage testimony) at p. 171, line 24 – p. 172, line 2.)

On January 17, 2014, the Illinois EPA issued its Permit Denial letter to KCBX. (R1-R3.) The Permit Denial letter states that, “[t]he permit application is DENIED because Sections 9 and 39.2 of the Illinois Environmental Protection Act, and 35 Ill. Adm. Code 201.152, 201.160(a), 212.301, and 212.321 might be violated.” (R1.) In Paragraph 5 of the Permit Denial letter regarding Section 39.2 of the Act, the Illinois EPA discusses Section 39(c) of the Act. (R2 (Paragraph 5).) The Permit Denial afforded KCBX the opportunity to resubmit the application and include the necessary information and documentation to correct the deficiencies noted in the Permit Denial. (R3.) KCBX did not resubmit its construction permit application, and this appeal followed on February 21, 2014. Because KCBX did not waive the 120-day statutory deadline for the Board to issue a decision in this Permit Appeal, a hearing was held in this matter on April 29-30 and May 1-2, 2014.

## ARGUMENT

### **I. Legal Standard For A Permit Appeal.**

Section 39(a) of the Act provides that, “[w]hen the Board has by regulation required a permit for the construction . . . of any type of . . . equipment . . . , the applicant shall apply to the Agency for such permit and it shall be the duty of the Agency to issue such a permit *upon proof by the applicant that the . . . equipment . . . will not cause a violation of this Act or of regulations hereunder.*” 415 ILCS 5/39(a) (2012) (emphasis added). It is undisputed that KCBX was required to submit a construction permit application to the Illinois EPA to install ten additional conveyors, one additional box hopper and one additional stacker at the South Site. (See R186-R204.) “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 . . . Act . . . or rules under the Act would have occurred if the requested permit had been issued.” *Community Landfill Co. et al. v. Illinois Env'tl. Prot. Agency*, PCB 01-170, 2001 WL 1598272 at \*2 (Dec. 6, 2001) (citing *Panhandle Eastern Pipe Line Co. v. Illinois Env'tl. Prot. Agency*, PCB 98-102, slip op. (Jan. 21, 1999); *Joliet Sand & Gravel Co. v. Pollution Control Bd.*, 163 Ill. App. 3d 830 (3rd Dist. 1987) (citing *Illinois Env'tl. Prot. Agency v. Pollution Control Bd.*, 118 Ill. App. 3d 772 (1st Dist. 1983))). In this Permit Appeal, the Illinois EPA does not have the burden to show that a violation will occur in the future. *Alton Packaging Corp. v. Pollution Control Bd.*, 162 Ill. App. 3d 731, 736-37 (5th Dist. 1987). Rather, KCBX has the burden to show that approval of its construction permit application, and thus the addition of ten conveyors, one box hopper and one stacker at the South Site, would not violate Sections 9, 39(c) and 39.2 of the Act and 35 Ill. Adm. Code 201.152, 201.160(a), 212.301 and 212.321. *Id.* at 737. KCBX is only entitled to rely upon information that it presented to the Illinois EPA in support of its permit

application between July 23, 2013 and January 17, 2014. *Id.* at 738; *Community Landfill*, 2001 WL 1598272 at \*3.

**II. KCBX Failed To Satisfy Its Burden Of Proving That It Submitted Sufficient Information To The Illinois EPA To Demonstrate That Neither The Act, Nor Certain Board Regulations Would Be Violated If The Construction Permit Application Was Granted.**

**A. Section 9 of the Act.**

The January 17, 2014 Permit Denial letter includes as a basis for denial KCBX's failure to demonstrate that Section 9 of the Act would not be violated if the Illinois EPA granted KCBX's July 23, 2013 construction permit application. (R1.) Ms. Armitage testified that she relied upon KCBX's November 1, 2013 Operating Program for Fugitive Particulate Matter, the November inspection of the South Site and corresponding inspection report, the citizen complaint forms and KCBX's January 13, 2014 response to the December 10, 2013 Wells Letter to determine that KCBX had failed to show that Section 9 of the Act would not be violated if the permit application was granted.<sup>2</sup> (May 1 Tr. at p. 172, line 24 – p. 173, line 5; p. 181, lines 3-21; p. 187, line 21 – p. 188, line 2; p. 196, lines 3-13; p. 203, lines 12-16; p. 205, line 20 – p. 206, line 5; p. 208, line 20 – p. 209, line 5.) In response, KCBX contends that the Illinois EPA's reference to Section 9 of the Act in the January 17, 2014 Permit Denial is improper, as the Illinois EPA does not cite to Section 9 after the first paragraph of the Denial Letter. (Petitioner's Post-Hearing Brief at p. 9, fn.2, pp. 48-49.)

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<sup>2</sup> Ms. Armitage also testified that she considered the Complaint filed against KCBX on November 4, 2013 in the Circuit Court of Cook County in her denial decision because "it evidenced that there was, indeed, concern for compliance with the prohibition against air pollution and that we needed to ensure that the facility made the showing that it was obligated to make in the context of the permitting transaction." (*Id.* at p. 202, lines 11-23; *id.* at p. 255, line 21 – p. 256, line 15.) Similarly, correspondence from elected officials and a not-for-profit organization evidenced the existing concern that the facility was having an adverse impact on the local community. (*Id.* at 207, line 11 – p. 208, line 9.)

The Board has recognized that:

[i]ndeed, an applicant's right to a review of the Agency's decision before this Board would be rendered empty were the applicant denied knowledge of the reasons why a permit application was denied (i.e., what specific sections of the Act or regulations may be violated if the permit were granted). Consistent with this theory the Board articulated . . . that "[i]n order for an applicant to adequately prepare its case in a permit review before the Board the applicant must be given notice of what evidence it needs to establish its case. The requirement that the Agency provide the applicant with the specific sections of the Act and regulations which support permit denial is consistent with the statutory framework of the Act which requires that the Agency render its initial permit decision and the Board render its permit review decision within specified periods."

*West Suburban Recycling and Energy Center, L.P. v. Illinois Env'tl. Prot. Agency*, PCB 95-119 and 95-125, 1996 WL 633368 at \*12-\*13 (Oct. 17, 1996) (quoting *Centralia Env'tl. Services, Inc. v. Illinois Env'tl. Prot. Agency*, PCB 89-170, slip op. at 116 (May 10, 1990)); see also *City of Joliet v. Illinois Env'tl. Prot. Agency*, PCB 09-25, 2009 WL 1304733 at \*21 (May 7, 2009) (in considering a reference to Section 12 in the preamble paragraph of the permit denial letter, the Board stated, "[w]hether or not this passage of the denial letter is 'boilerplate,' . . . the Board cannot simply ignore it. . . ."); *Rock River Water Reclamation Dist. v. Illinois Env'tl. Prot. Agency*, PCB 13-11, 2013 WL 1890226 at \*38 (May 2, 2013) (citing *Joliet*).

In addition to stating in the Permit Denial letter that a basis for denial was Section 9 of the Act, the Illinois EPA referenced Section 9 of the Act in the December 10, 2013 Wells Letter issued to KCBX. (R30.) In its January 13, 2014 response letter, KCBX discussed Section 9(a) of the Act, thereby evidencing KCBX's knowledge that the Illinois EPA was concerned with Section 9(a) as it related to the construction permit application. (R13, R15-R16.) In this Permit Appeal, the Illinois EPA has not relied upon any subsection of Section 9 of the Act, other than subsection 9(a), including at the hearing where counsel for KCBX had the opportunity to ask questions of Ms. Armitage regarding her bases for including Section 9 in the January 17, 2014

Permit Denial letter. As a result, KCBX's contention that the Illinois EPA improperly referenced Section 9 of the Act in the Permit Denial letter is without merit.

In its Post-Hearing Brief, KCBX offers no further discussion regarding Section 9 of the Act, which is one of the stated bases upon which the Illinois EPA denied KCBX's application. (R1.) Because KCBX failed to satisfy its burden of demonstrating that it provided sufficient information to the Illinois EPA that Section 9 of the Act would not be violated if the July 23, 2013 construction permit application was granted, the Illinois EPA's denial of KCBX's construction permit application based upon Section 9 of the Act should be affirmed. *Alton Packaging*, 162 Ill. App. 3d at 736-37.

**B. Section 212.301 of the Board Regulations.**

**1. The Permit Denial Letter Does Not Constitute A Substitute Enforcement Action for a Section 212.301 Violation.**

On September 12, 2013, counsel for KCBX contacted the Illinois EPA to "phone[] in high wind notice" because the South Site was "struggling to ensure that they didn't cause an emissions impact offsite." (May 1 Tr. at p. 121, line 5 – p. 122, line 13 (citing R1428).) On September 19, 2013, the Illinois EPA conducted an inspection of the South Site. (*Id.* at p. 122, lines 14-19.) In November 2013, the Illinois EPA (a) conducted a further inspection of the South Site, which showed that the water cannon system was operable but not necessarily operating, and (b) received citizen complaint forms, which "evidenced concern for and/or actual offsite impact by the facility." (*Id.* at p. 203, line 12 – p. 205, line 19; *see also* p. 159, line 21 – p. 160, line 13.) As a result, the Illinois EPA issued the December 10, 2013 Wells Letter to KCBX, providing KCBX with an opportunity to demonstrate that granting the July 23, 2013 construction permit application would not violate Section 212.301 of the Board regulations. (R30.) KCBX's January 13, 2014 response included legal argument but failed to provide any actual data.

regarding the emission controls used at the South Site, such as emission control logs, water cannon system or water truck application summaries or any spreadsheet or log that described whether and how the dust suppression controls were actually utilized at the South Site. (R11-R16; May 1 Tr. (J. Armitage testimony) at p. 208, line 20 – p. 209, line 5; April 29 Tr. (M. Estadt testimony) at p. 84, line 14 – p. 86, line 3; April 29 Tr. (T. Steinert testimony) at p. 224, line 22 – p. 226, line 15 (citing R65).) As a result, the Illinois EPA issued the Permit Denial letter on January 17, 2014 based, in part, upon 35 Ill. Adm. Code 212.301.

Citing *ESG Watts, Inc. v. Illinois Env'tl. Prot. Agency*, PCB 92-54, 1992 WL 331222 (Oct. 29, 1992) and *Centralia Env'tl. Services, Inc. v. Illinois Env'tl. Prot. Agency*, PCB 89-170, 1990 WL 204152 (Oct. 25, 1990), KCBX contends that the Illinois EPA improperly utilized the permitting transaction as a substitute enforcement action with respect to 35 Ill. Adm. Code 212.301. In *ESG Watts*, alleged existing violations set forth in an enforcement notice letter and an enforcement action formed the basis of the Illinois EPA's permit denials. 1992 WL 331222 at \*3. Similarly, in *Centralia*, the Illinois EPA denied a permit for Area IV based upon existing groundwater compliance problems in Areas I, II and III at the site. 1990 WL 204152 at \*8. In both *ESG Watts and Centralia*, the Board found the proper mechanism to address the existing violations was an enforcement action. 1992 WL 331222 at \*3; 1990 WL 204152 at \*8.

Unlike *ESG Watts and Centralia*, KCBX does not cite to an enforcement letter, an enforcement action or a violation notice from the Illinois EPA, referencing an existing violation of 35 Ill. Adm. Code 212.301 at the South Site. The Illinois Attorney General's Office's Complaint against KCBX does not include a count based upon 35 Ill. Adm. Code 212.301. (R103-R118.) KCBX specifically states that the inspection reports and citizen complaint forms

do not allege an actual violation of Section 212.301.<sup>3</sup> (Petitioner's Post-Hearing Brief at pp. 25, 28.) As such, the Board's stated concern in *ESG Watts* that the permit applicant should not be placed in the position of defending itself against alleged enforcement violations of the Act or regulations in a permit appeal is not at issue in this case. 1992 WL 331222 at \*6-\*7.

Similarly, the Board's prohibition against reliance on unadjudicated violations has not been ignored in this case. (Petitioner's Post-Hearing Brief at p. 24 (citing *ESG Watts, Inc. v. Illinois Env'tl. Prot. Agency*, PCB 95-109, 2000 WL 297577 (March 16, 2000)). Rather, in accordance with *Wells Manufacturing Co. v. Illinois Env'tl. Prot. Agency*, 195 Ill. App. 3d 593 (1st Dist. 1990), the Illinois EPA issued the December 10, 2013 Wells Letter to KCBX, advising KCBX of the Illinois EPA's intention to consider information outside the July 23, 2013 construction permit application in evaluating whether 35 Ill. Adm. Code Part 212, Subpart K (35 Ill. Adm. Code 212.301) may be violated if the application was granted. (R30.) KCBX had the opportunity to submit a response, addressing the Illinois EPA's concern regarding 35 Ill. Adm. Code 212.301. (R30; R11-R16.) Because KCBX chose not to address the issue in its January 13, 2014 letter, the Illinois EPA included Section 212.301 as a basis for denial in its January 17, 2014 Permit Denial letter. (R11-R16; R1-R3; May 1 Tr. at p. 173, lines 17-19 ("... the facility was of concern and had failed to make the requisite showing that it would not cause a violation of the act and regs").

Contrary to KCBX's contention, the Illinois EPA did not substitute the permitting

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<sup>3</sup> KCBX asserts that it was denied a meaningful opportunity to respond to the citizen complaints in which the citizens' names and contact information had been redacted. (Post-Hearing Brief at pp. 29-30.) Yet, KCBX's burden was to demonstrate that granting the construction permit application would not violate 35 Ill. Adm. Code 212.301, not to conduct depositions of the citizens as would be done in an enforcement action. Also, of note, Mr. Kolaz testified that the citizen complaint forms were not reliable because they did not reference conveyors, box hoppers or stackers. (April 30 Tr. at p. 97, lines 9-18.) A citizen, though, cannot realistically be expected to do so. (May 1 Tr. (J. Armitage transcript) at p. 207, lines 7-10.)

transaction for an enforcement action alleging a Section 212.301 violation. Therefore, KCBX has failed to satisfy its burden of showing that Section 212.301 was an improper basis to deny KCBX's construction permit application.

**2. KCBX Failed To Prove that It Demonstrated Compliance With Section 212.301 Between July 23, 2013 and January 17, 2014 Relating To Its Construction Permit Application.**

The form of construction permit application requires each applicant to provide, among other things, (a) specific emission standards and limitations set by rules which are applicable to the emission unit that is the subject of the application and (b) information regarding how compliance will be demonstrated. (*See, e.g.*, R198-R199.) In response to this requirement, KCBX stated, "See Narrative, Section 1.0 in initial application." (*Id.*) Asserting that the "initial application" is DTE's September 2012 Application, KCBX admits therein that 35 Ill. Adm. Code 212.301 is one of the applicable rules for which compliance must be demonstrated. (R567-R568.) In this Permit Appeal, the burden is not on the Illinois EPA to show that a violation of Section 212.301 will occur in the future. *Alton Packaging*, 162 Ill. App. 3d at 736. Similarly, to the extent the Illinois EPA sought to rely upon a past violation of Section 212.301, it would have run afoul of the standard against substituting a permit denial for an enforcement action, which is not the case in this Permit Appeal. *ESG Watts*, 1992 WL 331222 at \*3. Rather, KCBX had the initial burden to demonstrate in a response to the December 10, 2013 Wells Letter that Section 212.301 would not be violated if the July 23, 2013 construction permit application was granted. Having failed to do so, KCBX had the burden in this Permit Appeal to show that approval of its construction permit application, and thus the addition of ten conveyors, one box hopper and one stacker at the South Site, would not violate 35 Ill. Adm. Code 212.301. *Alton Packaging*, 162 Ill. App. 3d at 737. As discussed below, KCBX has failed to satisfy its burden.

KCBX contends that it demonstrated compliance with Section 212.301 by citing the November 1, 2013 Operating Program for Fugitive Particulate Matter, the November inspection report and the December 5, 2013 settlement meeting. (Petitioner's Post-Hearing Brief at pp. 31-34.) KCBX's November 1, 2013 Operating Program for Fugitive Particulate Matter discussed only certain capabilities of KCBX's dust control systems at the South Site, without providing any actual operational data. (May 1 Tr. (J. Armitage testimony) at p. 190, line 18 – p. 191, line 2; April 29 Tr. (M. Estadt testimony) at p. 79, lines 9-22.) The Operating Program stated that “[p]ermanent, fixed water cannon systems are typically drained and shut down from November 1 through March 31 to protect against freeze damage. However, KCBX will continue its use after November 1 and until freezing conditions require shut down” and a water truck would be available, as needed. (R153, fn. 3.) Because KCBX did not advise whether it operated the system during December 2013 and January 2014, Ms. Armitage assumed that the water cannon system was shut down during those months based on KCBX's Operating Program. (May 1 Tr. at p. 193, line 21 – p. 194, line 9.)

Similarly, KCBX's November 1, 2013 Operating Program failed to provide sufficient information regarding how fugitive emissions would be controlled from conveyors, stackers and box hoppers at the South Site. As to conveyors and stackers, the Operating Program states:

At portable and mobile transfer points, front-end loaders, bulldozers, box hoppers, conveyors, and stacking equipment are generally utilized. *When conditions warrant*, water from the pole-mounted cannons is applied to control fugitive particulate emissions and water from a portable cannon attached to the water truck *may also be used* for spot or supplemental control of fugitive particulate emissions. . . . water from the pole-mounted cannons or the portable cannon attached to the water truck is available for control at these transfer points *as needed* and drop distances are minimized as an additional control.

(R156 (emphasis added).) As to box hoppers, the Operating Program indicates that “[w]ater from a spray bar on the box hopper *may be used, as conditions warrant*, to control fugitive

particulate emissions at the hopper and along the conveying system in accordance with 35 IAC 212.308. Additionally, the cannon on the water truck is available to apply water, *if needed.*" (R155, fn.6 (emphasis added).) Ms. Armitage testified at length that this language failed to provide sufficient information regarding emission controls for the conveyors, stackers and box hoppers as related to Section 212.301. (May 1 Tr. at p. 194, line 10 – p. 200, line 17 and p. 202, lines 1-10 (citing R156 (paragraphs C.2 and 3) and R155, fn.6).)

In response, KCBX cites the November inspection report.<sup>4</sup> (Petitioner's Post-Hearing Brief at pp. 32-33.) Ms. Armitage explained that based upon the November inspection report, the 42 water cannons and the surfactant system at the South Site were operable, but not necessarily operating. (May 1 Tr. at p. 203, line 21 – p. 205, line 19.) The November inspection report references only two of the 42 water cannons being observed in operation. (R33-R34 ("[t]he cannon observed in operation near the river has a 250-foot radius throw. . . . Another cannon to the east was observed. . . .") Moreover, the report stated that implementation of the weather station had not been completed. (R33.)

KCBX also references a set of powerpoint slides entitled "Dust Mitigation System Overview." (Petitioner's Post-Hearing Brief at p. 33 (citing R2055-R2092).) In doing so, KCBX omits the fact that KCBX stamped each page of the slides "KCBX Terminals Company - Confidential Business Information - Confidential Settlement Communication" and presented them to the Illinois EPA at a settlement meeting held on December 5, 2013 regarding a separate case, *People v. KCBX Terminals Company* (Case No. 2013CH24788), pending in the Circuit

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<sup>4</sup> KCBX also refers to comments that Ms. Armitage made to draft September inspection reports. (Petitioner's Post-Hearing Brief at pp. 5-6, 33.) Ms. Armitage explained that because they were her handwritten comments, she considered them prior to making her decision to grant or deny the construction permit application. (May 1 Tr. at p. 140, line 20 – p. 141, line 5; p. 144, lines 1-14.) In addition, Ms. Armitage testified that the November inspection and corresponding report carried more weight in her decision-making process because they were closest to the January 17, 2014 decision date. (*Id.* at p. 178, line 19 – p. 179, line 13.)

Court of Cook County. (R2055-R2092; April 29 Tr. (M. Estadt testimony) at p. 127, lines 13-17.) While Mr. Bernoteit attended the meeting, the copies of the slides were returned to KCBX at the end of the meeting. (May 1 Tr. at p. 82, lines 10-13.) In addition, Mr. Bernoteit and Ms. Armitage did not speak about the information conveyed during the December 5, 2013 meeting because the “information was provided in the context of an enforcement meeting.” (*Id.* at p. 233, line 20 – p. 234, line 4.) KCBX chose not to supplement its July 23, 2013 construction permit application with any information that it provided during the December 5, 2013 meeting. (May 1 Tr. (R. Bernoteit testimony) at p. 82, lines 4-9.) KCBX also chose not to advise the Illinois EPA that it no longer deemed such information “Confidential Business Information – Confidential Settlement Communication” until 4:15 pm the day before the hearing, when it filed its Second Motion to Supplement the Administrative Record. As a result, under *Alton Packaging*, such information or related testimony may not be considered in determining whether KCBX satisfied its burden as to Section 212.301, because KCBX provided the information to the Illinois EPA outside the statutory review period. 162 Ill. App. 3d at 738; *see also Community Landfill*, 2001 WL 1598272 at \*3. Even if the presentation slides were considered, they discussed only the capabilities of the dust suppression controls at the South Site. (April 29 Tr. (M. Estadt testimony) at p. 125, lines 2-13; p. 127, lines 9-12; May 1 Tr. (J. Armitage testimony) at p. 253, lines 6 – 21.)

In attempting to show that it demonstrated compliance with Section 212.301, KCBX does not cite to its January 13, 2014 response to the December 10, 2013 Wells Letter. As Ms. Armitage explained, the January 13, 2014 letter “did not address the concerns as expressed in the Wells letter. It did not provide any information responsive to the concerns. It did not make any showing of proof as to how the facility would not violate the act or regs. So it certainly did not

dissuade the concerns that we had.” (*Id.* at p. 208, line 20 – p. 209, line 5 (citing R11-R16).) KCBX did not attach to the January 13, 2014 letter, any emission control logs or information on actual dust controls for the existing conveyors, box hoppers or stackers at the South Site or the new equipment KCBX was seeking to install there. (*Id.* at p. 209, lines 6-24.) Further, KCBX did not provide information regarding whether it operated the water cannon system at the South Site during freezing temperatures between November 1, 2013 through January 12, 2014, causing Ms. Armitage to believe that it had not been operated and would not be operated during the winter months to come, based upon the November 1, 2013 Operating Program. (*Id.* at p. 210, lines 1-13.) Therefore, because KCBX failed to satisfy its burden to prove that it submitted sufficient information to the Illinois EPA between July 23, 2013 and January 17, 2014, that demonstrated Section 212.301 of the Board regulations would not be violated if the application was granted, the Illinois EPA’s denial of KCBX’s application based upon Section 212.301 should be affirmed.

**C. Sections 39(c) and 39.2 of the Act.**

Section 39(c) of the Act provides, in pertinent part, as follows:

no permit for the development or construction of a new pollution control facility may be granted by the Agency unless the applicant submits proof to the Agency that the location of the facility has been approved by the County Board of the county if in an unincorporated area, or the governing body of the municipality when in an incorporated area, in which the facility is to be located in accordance with Section 39.2 of the Act.

415 ILCS 5/39(c) (2012). Section 39.2(a) of the Act states that, “[t]he county board of the county or the governing body of the municipality . . . shall approve or disapprove the request for local siting approval for each pollution control facility which is subject to such review.” 415 ILCS 5/39.2(a) (2012). A pollution control facility is “any waste storage site, sanitary landfill, waste disposal site, waste transfer station, waste treatment facility, or waste incinerator.” 415

ILCS 5/3.330(a) (2012). A storage site “is a site at which waste is stored.” 415 ILCS 5/3.485 (2012). Waste includes “discarded material, including solid, liquid, semi-solid, or contained gaseous material resulting from industrial, commercial, mining and agricultural operations. . . .” 415 ILCS 5/3.535 (2012). Paragraph 5 of the Permit Denial letter states, “[b]ased upon the observations made by the Bureau of Land’s field staff, storage pile #8 [at the South Site] was determined to be a waste pile due to vegetative growth observed during the inspection conducted on November 6, 2013,” thereby requiring KCBX, as a waste storage site and a pollution control facility, to demonstrate compliance with Sections 39(c) and 39.2 of the Act, 415 ILCS 5/39(c) and 39.2 (2012). (R2-3.) As of January 17, 2014, KCBX had not made such demonstration to the Illinois EPA. (*Id.*)

In response, KCBX contends that the Illinois EPA improperly relied upon unadjudicated land violations and substituted the Permit Denial letter for an enforcement action against KCBX. (Petitioner’s Post-Hearing Brief at pp. 42-43.) *ESG Watts*, 2000 WL 297577, *ESG Watts*, 1992 WL 331222, *Centralia Env’tl.*, 1990 WL 204152, and *The Grigoleit Co. v. Illinois Env’tl. Prot. Agency*, PCB 89-184, 1990 WL 263955 (Nov. 29, 1990), on which KCBX relies, do not address Section 39(c) of the Act, which prohibits the Illinois EPA from granting a permit for the development of a new pollution control facility unless the applicant submits proof that the location has been approved by the proper siting authority. Unlike in *Grigoleit*, the Illinois EPA did not simply rely upon outstanding violations of the Act to deny KCBX’s construction permit application. The Illinois EPA’s observations of Storage Pile #8 constituting a waste pile served as the basis for KCBX to have to demonstrate compliance with Sections 39(c) and 39.2 of the

Act. (R2-R3.) As a result, Permit Denial Reason #5 was not improper as a matter of law.<sup>5</sup>

KCBX also asserts that the December 10, 2013 Wells Letter did not notify KCBX that the Illinois EPA was considering observations from the Bureau of Land's November 19, 2013 inspection report. (Petitioner's Post-Hearing Brief at pp. 44-46.) In its January 13, 2014 response, KCBX admits that it had the opportunity to review the September and November inspection reports of the South Site and the Violation Notices (L-2013-01304 and L-2013-01305) issued by the Illinois EPA's Bureau of Land. (R11-R12.) In addition, KCBX admits that the December 10, 2013 Wells Letter references Section 39.2 of the Act. (Post-Hearing Brief at p. 45 ("the Wells Letter was the first time KCBX was aware of an alleged violation of Section 39.2 of the Act") (citing R30).) KCBX chose not to include any information in its January 13, 2014 response regarding Storage Pile #8, including who owned it, whether any amounts had been removed between November 7, 2013 and January 12, 2014 or whether any amounts were scheduled for future shipment. (R11-R16.) KCBX had notice of Section 39.2 of the Act in the December 10, 2013 Wells Letter and failed to provide sufficient information in its January 13, 2014 response letter to the Illinois EPA. Accordingly, the Illinois EPA properly included Denial Paragraph 5 in the January 17, 2014 Permit Denial letter.

KCBX further contends that it demonstrated Storage Pile #8 is a pile of coal, which is a valuable product. (Post-Hearing Brief at pp. 46-48.) During the hearing, Mr. Estadt offered testimony regarding Storage Pile #8 to attempt to refute Paragraph 5 of the Permit Denial letter. (*Id.*) Mr. Estadt admitted that Storage Pile #8 existed at the South Site when KCBX acquired the property from DTE on December 20, 2012, and that he had observed vegetative growth on the

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<sup>5</sup> In *Martell v. Mauzy*, 511 F. Supp. 729 (N.D. Ill. 1981), the Agency denied an operating permit to a sanitary landfill operator, resulting in a loss of present and future livelihood. Unlike *Martell*, this case concerns the denial of a construction permit application seeking to add equipment to existing operations.

pile. (April 29 Tr. at p. 56, line 23 – p. 57, line 3; p. 58, lines 4-7.) While stating that a portion of the coal had been removed from Storage Pile #8 at the South Site (*id.* at p. 57, lines 4-15), Mr. Estadt could not recall or did not know when such removal occurred, where the coal actually went and how the coal was actually used. (*Id.* at p. 77, line 1 – p. 78, line 10.) Mr. Estadt also could not recall providing the Illinois EPA with any information regarding Storage Pile #8 between July 23, 2013 and January 17, 2014. (*Id.* at p. 78, line 11 – p. 79, line 1.) In fact, KCBX's January 13, 2014 letter to the Illinois EPA did not provide any factual information regarding Storage Pile #8 for the Illinois EPA to determine prior to January 17, 2014, that compliance with Section 39(c), and as such 39.2, of the Act was not required. (*See* R11-R16.)

Mr. Estadt's testimony was insufficient to satisfy KCBX's burden of showing that compliance with Sections 39(c) and 39.2 of the Act was unnecessary. Even if his statements established that Storage Pile #8 was not a waste and, as such, the South Site was not a waste storage facility and a pollution control facility, Mr. Estadt's testimony may not be considered because it was not presented to the Illinois EPA prior to January 17, 2014. *Community Landfill Co.*, 2001 WL 1598272 at \*3 (“[i]t is well-settled that the Board's review of permit appeals is limited to information before the Agency during the Agency's statutory review period, and is not based on information developed by the permit applicant, or the Agency, after the Agency's decision”). Based upon the foregoing, KCBX has failed to satisfy its burden of proving that (a) Paragraph 5 of the Permit Denial was an improper basis to deny KCBX's construction permit application, and (b) KCBX's compliance with Sections 39(c) and 39.2 of the Act was

unnecessary.<sup>6</sup> Therefore, the Illinois EPA's denial of KCBX's application based upon Sections 39(c) and 39.2 of the Act should be affirmed.

**D. Section 201.152 of the Board Regulations.**

Section 201.152 of the Board's Permit Applications and Review Process Regulations provides, in pertinent part, as follows:

An application for a construction permit shall contain, as a minimum, the following data and information: The nature of the emission unit and air pollution control equipment, including the expected life and deterioration rate; information concerning processes to which the emission unit or air pollution control equipment is related; the quantities and types of raw materials to be used in the emission source or air pollution control equipment; the nature, specific points of emission and quantities of uncontrolled and controlled air contaminant emissions at the source that includes the emission unit or air pollution control equipment; the type, size, efficiency and specifications . . . of the proposed emission unit or air pollution control equipment; maps, statistics and other data reasonably sufficient to describe the location of the emission unit or air pollution control equipment.

35 Ill. Adm. Code 201.152. Paragraph 1 of the Permit Denial letter lists specific information that the Illinois EPA believed KCBX had failed to provide regarding the additional ten portable conveyors, one box hopper and one stacker, each a new emission unit. (R1-R2; April 29 Tr. (T. Steinert testimony) at p. 192, lines 13-23.)

**1. The Illinois EPA Was Not Required To Issue a Notice of Incompleteness to KCBX.**

Relying on *Sherex Chemical Co., Inc. v. Illinois Env'tl. Prot. Agency*, PCB 80-66, 1980

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<sup>6</sup> On March 26, 2014, the Illinois EPA filed a Notice of Withdrawal of Permit Denial Reason #5 with the Board, to narrow the issues for trial. The hearing was scheduled to commence on April 29, 2014, KCBX was requiring depositions before the hearing and all parties, including the Board, were working without a waiver of the 120-day statutory deadline. (Hearing Officer Order dated March 25, 2014.) The Board has stated that "[t]he Illinois Supreme Court has held that an administrative agency has no inherent authority to amend or change a decision and may undertake a reconsideration of a decision only where authorized by statute." (April 3, 2014 Order (quoting *Reichhold Chemicals, Inc. v. PCB*, 204 Ill. App.3d 674, 677 (3d Dist. 1990) (citations omitted)). Accordingly, KCBX was notified on April 3, 2014, that it had the burden to prove that it provided sufficient information to the Illinois EPA between July 23, 2013 and January 17, 2014, that Section 39(c) and 39.2 of the Act would not be violated if KCBX's application was granted.

WL 13391 (Oct. 2, 1980), KCBX argues that because the Illinois EPA did not issue a notice of incompleteness, “[a] Denial Reason based solely on Section 201.152 is inappropriate.” (Petitioner’s Post-Hearing Brief at pp. 12-13.) In its Supplemental Opinion of the Board in *Sherex*, the Board acknowledged:

[i]f there is no statement issued under the rule [Rule 103(b)(4) of Chapter 2 which is incorporated into 35 Ill. Adm. Code 201.158], then the filing date of the application is unchanged and the Agency must proceed to determine whether the applicant has demonstrated nonviolation. . . . The Board, in reconsidering the scope of the Agency’s duty under these circumstances, finds that the Agency does not have an absolute duty under Rule 103(b)(4) to inform Sherex that the application was incomplete.

*Sherex Chemical Co., Inc. v. Illinois Env’tl. Prot. Agency*, PCB 80-66, 1980 WL 13625 at \*1 (Dec. 19, 1980). The Board further clarified the application of 35 Ill. Adm. Code 201.158:

35 Ill. Adm. Code 201.158 states that an application for permit is not deemed filed until all required data is submitted. It further states that if the Agency fails to notify an applicant of an incomplete application package within 30 days of receiving the incomplete package, the effective date of filing is the date of the Agency’s receipt. Finally, Section 201.158 states an applicant may treat a notice of incompleteness as a denial for purposes of appeal. Nowhere does Section 201.158 or any other regulation require the Agency to issue Notice of Incompleteness as opposed to denials. . . . At most, Section 201.158 establishes a schedule for computing filing dates; it does not impose an affirmative duty on the Agency.

*Riverside Laboratories, Inc. v. Illinois Env’tl. Prot. Agency*, PCB 87-62, 1989 WL 74543 at \*8-\*9 (Jan. 19, 1989). Based upon the foregoing, the Illinois EPA was not required to issue a notice of incompleteness to KCBX, and the Illinois EPA properly relied on Section 201.152 as a basis for denial in the January 17, 2014 Permit Denial letter.

**2. KCBX Did Not Provide Sufficient Information To The Illinois EPA Pursuant to 35 Ill. Adm. Code 201.152.**

In its July 23, 2013 construction permit application, KCBX referenced an “initial application” in response to certain requests for information, but did not identify the initial

application to which it was referring. (See R195 (question 8), R196 (question 21), R198, R199 (questions 31 and 32), R202 and R204 (questions 39 and 48).) KCBX responds that it “*intended* ‘initial application’ to be a reference to the September 2012 DTE Application.” (Petitioner’s Post-Hearing Brief at p. 16 (emphasis added).) Mr. Steinert, who assisted in the preparation of the construction permit application, admits that it does not specifically state to which initial application KCBX is referring.<sup>7</sup> (April 29 Tr. at p. 196, lines 10-24; *see also* May 1 Tr. (R. Bernoteit testimony) at p. 17, lines 2-18.) The February 2009 Application, September 2012 Application and March 2013 Application had previously been submitted to the Illinois EPA for the South Site. (R1626, R563, R1739.) In fact, KCBX’s counsel questioned, and Mr. Steinert responded, that:

Q. Is that the initial application you were referring to?

A. You have to go back and repeat the question now. We have too many applications involved.

(April 29 Tr. at p. 147, lines 5-9.)

Assuming KCBX was referring to DTE’s September 2012 Application in its July 23, 2013 construction permit application, the attached tables do not include information (a) regarding the quantities of raw materials to be used in the ten new conveyors, one new box hopper and one new stacker required on page R196 of its application or (b) the quantities of uncontrolled and controlled air contaminant emissions corresponding to the new emission units required on page R202 of its application. (*See also* R1 (1.b.ii. and 1.b.iii.)) Specifically, in response to the first request, KCBX stated “[s]ee Tables 5&6 in initial application.” (R196.)

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<sup>7</sup> In its response to KCBX’s motion to supplement the record, the Illinois EPA stated that it was undisputed the initial application was the September 2012 Application, as the parties recognized in April 2014 that was the case. Such a statement did not preclude Mr. Bernoteit from testifying that during the statutory review period, July 23, 2013 – January 17, 2014, KCBX did not advise the Illinois EPA that the September 2012 Application was the initial application. (May 1 Tr. (R. Bernoteit testimony) at p. 17, lines 2-17.)

KCBX admits, though, that Tables 5&6 in the September 2012 Application do not include any information regarding the additional conveyors, box hopper and stacker that it was seeking to install at the South Site. (April 29 Tr. (T. Steinert testimony) at p. 206, line 19 – p. 209, line 22.) Similarly, in response to the request for emission information, KCBX stated, “[s]ee Tables 1-12 in initial application.” (R202.) KCBX again admits that Tables 1-12 in the September 2012 Application do not include any information regarding the new emission units that were the subject of KCBX’s construction permit application. (April 29 Tr. (T. Steinert testimony) at p. 217, line 17 – p. 218, line 18.)

In its Post-Hearing Brief, KCBX argues that it was not requesting any changes to the throughput or emission limitations. (Petitioner’s Post-Hearing Brief at pp. 1, 19 (citing R187).) Yet, in response to questions in the application form regarding quantities of raw materials and quantities of uncontrolled and controlled air contaminant emissions, KCBX did not state “not applicable” or “not requesting changes to throughput or emission limitations.” (R196; R202.) Rather, KCBX referred the Illinois EPA to tables within the September 2012 Application, which admittedly did not include any information regarding the ten additional conveyors, box hopper and stacker. (April 29 Tr. (T. Steinert testimony) at p. 206, line 19 – p. 209, line 22; p. 217, line 17 – p. 218, line 18.) Moreover, the September 2012 Application “did not concern equipment being taken from the north site and installed at the south site,” as KCBX’s July 23, 2013 construction permit application concerned.<sup>8</sup> (*Id.* at p. 206, line 23 – p. 207, line 14.)

KCBX also contends that it provided a map, statistics or other data reasonably sufficient

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<sup>8</sup> KCBX argues that because the ten additional conveyors, one additional box hopper and one additional stacker were located at its “north site,” a permitted facility, the Illinois EPA should have simply permitted that equipment at the South Site. (Petitioner’s Post-Hearing Brief at pp. 1, 14, 19-20.) This argument ignores the permit applicant’s burden under Section 39(a) of the Act, the fact that KCBX was seeking to add the equipment to a completely different location and the different conditions and provisions in the FESOP for the north site that were not included in the April 2013 Permit for the South Site. (*Compare* R538 *with* R130.)

to describe the location of the new emission units and the specific points of emission by responding “varies” to Questions 40, 41 and 42 of the application on page R204. (Petitioner’s Post-Hearing Brief at p. 20 (citing R2 (1.b.v)).) Box 39 of the application asks “[d]oes this application include process flow diagram(s) for the project showing new and modified emission units and control equipment and related existing equipment and their relationships,” to which KCBX responded “yes.” (R192.) In addition, in its construction permit application in response to the request for a flow diagram designation of exhaust point, KCBX responded, “[s]ee figure 1 in initial application.” (R204.) The Conveyor Transfer Points Process Flow Diagram contains limited information and fails to show whether bulk materials are removed from bulk material piles through conveyor transfer points at the South Site. (R590; April 29 Tr. (T. Steinert testimony) at p. 220, line 4 – p. 222, line 19; *compare with* February 2009 Application at R1668-R1669.)

KCBX further contends that because the permit analyst initially recommended granting the permit application and Mr. Bernoteit did not consider the permit application until December 5, 2013, the construction permit application must be deemed complete and sufficient. (Petitioner’s Post-Hearing Brief at pp. 13-16, 22.) In doing so, KCBX ignores several facts in this case. First, through its application, KCBX was striving to achieve increased material handling and throughput rates that it envisioned but was not meeting at the South Site as of July 23, 2013. (R187; April 29 Tr. (M. Estadt testimony) at p. 66, line 20 – p. 67, line 9.) Specifically, as of September 11, 2013, KCBX had 60,000 tons of petroleum coke and 300,000 tons of coal at the South Site, and it wanted to achieve material throughput of 1,100,000 tons/month. (R32; R139; R140.) Yet, as of September 12, 2013, the South Site was “struggling” to control emissions based on existing operations, without considering the additional twelve

emission units that KCBX was seeking to install. (R1428; May 1 Tr. (J. Armitage testimony) at p. 121, line 5 – p. 122, line 13.) Therefore, the Illinois EPA more closely considered the permit application.

Second, Mr. Bernoteit was the acting permit manager until December 2, 2013 and thus did not have day-to-day involvement with the application prior to that time. (*Id.* at p. 48, lines 1-10.) After December 5, 2013, Mr. Bernoteit reviewed the construction permit application and determined that the information KCBX included was insufficient.<sup>9</sup> (*Id.* at p. 85, lines 17-21; p. 80, lines 7-14.) Third, Mr. Dragovich does not make the final decision, but rather makes a recommendation to the unit manager as to whether a permit application should be granted, denied or rejected. (May 1 Tr. (R. Bernoteit testimony) at p. 43, lines 3-11.) Finally, on December 5, 2013, Mr. Bernoteit was instructed to prepare the Wells Letter and in response, he inquired whether he should prepare a denial letter at the same time, thinking “we may be headed down the road to denial.” (May 1 Tr. (R. Bernoteit testimony) at p. 80, line 15 – p. 81, line 6.) Ms. Armitage explained that “we had not at that point in time made what would ultimately become our final decision. Rather, I was just having him prepare documentation so that we would not encounter any time constraints. . . .” (*Id.* at p. 172, lines 15-22.)

Contrary to KCBX’s contention, the Illinois EPA was not required to issue a notice of incompleteness regarding the construction permit application. *Riverside Laboratories*, 1989 WL 74543 at \*8-\*9; *Sherex Chemical*, 1980 WL 13625 at \*1. In addition, KCBX admits that the Wells Letter did not ask for information relating to the contents of the application “because that

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<sup>9</sup> KCBX states that Mr. Dragovich was instructed not to talk to KCBX. (Petitioner’s Post-Hearing Brief at p. 15.) KCBX’s citation to page 214 of the April 30 transcript is confusing given that Mr. Dragovich was speaking about April 2012. In any event, Mr. Bernoteit explained that inquiries on the permit application have to be made through counsel when enforcement issues are also involved. (May 1 Tr. at p. 83, line 23 – p. 84, line 22.) In addition, Ms. Armitage explained that the Illinois EPA does not contact permit applicants after sending a Wells Letter so that all materials are reduced to writing for purposes of the administrative record. (*Id.* at p. 171, lines 10-23.)

is not its purpose.” (Petitioner’s Post-Hearing Brief at p. 4.) KCBX chose to rely upon DTE’s September 2012 Application which admittedly did not include any information regarding the new emission units that KCBX was seeking to install at the South Site and which included a Conveyor Transfer Points Process Flow Diagram that contained limited information. (April 29 Tr. (T. Steinert testimony) at p. 206, line 19 – p. 209, line 22; p. 217, line 17 – p. 218, line 18; p. 220, line 4 – p. 222, line 19; *compare* R590 with February 2009 Application at R1668-R1669.) Based upon the foregoing, KCBX has failed to satisfy its burden of proving that its construction permit application contained sufficient information pursuant to Section 201.152 of the Board regulations, and the Illinois EPA’s denial of KCBX’s application based upon Section 201.152 should be affirmed.

**E. Section 212.321 of the Board Regulations.**

Paragraph 4 of the Permit Denial states:

The application does not show whether the particulate matter emissions from the ten portable conveyors, one box hopper, and one stacker will comply with 35 Ill. Adm. Code 212.321. As the application did not include data that would prove the actual emission levels, pursuant to 35 Ill. Adm. Code 201.122, or any other information that could be used to estimate emissions, the Illinois EPA could not assess whether these emission units have a particulate matter emission rate at levels below which would be allowed by this rule.

(R2.) Section 212.321 of the Board’s Particulate Matter Emissions from Process Emission Units

Regulations provides, in pertinent part, as follows:

no person shall cause or allow the emission of particulate matter into the atmosphere in any one hour period from any new process emission unit which, either alone or in combination with the emission of particulate matter from all other similar process emission units for which construction or modification commenced on or after April 14, 1972, at a source or premises, exceeds the allowable emission rates specified in subsection (c) of this Section.

35 Ill. Adm. Code 212.321(a). The process weight rate rule calculation is  $E=A(P)^{\text{superscript B}}$ , where P=process weight rate and E=allowable emission rate. 35 Ill. Adm. Code 212.321(b).

The process weight rate (P) varies depending upon the type of equipment, whereas the values for “A” and “superscript B” in the equation are determined by statute and are dependent upon whether the process weight rate is greater or less than 450 tons/hour. *Id.*

The form of construction permit application requires each applicant to provide specific emission standards and limitations set by rules which are applicable to the emission unit that is the subject of the application. (*See, e.g.*, R198.) In response to this requirement, KCBX stated, “See Narrative, Section 1.0 in initial application.” (*Id.*) Relying on the September 2012 Application, KCBX admits that the process weight rate rule calculation in its construction permit application is incorrect. (April 29 Tr. (T. Steinert testimony) at p. 213, line 12 – p. 216, line 12.) KCBX relied upon “A” and “superscript B” values for process weight rates up to 450 tons/hour, even though its actual process weight rate was 2,500 tons per hour.<sup>10</sup> (*Id.*; R569; *see also* 35 Ill. Adm. Code 212.321(b).) KCBX admits that it could have corrected the calculation through the July 23, 2013 construction permit application. (April 29 Tr. (T. Steinert testimony) at p. 216, lines 5-12.) In addition, KCBX admits that Tables 5 and 6 of the September 2012 Application do not list the ten additional conveyors (PC-13 through PC-22), the additional stacker (SC-5) or the additional hopper (PH-2) and do not include any emission data specific to such equipment. (R602-R608; April 29 Tr. at p. 206, line 19 – p. 209, line 22.) Accordingly, KCBX has failed to satisfy its burden of proving that Section 212.321 of the Board regulations was an improper basis to deny KCBX’s construction permit application, and the Illinois EPA’s denial of KCBX’s application based upon Section 212.321 should be affirmed.

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<sup>10</sup> Mr. Steinert testified that the process weight rate for the new conveyors, box hopper and stacker that KCBX was seeking to install at the South Site was 3,000 tons/hour. (April 29 Tr. at p. 191, lines 6-11.) Yet, KCBX did not include the 3,000 tons/hour process weight rate for the new conveyors, box hopper and stacker in its construction permit application. (*Id.* at p. 209, lines 4-16.) Mr. Steinert explained that “to the extent the tons per hour changes that impacts the emissions rate that gets calculated.” (*Id.* at p. 209, lines 17-22.)

**F. Section 201.160 of the Board Regulations.**

Section 201.160(a) of the Board's Permit Applications and Review Process Regulations provides that, "[n]o construction permit shall be granted unless the applicant submits proof to the Agency that: (1) [t]he emission unit . . . will be constructed or modified to operate so as not to cause a violation of the Act or of this Chapter. . . ." 35 Ill. Adm. Code 201.160(a)(1). As discussed above, KCBX failed to submit proof to the Illinois EPA that the ten portable conveyors, one box hopper and one stacker would be constructed at the South Site so as not to cause a violation of Sections 9, 39(c) and 39.2 of the Act and 35 Ill. Adm. Code 201.152, 212.301 and 212.321. Therefore, KCBX has failed to satisfy its burden of proving that Section 201.160(a) of the Board regulations was an improper basis to deny KCBX's construction permit application, and the Illinois EPA's denial of KCBX's application based upon Section 201.160(a) should be affirmed.

**III. The Board Should Not Consider Certain Testimony and Exhibits In Rendering Its Ruling.**

**A. Mr. Steinert's and Mr. Kolaz's Respective Opinion Testimony Constituted Improper Legal Conclusions.<sup>11</sup>**

Expert testimony is admissible only if the expert has specialized knowledge that will "assist the trier of fact in understanding the evidence." *Grant v. Petroff*, 291 Ill. App. 3d 795, 801 (5th Dist. 1997). When determining whether proffered expert testimony assists the trier of fact, it is settled that "expert testimony as to legal conclusions that will determine the outcome of the case is inadmissible." *Good Shepherd Manor Foundation, Inc. v. City of Momence*, 323 F.3d 557, 564 (7th Cir. 2003) (finding that expert's opinions were legal conclusions where expert opined that city's actions violated a statute); *see also People v. Consolidated Freightways Corp.*

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<sup>11</sup> To the extent an appeal of this matter follows the Board's decision in this Permit Appeal, Section III.A. constitutes an Interlocutory Appeal of the Hearing Officer's April 28, 2014 Order.

of *Delaware et al.*, PCB 76-107, 1978 WL 9011 at \*5 (Oct. 4, 1978) (“[w]hile it is proper for Mr. Cutler [a proposed expert witness] to describe the conduct of Respondent pursuant to specified rules and regulations, legal conclusions and determinations of fact are matters which rest with this Board”); *People v. Panhandle Eastern Pipe Line Co.*, PCB 99-191, 2001 WL 1286284 at \*2 (Oct. 18, 2001) (citing *Coyne v. Robert H. Anderson & Assocs., Inc.*, 215 Ill. App. 3d 104, 112 (2d Dist. 1991) (“an expert witness cannot testify regarding legal conclusions”)).

Having overruled Illinois EPA’s objection, Mr. Steinert was permitted to state that in his opinion, KCBX’s July 23, 2013 construction permit application provided the Illinois EPA with a sufficient basis to determine whether the new equipment would comply with 35 Ill. Adm. Code 212.321. (April 29 Tr. at p. 170, line 12 – p. 175, line 12.) Mr. Steinert assisted in the preparation of the construction permit application (*id.* at p. 182, lines 18-20), and as such, opined that he did his own work correctly. In addition, Mr. Steinert testified that he only had experience drafting approximately 40 air permit applications; he had no experience as a permit analyst or permit section manager for the Illinois EPA or as a Board member in deciding whether a permit application contained sufficient information. (*Id.* at p. 183, line 22 – p. 184, line 19; p. 186, line 7 – p. 187, line 3; p. 240, lines 16-22; p. 242, line 12 – p. 243, line 10.) Mr. Steinert’s biased opinion testimony, which also constitutes an impermissible legal conclusion that the Board must determine in this Permit Appeal, does not “assist the trier of fact in understanding the evidence.” *Petroff*, 291 Ill. App. 3d at 801.

Similarly, over objection, Mr. Kolaz opined that KCBX’s July 23, 2013 construction permit application provided the Illinois EPA with sufficient information to determine that the new equipment would comply with 35 Ill. Adm. Code 201.152, 201.160(a), 212.301 and 212.321. (April 29 Tr. at p. 250, lines 8-19; p. 255, line 2 – p. 256, line 1 (citing Petitioner’s

Exhibit 1 (Petitioner's Witness Disclosure).) "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*, 2001 WL 1598272 at \*2. Accordingly, because his opinions in the Petitioner's Witness Disclosure constitute the legal conclusion that the Board ultimately must determine, Mr. Kolaz's opinion testimony, like Mr. Steinert's, should not have been permitted.

**B. Testimony And The Introduction Of Exhibits Regarding the December 5, 2013 Settlement Meeting Was Improper.**<sup>12</sup>

At 4:15 pm on April 28, 2014, the day before the commencement of the hearing in this Permit Appeal, KCBX served its Second Motion to Supplement the Record with, among other things, "a December 5, 2013 Meeting Sign-in Sheet" (Exhibit H) and "Slides Presented to Illinois EPA on December 5, 2013." (Exhibit I). As the justification for including these exhibits in the Administrative Record, KCBX simply stated:

Justification: This sign-in sheet is for a meeting during the permit review period when Illinois EPA learned of the fully operational status and facility-wide capability of the dust suppression system at the KCBX South Terminal. . . . These slides were presented to Illinois EPA on December 5, 2013.

(Petitioner's Second Motion to Supplement the Record at p. 8.) KCBX failed to advise the Board that the December 5, 2013 meeting was a confidential settlement meeting regarding the case, *People v. KCBX Terminals Company*, 13CH24788, pending in the Circuit Court of Cook County. (See April 29 Tr. (M. Estadt testimony) at p. 127, lines 13-17 ("Q. Can we agree at the

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<sup>12</sup> The Illinois EPA objected throughout the hearing to KCBX's questioning regarding the December 5, 2013 meeting and exhibits relating thereto. (See, e.g., April 29 Tr. at p. 9, line 4 – p. 12, line 3; p. 40, line 2 – p. 42, line 1; p. 110, line 5 – p. 111, line 16; p. 112, line 20 – p. 113, line 9; May 1 Tr. at p. 72, line 8 – p. 74, line 18; p. 228, line 7 – p. 229, line 9.) In addition, the Illinois EPA has contemporaneously filed a Motion for Reconsideration of the Board's May 1, 2014 Order as to Exhibits H and I, which is incorporated herein by reference.

beginning of the December 5th, 2013, settlement meeting it was discussed that that was, in fact, a meeting for settlement purposes. A. I think I can agree to that, yes.”) KCBX also failed to notify the Board that each of the presentation slides was stamped “KCBX Terminals Company – Confidential Business Information – Confidential Settlement Communication.” (R2055-R2092.) Further, Mr. Bernoteit had to return the presentation slides at the end of the settlement meeting, and KCBX did not thereafter submit the information that KCBX presented at the meeting to the Illinois EPA’s Permit Section in support of KCBX’s construction permit application. (May 1 Tr. at p. 82, lines 4-16; p. 78, line 12 – p. 79, line 3.)

KCBX has repeatedly argued that the Illinois EPA is required to keep enforcement actions separate from permitting transactions. (*Id.* at p. 211, lines 13-23; *see also* Petitioner’s Post-Hearing Brief at pp. 3, 24-25.) As Ms. Armitage testified, the Illinois EPA did so. (May 1 Tr. at p. 233, line 20 – p. 235, line 16.) KCBX knew how to submit documentation to the Illinois EPA’s Permit Section relating to its construction permit application. (*See* R186, R177, R73, R18, R11.) Instead of submitting a supplement to its permit application with non-confidential information from the December 5, 2013 settlement meeting, KCBX advised the Illinois EPA for the first time the day before the hearing, that it should have considered the December 5, 2013 settlement meeting information. The Board may only consider information that KCBX presented to the Illinois EPA between July 23, 2013 through January 17, 2014, in support of its construction permit application. *Community Landfill*, 2001 WL 1598272 at \*3. Therefore, all hearing testimony relating to the December 5, 2013 meeting, the meeting sign-in sheet and the presentation slides may not be considered in this Permit Appeal.

**C. References to Petition Exhibit 27 are Improper.**

In Petitioner’s Post-Hearing Brief at p. 8, Petitioner cites “Petition Exhibit 27.” Despite

filing two motions to supplement the record on April 7, 2014 and April 28, 2014, Petitioner failed to move to supplement the record with Exhibit 27 to the Petition for Review filed on February 21, 2014. Because Petition Exhibit 27 is not part of the Administrative Record, references to Petition Exhibit 27 may not be considered.

### CONCLUSION

KCBX submitted to the Illinois EPA's Permit Section its July 23, 2013 construction permit application, several extension letters of the statutory review period and its January 13, 2014 response to the Wells Letter. (R186, R177, R73, R18 and R11.) In the pending enforcement action, KCBX submitted to the Illinois Attorney General's Office its November 1, 2013 Operating Program for Fugitive Particulate Control, which the Illinois EPA considered in its review of the construction permit application, an October 3, 2013 email (R1196), and a November 15, 2013 letter, which did not impact the decision to grant or deny the application. (May 1 Tr. (J. Armitage testimony) at p. 191, line 3 – p. 192, line 23.) KCBX admits that the July 23, 2013 construction permit application, which relies upon DTE's September 2012 Application, does not include specific information regarding the ten additional conveyors, additional box hopper or additional stacker that KCBX was seeking to install at the South Site. (April 29 Tr. (T. Steinert testimony) at p. 206, line 19 – p. 209, line 22; p. 217, line 17 – p. 218, line 18.) In addition, KCBX's November 1, 2013 Operating Program for Fugitive Particulate Control failed to provide sufficient information regarding emission controls for the existing and new conveyors, stackers and box hoppers. (May 1 Tr. (J. Armitage testimony) at p. 194, line 10 – p. 200, line 17 and p. 202, lines 1-10 (citing R156 (paragraphs C.2 and 3) and R155, fn.6).) Further, KCBX's January 13, 2014 letter did not address any concerns set forth in the Wells Letter, and KCBX chose not to attach any emission control logs or other dust control data for

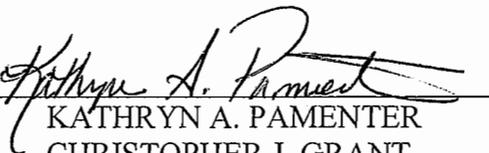
conveyors, box hoppers or stackers at the South Site that would also serve as the controls for the new equipment KCBX was seeking to install there. (R11-R16; May 1 Tr. (J. Armitage testimony) at p. 209, lines 6-24.)

Recognizing that its construction permit application, the November 1, 2013 Operating Program for Fugitive Particulate Control and its January 13, 2014 response letter may not be sufficient, at the “11th hour,” KCBX sought to include in the Administrative Record, presentation slides relating to a confidential, settlement meeting for a separate enforcement case. (Petitioner’s Second Motion to Supplement the Record served on the Illinois EPA at 4:15 pm on April 28, 2014.) In addition, over objection, KCBX sought to elicit testimony at the hearing relating to the December 5, 2013 settlement meeting. However, KCBX’s attempt to supplement the record with information that the Illinois EPA was not permitted to rely upon before January 17, 2014 was simply too late. *Community Landfill*, 2001 WL 1598272 at \*3. As Ms. Armitage explained, “what is interesting to me is if this is something the facility had wanted us to consider, it needed – it is not on us to put things into your application for permit. It is on the facility to put things into the application for permit. . . .” (May 1 Tr. at p. 235, lines 17 – 22.)

Through its construction permit application, KCBX was seeking to install twelve new emission units at the South Site to achieve the material handling and throughput rates envisioned for the site that, as of July 23, 2013, KCBX was not meeting. (R187; April 29 Tr. (M. Estadt testimony) at p. 66, line 20 – p. 67, line 9; p. 132, lines 1-19.) KCBX had the burden to show through its construction permit application and the January 13, 2014 response to the Wells Letter that granting the application would not violate the Act or the Board regulations. Having failed to satisfy its burden, the Illinois EPA issued the January 17, 2014 Permit Denial.

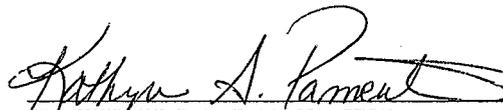
In this Permit Appeal, KCBX had the burden to demonstrate that it submitted sufficient information to the Illinois EPA between July 23, 2013 and January 17, 2014, that Sections 9, 39(c) and 39.2 of the Act and 35 Ill. Adm. Code 201.152, 201.160(a), 212.301 and 212.321 would not be violated if the application was granted. *See, e.g., Alton Packaging*, 162 Ill. App. 3d at 737. KCBX failed to satisfy its burden. Accordingly, the Illinois EPA's January 17, 2014 denial of KCBX's construction permit application must be affirmed.

ILLINOIS ENVIRONMENTAL PROTECTION  
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**CERTIFICATE OF SERVICE**

I, Kathryn A. Pamenter, an Assistant Attorney General, do certify that I caused to be served this 16th day of May, 2014, the attached Notice of Electronic Filing and Respondent Illinois Environmental Protection Agency's Post-Hearing Brief upon (a) Katherine D. Hodge, Edward W. Dwyer and Matthew C. Read, of Hodge Dwyer & Driver, *via facsimile* and *via regular mail* addressed as set forth on said Notice of Electronic Filing by placing a true and correct copy in an envelope addressed as set forth on said Notice of Electronic Filing, first class postage prepaid, and depositing same with the United States Postal Service at 100 West Randolph Street, Chicago, Illinois, at or before the hour of 5:00 pm, (b) Bradley P. Halloran and John Therriault *via email* and (c) Stephen A. Swedlow and Michelle Schmit, of Quinn Emanuel Urquhar Sullivan LLP, *via facsimile* and *via regular mail* addressed as set forth on said Notice of Electronic Filing by placing a true and correct copy in an envelope addressed as set forth on said Notice of Electronic Filing, first class postage prepaid, and depositing same with the United States Postal Service at 100 West Randolph Street, Chicago, Illinois, at or before the hour of 5:00 pm.

  
KATHRYN A. PAMENTER