

**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 7th day of April, 2014, the Respondent's Motion for Leave to File Reply to KCBX Terminals Company's Response to Motion to Strike was filed with the Illinois Pollution Control Board, a true and correct copy of which is attached hereto and is hereby served upon you.

PEOPLE OF THE STATE OF ILLINOIS,  
*ex rel.* LISA MADIGAN, Attorney General  
 of the State of Illinois

By:   
 Kathryn A. Pamentor  
 Christopher J. Grant  
 Assistant Attorneys General  
 Environmental Bureau  
 69 W. Washington St., 18<sup>th</sup> Floor  
 Chicago, IL 60602  
 (312) 814-0608  
 (312) 814-5388

DATE: April 7, 2014

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

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

**RESPONDENT’S MOTION FOR LEAVE TO FILE REPLY TO KCBX TERMINALS COMPANY’S RESPONSE TO MOTION TO STRIKE**

Respondent, Illinois Environmental Protection Agency, pursuant to 35 Ill. Adm. Code 101.500(e), hereby moves this Board for leave to file a reply to KCBX Terminals Company’s Response to Respondent’s Motion to Strike (A) Paragraph 51 and Exhibit 30, and (B) Paragraphs 56-57 of KCBX Terminal’s Company’s Petition for Review and for Related Relief. In support of its motion, Respondent states as follows:

1. On February 21, 2014, KCBX Terminals Company (“KCBX”) filed its Petition for Review of the Illinois Environmental Protection Agency’s (“Illinois EPA”) Permit Denial dated January 17, 2014 to the Request for Revision to Revised Construction Permit that KCBX submitted to Illinois EPA on July 23, 2013.

2. On March 24, 2014, Respondent timely filed the Administrative Record in the above-captioned Permit Appeal.

3. 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.

4. On March 28, 2014, Respondent filed its Motion to Strike (A) Paragraph 51 and Exhibit 30, and (B) Paragraphs 56-57 of KCBX Terminals Company's Petition for Review and for Related Relief ("Motion to Strike").

5. On April 4, 2014, KCBX filed its Response to Respondent's Motion to Strike (A) Paragraph 51 and Exhibit 30 and (B) Paragraphs 56-57 of KCBX Terminals Company's Petition for Review and for Related Relief (the "Response to Motion to Strike"). In its Response, KCBX does not contest Respondent's motion to strike Paragraph 51 and Exhibit 30 of KCBX's Petition for Review.

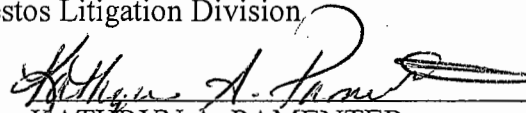
6. In the absence of an opportunity to file a reply to KCBX's Response to Motion to Strike, Respondent will be materially prejudiced as to Paragraphs 56-57 of KCBX's Petition for Review. Given the pending enforcement action against KCBX in the Circuit Court of Cook County, the issues to be considered in depositions and to be presented at the Permit Appeal hearing must be clear. A copy of the proposed reply is attached hereto as Exhibit A. By this Motion, Respondent seeks leave to file its reply with the Illinois Pollution Control Board to avoid material prejudice.

WHEREFORE, the Respondent, Illinois Environmental Protection Agency, respectfully requests that the Board grant it leave to file its Reply to Motion to Strike and such other relief as the Board deems proper.

PEOPLE OF THE STATE OF ILLINOIS,  
*ex rel.* LISA MADIGAN, Attorney  
General of the State of Illinois

MATTHEW J. DUNN, Chief  
Environmental Enforcement /  
Asbestos Litigation Division,

By:



KATHRYN A. PAMENTER  
CHRISTOPHER J. GRANT  
Assistant Attorneys General  
Environmental Bureau  
69 W. Washington, 18<sup>th</sup> Floor  
Chicago, Illinois 60602  
(312) 814-0608  
(312) 814-5388

**EXHIBIT A**

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 REPLY TO KCBX TERMINALS COMPANY'S RESPONSE TO MOTION TO STRIKE (A) PARAGRAPH 51 AND EXHIBIT 30, AND (B) PARAGRAPHS 56-57 OF KCBX TERMINALS COMPANY'S PETITION FOR REVIEW AND FOR RELATED RELIEF**

Respondent, Illinois Environmental Protection Agency, for its Reply to KCBX Terminals Company's ("KCBX") Response to Motion to Strike (A) Paragraph 51 and Exhibit 30, and (B) Paragraphs 56-57 of KCBX Terminals Company's Petition for Review and for Related Relief (the "Response"), hereby states as follows:

1. On January 17, 2014, Respondent issued the Permit Denial to KCBX in response to its July 23, 2013 construction permit application. (Administrative Record at R000001-R000003.) 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, Respondent 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”).

2. Based upon the standard articulated in *West Suburban Recycling*, Respondent filed its Motion to Strike Paragraphs 56 and 57 of KCBX’s Petition for Review, which provide as follows:

56. Allegations in the reports of September inspections regarding deficiencies in the fugitive particulate operating program (hereafter “FPOP”) at the South Facility do not provide a basis for the denial of the Request for Revision.
57. FPOP deficiencies in the inspection report are simply allegations of legal noncompliance, which Illinois EPA cannot consider when deciding whether to grant or deny the Request for Revision. Second Response to Pilapil at 5. Furthermore, the Board, not Illinois EPA, has the authority to determine the adequacy of FPOPs. Finding otherwise would be an unauthorized delegation of the Board’s authority to set emission or equipment standards. In addition, KCBX’s FPOP is not deficient.

That KCBX focused on statements in the September inspection reports regarding deficiencies in KCBX’s fugitive particulate matter operating program does not cause such statements to constitute a basis for Respondent’s denial of KCBX’s construction permit application. The Permit Denial letter governs. *West Suburban Recycling*, 1996 WL 633368 at \*12. Moreover, the issues raised in Paragraph 57 are presently being litigated in *People of the State of Illinois v. KCBX Terminals Company*, Case No. 2013CH24788, pending in the Circuit Court of Cook County.

3. KCBX contends that the issues raised in Paragraphs 56 and 57 should be considered because Respondent did not seek to strike Paragraph 58 of its Petition for Review and, similarly, KCBX’s November 1, 2013 fugitive particulate matter operating program is included in the Administrative Record. (Response at pp. 2-3.) In contrast to Paragraphs 56 and

57, Paragraph 58 of the Petition for Review set forth a factual statement which did not address the sufficiency of the November 1, 2013 operating program:

58. On November 1, 2013, KCBX provided an updated FPOP for the South Facility to Illinois EPA, which contained considerable enhancements and explained that the new cannon system at the South Facility was operational on a full manual and/or limited automated basis.

Similarly, Respondent included the November 1, 2013 operating program in the Administrative Record (R000150-R000163) due to the description contained therein of KCBX's water cannon system at the site. Respondent is prepared to enter into a Joint Stipulation striking the November 1, 2013 fugitive particulate matter operating program from the Administrative Record.

4. In addition, KCBX contends the sufficiency of its fugitive particulate matter operating program must be a basis for denial because (a) the September inspection report described deficiencies of the operating program and included a copy of the fugitive particulate matter operating program prepared by DTE Chicago Fuels Terminal, LLC ("DTE") (R000051-R000053 and R000059-R000061) and (b) the Administrative Record includes a copy of the Complaint pending in the Circuit Court of Cook County, Count II of which concerns alleged violations of 212.310 and 212.312 and to which a copy of the DTE operating program is attached (R000109-R000118). However, the Permit Denial letter controls. *West Suburban Recycling*, 1996 WL 633368 at \*12. Further, Respondent was required to include a complete copy of those documents in the Administrative Record. To ensure clarity on the issues before the Board, Respondent is prepared to enter into a Joint Stipulation prohibiting consideration of pages R000051-R000053 (Sections discussing 212.309, 212.310 and 212.312), R000059-R000061 and R000109-R000118.

5. The Permit Denial does not set forth Sections 212.309, 212.310 or 212.312 of the Board's fugitive particulate matter regulations, 35 Ill. Adm. Code 212.309, 212.310, 212.312.



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. As such, neither discovery, nor trial testimony should be permitted on those issues.

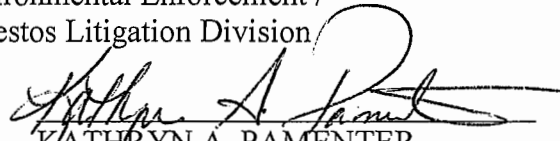
6. Through the filing of the Motion to Strike, Respondent sought to narrow the issues to be presented at trial based on established case law. KCBX's belief that the alleged deficiencies in its fugitive particulate matter operating programs constituted a basis for the Permit Denial is irrelevant. The factual statements in KCBX's 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 Permit Denial. To the extent KCBX foregoes entering into the proposed Joint Stipulation, discovery and trial testimony should only be permitted on the factual statements in KCBX's fugitive particulate matter operating programs regarding KCBX's dust suppression controls at the site.

WHEREFORE, based upon the foregoing, Respondent, Illinois Environmental Protection Agency, respectfully requests that the Board grant Respondent's Motion to Strike and such other relief as the Board deems proper.

PEOPLE OF THE STATE OF ILLINOIS,  
*ex rel.* LISA MADIGAN, Attorney  
General of the State of Illinois

MATTHEW J. DUNN, Chief  
Environmental Enforcement /  
Asbestos Litigation Division

By:



KATHRYN A. PAMENTER  
CHRISTOPHER J. GRANT  
Assistant Attorneys General  
Environmental Bureau  
69 W. Washington, 18<sup>th</sup> Floor  
Chicago, Illinois 60602  
(312) 814-0608  
(312) 814-5388

**CERTIFICATE OF SERVICE**

I, KATHRYN A. PAMENTER, an Assistant Attorney General, do certify that I caused to be served this 7th day of April, 2014, the attached Notice of Electronic Filing and Respondent's Motion for Leave to File Reply to KCBX Terminals Company's Response to Motion to Strike upon (a) Katherine D. Hodge, Edward W. Dwyer and Matthew C. Read *via facsimile*, and (b) Bradley P. Halloran *via email*.

  
KATHRYN A. PAMENTER