

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

KCBX TERMINALS COMPANY,)	
)	
Petitioner,)	
)	
v.)	PCB 14-110
)	(Air Permit Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

NOTICE OF FILING

TO: Mr. John Therriault	Mr. Bradley P. Halloran
Assistant Clerk of the Board	Hearing Officer
Illinois Pollution Control Board	Illinois Pollution Control Board
100 West Randolph Street	100 West Randolph Street
Suite 11-500	Suite 11-500
Chicago, Illinois 60601	Chicago, Illinois 60601
(VIA ELECTRONIC MAIL)	(VIA FIRST CLASS MAIL)

(SEE PERSONS ON ATTACHED SERVICE LIST)

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board **PETITIONER'S MOTION FOR LEAVE TO FILE REPLY TO RESPONDENT'S RESPONSE TO PETITIONER'S MOTION FOR RECONSIDERATION AND MODIFICATION** and **PETITIONER'S REPLY TO RESPONDENT'S RESPONSE TO PETITIONER'S MOTION FOR RECONSIDERATION AND MODIFICATION**, copies of which are herewith served upon you.

Respectfully submitted,

KCBX TERMINALS COMPANY,
Petitioner,

Dated: August 12, 2014

By: /s/ Katherine D. Hodge
Katherine D. Hodge

Katherine D. Hodge
Edward W. Dwyer
Matthew C. Read
HODGE DWYER & DRIVER
3150 Roland Avenue
Post Office Box 5776
Springfield, Illinois 62705-5776
(217) 523-4900

Stephen A. Swedlow, Esq.
Michelle Schmit, Esq.
Quinn Emanuel Urquhart Sullivan LLP
500 West Madison Street, Suite 2450
Chicago, Illinois 60661

CERTIFICATE OF SERVICE

I, Katherine D. Hodge, the undersigned, hereby certify that I have served the attached PETITIONER'S MOTION FOR LEAVE TO FILE REPLY TO RESPONDENT'S RESPONSE TO PETITIONER'S MOTION FOR RECONSIDERATION AND MODIFICATION and PETITIONER'S REPLY TO RESPONDENT'S RESPONSE TO PETITIONER'S MOTION FOR RECONSIDERATION AND MODIFICATION upon:

Mr. John Therriault
Assistant Clerk of the Board
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601

via electronic mail on August 12, 2014 and upon:

Mr. Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601

Division of Legal Counsel
Illinois Environmental Protection
Agency
1021 North Grand Avenue
Post Office Box 19276
Springfield, Illinois 62794-9276

by depositing said documents in the United States Mail, postage prepaid, in Springfield, Illinois on August 12, 2014 and upon:

Kathryn A. Pamenter, Esq.
Christopher J. Grant, Esq.
Robert R. Petti, Esq.
Assistant Attorney General
Office of the Attorney General
69 West Washington Street, Suite 1800
Chicago, Illinois 60602

via facsimile and by depositing said document in the United States Mail, postage prepaid, in Springfield, Illinois on August 12, 2014.

/s/ Katherine D. Hodge
Katherine D. Hodge

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

KCBX TERMINALS COMPANY,)	
)	
Petitioner,)	
)	
v.)	PCB 14-110
)	(Air Permit Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

**PETITIONER'S MOTION FOR LEAVE TO FILE
REPLY TO RESPONDENT'S RESPONSE TO PETITIONER'S
MOTION FOR RECONSIDERATION AND MODIFICATION**

NOW COMES Petitioner, KCBX TERMINALS COMPANY ("KCBX"), a North Dakota corporation, by and through its attorneys, HODGE DWYER & DRIVER and QUINN EMANUEL URQUHART SULLIVAN LLP, and pursuant to 35 Ill. Admin. Code § 101.500(e), hereby files the following Motion for Leave to File Reply to Respondent's Response to Petitioner's Motion for Reconsideration and Modification ("Reply"). In support thereof, Petitioner states as follows:

1. Section 101.500(e) of the Illinois Pollution Control Board's ("Board's") procedural rules, provides that a person may reply "as permitted by the Board or the hearing officer to prevent material prejudice." 35 Ill. Admin. Code § 101.500(e).
2. On July 28, 2014, KCBX filed Petitioner's Motion for Reconsideration and Modification of the Board's June 19, 2014, Opinion and Order ("Order").
3. On August 6, 2014, Respondent, the Illinois Environmental Protection Agency ("Illinois EPA") filed its Response to Petitioner's Motion for Reconsideration and Modification. In its Response, Illinois EPA comments on its review of the Administrative Record for the first time since the Board's Order, mischaracterizes an

argument presented by KCBX, and argues that KCBX's Motion for Reconsideration and Modification does not meet requirements in the Board's procedural rules.

4. KCBX would be materially prejudiced if it is not permitted by the Board to reply to Illinois EPA's comments on its review of the Administrative Record, Illinois EPA's mischaracterization of KCBX's argument, and Illinois EPA's argument regarding the Board's procedural rules (Reply attached hereto).

WHEREFORE Petitioner, KCBX TERMINALS COMPANY, for the above stated reasons, respectfully prays that the Illinois Pollution Control Board enter an Order granting this Motion for Leave to File Reply to Respondent's Response to Petitioner's Motion for Reconsideration and Modification and that the Illinois Pollution Control Board award KCBX TERMINALS COMPANY all other relief just and proper in the premises.

Respectfully submitted,

KCBX TERMINALS COMPANY,
Petitioner,

Dated: August 12, 2014

By: /s/ Katherine D. Hodge
One of Its Attorneys

Katherine D. Hodge
Edward W. Dwyer
Matthew C. Read
HODGE DWYER & DRIVER
3150 Roland Avenue
Post Office Box 5776
Springfield, Illinois 62705-5776
(217) 523-4900

Stephen A. Swedlow, Esq.
Michelle Schmit, Esq.
Quinn Emanuel Urquhart Sullivan LLP
500 West Madison Street,
Suite 2450
Chicago, Illinois 60661
(312) 705-7400

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

KCBX TERMINALS COMPANY,)	
)	
Petitioner,)	
)	
v.)	PCB 14-110
)	(Air Permit Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

**PETITIONER'S REPLY TO RESPONDENT'S RESPONSE TO
PETITIONER'S MOTION FOR RECONSIDERATION AND MODIFICATION**

NOW COMES Petitioner, KCBX TERMINALS COMPANY ("KCBX"), a North Dakota corporation, by and through its attorneys, HODGE DWYER & DRIVER, and pursuant to 35 Ill. Admin. Code § 101.500, hereby files the following Reply to Respondent's Response to Petitioner's Motion for Reconsideration and Modification ("Response"). In support thereof, Petitioner states as follows:

1. On August 6, 2014, Respondent, the Illinois Environmental Protection Agency ("Illinois EPA") filed its Response. In its Response, Illinois EPA comments on its review of the Administrative Record for the first time since the Board's June 19, 2014, Opinion and Order ("Order"), addresses arguments presented by KCBX in its Motion for Reconsideration and Modification, and argues that KCBX's Motion for Reconsideration and Modification does not meet requirements set forth in the Board's procedural rules. Illinois EPA also now acknowledges that the Board's Order is final. Response at FN 2.
2. First, Illinois EPA does not have unlimited time for its additional consideration of KCBX's construction permit application. Illinois EPA claims that it is

complying with the Board's directive of "giving additional consideration" to information in KCBX's construction permit application, consistent with the Board's Order and the requirements of the Illinois Environmental Protection Act ("Act") and applicable regulations. Response at 1-2. Since the Board's decision, Illinois EPA apparently felt it necessary to review the entire Administrative Record again. Response, Exhibit A, Affidavit of Robert W. Bernoteit at ¶3. Further, Illinois EPA claims that it has not completed its review of the application. Response at 4.

3. But Illinois EPA has had ample time to review both KCBX's construction permit and other documents in the Administrative Record. KCBX filed its construction permit application over one year ago. The Administrative Record closed when Illinois EPA issued its Permit Denial on January 17, 2014. The documents in the Administrative Record, including the construction permit application, were in the possession of Illinois EPA well before the Administrative Record closed. *See e.g.* R-186. In addition, the Board's findings in its Order are relatively straightforward: Illinois EPA's reasons for denying KCBX's revised permit are insufficient. Order at 57. Illinois EPA is well aware of the contents of the Administrative Record, and the Board's findings are clear. Therefore, Illinois EPA must finish its additional consideration of information in the application immediately.

4. Illinois EPA's actions suggest that the Board's Order allows unlimited time to mull over the Administrative Record. KCBX disagrees with such a reading and points to Illinois EPA's vague characterization of its activities as further support for the Board to issue a specific directive requiring Illinois EPA to act immediately. The Act

gave Illinois EPA 90 days to consider KCBX's permit application, a period that was extended by KCBX on three occasions. 415 ILCS 5/39(a)(iv); R-19, R-175, R-177.

Illinois EPA's time is up.

5. Second, Illinois EPA claims that KCBX asserted in its Motion for Reconsideration that because Illinois EPA did not appeal the Board's Order, the Board is "required to direct the Illinois EPA to immediately issue a construction permit."

Response at 1. This claim mischaracterizes KCBX's argument. KCBX argued that the Board's findings and directive for additional consideration of information in the application leave Illinois EPA no other options but to issue the revised construction permit. Motion for Reconsideration and Modification at 5-8. KCBX commented simply that Illinois EPA did not appeal the Order. Motion for Reconsideration and Modification at 2.

6. Finally, Illinois EPA argues that KCBX's Motion for Reconsideration and Modification should be denied because KCBX did not set forth any new evidence, change in law, or errors in the Board's application of existing law in when issuing its Order. Response at 2. However, KCBX outlined why the Board's findings support a different directive, specifically, that the Board require Illinois EPA to complete its additional consideration of information in the application and issue a revised construction permit immediately. Based on Illinois EPA's Response describing actions taken on the construction permit application to date, it is clear that Illinois EPA must be given a deadline for acting.

WHEREFORE Petitioner, KCBX TERMINALS COMPANY, for the above stated reasons, respectfully prays that the Illinois Pollution Control Board reconsider its June 19, 2014 order, and modify it to direct Illinois EPA to issue immediately the revised construction permit requested in KCBX's Request for Revision.

Respectfully submitted,

KCBX TERMINALS COMPANY,
Petitioner,

Dated: August 12, 2014

By: /s/ Katherine D. Hodge
One of Its Attorneys

Katherine D. Hodge
Edward W. Dwyer
Matthew C. Read
HODGE DWYER & DRIVER
3150 Roland Avenue
Post Office Box 5776
Springfield, Illinois 62705-5776
(217) 523-4900