

ILLINOIS POLLUTION CONTROL BOARD
June 19, 2014

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

KATHERINE D. HODGE, MATTHEW C. READ, and EDWARD W. DWYER of HODGE DWYER & DRIVER and STEPHEN A. SWEDLOW and MICHELLE SCHMIT of QUINN EMANUEL URQUHART & SULLIVAN, LLP APPEARED ON BEHALF OF PETITIONER; and
KATHRYN A. PAMENTER, CHRISTOPHER J. GRANT, and ROBERT W. PETTI OF THE OFFICE OF THE ATTORNEY GENERAL APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD¹ (by J. D. O’Leary):

On February 21, 2014, KCBX Terminals Company (KCBX) filed a petition asking the Board to review a January 17, 2014 determination of the Illinois Environmental Protection Agency (Agency or Illinois EPA). *See* 415 ILCS 5/40(a)(1) (2012); 35 Ill. Adm. Code 101.300(b), 105.206. The determination concerns KCBX’s bulk material terminal at 10730 South Burley Avenue in Chicago, Cook County (South Facility or South Terminal). The Agency denied KCBX’s “Request for Revision to Revised Construction Permit for its South Facility.” KCBX appealed the Agency’s determination on various grounds.

For the reasons stated below, the Board today finds that KCBX has demonstrated that the Agency’s reasons for denial are insufficient, and that the submitted permit application does not demonstrate violation of the provisions of the Act and rules cited by the Agency in its denial letter. The Agency’s January 17, 2014 determination to deny the permit is therefore reversed, and the Board remands this case to the Agency for additional consideration of the application consistent with this order and with the requirements of the Act and applicable regulations.

This opinion and order begins with the procedural history and then addresses two preliminary matters before providing the factual background of the case. The Board then summarizes KCBX’s petition for review. Next, the Board summarizes a public comment filed by the Southeast Environmental Task Force and the response to it filed by KCBX. The Board then reviews the post-hearing briefs filed by KCBX and the Agency. The Board then provides

¹ Chad Kruse, who worked for the Illinois Environmental Protection Agency prior to joining the Board as an attorney assistant on March 19, 2013, took no part in the Board’s drafting or deliberation of any order or issue in this matter.

legal and statutory background before discussing the issues presented, reaching its conclusion, and issuing its order.

PROCEDURAL HISTORY

On February 21, 2014, KCBX filed a petition for review (Pet.) of a permit denial issued to it by the Agency on January 17, 2014. Accompanying the petition were 33 exhibits (Exh. 1-33). On February 25, 2012, KCBX filed a motion to supplement the petition for review. On March 6, 2014, the Board issued an order accepting the petition for hearing but reserving ruling on the motion to supplement the petition. On March 20, 2014, the Board issued an order granting the unopposed motion to supplement the record.

On March 24, 2014, the Agency filed the administrative record (R.).

On March 25, 2014, the hearing officer issued an order scheduling hearing to begin on April 29, 2014, in Chicago.

On March 26, 2015, the Agency filed notice that it withdrew for all purposes the entire fifth reason of its January 17, 2014 denial. On April 3, 2014, the Board issued an order that did not consider the notice of withdrawal and directed the parties to hearing on the Agency's January 17, 2014 determination according to the schedule set by the hearing officer.

On March 28, 2014, the Agency filed a motion to strike from KCBX's petition for review paragraph 51 and Exhibit 30 and paragraphs 56 and 57. KCBX responded to the motion on April 4, 2014. On April 7, 2014, the Agency filed a motion for leave to file a reply accompanied by its reply.

Also on March 28, 2014, KCBX filed notices of discovery depositions served on Mr. Joseph Kotas, Mr. Robert Bernoteit, Mr. Michael Dragovich, and Mr. Raymond Pilapil. Attached to each of these four notices was a deposition rider seeking production of certain documents. On April 2, 2014, the Agency filed a motion for a protective order to deny discovery of documents requested in the deposition riders. KCBX filed its response opposing a protective order on April 4, 2014. On April 8, 2014, the hearing officer issued an order denying the Agency's motion for a protective order.

On April 7, 2014, KCBX filed a motion to supplement the administrative record with specified documents. On April 9, 2014, KCBX filed a motion for leave to file an amendment to its motion to supplement. On April 14, 2014, the Agency responded to the motion to supplement. On April 15, 2014, the Agency responded to the motion for leave to file an amendment to the motion to supplement. Also on April 15, 2014, KCBX filed a motion for leave to file a reply accompanied by its reply.

On April 8, 2014, KCBX filed a motion for a protective order regarding the Agency's witness disclosure. On April 14, 2014, the Agency filed its objection. On April 15, 2014, KCBX filed a motion for leave to reply to the Agency's objection accompanied by its reply. On April 17, 2014, the Agency filed a motion to amend its witness disclosure. On April 22, 2014,

KCBX filed notice that it withdrew its motion for a protective order regarding the Agency's witness disclosure.

On April 14, 2014, the Agency filed an interlocutory appeal from the hearing officer of the April 8, 2014 order denying the motion for a protective order. On April 15, 2014, KCBX filed a response in opposition to the Agency's interlocutory appeal.

On April 17, 2014, the Board adopted an order addressing three pending issues. First, the Board affirmed the hearing officer's April 8, 2014 order. Second, the Board granted the Agency's motion for leave to file a reply in support of its motion to strike, granted the Agency's uncontested motion to strike paragraph 51 and Exhibit 30 of the petition for review, and denied the Agency's motion to strike paragraphs 56 and 57 of the petition. Third, the Board granted KCBX's motion for leave to amend its motion to supplement and also granted its motion for leave to file a reply. The Board partially granted and partially denied KCBX's motion to supplement the record.

On April 21, 2014, the Agency filed a supplement to the administrative record (R000538-843). On April 23, 2014, the Agency filed a second supplement to the administrative record (R000844-1427). On April 24, 2014, the Agency filed a third supplement to the administrative record (R001428-31). On April 25, 2014, the Agency filed a fourth supplement to the administrative record (R001432-1624). On May 2, 2014, the Agency filed a fifth supplement to the administrative record (R001625-2106). On May 8, 2014, the Agency filed a sixth supplement to the administrative record (R0002107-09).

On April 21, 2014, the Agency filed a motion to reconsider the Board order adopted April 17, 2014. On April 23, 2014, KCBX responded to the motion.

On April 28, 2014, KCBX filed a second motion to supplement the record with documents attached to the motion as Exhibits A-I.

The hearing in this matter began as scheduled on Tuesday, April 29, 2014, and continued day-to-day until concluding on Friday, May 2, 2014. On May 2, 2014, the Board received the transcript of proceedings on April 29, 2014 (Tr. 4/29); April 30, 2014 (Tr. 4/30); and May 1, 2014 (Tr. 5/1). On May 5, 2014, the Board received the transcript of proceedings on May 2, 2014 (Tr. 5/2).

On May 1, 2014, the Board adopted an order denying the Agency's motion to reconsider the Board's April 17, 2014 order and granting KCBX's second motion to supplement the record.

On May 6, 2014, the Board received a public comment filed by the Southeast Environmental Task Force (SETF) (PC 1). On May 16, 2014, KCBX filed a response to the public comment filed by SETF (PC 1 Resp.).

On May 9, 2014, KCBX filed its post-hearing brief (Pet. Brief). On May 16, 2014, the Agency filed its post-hearing brief (Agency Brief).

On May 16, 2014, the Agency filed a motion for reconsideration of the Board's May 1, 2014 order (Mot. Recon.). On May 21, 2014, KCBX filed its response to the Agency's motion (Resp. Recon.).

Also on May 16, 2014, KCBX filed a motion to revise the hearing officer's schedule to complete the record. The Agency responded to the motion on May 19, 2014. In an order dated May 20, 2014, the hearing officer denied the motion.

On May 20, 2014, KCBX filed a motion for leave to file a post-hearing reply brief (Mot. Leave), accompanied by its reply. On May 21, 2014, the Agency responded to KCBX's motion for leave (Resp. Leave).

PRELIMINARY MATTERS

Motion to Reconsider Board Order of May 1, 2014

Summary of May 1, 2014 Order

On April 28, 2014, KCBX filed its second motion to supplement the record. Addressing the motion in its May 1, 2014 order, the Board first cited Section 101.500(d), its procedural rule governing responses to motions:

Within 14 days after service of a motion, a party may file a response to the motion. . . . Unless undue delay or material prejudice would result, neither the Board nor the hearing officer will grant any motion before expiration of the 14 day response period except in deadline driven proceedings where no waiver has been filed.

KCBX Terminals Co. v. IEPA, PCB 14-110, slip op. at 6 (May 1, 2014), citing 35 Ill. Adm. Code 101.500(d). The Board noted that KCBX had not filed an extension or waiver of the statutory decision deadline. KCBX Terminals Co. v. IEPA, PCB 14-110, slip op. at 6 (May 1, 2014). While the 14-day response period had not run on May 1, 2014, the Board proceeded to decide KCBX's motion. *Id.* The Board individually reviewed the eight documents with which KCBX moved to supplement the record. *Id.* at 6-10. The Board found that each of the documents were before the Agency during its review of KCBX's application, and that the Agency either relied upon or should have relied upon each of them. The Board granted KCBX's motion to supplement the record with each of the documents.

Agency Motion to Reconsider

On May 16, 2014, the Agency filed a motion for reconsideration of the Board's May 1, 2014 Order granting KCBX's motion to supplement the record. Mot. Recon. at 1. The Agency noted that a motion for reconsideration is meant to bring to the Board's attention newly-discovered evidence unavailable at the time of hearing, changes in the law, or errors in the Board's previous application of existing law. *Id.* at 2, citing Korogluyan v. Chicago Title &

Trust Co., 213 Ill. App. 3d 662, 627 (1st Dist. 1992); Citizens Against Regional Landfill v. Co. Bd. of Whiteside, PCB 93-156 (Mar. 11, 1993). The Agency argued that the Board's May 1, 2014 Order erred in its application of procedural rules governing responses to motions. Mot. Recon. at 2; *see* 35 Ill. Adm. Code 101.500(d).

The Agency argues that Section 101.500(d) precludes the Board from ruling on a motion before the expiration of the 14-day response period unless undue delay or material prejudice would result or the Board faces a decision deadline where no waiver of that deadline has been filed. *Id.* at 1. The Agency claimed that, in the absence of undue delay, material prejudice, or the response period's infringement of the decision deadline, the Board should have allowed it 14 days to respond to KCBX's motion. *Id.* at 1-2

The Agency acknowledged that KCBX has not waived the decision deadline in this case. Mot. Recon. at 3; *see* 35 Ill. Adm. Code 101.500(d). The Agency argued, however, that the decision deadline of June 23, 2014, did not require the Board to decide KCBX's motion before the 14-day response deadline had run. Mot. Recon. at 3. The Agency argued that the Board's application of Section 101.500(d) would allow it to "rule on any motion at any time without affording time for a responsive pleading in any case where there has not been a waiver of the decision deadline." *Id.* at 3-4. Such an interpretation, according to the Agency, "would obviate the need for this rule altogether." *Id.* at 4. The Agency argued that, if the 14-day response period extended past the decision deadline, this exception would apply, and the Board could waive the allotted response time by ruling on the motion. *Id.* at 3. The Agency claimed that, because the response time did not interfere with the decision deadline, the Board erred in denying it a chance to respond to KCBX's motion. *Id.* at 3-4.

The Agency requested that the Board reconsider its May 1, 2014 order and allow it to respond to KCBX's motion only as to Exhibits H and I, which are addressed in the Agency's post-hearing brief. Mot. Recon. at 4; *see* Agency Brief at 33-34.

KCBX Response

KCBX rejected the Agency's reading of Section 101.500, arguing that the Board properly applied an exception to rule on motions before the 14-day response period in deadline driven proceedings where no waiver has been filed. Resp. Recon. at 3. While KCBX acknowledges that the 14-day response period would not have extended past the decision deadline, it argued that it is not necessary to exceed that deadline to trigger the Section 101.500(d) exception. *Id.* at 4; *see* 35 Ill. Adm. Code 101.500(d). Rather, "Section 101.500(d) allows the Board to grant a motion prior to the 14-day period in '*deadline driven proceedings* where no waiver has been filed.'" Resp. Recon. at 4 (emphasis in original).

KCBX noted that it filed its motion on April 28, 2014, in the middle of a four-day hearing. Resp. Recon. at 4. KCBX argued that, if the Board chose to delay its decision until its next meeting on May 15, 2014, the hearing would have been over and post-trial briefing may have been delayed, leaving the Board less time for deliberation. *Id.* at 4-5. Furthermore, KCBX argued, the Agency was fully aware of the circumstances in this case, as it frequently urged the Board to consider the expedited schedule in this matter. *Id.* at 5. KCBX argued that it was

therefore logical and appropriate for the Board to rule on the motion at its May 1, 2014 meeting. *Id.* The Board acted within its legal discretion in a deadline driven proceeding with no waiver filed, and did not err in applying Section 101.500(d) to the SMTS. *Id.* at 6; 35 Ill. Adm. Code 101.500(d). On this basis, KCBX urged the Board to deny the Agency's motion for reconsideration. Resp. Recon. at 6.

Discussion

The Agency correctly notes that Section 101.500(d) provides a 14-day period to respond to a motion with limited exceptions including "a deadline in a proceeding where no waiver of the decision deadline has been filed." Mot. Recon. at 1. The Agency acknowledges both that the Board is subject to a June 23, 2014 deadline and that "there has been no waiver of the decision deadline in this matter." *Id.* at 2, 3. The plain language of Section 101.500(d) authorized the Board to decide KCBX's motion to supplement the record before the 14-day response period had run.

The Agency argues that Section 101.500(d) requires the Board to allow a 14-day response period unless that period would extend past the Board's decision deadline. Mot. Recon. at 3. This condition is not found in Section 101.500(d). The circumstances of this case illustrate the difficulty in applying the Agency's proposed exception. Had the Board been required to allow 14 days to respond to KCBX's motion, the Agency's response would have been due May 12, 2014, and the Board would first have been able to decide the motion at its regularly-scheduled meeting on May 15, 2014. *See id.* at 2-3. In that event, the Board would have been deciding whether to supplement the record nearly two weeks after the hearing had adjourned, six days after KCBX was due to file its post-hearing brief, and one day before the Agency was due to file its post-hearing brief.

The Board is not persuaded by the Agency's motion that it erred in applying Section 101.500(d) of its procedural rules to decide KCBX's motion to supplement the record at its regularly-scheduled May 1, 2014 meeting. The motion to reconsider is denied.

The Board notes that the Agency requested that the Board afford it an opportunity to file a response to KCBX's motion to supplement the record. Mot. Recon. at 4. The Agency included a response as Section 3(B) of its post-hearing brief filed May 16, 2014. *Id.*; *see* Agency Brief at 33-34. Having denied the Agency's motion to reconsider, the Board declines to consider Section 3(B) of the brief as a response to the motion.

Motion for Leave to File Reply

KCBX Motion

KCBX states that, on May 20, 2014, the hearing officer denied its motion to revise the briefing schedule by extending the deadline to close the record and allowing it to file a reply brief. Mot. Leave at 2. KCBX cited the hearing officer order, which stated that "KCBX does not allege that it would be materially prejudiced should I deny their motion." *Id.*, citing KCBX Terminals Co. v. IEPA, PCB 14-110, slip op. at 2 (May 20, 2014).

KCBX cites the Board's rules, which state that a party may reply to prevent material prejudice. Mot. Leave at 2, citing 35 Ill. Adm. Code 101.500(e). KCBX claims filing a reply brief is necessary to prevent material prejudice. Mot. Leave at 2. KCBX first claims the Agency mischaracterizes KCBX's legal argument by, for example, asserting that KCBX shifts the burden of proof to the Agency. Mot. Leave at 2-3. KCBX claims that it could not have foreseen that the Agency would mischaracterize KCBX's legal arguments. *Id.* at 3.

Second, KCBX argues that the Agency is presenting genuinely new arguments not raised in the denial letter. Mot. Leave. at 3. KCBX claims that the Agency now argues that KCBX failed to demonstrate compliance with Section 9 of the Act at hearing or in their post-hearing brief. *Id.* KCBX claims that it addressed the Agency's five reasons for denying KCBX's permit review request, and had no reason to address their compliance with Section 9 of the Act. *Id.* KCBX states that the Agency's response raises a new implicit reason based on Section 9 for denial. *Id.*, citing Agency Brief at 10. KCBX argues that if it is not allowed to address this argument, it will be denied the opportunity to respond to the issue before the Board and preserve the issue on appeal. *Id.*

Third, KCBX claims that the Agency's post-hearing response brief "mischaracterizes evidence submitted into the record as a basis for this permit denial." Mot. Leave at 3. Specifically, KCBX argues that the Agency "mischaracterizes its Wells Response letter as simply legal in nature and asserted that KCBX 'chose not to' address the Agency's concern regarding 35 Ill. Adm. Code 212.301." *Id.* at 3-4, citing Agency Brief at 14. KCBX argues that it could not have contemplated the need to address this argument. *Id.* at 4.

KCBX adds that it simultaneously submitted the post-hearing reply brief on May 20, 2014, allowing the Board thirty days to review the record prior to the June 19, 2014 deadline. Mot. Leave at 4.

Agency Response

The Agency first noted the hearing officer's order denying KCBX's motion to revise the schedule to complete the record. In that order, the hearing officer stated that "KCBX's statement that it just received the Agency's brief and has not had the opportunity to review it could not have come as a surprise to KCBX as it knew 53 days beforehand that the Agency's post-hearing brief and the record close date was on May 16, 2014. All parties were aware and in agreement that the briefing schedule did not allow for replies." Resp. Leave at 1, citing KCBX Terminals Co. v. IEPA, PCB 14-110, slip op. at 2 (May 20, 2014). The Agency argues that "KCBX agreed to a case management schedule that provided a May 16, 2014 Record closing date and, as a result, no time for filing a reply or surreply brief." Resp. Leave at 2.

The Agency first addresses KCBX's claim that the Agency's response brief introduced the argument regarding Section 9 of the Act for the first time. The Agency stated that it merely responded to Section F and footnote 2 of KCBX's post-hearing brief. Resp. Leave at 3, citing Pet. Brief at 9, n.2, 48-49. Second, addressing the burden of proof, the Agency argues it responded to KCBX's claim that the Agency must allege an actual violation of Section 212.301.

Resp. Leave at 3, citing Pet. Brief at 25, 28. Third, the Agency addresses KCBX's assertion that the Agency mischaracterizes KCBX's response to the Wells letter. Resp. Leave at 3. The Agency argues that its description of the response is accurate, as KCBX cannot argue that it attached any documentation, or that it set forth case citations and legal argument. *Id.* at 3-4. The Agency adds that KCBX offers no basis to justify Section II, the second through seventh arguments in Section IV, and Section V of its post-hearing reply brief, making KCBX's claim of material prejudice baseless. *Id.* at 4.

The Agency also argues that granting KCBX's motion for leave would unduly prejudice the Agency by not allowing the Agency time to file a surreply. Resp. Leave at 4. The Agency claims that granting the motion without allowing a surreply would preclude it from responding to the following: new arguments, statements without citation to the record, "selective quotations of the hearing transcripts", and citation to a discovery deposition that is not part of the administrative record and was not admitted into evidence at the hearing. *Id.*

The Agency concludes by asking the Board to deny KCBX's motion for leave, and to strike KCBX's post-hearing reply brief. Resp. Leave at 5. The Agency argues that granting the motion would render hearing officer orders and the Board's procedural rules "meaningless." *Id.*

Discussion

The Board notes that the parties agreed to a case management schedule during a status conference with the hearing officer. KCBX Terminals Co. v. IEPA, PCB 14-110, slip op. at 1 (Mar. 25, 2014). Among the deadlines in that schedule, KCBX's post-hearing brief was due to be filed on or before May 9, 2014, and the Agency's post-hearing brief was due to be filed on or before May 16, 2014. *Id.* The schedule did not include or set a deadline to file either a reply brief or surreply. *See id.* The hearing officer order specifically stated that the "[r]ecord closed on May 16, 2014." *Id.* The parties have followed this schedule and met these deadlines.

The Board also notes that KCBX on May 16, 2014 filed with the hearing officer a motion to revise the schedule to complete the record. KCBX Terminals Co. v. IEPA, PCB 14-110 (May 16, 2014), citing 35 Ill. Adm. Code 101.612(b) (Schedule to Complete Record). The hearing officer noted that KCBX had not alleged that denial of the motion would cause material prejudice and issued an order denying the motion. KCBX Terminals Co. v. IEPA, PCB 14-110, slip op. at 2 (May 20, 2014). The ruling on the motion stated in part that "[t]he Agency is correct in arguing that the case management schedule was agreed to and that I repeatedly sought and received affirmation of the agreed briefing schedule, including the record close date of May 16, 2014. . . . All parties were aware and in agreement that the briefing schedule did not allow for replies." *Id.*

Under the Board's procedural rules, KCBX does not have the right to file a reply, except as permitted by the Board to prevent material prejudice. *See* 35 Ill. Adm. Code 101.500(a). The record plainly shows that the parties have agreed to and followed a schedule including deadlines for discovery, hearing, and post-hearing briefing. The Board recognizes that KCBX's motion to the hearing officer did not rely upon Section 101.500(e) or raise the issue of material prejudice. *See* KCBX Terminals Co. v. IEPA, PCB 14-110 (May 16, 2014). However, the Board is not

persuaded that granting KCBX's motion, filed four days after the agreed-upon date to close the record, is necessary to avoid material prejudice. The Board notes the Agency's argument that granting the motion would prejudice it by denying it the opportunity to file a surreply. The motion for leave to file a reply is denied, and the Board declines to accept the brief submitted by KCBX on May 20, 2014, with its motion for leave.

FACTUAL BACKGROUND

North Terminal

On April 5, 2012, the Agency issued to KCBX Terminals Company a "Federally Enforceable State Operating Permit – NSPS Source – Renewal" under application No. 95050167 for operation of the bulk solid materials terminal at 3259 East 100th Street in Chicago. R. at 538-61; *see id.* at 1922-59; Tr. 4/30 at 15. The permit authorized operation of emission sources including a stacker, box hoppers, and ten portable conveyors pursuant to application No. 95050167. R. at 538; *see* Tr. 4/29 at 155-56; Tr. 4/30 at 15-16. KCBX submitted its permit application to the Agency on July 14, 2011. R. at 538, 1922; *see* Tr. 4/30 at 15. Permit application No. 95050167 includes an Attachment C entitled "Detailed Facility Equipment List, which provides a name and start-up date of the listed equipment. R. at 1935-36; *see* Tr. 4/29 at 157.

DTE Operation at South Facility

Before December 20, 2012, DTE Chicago Fuels Terminal, LLC (DTE) conducted a materials handling operation at the South Facility. *See* R. at 1711-37. On February 13, 2008, the Agency issued to DTE Joint Construction and Operating Permit No. 07050082. R. at 1631. On February 2, 2009, DTE submitted to the Agency an application for a joint construction and operating permit "to construct additional portable conveyors, stackers and a rail car unloading system." R. at 1626. Under "Process Emission Unit Data and Information," the application lists the manufacturer of the emission unit, the model number, and serial number, all if known, as "To Be Determined." R. at 1641. Table 13 of the application, entitled "Listing of Emission Units," identifies process equipment with a unit designation and, in some cases, a DTE designation. R. at 1697-98. The application also requested issuance of a Federally Enforceable State Operating Permit (FESOP). *Id.* On May 21, 2009, the Agency issued DTE a "Joint Construction and Operating Permit – NSPS Source" under Application No. 07050082. R. at 1711-37.

On September 17, 2012, DTE submitted to the Agency an application for a permit "to construct additional portable conveyors, stackers and storage piles diesel generators." R. at 563; *see* Tr. 4/29 at 143-44, 201-02. Under "Process Emission Unit Data and Information," the application lists the manufacturer of the emission unit, the model number, and serial number, all if known, as "To Be Determined." R. at 580. Table 13 of the application, entitled "Listing of Emission Units," identifies process equipment with a unit designation. R. at 220-21, 622-23. DTE also submitted information regarding its request for a FESOP. R. at 563. On December 18, 2012, the Agency issued DTE a "Construction Permit – NSPS and NESHAP Source – Revised" under Application No. 07050082. R. at 699-720; *see* Tr. 4/29 at 142-43.

KCBX Operation at South Facility

On December 20, 2012, KCBX acquired the South Facility from DTE. *See* Tr. 4/29 at 19. On that date, the Agency issued KCBX a revised construction permit under Application No. 07050082 reflecting the change in ownership. R. at 624-46.

Mr. Estadt testified that, upon acquiring the South Facility, KCBX operated under the Fugitive Dust Plan that was then in place at the site. Tr. 4/29 at 36-37; *see* R. at 116-17; Tr. 5/1 at 179-80. He further testified that the plan addressed potential fugitive dust from storage piles, traffic areas, and conveyor loading operations. Tr. 4/29 at 38; *see* R. at 116-17 (Fugitive Dust Plan). Under “Conveyor Loading Operation,” the plan provides in its entirety that

[a]ll conveyor loading operations to storage piles are controlled by telescoping chutes and the inherent moisture content of the cola product. The coal, when delivered, has an inherently high moisture content. The inherent high moisture content coupled with the water applied to the storage piles for fugitive dust suppression provides more than adequate fugitive dust suppression for the conveyor loading operations. R. at 116-17.

On March 11, 2013, KCBX submitted to the Agency a “Supplement to Pending Construction Permit Application” for Permit No. 07050082. R. at 1739-87. On April 18, 2013, the Agency issued KCBX a “Construction Permit – NSPS and NESHAP Source – Revised” for the South Facility under Application No. 07050082. R. at 130-49; *see* Tr. 4/29 at 144-45, 223-24; Tr. 4/30 at 8-12. The permit authorized construction of emission units including 10 portable conveyors designated as PC-3 through PC-12 and four stackers designated as SC-1 through SC-4. R. at 130; *see* Tr. 4/30 at 10-12. The permit included material throughput limits of 1,100,000 tons per month and 11,000,000 tons per year of coal and coke. R. at 140; *see* Tr. 4/29 at 157-59.

July 23, 2013 Application for Permit Revision

On July 23, 2013, KCBX filed an application for a revised construction permit. R. at 186-204. The application sought to revise Construction Permit No. 07050082. *Id.* at 191 (Form APC628). KCBX proposed to add as equipment at the South Facility ten portable conveyors, one box hopper, and one stacker, “all of which may be relocated from the North Facility.” *Id.* at 187, 195.

Mr. Kolaz testified that a conveyor “consists of a belt to which material is added at one point, and then conveyed and dropped at another.” Tr. 4/30 at 44-45. Mr. Estadt testified that conveyors are linked together in order to move materials at a facility. Tr. 4/29 at 33-34. Mr. Estadt distinguished portable conveyors from fixed conveyors. Tr. 4/29 at 33-34. Mr. Steinert testified that “[a] portable conveyor is a piece of equipment that is not self-propelled, but it can be moved around and it essentially by means of a belt moves bulk material from one location to another.” Tr. 4/29 at 142. Mr. Estadt testified that a box hopper works much like a conveyor to place material onto an outbound vessel. *Id.* at 34. He also testified that a stacker would be placed at the end of a line of conveyors and used to lift materials higher. *Id.*

Mr. Estadt testified that “[m]ore portable conveyance would allow us to set one line and have another line ready to go so that we’d have the opportunity to be more efficient on our transfers and it wouldn’t really increase how much we’re sending out.” Tr. 4/29 at 36; *see* Tr. 4/30 at 154-55. In the cover letter to its application, KCBX states that it “is *not* requesting any changes to the annual and monthly throughput limitations and/or the emission limitations in the Revised Construction Permit, and/or to the related testing, monitoring, recordkeeping and reporting requirements. Similarly, KCBX is *not* requesting any changes to any other applicable requirements in the Revised Construction Permit.” R. at 187 (emphases in original); *see* Tr. 4/29 at 159-60.

In the cover letter to its application, KCBX stated that it “renews its prior requests for a meeting and/or telephone conference with the appropriate representatives at Illinois EPA for the purpose of discussing the changes to the Conveyor Addition Project and the requested revisions to the Revised Construction Permit.” R. at 187.

Completeness Review Worksheet

On August 14, 2013, Agency permit analyst Mike Dragovich completed a Completeness Review Worksheet for Construction Permit Fees for Application No. 07050082 received on July 23, 2013. R. at 2107-09. The Completeness Review for Technical Information indicated “Application Complete.” *Id.* at 2107. The Completeness Review for Fees indicated “Correct.” *Id.* Under “Action To Be Taken,” the worksheet indicated “Continue with Technical Review.” *Id.*

Also on August 14, 2013, Mr. Dragovich completed Completeness Screening Questions for applicant “KCBX Terminal (DTE)” regarding application No. 07050082. R. at 2109. The analyst responded “Yes” to the ninth question, which asked whether the application proposed and clearly identified “the annual and short-term emissions limits *and* associated material throughput/usage limits and emission factors to be included in the new/revised permit.” R. at 2109 (emphasis in original). The analyst also responds “Yes” to the tenth question, which asked “[i]f the permit was due today, could you write an enforceable permit with the information provided in the application?” *Id.*

August 27, 2013 Meeting

On August 27, 2013, representatives of KCBX and the Agency met with one another. R. at 183 (Illinois Environmental Protection Agency Division of Legal Counsel Meeting Sign-In Sheet). Mr. Steinert, who attended it, testified that “the purpose of the meeting was to explain the purpose and the need for the application. . . . [i]t was also to get a chance for the Agency to ask us any questions. We asked them if they needed any additional information or had any questions on the application that was submitted.” Tr. 4/29 at 176. Mr. Bernoteit, who also attended the meeting, testified that Mr. Dragovich “was wanting more information concerning the equipment addressed in the application” and requested Mr. Steinert’s help. Tr. 5/1 at 29-30; *see* Tr. 4/29 at 176-77. Mr. Steinert testified that the Agency’s only request for information was “the equipment ID numbers for the 12 pieces of equipment that were going to be transferred, that

they wanted the ID numbers as we would like to see them represented in the construction permit.” Tr. 4/29 at 177.

Mr. Bernoteit testified that the meeting also addressed environmental justice outreach. Tr. 5/1 at 29; *see* Tr. 4/29 at 201.

September 3, 2013 E-Mail

On September 3, 2013, Mr. Steinert sent to Mr. Dragovich an e-mail stating that, “[a]s discussed in our meeting of Tuesday last week, following is a list of equipment and ID numbers for the portable conveyors and box hopper that KCBX intends to move from the North facility (3259 E. 100th Street) to the South facility (10730 South Burley Avenue). You may use these IDs in the construction permit.” R. at 182; *see* Tr. 4/29 at 177. The e-mail listed equipment operated under the Current South Construction Permit: Portable Conveyors (PC-3 through PC-12), Stacking Conveyors (SC-1 through SC-4), and Portable Hopper (PH-1). R. at 182. The e-mail also listed equipment to be added from North: Portable Conveyors (PC-13 through PC-22), Stacking Conveyor (SC-5), and Portable Hopper (PH-2). *Id.*

Mr. Steinert testified that he telephoned Mr. Dragovich approximately one week after sending his September 3, 2013 e-mail. Tr. 4/29 at 179. Mr. Steinert further testified that Mr. Dragovich acknowledged receiving the e-mail and indicated that he did not need additional information or have questions regarding the application. *Id.*

September 5, 2013 Permit Calculation Sheet

On September 5, 2013, Mr. Dragovich prepared a Permit Calculation Sheet regarding KCBX’s application to revise Permit No. 07050082. R. at 761. The sheet notes that “[t]he facility is a bulk material handling facility.” It also noted “emission units to be listed on the revised construction permit” and refers to units including PC-13 through PC-22, SC-5, and PH-2. *Id.* Based on throughput limits, the sheet also relied on emission factors to calculate emission limitations for material storage piles and transfer and conveying and loadout. *Id.* at 762. The sheet also states that the “source is located in an area with $\geq 30\%$ minority population and $\geq 20\%$ poverty.” *Id.*

Under “Conclusions and recommendations,” the calculation sheet states that “[i]t is recommended that this revised construction [permit] be granted. The permit allows operation until final action is taken on the FESOP. The source applied for a FESOP because the facility is major for NO_x and PM-10. The construction permit was revised to add ten conveyors, one stacking conveyor, and one portable hopper to the operation with no increase in permit emissions from the previous permit.” R. at 765-66; *see* Tr. 4/29 at 179-80.

September 5, 11 and 13, 2013 Inspections

Ms. Armitage testified that a wind event on August 30, 2013, generated reports from the Attorney General’s Office, local organizations, and local elected officials that possible violations had occurred at the South Facility. Tr. 5/1 at 118-19. In response to these reports, she directed

Agency field staff to conduct an inspection of the South Facility. *Id.* at 119. The Agency performed an inspection of the South Facility on September 5, 2013. *See* R. at 164-66.

The narrative report of the September 5, 2013 inspection states in part that KCBX operated a “smaller ‘dust suppression system’ consisting of six ‘Rain Guns’ and 1 water wagon. The existing guns are designed to spray the conveyors only and not the storage piles, The guns only partially reach the storage piles. The ten storage piles are watered only with the water wagon which is equipped with a spray nozzle.” R. at 165. The report also states that “the night before there was a downpour and all material was really wet. We saw no sign of dust blowing anywhere, but the potential for emissions during drier weather still persists.” *Id.*

Ms. Armitage further testified that counsel for KCBX reported high winds and possible compliance issues at the South Facility on September 12, 2013. Tr. 5/1 at 121-22; *see* R. at 1428. She further testified that, in response to this report, she directed that Agency staff perform an additional inspection of the South Facility. Tr. 5/1 at 122-23; R. at 1428. The Agency performed inspections of the South Facility on September 11, 2013, and September 13, 2013. R. at 40-70.

The narrative report of the September 11, 2013 inspection refers to emissions from truck traffic and truck engine operations. R. at 42, 43. It also stated that “[c]onveyors were observed but they were not in operation. No internal transfer of materials was being conducted.” *Id.* at 43. The report also described installation of a new fugitive particulate matter control system. *Id.* at 42. “The water cannons are large sprinklers mounted on 60-foot galvanized steel towers. Some with (sic) have a 175-foot water spray radius (served by four-inch water lines) and others will have a 250-foot water spray radius (serviced by six-inch water lines.) There will be two separate water pumping systems to provide redundant operation should one of the systems fail, according to Estadt.” *Id.*

The narrative report of the September 13, 2013 inspection again refers to emissions from truck traffic, truck loading, and truck operations. R. at 44-45. It also stated that “[n]o visible emissions were observed during fifteen minutes of observation under steady, brisk winds estimated at 15-20 mph. There did not appear to be much activity at the site.” *Id.* at 44. Regarding Conveyor Operations, the report cited a single authority, 35 Ill. Adm. Code 212.305, in finding the dust suppression system deficient. *Id.* at 46-47.

Draft Permit

On September 19, 2013, Mr. Dragovich circulated by e-mail among Agency staff a draft permit. R. at 650; *see* Tr. 4/30 at 199-200. The draft permit refers to emission sources including PC-13 through PC-22, SC-5, and PH-2. Mr. Dragovich testified that he understood these sources to be the equipment identified by KCBX to transfer from its North Facility to its South Facility. Tr. 4/29 at 200-01. Mr. Dragovich also testified that he recommended granting the permit application for the equipment listed in the draft permit. Tr. 4/30 at 200; *see* R. at 651-70.

On October 2, 2013, Mr. Dragovich circulated by e-mail among Agency staff a draft revised construction permit No. 07050082. R. at 671. His e-mail noted a 90-day review period

ending October 21, 2013. *Id.*; *see* 415 ILCS 5/39(a) (2012). The draft permit proposed to grant the application to construct specified equipment including PC-13 through PC-22, SC-5, and PH-2. R. at 672-91.

On October 10, 2013, Mr. Dragovich inquired by e-mail to Agency staff whether to send KCBX a copy of the draft permit. R. at 2093. His e-mail again noted a 90-day review period ending October 21, 2013. *Id.* In response, Mr. Dragovich received instruction to “hold off on sending a draft to the company for review.” *Id.* The response stated that the Attorney General’s Office “is pursuing enforcement against KCBX for fugitive PM emissions and permitting issues are involved.” *Id.*

By letter dated October 18, 2013, to Mr. Bernoteit, KCBX granted the Agency a waiver of the permit application review deadline to November 20, 2013. R. at 177, 178, citing 415 ILCS 5/39(a) (2012).

November 1, 2013 Fugitive Particulate Control Program

KCBX prepared an interim fugitive dust plan dated October 1, 2013, for the South Facility. R. at 1197-1208; *see* Tr. 5/1 at 179-80, 182-84; *see also* R. at 915, 1192-94, 1209-31, 2051-52.

By e-mail dated November 1, 2013, to persons including an Assistant Attorney General and an Agency attorney (R. at 647; *see* Tr. 4/29 at 38-39), KCBX submitted a revised Operating Program for Fugitive Particulate Control for the South Facility. R. at 150-63. The e-mail reported that “the new cannon system at KCBX, which now includes 42 cannons, is operational on a full manual and/or limited automated basis.” R. at 647; *see* Tr. 4/29 at 39. Mr. Estadt testified that the November 1, 2013 plan replaced the previous versions of KCBX’s program for the South Facility. Tr. 4/29 at 72-73. Regarding “Material Transfers,” Section C of the plan states in part that,

[a]t 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.”

As stated in [Section] 1.A, uncontrolled emissions from stockpiles should not exceed 50 tpy and therefore, dedicated waster spray systems and telescopic chutes for conveyor loading operations are not required by 35 IAC 212.305. However, 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. R. at 156.

Under “Program” at Section G, the plan states that, “[e]ach day, fugitive emission sources and current weather conditions are monitored and Best Management Practices (BMP) listed in

Sections A through F are implemented to control fugitive particulate emissions when conditions warrant.” *Id.* at 157.

Mr. Estadt testified that KCBX’s activity slows as the natural course of business when the river and lake are frozen. Tr. 4/29 at 55. He testified that its plan “states that we treat inactive stockpiles with surfactant and encrusting agents.” *Id.*; see R. at 153-54. He further testified that “we also have water trucks that we keep in heated garages.” Tr. 4/29 at 55.

In a letter dated November 15, 2013, to an Assistant Attorney General, KCBX reported on the status of the water cannon system at the South Facility. R. at 648. The letter reported that the “system is now installed and operation.” *Id.* The letter added that “[t]he new system consist of forty-two oscillating water cannons mounted on sixty-foot high poles that operate on a computer-controlled, pre-programmed schedule to apply up to 1,800 gallons of water per minute to the entire storage area at the site.” *Id.*

Mr. Estadt testified that, at a meeting on December 5, 2013, he presented an overview of the revised program to the Agency. Tr. 4/29 at 112-23; see R. at 2053-92.

People’s Circuit Court Complaint

On November 4, 2013, the Attorney General filed a complaint in the Cook County Circuit Court against KCBX as operator of the South Facility. R. at 103-14 (People ex rel. Madigan v. KCBX Terminals Co., No. 2013CH24788). The complaint alleged in Count I that, “[o]n August 30, 2013, a visible cloud of black dust from the petroleum coke and coal located at the [South Facility] Site and was observed off-site blowing into the surrounding residential neighborhood.” R. at 106 (¶12). The complaint further alleged that, “[o]n at least August 30, 2013, and such other dates better known to the Defendant, petroleum coke and coal dust discharged or emitted from the Site into the surrounding neighborhood threatened the human health of the local residents in the vicinity of the Site and unreasonably interfered with the enjoyment of life and/or property.” R. at 107 (¶21). The complaint alleged that KCBX had violated Section 9(a) of the Act at the South Facility “[b]y causing, threatening or allowing the discharge of petroleum coke and coal dust into the environment so as to cause air pollution.” R. at 108, citing 415 ILCS 5/9(a) (2012).

The complaint alleged in Count II that, “[b]etween December 20, 2012 and October 3, 2013, the fugitive particulate matter operating program for the Site was a three-page Fugitive Dust Plan submitted to the Illinois EPA by DTE Chicago Fuels Terminal, LLC, the former owner of the Site, and adopted by the Defendant.” R. at 111-12 (¶20). The complaint further alleged that that plan lacked specified elements and contained vague language. R. at 112 (¶21). The complaint further alleged that, “[b]etween December 20, 2012 and October 3, 2013, the Defendant did not amend the Site’s fugitive particulate matter operating program and did not submit an amended operating program to the Illinois EPA for review.” R. at 112 (¶22). The complaint alleged that KCBX failed to “maintain a complete fugitive particulate operating program, amend the operating program to reflect current operations at the Site and submit an amended operating program to Illinois EPA for review” in violation of Sections 212.310 and

212.312 of the Board's regulations and Section 9(a) of the Act. R. at 112 (¶23), citing 415 ILCS 5/9(a) (2012); 35 Ill. Adm. Code 212.310, 212.312.

Agency Environmental Justice Outreach Meeting (11/14/13)

Ms. Armitage testified that a permit application to the Agency triggers an assessment “whether the source filing the application is located in a potential EJ [environmental justice] area.” Tr. 5/1 at 115-16. She further testified that “KCBX is located in a potential area – EJ area.” *Id.* at 116. She also testified that the Agency develops a public outreach plan for each such facility. *Id.*

On November 14, 2013, the Agency conducted a meeting in Chicago regarding KCBX's July 2013 application to revise Permit No. 07050082 for the South Facility. R. at 125-26; *see* Tr. 5/1 at 161-62. The Factsheet for the meeting states that the application seeks “to move 12 portable conveyors to this location that are currently located at KCBX's 3259 E. 100th Street bulk materials terminal. . . . The application does not request an increase in the amount of material that may be moved on-site.” R. at 125. Ms. Armitage testified that persons attending the meeting voiced concern that the facility was causing violations of the Act and regulations that “would potentially only be exacerbated if additional units were allowed to be brought to the site.” Tr. 5/1 at 161-62.

Citizen Complaints

The Agency record includes a number of Citizen Pollution Complaint Forms, which include descriptions of problems believed to result from operation of the South Facility. Complaints referred to health issues. *See, e.g.*, R. at 388-89. Others referred either to damage caused by particles or cleaning necessitated by them. *See, e.g.*, R. at 505-06. The record also includes copies of electronic Citizen Pollution Complaints, which include descriptions of problems traced to the South Facility. *See, e.g.*, R. at 301-02, 336-37, 340-41. Ms. Armitage testified that these citizen complaint forms contributed to the Agency's determination to deny the permit application. Tr. 5/1 at 205-06.

Correspondence

In a letter to the Agency dated November 15, 2013, Representative Robin L. Kelly cited factors including legal actions, research regarding potential pet coke hazards, and constituents' opposition to request that the Agency “reconsider KCBX's application until all the potential negative health and environmental impacts can be fully assessed and understood.” R. at 172-73. In a letter to the Agency dated November 18, 2013, counsel for SETF claimed that the Agency should deny KCBX's permit application until it has a complete record of KCBX's compliance history. R. at 120. In a letter dated December 16, 2013, Senator Richard J. Durbin and Representative Kelly urged the Agency “to critically review KCBX's new air permit application to ensure that it complies with all Clean Air Act regulations – including the National Ambient Air Quality Standards – and protects the public from any negative health impacts.” R. at 29. Ms. Armitage testified that this correspondence contributed to the Agency's determination to deny the permit application. Tr. 5/1 at 207-08.

November 6 and 19, 2013 Inspections

On November 6, 2013, the Agency conducted a multimedia inspection of the South Facility. R. at 33-34, 85-94. The Bureau of Land's narrative of that inspection reports that "some expired vegetation was observed on a coal pile identified as Storage Pile #8." R. at 88. The report also cited an apparent violation of Section 21(a) of the Act, which prohibits any person from causing or allowing "the open dumping of any waste." *Id.* at 89, citing 415 ILCS 5/21(a) (2012). The report states that "Storage Pile # 8 has been determined a waste pile due to vegetative growth observed during the inspection." R. at 89.

The Bureau of Air's report of the November 6, 2013 inspection notes Mr. Estadt's statement that 42 towers of the water cannon system had been installed. R. at 33. The report states that "[t]he 43rd cannon is in the design but hasn't been constructed yet because of the presence of a pile at the 43rd cannon's location. The plan is to install the 43rd cannon at a later date." *Id.* The report adds that "[t]he water cannon system is not fully automated yet. A barometric measurement device has yet to be interfaced into the weather station. The wind gauge is currently working. Both of these will comprise the data input which is used to automatically adjust parameters of the water application system." *Id.* Mr. Estadt testified that, during the multimedia inspection, KCBX had its dust suppression system operational and cycled through all of the cannons so the Agency could see water coming from them. Tr. 4/29 at 44-45, 52-53.

On November 19, 2014, the Agency returned to the South Facility for additional inspection. R. at 35. The Bureau of Air's report of that inspection states in part that Mr. Estadt "showed the data obtained from their wind gauge during a high wind event on 11/17/13. Wind gusts exceeding 50 mph were recorded. The water cannons were cycling and in operations during the event which brought precipitation as well." R. at 35. Ms. Armitage testified that she considered the November inspection reports in the determination to deny KCBX's permit application. Tr. 5/1 at 203, 252.

By letter dated November 19, 2013, to Mr. Bernoteit, KCBX granted the Agency a waiver of the permit application review deadline to December 20, 2013. R. at 73, citing 415 ILCS 5/39(a) (2012).

November 20, 2013 Notices of Violation

On November 20, 2013, the Agency issued Violation Notice No. L-2013-01304 to KM Railways, Inc. based on an inspection of KCBX Terminals South performed November 6, 2013. R. at 77-78. Attachment A to the notice cites Section 21(a) of the Act, which provides that "[n]o person shall cause or allow the open dumping of any waste." R. at 79, citing 415 ILCS 5/21(a) (2012). The attachment continues that "[y]ou are in apparent violation of Section 21(a) for the following reason: Storage pile #8 has been determined to be a waste pile." R. at 79. "Suggested Resolutions" of the notice include immediate removal and proper disposal of Storage Pile #8 and submission to the Agency of documentation demonstrating this disposal. *Id.*

Also on November 20, 2013, the Agency issued Violation Notice No. L-2013-01305 to KCBX Terminals Company based on an inspection of KCBX Terminals South performed November 6, 2013. R. at 81-82. Attachment A to the second notice also cites Section 21(a) of the Act. R. at 83, citing 415 ILCS 5/21(a) (2012). The attachment continues that “[y]ou are in apparent violation of Section 21(a) for the following reason: Storage pile #8 has been determined to be a waste pile.” R. at 83. “Suggested Resolutions” of the notice again include immediate removal and proper disposal of Storage Pile #8 and submission to the Agency of documentation demonstrating this disposal. *Id.*

December 10, 2013 Agency Wells Letter

By letter dated December 10, 2013, the Agency notified KCBX of its “intent to consider information contained within the IEPA files in its review of construction permit application No. 07050082. . . .” R. at 30. The letter intended “to inform the applicant that we are considering things outside of their application in order to make a decision on their application.” Tr. 5/1 at 43, 67; *see id.* at 164. The Agency stated that it intended to consider

information collected by the Illinois EPA as part of the inspections conducted by the Illinois EPA, Bureau of Air, Field Operations Section on September 5, 2013, September 11, 2013, September 13, 2013, November 6, 2013, and November 19, 2013, and approximately 50 citizen pollution complaint forms. These documents and other available information indicate violations of Sections 9 and 39.2 of the Illinois Environmental Protection Act, and 35 Ill. Adm. Code Part 212, Subparts K and U. R. at 30.

The letter further stated that KCBX “has previously been informed of the existence of these alleged violations through, *inter alia*, the Complaint for Injunctive Relief and Civil Penalties filed by the Illinois Attorney General on November 4, 2013, the Illinois EPA, Bureau of Land issued Violation Notice L-2013-01304 and L-2013-01305 dated November 20, 2013.” R. at 30.

The Agency’s letter added that it provided an opportunity to respond “with information addressing the alleged violations of Sections 9 and 39.2 of the Illinois Environmental Protection Act, and 35 Ill. Adm. Code 212, Subpart K.. R. at 30, citing 415 ILCS 5/9, 39.2 (2012), 35 Ill. Adm. Code 212.301 – 212.316. The Agency recommended that KCBX submit any response it wished to file by December 18, 2013. *Id.*

KCBX Responses to Agency Wells Letter

In a letter dated December 18, 2013, KCBX responded to the Agency’s December 10, 2013 letter by granting the Agency a waiver of the permit application review deadline to January 20, 2014. R. at 19, citing 415 ILCS 5/39(a) (2012); *see* Tr. 5/1 at 168-69.

In a letter dated January 13, 2014, KCBX submitted its second response to the Agency’s December 10, 2013 letter. R. at 11-16. The letter states in part that, since acquiring the South Facility from DTE, KCBX had implemented dust suppression “including pile management procedures and surfactant application capability.” R. at 14. The letter continued that

KCBX also designed and installed an advanced, programmable water cannon system to even further control dust emissions, which system commenced operation in early November 2013. The new system consists of forty-two oscillating water cannons mounted on sixty-foot high poles that operate on a computer-controlled, pre-programmed schedule to apply up to 1,800 gallons of water per minute to the entire storage area at the site. *Id.*

KCBX stated that the Agency's "reports of the inspection conducted on November 6 and 19, 2013, specifically reference and describe the new water cannon system installed in operation at the site as well as other improvements." *Id.* at 15.

Completeness Review Worksheet and Permit Calculation Sheet

On January 16, 2014, Mr. Dragovich prepared a Completeness Review Worksheet for Construction Permit Fees for permit application No. 07050082. R. at 25. Under Identification of Review, the worksheet indicates "Initial Completeness Review." *Id.* An undated Air Permit Application Completeness Screening Checklist for permit application No. 07050082 states that the application does not "propose and clearly identify the annual and short-term emission limits and associated material throughput/usage limits and emission factors to be included in the new/revised permit." *Id.* at 24 (emphasis in original). The checklist also indicates that, if the permit had been due on that date, the Agency could not "write an enforceable permit with the information provided in the application." *Id.*

On January 17, 2014, Mr. Dragovich prepared a Permit Calculation Sheet for permit No. 07050082. *Id.* at 4-10; *see* Tr. 5/1 at 41. Under "Conclusions and recommendations," the calculation sheet states that

[i]t is recommended that this revised construction be granted. This permit allows operation until final action is taken on the FESOP. The source applied for a FESOP because the facility is major for NO_x and PM-10. The construction permit was revised to add ten conveyors, one stacking conveyor, and one portable hopper to the operation with no increase in permit emissions from the previous permit.

It is recommended that this permit denial be issued. Application did not contain minimum data and information in a construction permit to add ten conveyors, one stacking conveyor, and one portable hopper types of raw materials that will be handled, 35 Ill. Adm. Code 212.301 emissions beyond the property line, and 35 Ill. Adm. Code 212.321 process emission rate for the new emission units in this construction permit. R. at 9.

January 17, 2014 Denial

By letter dated January 17, 2014, the Agency denied KCBX's application to revise permit No. 07050082. R. at 1-3; *see* Tr. 5/1 at 172. The letter stated that "[t]he 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.” R. at 1. The Agency continued by stating “specific reasons why the Act and the Rules and Regulations may not be met.” *Id.*

Minimum Data and Information

First, the Agency stated that “35 Ill. Adm. Code 201.152 specifies minimum data and information to be contained in a construction permit application. This application did not contain this information and the Illinois EPA could not determine compliance with the Illinois Environmental Protection Act (Act) and Regulations.” R. at 1. The Agency continued that

the following information must be provided in order for the Illinois EPA to determine compliance of the ten portable conveyors, one box hopper, and one stacker with the regulations:

- i. information concerning processes to which the emission unit or air pollution control unit is related;
- ii. the quantities and types of raw materials to be used in the emission unit or air pollution control equipment;
- iii. 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;
- iv. the type, size, efficiency and specifications (including engineering drawings, plans and specifications) of the proposed emission unit or air pollution control equipment; and
- v. maps, statistics and other data reasonably sufficient to describe the location of the emission unit or air pollution control equipment. *Id.* at 1-2; *see* 35 Ill. Adm. Code 201.152.

Construction or Modification So As Not To Cause Violation

As a second basis for its denial, the Agency stated that, “[p]ursuant to 35 Ill. Adm. Code 201.160(a)(1), no construction permit shall be granted unless the applicant submits proof to the Illinois EPA that the emission unit or air pollution control equipment will be constructed or modified to operate so as not to cause a violation of the Illinois Environmental Protection Act or of Title 35: Environmental Protection, Subtitle B: Air Pollution, Chapter I: Pollution Control Board. R. at 2; *see* 35 Ill. Adm. Code 201-245 (Board air regulations).

Compliance with Fugitive Particulate Matter Requirements

As a third basis for its denial, the Agency stated that “[t]he application does not show compliance with 35 Ill. Adm. Code 212.301 (Fugitive Particulate Matter). Based upon the

observations made by the Division of Air Pollution Control's field staff and citizen pollution complaint forms, emissions from the source may violate 35 Ill. Adm. Code 212.301." R. at 2.

Compliance with Particulate Matter Emission Rates

As a fourth basis for its denial, the Agency stated that

[t]he 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 212.122, 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. R. at 2.

Pollution Control Facility

As a fifth basis for its denial, the Agency stated in pertinent part that,

[p]ursuant to Section 39(c) of the Act, except for those facilities owned or operated by sanitary districts organized under the Metropolitan Water Reclamation District Act, no permit for the development or construction of a new pollution control facility may be granted by the Illinois EPA unless the applicant submits proof to the Illinois EPA 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. R. at 2.

The Agency stated that a "pollution control facility" is "any waste storage site, sanitary landfill, waste disposal site, waste transfer station, waste treatment facility, or waste incinerator." *Id.*, citing 415 ILCS 5/3.330 (2012). The Agency concluded that, "[b]ased upon the observations made by the Bureau of Land's field staff, storage pile #8 was determined to be a waste pile due to vegetative growth observed during the inspection on November 6, 2013." R. at 3.

SUMMARY OF KCBX'S PETITION FOR REVIEW

After providing background for its petition for review (Pet. at 1-9), KCBX states that the Agency denied its permit application "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." Pet. at 9 (¶31) (emphasis in original); *see* R. at 1.

Section 9 of the Act

KCBX first alleges that the Agency does not specify how violations of Section 9 of the Act might occur. Pet. at 10 (¶32).

Denial Reason 1: 35 Ill. Adm. Code 201.152

KCBX claims that the Agency’s permit denial states that the permit application does not contain the required information and that the Agency could not determine compliance with the Act and regulations. Pet. at 10 (¶33). KCBX claims that the denial then lists the specific information that must be provided in order for the Agency to determine compliance. *Id.* (¶35)

KCBX argues that the Agency “never requested this additional information during the review period,” despite having numerous opportunities to do so. Pet. at 10-11 (¶36). KCBX acknowledges that the Agency requested during the August 27, 2013 meeting that KCBX provide equipment identification numbers. *Id.* at 12 (¶43); *see* R. at 182. KCBX maintains that, although they extended the Agency’s review deadline and communicated with the Agency a number of times about the permit application, the Agency did not raise the issue of incompleteness before issuing its denial. Pet. at 12 (¶43). KCBX claims that on November 4, 2013, Mr. Dragovich “stated that no additional information was needed from KCBX.” *Id.* (¶44)

KCBX then argues that the Agency already had this information because the application continues the prior application No. 07050082 submitted to the Agency. *Id.* at 11 (¶37). KCBX further argues that the Agency has previously issued three permits under the same application No. 07050082. *Id.* (¶38). KCBX claims that these previous applications and the current application include all information necessary to grant its requested permit revision. *Id.* (¶39). KCBX contends that the Agency relied on the information in these prior applications to find that the same type of equipment would not violate the Act or regulations. *Id.* (¶41).

KCBX also claims that the Agency did not notify KCBX within thirty days of the filing date that its application was incomplete. Pet. at 12 (¶45), citing 35 Ill. Adm. Code 201.158 (Incomplete Applications).

Denial Reason 2: 35 Ill. Adm. Code 210.160(a)

KCBX notes that the denial cites 35 Ill. Adm. Code 201.160(a)(1), which states that “no construction permit shall be granted unless the applicant submits proof to the Illinois EPA that the emission unit or air pollution control equipment will be constructed or modified to operate so as not to cause a violation. . . .” Pet. at 12 (¶46). KCBX claims that, for the reasons above under Denial Reason 1, the Agency already possesses the necessary information, as the current application continues previous applications under the same number. *Id.* (¶47).

Denial Reason 3: 35 Ill. Adm. Code 212.301

KCBX states that the permit denial alleges that the application does not comply with 35 Ill. Adm. Code 212.301 and also alleges that emissions from KCBX’s facility “may” violate this provision. Pet. at 13 (¶48). KCBX argues that the Agency does not present evidence that the equipment “may” violate Section 212.301. *Id.* (¶49) KCBX further argues that “the mere possibility of causing a violation is not appropriate grounds for denying a permit.” *Id.*

KCBX argues that, since acquiring the South Facility, they have invested in and improved dust suppression. Pet. at 13 (¶50). KCBX claims that this improved system is at least as effective as the system at the North Facility, which the Agency has already deemed appropriate. *Id.*

KCBX contends that the inspection reports referenced in the Agency's Wells Letter do not justify the Agency's denial of the request for revision. Pet. at 14 (¶52). KCBX argues that September 5, 2013, November 6, 2013, and November 19, 2013 inspection reports "do not allege any emissions of particulate matter at the South Facility." *Id.* (¶53). KCBX acknowledges that the September 11 and 13, 2013 reports do allege air emissions, but argues that Illinois law and the revised construction permit allow emissions. *Id.* (¶54). KCBX adds that the September inspections occurred before the improved water cannon system becoming operational in November 2013. *Id.* KCBX argues that no allegations in the inspection reports support the finding that moving equipment from the North Facility to the South Facility will lead to violations of the Act or regulations. *Id.*

KCBX argues that allegations within the September inspection reports about deficiencies in the FPOP for the South Facility are not a basis for denial. Pet. at 15 (¶56). KCBX further argues that its FPOP is not deficient. *Id.* (¶57).. KCBX maintains that inspection reports contain mere allegations of legal noncompliance, which the Agency cannot consider when deciding whether to grant the application. *Id.* KCBX also contends that it is the Board's authority, not the Agency's, to determine adequacy of FPOPs. *Id.*

KCBX states that on November 1, 2013 KCBX provided its updated FPOP for the South Facility to the Agency. Pet. at 15 (¶58). KCBX claims that, on November 15, 2013, it informed the Agency that the new cannon system at the South Facility was active. *Id.* (¶59) KCBX argues that reports of subsequent inspections reflect operation that reporting no alleged violations. *Id.*

KCBX contends that complaints do not justify the Agency's denial of the permit application. Pet. at 15 (¶60). KCBX argues the Agency may not rely on mere allegations, particularly when the complaints lack specific facts about emissions of particulate matter in the area. *Id.* at 16 (¶61). KCBX also states that many of the complaints contain no information describing an event, and that others have been redacted to the point KCBX cannot properly respond to them. *Id.* (¶62).

KCBX maintains that the FESOP granted to the North Facility means that the Agency determined that operation of the equipment at the North Facility does not violate the Act or regulations. Pet. at 16-17 (¶64). KCBX argues that the same type of equipment is already permitted for the South Facility, and that therefore the same type of equipment, at the same throughput, would not violate the Act or regulations. *Id.* at 17 (¶65). KCBX explains that it is simply aligning the contemplated throughput with the appropriate equipment. *Id.*

Denial Reason 4: 35 Ill. Adm. Code 212.321

KCBX states that the permit denial claims that the application did "not show whether particulate matter emissions from the equipment will comply with 35 Ill. Adm. Code 212.321."

Pet. at 17 (¶67). KCBX argues that, for reasons already described, the Agency has information necessary to show compliance. *Id.* at 17-18 (¶68).

Denial Reason 5: 415 ILCS 5/39(c), 39.2

KCBX notes the Agency's allegation that storage pile #8 is a waste pile due to vegetative growth observed during the November 6, 2013 inspection. Pet. at 18 (¶69). KCBX argues that it was not made aware that the Agency would consider its Bureau of Land inspections when reviewing the application, and therefore could not respond to the allegation during the review period. *Id.* (¶70). KCBX states that storage pile #8 contains coal, a valuable material, and is therefore not a waste pile. *Id.* (¶71) KCBX further states that, because the South Facility does not contain a waste storage site, sanitary landfill, waste disposal site, waste transfer station, waste treatment facility, or a waste incinerator, it is not a pollution control facility as alleged by the Agency. *Id.* (¶72).

Conclusion and Relief Requested

KCBX argues that the Agency's decision to deny KCBX's request for revision is arbitrary and capricious, and not supported by the Act and Board regulations. Pet. at 18 (¶73). KCBX sought a hearing on the Agency's denial "and such other relief as the Board deems appropriate." *Id.* at 19.

PUBLIC COMMENT

Summary of Public Comment by SETF (PC1)

SETF states that it "is a community-based organization that advocates on behalf of public health and environmental quality on Chicago's southeast side. PC 1 at 1. SETF supports the Agency's denial of KCBX Terminal's permit request to install new air emission units. PC 1 at 1. SETF makes two comments regarding this denial, one procedural in nature and the other substantive.

First, SETF notes that the Agency's denial came at a preliminary stage, before a draft permit was available for public comment. PC 1 at 2. SETF stresses that public notice of a draft permit, a public hearing, and a public comment period have not occurred. *Id.* SETF argues that this distinguishes the instant case from recent Board permit appeals. *Id.*, citing IEPA v. PCB, 386 Ill. App. 3d 375, 377-790 (2008); Village of Barrington v. IEPA, PCB 05-55, 05-58, 05-59 (cons.) (Apr. 21, 2005); Prairie Rivers Network v. IEPA, PCB 01-112 (Aug. 9, 2001). SETF claims that, if the Board reverses the denial and remands the proceeding back to the Agency, the Agency need not issue KCBX a permit. PC 1 at 2. Rather, SETF argues that the Agency would develop a draft permit on which the public could contribute through public notice, a public hearing, and a written comment period. *Id.* at 2-3, 4.

Second, SETF claims that the Agency was within its discretionary authority to deny this permit. *Id.* at 5. SETF argues that the record includes individual pollution complaint forms relevant to whether the new emissions units would cause violations of the Act and Board

regulations. SETF states that a number of these complaints cite “airborne releases of material from KCBX’s operations into nearby residential neighborhoods.” *Id.* at 5. SETF argues that these complaints provided the Agency a basis to determine that adding new emission units to KCBX’s facility would lead to violations. *Id.*

SETF cites Section 9(a) of the Act, which provides that no one shall cause, threaten, or allow the “discharge or emission of any contaminant into the environment” so as to cause air pollution in Illinois, “either alone or in combination with contaminants from other sources.” *Id.* at 5-6; citing 415 ILCS 5/9(a) (2012); 35 Ill. Adm. Code 201.141. SETF argues that, against this prohibition, the individual complaints contain information relevant to the Agency’s deliberations, including: black dust coating residences; inability to open windows and doors to the elements without soot entering homes; clouds of black dust forming from the petcoke storage and keeping residents from going outside; respiratory problems and foul smells affecting residents; and petcoke washing into drinking water. PC 1 at 6-8. SETF claims that these complaints are consistent with the Agency’s own inspection reports, as well as allegations made by the Attorney General’s Office in its enforcement action, People of the State of Illinois ex. rel. Madigan v. KCBX, 2013CH24788, in the Circuit Court of Cook County. *Id.* at 9.

In light of this evidence, SETF insists it was entirely reasonable for the Agency to conclude that permitting installation of the new emission units would increase the throughput rate at the facility and lead to further violations of the Act and Board regulations. *Id.* at 10. SETF concludes that KCBX has not met its burden of showing that its requested permit would comply with all requirements of the Act and Board regulations, “and the Board should not substitute its judgment for that of the Illinois EPA.” *Id.*

KCBX Response to PC 1

KCBX notes that SETF’s comments directly address the relief it has requested and the information to be considered by the Board in this appeal. PC 1 Resp. at 1. Therefore, KCBX responds to those comments. *Id.*

First, though SETF seeks further public comment in this proceeding if the Board directs the Agency to move forward, KCBX claims that the Agency has already exceeded its obligations on this point. PC 1 Resp. at 1-2. KCBX states that the record for its permit application already extends for 178 days, nearly twice the statutory 90-day permit application review period. *Id.*; *see* 415 ILCS 5/39(a). KCBX notes that, during this time, the Agency held a public meeting to answer questions related to its application. PC 1 Resp. at 2, citing R. at 125. Public comments in this period came from elected officials and citizens alike. PC 1 Resp. at 2, citing R. at 29, 172-73.

In addition, KCBX states that it is seeking to relocate portable equipment for the KCBX North Terminal to the corresponding South Terminal. PC 1 Resp. at 2. KCBX adds that it is not seeking to change monthly throughput or emissions limitations. *Id.*, citing R. at 186-204. KCBX argues that, if the Board directs the Agency to issue the requested permit, future Agency action will be limited by the denial letter and the Board’s direction. PC 1 Resp. at 2. KCBX

claims that additional public input would not serve to inform the Agency in its deliberations and would only delay issuance of a permit. *Id.*

Second, KCBX opposes SETF's argument that citizen complaints provide relevant information for the Agency's permit deliberations. PC 1 Resp. at 2-3. KCBX characterizes citizen complaint forms, inspection reports, and the Circuit Court complaint as "unadjudicated alleged noncompliance" that the Agency is precluded from considering. PC 1 Resp. at 3. Furthermore, SETF claims that the Agency's denial letter cites citizen complaints only with regard to a potential violation of 35 Ill. Adm. Code 212.301. *Id.*, citing R. at 2. KCBX claims that, although SETF cites Section 9(a) of the Act and Section 201.141 of the Board's regulations, the Agency's denial letter does not list potential violations of those authorities. PC 1 Resp. at 3. KCBX argues that those provisions are not relevant in this appeal. *Id.* Likewise, KCBX argues that the transcript of hearing held by the City of Chicago to consider proposed regulations is not a part of this record and should not be considered by the Board. *Id.*

SUMMARY OF KCBX'S POST-HEARING BRIEF

Section 9 of the Act

KCBX notes that the Agency's letter denied the permit application in part because Section 9 of the Act "might be violated." Pet. Brief at 48; *see* R. at 1. KCBX states that the provisions of Section 9 prohibit numerous activities. Pet. Brief at 48, citing 415 ILCS 5/9 (2012). KCBX argues that, in the specific reasons listed in the denial letter, the Agency did not specifically state how Section 9 might be violated by granting the permit application. Pet. Brief at 48; *see id.* at 9, n.2. KCBX claims that the Agency did not justify denying the application on the basis of Section 9. *Id.* at 48. KCBX concluded that the Agency's "reference to Section 9 is improper and does not provide an adequate basis" to deny the permit application. *Id.* at 49; *see id.* at 9, n.2.

35 Ill. Adm. Code 201.152 (Denial Reason 1)

The Agency claimed that KCBX's application did not provide certain information and that the Agency "could not determine compliance" with the Act and regulations. Pet. Brief at 10, citing R. at 1. KCBX claimed that the Agency did not identify the provisions with which it could not determine compliance. Pet. Brief at 10. KCBX argued that Denial Reason 1 therefore simply alleges that information is missing and that the application is incomplete. *Id.* KCBX insisted that the Agency could not deny the permit for incompleteness, as it failed to issue a Notice of Incompleteness (NOI) pursuant to Section. 201.158. Pet. Brief at 10, 12-13, citing 35 Ill. Adm. Code 201.158. Even if the Agency had issued the NOI, KCBX argued that its Request for Revision was complete and sufficient. Pet. Brief at 13-23.

Completeness and Sufficiency

KCBX noted that even an incomplete application will be deemed "filed" if the Agency does not issue an NOI within thirty days after submission of the application. Pet. Brief at 12, citing 35 Ill. Adm. Code 201.158.

KCBX argues that, in Sherex Chemicals, the Board interpreted the predecessor of Section 201.158 to distinguish “completeness” from “sufficiency.” Pet. Brief at 12, citing Sherex Chemicals Co. v. IEPA, PCB 80-66, slip op. at 2 (Oct. 2, 1980). KCBX further argues that the Board has clarified that this regulation did not impose an absolute duty to notify an applicant of incompleteness. Pet. Brief at 12, citing Sherex, PCB 80-66, slip op. at 1 (Dec. 19, 1980). However, in the absence of an NOI, KCBX claims that the Agency cannot deny the application “solely on the grounds that certain information allegedly is not present in the application. Pet. Brief at 13. Instead, the Agency can only cite to missing information in support of its denial if that missing information prevented it from determining that the proposed activity would not comply with the Act and regulations.” *Id.* Therefore, KCBX asserted, denial of its application solely for incompleteness under Section 201.152 was improper. Pet. Brief at 13.

Completeness

KCBX argued that, because the Agency did not issue an NOI, initially determined that the application was complete, requested multiple waivers of the decision deadline, and independently investigated the South Terminal, the Agency is precluded from denying the Request for Revision for incompleteness. Pet. Brief at 13, 15-16.

KCBX stressed that the Agency’s initial permit analyst, Mr. Dragovich, concluded that the application was complete and recommended issuing the permit. Pet. Brief at 13, citing Tr. 4/30 at 191-92, 200; R. at 766. KCBX claimed that it confirmed with Mr. Dragovich that the Agency did not need either clarification or assistance with the application. Pet. Brief at 14, citing Tr. 4/29 at 176-177, 179. KCBX also states that Mr. Dragovich reviewed other applications, permits, and revisions under the same permit number and information in DTE’s 2012 application. Pet. Brief at 14, citing Tr. 4/30 at 202, 209-12.

Shortly thereafter, according to KCBX, the Agency “changed course.” Pet. Brief at 14. The Agency assigned a new permit analyst, Mr. Bernoteit, with instructions to draft a Wells Letter and Permit Denial. *Id.* at 14-15, citing Tr. 5/1 at 46-47. KCBX noted that Mr. Bernoteit did not rely on the same information that Mr. Dragovich had in his analysis. Pet. Brief at 15, citing Tr. 5/1 at 56-58.

KCBX states that it granted multiple waivers of the Agency review deadline. Pet. Brief at 15, citing R. at 18-19, 175, 177. KCBX adds that the Agency held an environmental justice outreach meeting regarding the construction permit. Pet. Brief at 15, citing R. at 125. KCBX also adds that the Agency inspected the South Terminal five times while the review was ongoing. Pet. Brief at 15, citing R. at 31, 40, 164. KCBX suggests that the Agency had time and opportunity to conclude that the permit application was complete and did so only in issuing the denial. *See* Pet. Brief at 15-16. KCBX argues that the Agency is precluded from denying its application based simply on incompleteness. *Id.*

Information in Application

KCBX asserted that Denial Reason 1 was improper because KCBX provided much of the information the Agency insisted was “missing.” Pet. Brief at 16. While Mr. Bernoteit testified that he was confused by references to an “initial application,” Mr. Dragovich had no questions regarding the application and reviewed the file for permit number 07050082, including DTE’s 2012 application. Pet. Brief at 16, citing Tr. 4/30 at 209-12, Tr. 5/1 at 16-18. Noting that the Agency’s original administrative record included portions of that application, KCBX suggests that it is disingenuous of the Agency to profess any uncertainty about references to an initial application. *See* Pet. Brief at 17.

KCBX insisted that it provided all of the information cited in the Agency’s denial letter. Pet. Br. at 17-20; *see* 35 Ill. Adm. Code 201.152. First, the Agency claimed that KCBX failed to provide “information concerning processes to which the emission unit or air pollution control equipment is related.” R. at 1; *see* 35 Ill. Adm. Code 201.152. KCBX counters that the cover letter to its application stated that it sought a permit revision to install 12 specific pieces of equipment. Pet. Brief at 17-18, citing R. at 186-87. KCBX insisted that the record clearly described the process to which this equipment would be applied, namely “material handling” for coal and pet coke. Pet. Brief at 18, citing R. at 12, 125, 130-49, 195, 590. KCBX argues that the Agency received and reviewed ample information “concerning processes to which the emission unit . . . is related.” Pet. Brief at 18.

Second, the Agency determined that KCBX had not provided “the quantities and types of raw materials to be used in the emission unit or air pollution control equipment.” R. at 1; *see* 35 Ill. Adm. Code 201.152. KCBX responded that it described coal and pet coke as the materials managed at the facility. Pet. Brief at 18-19, citing R. at 12, 195. KCBX emphasized that the cover letter to its application stated that it requested no changes to its emission throughputs or other requirements for these materials. Pet. Brief at 19, citing R. at 187. KCBX argues that it “provided, and Illinois EPA was well aware of, the quantities and types of raw materials to be used in the equipment.” Pet. Brief at 19.

Third, the Agency determined that KCBX’s application did not include “the nature, specific points of emission and quantities of uncontrolled air contaminant emissions at the source that includes the emission unit or air pollution control equipment.” R. at 1; *see* 35 Ill. Adm. Code 201.152. KCBX stated that it described the equipment in question and clarified that it sought no changes in throughputs or emission limitations. Pet. Brief at 19, citing R. at 187, 195. KCBX also argued that its application listed the exhaust point and referred to Figure 1 of the initial application. Pet. Brief at 19, citing R. at 204, 589. KCBX states that Figure 1 is “a conveyor transfer point process flow diagram and shows PM being emitted from a transfer point.” Pet. Brief at 19, citing R. at 212.

Fourth, the Agency insisted that KCBX did not provide “the type, size, efficiency and specifications (including engineering drawings, plans and specifications) of the proposed emission unit or air pollution control equipment.” R. at 2; *see* 35 Ill. Adm. Code 201.152. KCBX responded that the record provides this information in various materials. Pet. Brief at 19-20, citing Tr. 4/29 at 177; Tr. 4/30 at 202; Tr. 5/1 at 63; R. at 12, 125, 140, 169, 182, 187, 195, 538. KCBX stressed Mr. Dragovich’s review of the FESOP for the North Facility, which would

have identified the permitted equipment it sought to move to the South Facility. Pet. Brief at 20, citing R. at 538, Tr. 4/30 at 202.

Fifth, the Agency determined that KCBX's application lacked "maps, statistics and other data reasonably sufficient to describe the location of the emission unit or air pollution control equipment." R. at 2; *see* 35 Ill. Adm. Code 201.152. KCBX stated that it described the exhaust point from this equipment as "varies" because the equipment was portable. Pet. Brief at 20, citing R. at 204. KCBX argued that this has been sufficient for the Agency to grant a permit and should have been sufficient in this case. Pet. Brief at 20.

Unnecessary Information

Furthermore, KCBX stresses Mr. Bernoteit acknowledgement that information such as the manufacturer and serial numbers was not necessary to approve a permit for portable conveyors. Pet. Brief at 21, citing Tr. 4/29 at 197-199. Past permitting decisions, including the September 2012 DTE Application, confirm this, according to KCBX. Pet. Brief at 21, citing R. at 195, 204, 580, 589.

Summary

KCBX argues that it would be a "capricious exercise" of Agency authority to determine that the application was complete, state this opinion to the applicant, gather additional information, obtain waivers of the review deadline, and then deny the permit on the basis of incompleteness. Pet. Brief at 22.

35 Ill. Adm. Code 201.160(a) (Denial Reason 2)

KCBX argues that the Agency's second stated reason to deny the permit application "merely restates" Section 201.160(a) of the Board's air pollution permitting regulations. Pet. Brief at 23; *see* 35 Ill. Adm. Code 201.160(a). KCBX further argues that this provision "set forth 'standard for issuance' for construction permits." Pet. Brief at 23. KCBX claims that the Agency's second denial reason does not assert that granting the permit application would result in a violation of the Act or regulations or state any reason to deny the application. *Id.* KCBX concludes that the Agency's second denial reason provides no justification to deny the permit application. *Id.*

35 Ill. Adm. Code 212.301 (Denial Reason 3)

KCBX argues that the Agency improperly relied on field inspection reports and unverified citizen complaints to support its claim that emissions from the source *may* be in violation of Section 212.301. Pet. Brief at 23 (emphasis in original), citing R. at 2. Further, KCBX claims that it is not only improper for the Agency to rely on these materials, but that the reports and complaints do not support the Agency's conclusion. Pet. Brief at 23. KCBX maintains that its fugitive dust plan demonstrates compliance with Section 212.301, and therefore, the Agency's third denial reason must be reversed. *Id.*

Enforcement and Permitting

KCBX contends that, contrary to well settled law, the Agency impermissibly employed the permitting process to achieve its enforcement objectives by denying the application based on unadjudicated allegations. Pet. Brief at 24 (citations omitted). KCBX acknowledges that the Agency may rely on alleged violations and citizen complaints for the basis of an enforcement action, but argues that the Agency may not rely upon them to deny a permit. *Id.* at 24.

KCBX cites ESG Watts, in which the Agency denied an application because it would exacerbate the existing alleged violations. Pet. Brief at 25. KCBX states that the Board reversed the Agency, finding that denying a permit is “an improper use of the permit process as a means of enforcement.” *Id.*, citing ESG Watts, Inc. v. IEPA, PCB 92-54, slip op. at 11 (Oct. 29, 1992). KCBX adds that, on appeal, the Illinois Appellate Court affirmed the Board and stated that “the procedures for permit denial and enforcement of the Act are separate and distinct.” Pet. Brief at 25, citing IEPA v. PCB, 624 N.E.2d 402, 404 (3rd Dist. 1993). In this case, KCBX argues that Ms. Armitage determined that the permit “should be denied, in part, because inspection reports and citizen complaints caused her to believe the facility ‘was of concern.’” Pet. Brief at 25, citing Tr. 5/1 at 173. KCBX concludes that, because the Agency relied on unadjudicated allegations and complaints to find a potential to violate Section 212.301, “Denial Reason 3 must be reversed as a matter of law.” Pet. Brief at 25.

Inspection Reports and Section 212.301

KCBX argues that, even if the Agency could deny permit applications based on unadjudicated allegations in inspection reports, the inspection reports in this case do not support the Agency’s conclusion that KCBX’s equipment may violate Section 212.301. Pet. Brief at 25. KCBX contends that the Agency inspected the South Facility five separate times and documented their observations in three separate reports, but that “[n]one of the reports allege an actual violation of Section 212.301.” *Id.* (emphasis in original), citing R. at 31-35, 40-58, 164-66. KCBX states that only the report based on the September 11th and 13th inspections refers to Section 212.301, and that report concluded “that emissions from the material piles and traffic at the South Facility terminal *may* violate Section 212.301.” Pet. Brief at 25-26, citing R. at 45, 47. KCBX argues that that conclusion “has no bearing on whether the conveyance equipment at issue in KCBX’s application . . . may also allegedly violate Section 212.301.” Pet. Brief at 26. KCBX cited the testimony of Mr. Kolaz, who stated that:

there were no visible emissions [in the inspection reports] . . . nothing from the stacker, nothing from the portable feed hopper, nothing from the portable conveyors or even the fixed conveyors. And these are trained inspectors. The only thing they could focus on was truck dust, and as I pointed out, that wasn’t even done accurately. *Id.*, citing Tr. 4/30 at 178.

KCBX asserts that the Agency may not conclude that, because some operations at the site may violate Section 212.301, the conveyance equipment also may violate that section. Pet. Brief at 26.

KCBX also argues that allegations relating to Section 212.301 in the September 11th and 13th inspection are unreliable and contradict one another. Pet. Brief at 26. KCBX states that “[t]he inspector testified that the ‘mere existence’ of a large material pile at any facility presents a threat of visible emissions,” a standard under which the Agency could deny any KCBX permit application simply because of the nature of its business. *Id.* at 26-27. KCBX asserts that this overly broad conclusion cannot be the basis for a permit denial. *Id.* at 27.

KCBX then argues that the Agency inspector, who viewed emissions from truck traffic, was positioned incorrectly. Pet. Brief at 27. KCBX cites Mr. Kolaz, who testified that, when observing whether a facility is in compliance with Section 212.301, the inspector must be outside the plant boundaries. *Id.*, citing Tr. 4/30 at 87. KCBX also claims that the Agency inspector failed to follow the Agency’s own procedures for measuring particulate matter and opacity. Pet. Brief at 27. KCBX contends that, according to Mr. Kolaz’s testimony and the inspector’s admission that the measurements regarding fugitive particulate matter and opacity were not taken in compliance with the Board’s Section 212.109 and 212.301 regulations, the measurements “are of no value to any permit or compliance evaluation.” *Id.*

KCBX concludes that the inspection reports provide no basis to claim that emissions may violate 35 Ill. Adm. Code 212.301. Pet. Brief at 28.

Citizen Complaints

KCBX argues that the citizen complaints relied upon by the Agency “do not address compliance with Section 212.301, visible emissions at the property line, or the location of the observer.” Pet. Brief at 28. KCBX also states that the citizen’s complaints, like the inspection reports, do not argue that the equipment KCBX seeks to add will cause any violation of the Act. *Id.*, citing Tr. 4/30 at 97-98.

KCBX also questions the authenticity and reliability of the complaints. Pet. Brief at 28. KCBX cites Ms. Armitage’s testimony that the Agency “did not seek to verify any of the information in the complaints.” *Id.*, citing Tr. 5/1 at 205-06. KCBX states that many of the complaints are on a form dated September 2012, which is three months before KCBX acquired the South Facility, and have no indication of when the form was completed. Pet. Brief at 28 (citations omitted). KCBX claims that, in addition to being undated, many of the forms do not identify KCBX as the responsible party. *Id.* at 28-29 (citations omitted). KCBX states that a majority of the complaints do not provide “*any detail whatsoever* on the nature, date, time, or location of the complained-of activity.” *Id.* at 29 (emphasis in original) (citations omitted). KCBX also points out that the contents of a number of the complaints appear to result from photocopying. *Id.* (citations omitted). KCBX argues that the Agency cannot reasonably rely on undated, photocopied, and blank complaints when determining whether “the transfer of the twelve pieces of equipment to the South Site may cause emissions to be ‘visible by an observer looking generally toward the zenith at a point beyond the property line of the source.’” *Id.*, citing 35 Ill. Adm. Code 212.301.

Finally, KCBX claims that, to the extent the Agency relied on citizen complaints, it was entitled to a meaningful opportunity to respond. Pet. Brief at 29, citing Wells Mfg. Co. v. IEPA,

552 N.E.2d 1074, 1077 (Ill. App. Ct. 1990). KCBX claims that it was unable to do so because of the Agency's heavy redaction. Pet. Brief at 29. KCBX contends that the Agency redacted information even when the citizen consented to the disclosure of his or her identity. Pet. Brief at 29-30 (citations omitted). KCBX argues that without identifying information, "it was impossible for KCBX to substantively respond to the complaints." *Id.* at 30.

Additional Allegations

KCBX asserts that the Agency apparently relied upon additional unadjudicated violations, including an enforcement action filed by the Attorney General, and correspondence from politicians and non-governmental organizations. Pet. Brief at 30, citing R. at 101-18, 119-20, 172-73; Tr. 5/1 at 207-08, 255-56. KCBX argues that these may not be for the basis of a permit denial as a matter of law. Pet. Brief at 30. KCBX also argues that, to the extent the Agency did rely on the enforcement action and correspondence, they do not address Section 212.301, or visible emissions at the property line, or the equipment at issue in this appeal. *Id.* KCBX concludes that the enforcement action and correspondence provide no basis to conclude that granting the permit application may cause a violation of Section 212.301. *Id.*

Compliance with Section 212.301

KCBX argues that the fugitive dust plan submitted to the Agency on November 1, 2013 demonstrated compliance with Section 212.301. Pet. Brief at 31, citing R. at 150-63. KCBX explains that the plan includes operation of fixed water cannons and portable water trucks to control potential fugitive emissions from the conveyance equipment. Pet. Brief at 31, citing R. at 156. KCBX argues that, despite a detailed description of the plan, Ms. Armitage issued the third denial reason because she claimed "that she could not determine compliance with Section 212.301 because the Illinois EPA did not know how and when KCBX operates its emissions controls." Pet. Brief at 31, citing Tr. 5/1 at 200.

KCBX claims that the Agency's uncertainty is contradicted by the record. Pet. Brief at 32. KCBX first argues that the plan sets out best management practices to be "'implemented' each day." *Id.* (emphasis in original), citing R. at 157. Second, KCBX states that the Agency inspected the South Facility five times during both the construction and implementation of KCBX's new dust suppression system. Pet. Brief at 32, citing R. at 31-35, 40-58, 164-66. Third, KCBX explains that it met with no fewer than six individuals from the Agency, and gave a detailed presentation on its dust suppression system. Pet. Brief at 32, citing R. at 2053, 2055-92.

KCBX asserts that during the November 6, 2013 inspection Mr. Estadt demonstrated the water cannon system to the Agency. Pet. Brief at 32, citing R. at 33-34. Mr. Estadt testified that he ran a full cycle of all 42 water cannons while the inspector was on-site. Pet. Brief at 32, citing Tr. 4/29 at 52-53. KCBX also notes Mr. Estadt's testimony that he explained KCBX's weather station to the inspector. Pet. Brief at 32, citing Tr. 4/29 at 47-48. KCBX also notes the November 19, 2013 inspection narrative, in which the inspector described Mr. Estadt showing him the data obtained during a high wind event on November 17, 2013, and the action taken by the water cannon system to address the weather. Pet. Brief at 32-33, citing R. at 35. KCBX

claims that “[u]nedited draft inspection reports demonstrate that the inspector was impressed by KCBX’s dust suppression system.” Pet. Brief at 33, citing R. at 1308-09, 1319, 1326. KCBX argues that Ms. Armitage deleted this impression from the final reports, although she has never been to the South Facility. Pet. Brief at 33, citing Tr. 5/1 at 247.

KCBX claims that it also met with the Agency on December 5, 2013, and gave a presentation entitled “Dust Mitigation System Overview.” Pet. Brief at 33, citing R. at 2055-92; Tr. 4/29 at 113-23. KCBX asserts that the presentation provided detailed information on the water cannon system. Pet. Brief at 33.

Summary

KCBX concludes that, because it has demonstrated to the Agency on multiple occasions that its dust suppression system is equipped to comply with Section 212.301, the Agency’s Denial Reason 3 should be reversed. Pet. Brief at 34.

35 Ill. Adm. Code 212.321 (Denial Reason 4)

The Agency’s denial claimed that KCBX’s application did not include data showing actual emission levels for the equipment at issue. R. at 2. Absent this data, the Agency concluded that KCBX’s “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,” the process weight rate rule. R. at 2; *see* Pet. Brief at 34; 35 Ill. Adm. Code 212.321. KCBX disputed this claim and argued that it had provided sufficient data to show that the equipment at issue would not violate the process weight rate rule. Pet. Brief at 34; *see* 35 Ill. Adm. Code 212.321.

KCBX noted that the Agency’s permit analyst, Mr. Dragovich, reviewed KCBX’s application, determined on August 14, 2013, that it was complete, and recommended granting the application. Pet. Brief at 34, citing R. at 2107-09; Tr. 4/30 at 191-92, 200. KCBX argued that Mr. Dragovich’s review relied on KCBX’s application, as well as other permits, revisions, and applications on file for permit No. 07050082. Pet. Brief at 35, citing R. at 564-623; Tr. 4/30 at 202, 209-12. KCBX argues that the Agency’s Chief of the Bureau of Air, Ms. Armitage, later instructed Mr. Bernoteit to review KCBX’s application and draft a Wells Letter and Permit Denial. Pet. Brief at 35, citing Tr. 5/1 at 46-47. Mr. Bernoteit first reviewed KCBX’s application on December 5, 2013, and he did not consult materials on which Mr. Dragovich had relied. Pet. Brief at 35; citing Tr. 5/1 at 56-58.

KCBX argued that Mr. Dragovich was correct, in that the application demonstrated that the process weight rate rule would not be violated. Pet. Brief at 40. To support this assertion, KCBX addressed the actual emission rate, from the standard USEPA emission factor and the allowable emissions rate, derived from Section 212.321. *Id.* at 35-40; 35 Ill. Adm. Code 212.321. Both equations are a function of the process weight rate, the rate in tons per hour at which equipment processes material. Pet. Brief at 38.

Estimated Emissions

KCBX argued that “[t]here is no question about the appropriate emission factor that should be used for the equipment” that is the subject of this appeal. Pet. Brief at 36. KCBX added that its current permit includes the appropriate emission factor. *Id.*, citing R. at 140 (Condition 14.c.ii). KCBX noted that it is not requesting alteration of the South Terminal’s annual and monthly coal and petcoke throughput limitations or emissions limitations. *Id.* at 36. To determine estimated emissions from this equipment, KCBX stated that its application referred to the same standard emissions factor used in the September 2012 DTE Application. *Id.* at 38, citing R. at 199, 584. This factor was developed as part of USEPA’s AP-42 Compilation of Air Pollution Emission Factors, Chapter 13.2.4 (Aggregate Handling and Storage Piles). KCBX argued that the Agency knew that its application relied on USEPA’s AP-42 emission factor and that the Agency itself used that factor to evaluate the application. Pet. Brief at 37-38, citing R. at 4, 5, 8, 651-70, 761-62, 765.

The equation for actual emissions, using what KCBX insists is the maximum Process Weight Rate in tons per hour, is a product of the USEPA standard emission factor (0.00064), the Process Weight Rate (4,000 T/hr), and the agreed control efficiency credit of 50% (0.5). Pet. Brief at 38-39. KCBX notes that a control efficiency of 50% is reflected in its current permit. *Id.* at 39, citing R. at 140 (Condition 14.c.i). The product of these figures results in 1.3 pounds per hour of emissions at maximum processing. Pet. Brief at 39. If this figure exceeds the allowable emission rate, the equipment violates Sec. 212.321 of the Board’s regulations. *See* 35 Ill. Adm. Code 212.321. KCBX stresses that “[e]ven if no credit is taken for water suppression, the actual emissions would be 2.6 pounds per hour.” Pet. Brief at 39, citing Tr. 4/30 at 101-02.

Allowable Emissions Rate

KCBX states that the Allowable Emissions Rate is also based upon the Process Weight Rate. Pet. Brief at 38; *see* 35 Ill. Adm. Code 212.321. Section 212.321 requires the use of particular figures based on whether the Process Weight Rate is greater or less than 450 tons per hour. 35 Ill. Adm. Code 212.321. At a maximum rate of 4,000 T/hr, that rate is taken to the power of 0.16, then multiplied by 24.8 to give the pounds per hour of allowable emission under the Board’s regulations. Pet. Brief at 38; *see* 35 Ill. Adm. Code 212.321. KCBX states that, for its operations, the formula allows 93.5 pounds of emission per hour. Pet. Brief at 38. KCBX notes that, running at its maximum processing rate, this equipment would not violate the cap established by the Board’s regulations. *Id.* at 39.

Furthermore, KCBX argues, one can determine the Process Weight Rate at which the equipment would have to run to violate Sec. 212.321. Pet. Brief at 39. The point at which the Processing Weight Rate (variable P) would violate the regulatory limit is represented below:

$$0.5 \cdot 0.00064 \cdot P = 28.4 \cdot P^{0.16}$$

$$P = 660,000 \text{ T/hr}$$

In other words, KCBX claims, the equipment in question would have to run at a Process Weight Rate of 660,000 tons per hour to violate Sec. 212.321. *Id.*; 35 Ill. Adm. Code 212.321. KCBX

stresses that operating its equipment at this rate for even one hour would require “approximately 60% of the monthly throughput limit.” Pet. Brief at 39.

KCBX argued that “[t]he relationship between the allowable emissions rate derived from the equations in Section 212.321, and the *actual* emissions calculated using USEPA’s AP-42, a generally accepted emission factor is clear. The relationship demonstrates that the process weight rate limit would not be violated in this case.” Pet. Brief at 40. When compared to the limitations of this equipment, KCBX’s witness Mr. Kolaz insisted that they “don’t remotely come close.” *Id.* at 39, citing Tr. 4/30 at 101. Mr. Kolaz further testified that the Agency had all of the information necessary to make this determination. Pet. Brief at 40. KCBX concludes that it provided sufficient information to perform these calculations and that the Agency erred in applying Denial Reason 4 to Petitioner’s Request for Revision. *Id.*

415 ILCS 5/39(c), 39.2 (Denial Reason 5)

KCBX notes that the Agency’s fifth denial reason characterized Storage Pile #8 as a “waste pile.” Pet. Brief at 40, citing R. at 2-3. The Agency based this characterization on “vegetative growth observed” on Storage Pile #8 during an Agency Bureau of Land inspection on November 6, 2013. Pet. Brief at 40, citing R. at 3. KCBX claims that, in the Agency’s view, Storage Pile #8 qualified as a pollution control facility, which requires local siting under Section 39.2(c) of the Act. Pet. Brief at 40-41, citing 415 ILCS 5/39.2(c) (2012), R. at 2. KCBX argues that the Agency apparently denied the permit application in part because the Agency had not received proof of approval for the location of such a site. Pet. Brief at 40-41, citing R. at 2.

KCBX notes that, after it appealed the Agency’s denial, the Agency filed a Notice of Withdrawal of Permit Denial Reason 5. However, the Board stated that it would take no action on the notice. The Board’s order noted that the Agency “cites no statutory, regulatory, or caselaw authority to amend its decision by striking an entire basis for the Agency’s decision to deny the requested permit revision.” KCBX Terminals Co. v. IEPA, PCB 14-110, slip op. at 1 (Apr. 3, 2014). The Board declined to consider the notice and directed the parties to hearing on the Agency’s determination. *Id.*

KCBX noted that the parties now appear to agree that Denial Reason 5 lacks merit. Pet. Brief at 41. Because the Board’s April 3, 2014 order did not directly rule on the Agency’s notice of withdrawal, however, KCBX addressed the merits of Denial Reason 5. *Id.* at 41-47.

KCBX first argued that it was improper to use an unadjudicated alleged violation of waste provisions as grounds for denying a permit. Pet. Brief at 42. KCBX claims that both Board and Illinois Appellate Court decisions bar the Agency from denying a permit on the basis of such alleged violations. *Id.* Instead, such alleged violations are properly the subject of enforcement actions, and a permit denial cannot substitute for an enforcement action. *Id.* at 42-43, citing, *e.g.*, ESG Watts, Inc. v. IEPA, PCB 95-109 (Mar. 16, 2000). KCBX also cited Grigoleit, in which the Board found the Agency’s denial reason inappropriate and stated that, “if the Agency has *waste* concerns, the proper mechanism to address those concerns is an enforcement action rather than the denial of an *air* permit.” Pet. Brief at 42-43 (emphasis in original), citing Grigoleit Co. v. IEPA, PCB 89-184 (Nov. 29, 1990). KCBX emphasizes that the

alleged violations based on the Bureau of Land's observations are the subject of a pending administrative enforcement action. Pet. Brief. at 43, citing R. at 77. KCBX states that it has not had a chance to fully contest the allegations. Pet. Brief at 43. KCBX insisted that these alleged violations cannot form the basis for the Agency's denial. *Id.*

Second, KCBX argued that the Bureau of Land observations were missing from the list of materials the Agency would consider in reviewing the application. Pet. Brief at 44. KCBX claims that none of the documents listed in the Wells Letter asserted that Storage Pile #8 was a "waste pile" or qualifies as a pollution control facility. *Id.*, citing R. at 30. Therefore, KCBX argues that it did not have adequate opportunity to respond to information in the Agency's files that the Agency considered when reviewing KCBX's application. *Id.* Although KCBX acknowledges that the Wells letter refers to Violation Notices issued by the Agency's Bureau of Land, it argues that the Agency "did not notify KCBX that it would be relying on the Violation Notices, themselves, as reasons for the Permit Denial. They were not listed among the items in Illinois EPA's file that Illinois EPA would be considering in its review." Pet. Brief at 45.

Furthermore, KCBX argues that the Wells Letter referred to a violation of Section 39.2 of the Act, but the Violation Notice did not refer to such a violation. Pet. Brief at 45. KCBX claims that the Wells letter was the first time KCBX was aware of an alleged violation of Section 39.2 and that it was not based on specific allegations. *Id.* KCBX argues that this lack of adequate notice left it without an opportunity to respond to the information in the Agency's files related to Storage Pile #8. *Id.* at 45-46.

Third, KCBX insists that Storage Pile #8 at the South Terminal is comprised of coal owned by its customers, which is a valuable product and not "waste" under the Act. Pet. Brief at 46. KCBX notes that the coal is stored, staged, and sent through outbound shipments at its customers' request. *Id.* Currently, 8,000 to 10,000 tons of coal remain at Storage Pile #8 of the 90,000 tons originally loaded there. Pet. Br. at 46. KCBX states that none of the coal from Storage Pile #8 has been rejected by its customers. *Id.* All of it remains in the stream of commerce. *Id.*

KCBX claims that, to qualify as a "waste pile" under Section 810.103 of the Board's regulations, the pile must itself contain "waste," defined in part by Section 3.535 of the Act as "garbage, sludge . . . or other discarded material." Pet. Brief at 47, citing 415 ILCS 5/3.535 (2012); 35 Ill. Adm. Code 810.103. KCBX argues that coal in the stream of commerce does not qualify as "garbage" or "sludge." Pet. Brief at 47. KCBX surmises that the Agency's allegation appears to be based on the theory that Storage Pile #8 qualifies as "other discarded material." *Id.* KCBX claims that the coal in Storage Pile #8 does not fit under the dictionary definition of "discard," which is "to throw away; reject." *Id.*, citing <http://www.thefreedictionary.com/discard> (accessed Mar. 18, 2014). KCBX adds that "[t]he mere fact that vegetation existed on one side of the coal pile is of no consequence." Pet. Brief at 48. KCBX asserts that, absent waste, Storage Pile #8 is not a waste pile, and the South Facility is not a pollution control facility and therefore does not require local siting. *Id.*; see 415 ILCS 5/3.535; 35 Ill. Adm. Code 810.103.

SUMMARY OF AGENCY'S POST-HEARING BRIEF

Board Consideration of Testimony and Exhibits

Testimony of Mr. Steinert and Mr. Kolaz

The Agency argues that “[e]xpert testimony is admissible only if the expert has specialized knowledge that will ‘assist the trier of fact in understanding the evidence.’” Agency Brief at 31, citing Grant v. Petroff, 291 Ill. App. 3d 795, 801 (5th Dist. 1997). The Agency adds that, in determining whether the 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.” Agency Brief at 31 (citations omitted).

The Agency argues that, over its objection, Mr. Steinert was permitted to express the opinion that KCBX’s application “provided the Illinois EPA with a sufficient basis to determine whether the new equipment would comply with 35 Ill. Adm. Code 212.321.” Agency Brief at 32, citing Tr. 4/29 at 170-75. The Agency claimed that Mr. Steinert lacked experience in determining the sufficiency of applications and that his testimony effectively opines “that he did his own work correctly.” Agency Brief at 32, citing Tr. 4/29 at 183-84, 186-87, 240, 242-43. The Agency claims that this biased testimony offering an impermissible legal conclusion does not assist the trier of fact. Agency Brief at 32.

The Agency further argues that, over its objection, Mr. Kolaz opined that KCBX’s 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.” Agency Brief at 32, citing Tr. 4/29 at 250, 255-56. The Agency claims that the Board must determine whether KCBX’s application as submitted demonstrates that no violation of the Act or regulations would occur if the permit had been issued. Agency Brief at 33, citing Community Landfill Co. v. IEPA, PCB 01-170, slip op. at 4 (Dec. 6, 2001). The Agency argued that, “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.” Agency Brief at 33.

Exhibit 27 of Petition for Review

The Agency argues that KCBX’s brief cites “Petition Exhibit 27.” Agency Brief at 34, citing Pet. Brief at 8. The Agency claims that, “[d]espite 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.” Agency Brief at 34-35. The Agency argues that the Board should not consider references to Exhibit 27 because it is not part of the administrative record. *Id.* at 35.

Section 9 of the Act

The Agency states that it denied KCBX’s permit application in part because KCBX failed to demonstrate that Section 9 of the Act would not be violated if the Agency granted the permit. Agency Brief at 10. The Agency clarifies that it relied only on subsection (a) of Section 9. *Id.* at 11.

The Agency cites Ms. Armitage's testimony that she relied upon KCBX's November 1, 2013 Operating Program for Fugitive Particulate Matter, the November inspections and corresponding report, the citizen complaints, and the response to the Wells Letter to determine that KCBX failed to show that Section 9 would not be violated. *Id.*, citing Tr. 5/1 at 172-73, 181, 187-88, 196, 203, 205-206, 208-09. The Agency also cites Ms. Armitage's testimony that she considered the complaint filed against KCBX in the Circuit Court of Cook County 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." Agency Brief at 10 n.2, citing Tr. 5/1 at 202. The Agency also noted her testimony that correspondence from elected officials and a not-for-profit organization contributed to her decision because they showed the facility was having an adverse impact on the neighboring community. Agency Brief at 10 n.2, citing Tr. 5/1 at 207-08.

The Agency discounts KCBX's claim that reference to Section 9 in the denial letter is improper because it does not cite Section 9 after the first paragraph. Agency Brief at 10, citing Pet. Brief at 9, n.2, 48-49. The Agency suggests that this reference informed KCBX of one of the reasons why its permit was denied and enabled it to prepare its case before the Board. Agency Brief at 11, citing West Suburban Recycling & Energy Center v. IEPA, PCB 95-119, 125, slip op. at 15-16 (Oct. 17, 1996). The Agency cites City of Joliet, in which the Board stated that, whether or not the denial letter includes "boilerplate" language, "the Board cannot simply ignore it, picking and choosing which words of the letter to give effect." City of Joliet v. IEPA, PCB 9-25, slip op. at 23 (May 7, 2009).

The Agency argues that it referred to Section 9 not only in the permit denial letter, but also in the Wells Letter. Agency Brief at 11, citing R. at 30. The Agency claims that KCBX discussed Section 9(a) of the Act in its January 13, 2014 response letter, signifying that KCBX was aware of the Agency's concern with Section 9. Agency Brief at 11. The Agency claims that KCBX's contention that the Agency's denial letter improperly referred to Section 9 of the Act "is without merit." *Id.* at 12.

The Agency argues that KCBX failed to meet its burden of showing that it provided the Agency sufficient information to show that Section 9 would not be violated if the permit application was granted. Agency Brief at 12. Therefore, the Agency argues that the denial based upon Section 9 of the Act should be affirmed. *Id.*

35 Ill. Adm. Code 201.152 (Denial Reason 1)

The Agency argues that KCBX failed to provide the information required by Section 201.152 for the twelve pieces of transferred equipment. Agency Brief at 23; 35 Ill. Adm. Code 201.152. The Agency argues that KCBX failed to meet its burden of showing that the application complied with Section 201.152 and that denial on this basis should be affirmed. Agency Brief at 29.

Notice of Incompleteness

The Agency discounts KCBX's reliance on Sherex. The Agency stresses that, when the Board reconsidered its order reversing the Agency's permit denial in that case, it found "that the Agency does not have an absolute duty under Rule 103(b)(4) to inform Sherex that the application was incomplete." Agency Brief at 24, citing Sherex Chemical Co., Inc. v. IEPA, PCB 80-66, slip op. at 1 (Dec. 19, 1980). The Agency claims that Section 201.158 merely "establishes a schedule for computing filing dates." Agency Brief at 24, citing Riverside Laboratories, Inc. v. IEPA, PCB 87-62, slip op. at 12 (Jan. 19, 1989). The Agency argued that it was not required to issue an NOI to KCBX within the thirty-day period and that it properly relied on Section 201.152 to deny the application. Agency Brief at 24.

Required Information under Section 201.152

The Agency states that KCBX's July 23, 2013 application cross-referenced an "initial application" without specifying the precise application to which it referred. Agency Brief at 24-24, citing R. at 195, 196, 198, 199, 202, 204. The Agency stresses Mr. Steinert's acknowledgement that the application "does not specifically state to which initial application KCBX is referring." Pet. Brief at 25, citing Tr. 4/29 at 196. The Agency further stresses that three applications for the South Facility had been submitted. Agency Brief at 25, citing R. at 563, 1626, 1739. The Agency claims that, although the parties now recognize that "initial application" refers the September 2012 DTE application, this recognition is not inconsistent with Mr. Bernoteit's testimony that KCBX failed during the review period to identify the "initial application." Agency Brief at 25 n.7, citing Tr. 5/1 at 17.

The Agency argues that the September 2012 application contained no information on the quantities of raw materials to be used or the quantities of controlled and uncontrolled air contaminant emissions. Agency Brief at 25, citing R. at 1, 196, 202. While KCBX responded to the request for information regarding raw materials by referring to "Tables 5 and 6 in the initial application," the Agency argues that KCBX admits that the tables "do not include any information regarding the additional conveyors, box hopper and stacker that it was seeking to install at the South Site." Agency Brief at 25-26, citing R. at 196, Tr. 4/29 at 206. The Agency also notes that KCBX referred to "Tables 1-12 in initial application" in response to a request for emission information. Agency Brief at 26, citing R. at 202. The Agency claims that KCBX has admitted that those tables "do not include any information regarding the new emission units that were the subject of KCBX's construction permit application." Agency Brief at 26, citing Tr. 4/29 at 217-18.

While KCBX claimed it sought no increase in its throughput or emissions limitations, the Agency argues that KCBX did not so indicate in response to requests for information about raw materials and emissions. Agency Brief at 26, citing R. at 187, 196, 202, Pet. Brief at 1, 19. The Agency claims that KCBX instead referred to the "initial application," which did not account for the additional equipment at issue in the application. Agency Brief at 26, citing Tr. 4/29 at 206, 217-18. The Agency also argues that KCBX ignored its burden under Section 39(a) of the Act when it insisted that the Agency should have permitted the equipment for the South Site because it was already permitted for the North Site. Agency Brief at 26 n.8. The Agency argues that this overlooks "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." *Id.*

Finally, the Agency takes issue with KCBX's assertion that it provided a "map, statistics or other data reasonably sufficient to describe the location of the new emission units and the specific points of emission." Agency Brief at 26-27. IEPA argued that the flow diagram KCBX cited as "figure 1 in initial application" contained limited information and failed "to show whether bulk materials are removed from bulk material piles through conveyor transfer points at the South Site." Agency Brief at 27, 29, citing R. at 590, 1668-69, Tr. 4/29 at 206-09, 217-18, 220-22.

Agency Permit Analyses

The Agency discounts KCBX's position that, because Mr. Dragovich initially recommended granting the application and Mr. Bernoteit did not consider it until December 5, 2013, then the application "must be deemed complete and sufficient." Agency Brief at 27, citing Pet. Brief at 13-16, 22. The Agency argues that KCBX sought to achieve its throughput rates while "struggling" to control emissions from existing operations. Agency Brief at 27-28, citing R. at 1428, Tr. 5/1 at 121-22. On this basis, the Agency argues, closer review of the application was appropriate. Agency Brief at 28.

In addition, the Agency argues that Mr. Bernoteit did not have day-to-day involvement with KCBX's application until December 2, 2013, because he served until that time as the acting permit section manager. Agency Brief at 28, citing Tr. 5/1 at 48. The Agency stresses that, once Mr. Bernoteit reviewed the application, he concluded that it was insufficient. Agency Brief at 28, citing Tr. 5/1 at 80, 85. The Agency also notes that Mr. Dragovich did not make final decisions on permit applications but instead made recommendations to the unit manager. Agency Brief at 28, citing Tr. 5/1 at 43. Finally, the Agency notes Mr. Bernoteit's testimony regarding preparation of a Wells Letter and draft Permit Denial. Agency Brief at 28, citing Tr. 5/1 at 80, 172. The Agency suggests that he raised the issue of a denial letter when directed to prepare a Wells letter because denial was foreseeable. Agency Brief at 28, citing Tr. 5/1 at 80-81. The Agency also cites Ms. Armitage's testimony that the denial letter was prepared before a final determination had been made in order to avoid "any time constraints." Agency Brief at 28, citing Tr. 5/1 at 172.

35 Ill. Adm. Code 201.160(a) (Denial Reason 2)

The Agency states that the Board's procedural rules establish that "[n]o construction permit shall be granted unless the applicant submits proof to the Agency that [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. Agency Brief at 31, citing 35 Ill. Adm. Code 201.160(a)(1). The Agency argues that it had shown that KCBX failed to submit proof that the ten portable conveyors, one box hopper and one stacker would be constructed at the South Facility so as not to cause a violation of Sections 9, 39(c), and 39.2 of the Act and Sections 303.152, 212.301, and 212.321 of the Board's regulations. Agency Brief at 31. The Agency claims that "KCBX has failed to satisfy its burden of proving that Section 201.160(a) of the Board's regulations was an improper basis to deny KCBX's construction permit application." *Id.* The Agency concludes that denial of the application on the basis of Section 201.160(a) "should be affirmed." *Id.*

35 Ill. Adm. Code 212.301 (Denial Reason 3)

The Agency states that, on September 12, 2013, KCBX contacted it with a “high wind notice” because the South Facility was “struggling to ensure that they didn’t cause an emissions impact offsite.” Agency Brief at 12, citing R. at 1428; Tr. 5.1 at 121-22. The Agency adds that it conducted an inspection of the South Facility on September 19, 2013. Agency Brief at 12, citing Tr. 5.1 at 122. The Agency claims that a November 2013, inspection showed that the water cannons were operable but not necessarily operating. Agency Brief at 12. The Agency also reported receiving citizen complaints indicating offsite impacts from the facility. *Id.*, citing Tr. 5/1 at 203-05. As a result, the Agency argues that it issued KCBX a Wells Letter to provide KCBX with an opportunity to show that granting the permit would not cause a violation of Section 212.301. *Id.*, citing R. at 30. The Agency argues that KCBX’s January 13, 2014 response letter provided only legal argument and failed to include any data regarding the emission controls, and whether or how the dust suppression system was being utilized at the South Facility. Agency Brief at 12-13. The Agency issued the denial letter based in part on Section 212.301. *Id.*

The Agency disputes KCBX’s contention that the Agency improperly used the permitting transaction as a substitute enforcement action with respect to 35 Ill. Adm. Code 212.301. Agency Brief at 13. However, the Agency distinguishes ESG Watts and Centralia because KCBX cites no enforcement letter, enforcement action, or violation notice from the Agency. *Id.* Further the Agency argues that the Attorney General’s complaint against KCBX does not include a count based upon to 35 Ill. Adm. Code 212.301. *Id.*, citing R. at 103-18. The Agency discounts KCBX’s assertion that it was prevented from meaningfully responding to citizen complaints. Agency Brief at 14 n.3. The Agency claims that KCBX has the burden to demonstrate that granting the construction permit would not violate Section 212.301 and not to depose citizen filing complaints as in an enforcement action. *Id.* at 14. The Agency also argues that KCBX’s criticism of the citizen’s complaints for lack of specificity places an unrealistic burden on those citizens. *Id.* Therefore, the Agency argues that the concern 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. *Id.*

The Agency argues that KCBX failed to address the issue of compliance with Section 212.301 in its response to the Wells letter. Agency Brief at 14. The Agency stated that it therefore included Section 212.301 as a basis for denial. *Id.*

The Agency states that KCBX claimed it demonstrated compliance with Section 212.301 by citing the November 1, 2013 Operating Program for Fugitive Particulate Matter, the November inspection report. Agency Brief at 16. The Agency contends that KCBX’s November 1, 2013 Operating Program for Fugitive Particulate Matter only discussed the capabilities of KCBX’s dust control system without providing actual operational data. *Id.*, citing Tr. 4/29 at 79, Tr. 5/1 at 190-91. The Agency also claims KCBX’s Operating Program states that “[p]ermanent, fixed water cannon systems are typically drained and shut down on November 1 through March 31 to protect against freezing damage. However, KCBX will continue its use after November 1 and until freezing conditions require shut down,” and that a water truck would

be available as needed. Agency Brief at 16, citing R. at 153, n.3. The Agency states that, 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. Agency Brief at 16, citing Tr. 5/1 at 193-94.

The Agency also states that KCBX failed to provide sufficient information regarding how fugitive emissions would be controlled from conveyors, stackers, and box hoppers at the South Facility. Agency Brief at 16, citing R. at 155-56; Tr. 5/1 at 194-200, 202. The Agency decided, and Ms. Armitage testified, that it was insufficient that water cannons would be used “when conditions warrant,” and that water trucks “may also be used.” *Id.* at 16-17, citing R. at 155 n.6, 156.

The Agency notes Ms. Armitage’s testimony that the November inspection and corresponding reports carried more weight in her review of the application because they were closer to the January 17, 2014 decision date. Agency Brief at 17, n.4, citing Tr. 5/1 at 178-79. The Agency claims that the November inspection report shows the 42 water cannons were operable, but not necessarily operating. Agency Brief. at 17, citing Tr. 5/1 at 203-05. The Agency argues that only two of the 42 water cannons were observed in operation during that inspection. Agency Brief at 17, citing R. at 33-34. The Agency also notes that implementation of the weather station had not been completed. Agency Brief at 17, citing R. at 33.

The Agency states that KCBX has not sought to demonstrate compliance with Section 212.301 by citing its January 13, 2014 response to the Wells Letter. Agency Brief at 18. The Agency claims that the response did not address the concerns found in the Wells Letter, did not provide any information responding to the concerns, and did not offer any showing of proof that the South Facility would not violate the Act or regulations. *Id.*, citing Tr. 5/1 at 208-09. The Agency maintains that KCBX did not provide any information on whether the water cannon system was operating during freezing temperatures after November 1 through January 12, and that based on the November 1, 2013 Operating Program. Agency Brief at 19. Ms. Armitage believed that it had not been operating, and would not be operating during future winter months. *Id.*, citing Tr. 5/1 at 210.

35 Ill. Adm. Code 212.321 (Denial Reason 4)

The Agency concluded that KCBX failed to provide sufficient information to assess whether emissions would satisfy the process weight rate rule at Section 212.321 of the Board’s regulations. Agency Brief at 29, citing R. at 2.

The Agency first reviewed the fixed and variable components of the process weight rate rule. Agency Brief at 30; 35 Ill. Adm. Code 212.321(b). The Agency noted that KCBX’s permit application simply referred to the “Narrative, Section 1.0” portion of the September 2012 DTE application. Agency Brief at 30, citing R. at 198.

Within the documents KCBX cited in its application, the Agency notes an error in the allowable emission rate calculation, which KCBX acknowledged but failed to correct. Agency Brief at 30, citing Tr. 4/29 at 213-16. Specifically, the Agency argues that KCBX’s application

relied on values corresponding to process weight rates of up to 450 tons per hour, even though its actual rate was 2,500 tons per hour. Agency Brief at 30, citing R. at 209, 569. This error altered the allowable emission rate for the site in a manner for which KCBX should have accounted, according to the Agency. Agency Brief at 30.

The Agency also argued that Tables 5 and 6 of the September 2012 application do not account for the additional equipment and lack emission data specific to that equipment. Agency Brief at 30, citing R. at 602-08, Tr. 4/29 at 206-09.

415 ILCS 5/39(c), 39.2 (Denial Reason 5)

The Agency's denial letter stated that the vegetative growth observed during a Bureau of Land inspection made Storage Pile #8 a "waste pile." Agency Brief at 19-20, citing 415 ILCS 5/3.330(a), 3.485 (2012). As a waste pile, the storage pile made the site a pollution control facility subject to siting approval by the local government. Agency Brief at 19, citing 415 ILCS 5/39(c), 39.2 (2012). The Agency claims that KCBX failed to demonstrate this approval by the time of the January 17, 2014 Permit Denial. Agency Brief at 20, citing R. at 2-3. Therefore, the Agency insisted it was correct to deny KCBX's permit application on this basis. Agency Br. at 22-23.

The Agency disputes KCBX's claim that it has substituted permit denial for an enforcement action. Agency Brief at 20, citing Pet. Brief at 42-43. The Agency argues that KCBX's brief relied on cases that do not address Section 39(c) of the Act. Agency Brief at 20. The Agency insists that, because Storage Pile #8 constituted a waste pile, KCBX had to demonstrate compliance with Sections 39(c) and 39.2. *Id.* at 20-21; 415 ILCS 5/39(c), 39.2. The Agency consequently claims that "Denial Reason #5 was not improper as a matter of law." Agency Brief at 21.

The Agency likewise disputes KCBX's claim that the Agency did not provide sufficient notice regarding the observed vegetation in Storage Pile #8. Agency Brief at 21, citing Pet. Brief at 44-46. The Agency claims that, in its January 13, 2014 response, KCBX admitted that it had the opportunity to review inspection reports and Violation Notices issued by the Bureau of Land. Agency Brief at 21, citing R. at 11-12. The Agency further claims that KCBX acknowledges the reference in the Wells letter to Section 39.2. Agency Brief at 21, citing R. at 30. The Agency argued that KCBX failed to provide supplemental information concerning Storage Pile #8 or further compliance with Section 39.2. Agency Brief at 21.

Finally, the Agency argues that KCBX has failed to show that compliance with Sections 39(c) and 39.2 was unnecessary. Agency Brief at 21-22. The Agency suggests that Mr. Estadt failed to establish that Storage Pile #8 was not waste. Agency Brief at 21-22, citing Tr. 4/29 at 56-57, 58, 77-79. The Agency adds that KCBX provide no factual information about Storage Pile #8 before issuance of the denial letter. Agency Brief at 22, citing R. at 11-16. According to the Agency, even if Mr. Estadt had established that Storage Pile #8 was not waste, that testimony may not be considered because it was not presented before the Agency's January 17, 2014 decision. *Id.* at 22, citing Comm. Landfill Co. v. IEPA, PCB 01-170 (Dec. 6, 2001). The Agency concludes that KCBX had failed to meet its burden of proving that Denial Reason 5 was

improper and that compliance with Sections 39(c) and 39.2 was unnecessary. Agency Brief at 22-23.

STATUTORY AND LEGAL BACKGROUND

Statutory and Regulatory Provisions

Section 9(a) of the Act provides that no person shall “[c]ause or threaten or allow the discharge or emission of any contaminant into the environment in any State so as to cause or tend to cause air pollution in Illinois, either alone or in combination with contaminants from other sources, or so as to violate regulations or standards adopted by the Board under this Act.” 415 ILCS 5/9(a) (2012).

Section 39(c) of the Act provides in pertinent part that,

[e]xcept for those facilities owned or operated by sanitary districts organized under the Metropolitan Water Reclamation District Act, 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 this Act. 415 ILCS 5/39(c) (2012).

Section 39.2 of the Act provides in pertinent part that

[t]he county board of the county or the governing body of the municipality, as determined by paragraph (c) of Section 39 of this Act, shall approve or disapprove the request for local siting approval for each pollution control facility which is subject to such review. An applicant for local siting approval shall submit sufficient details describing the proposed facility to demonstrate compliance [with], and local siting approval shall be granted only if the proposed facility meets” nine criteria. 415 ILCS 5/39.2(a) (2012).

Section 201.152 of the Board’s air pollution regulations provides in pertinent part that

[a]n 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 (including engineering drawings, plans and specifications certified to by a registered Illinois professional engineer)

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. The Agency may waive the submission by the applicant of such engineering drawings, plans, specifications or such other portions of the above data or information as it shall deem inappropriate or unnecessary to the construction permit application. 35 Ill. Adm. Code 201.152.

Section 201.158 of the Board's air pollution regulations provides in its entirety that

[a]n application shall not be deemed to be filed until the applicant has submitted all information and completed application forms required by Section 201.152 or 201.157 of this Subpart, whichever is applicable, and procedures adopted and effective pursuant hereto. Provided, however, that if the Agency fails to notify the applicant within 30 days after the filing of a purported application that the application is incomplete and of the reasons the Agency deems it incomplete, the application shall be deemed to have been filed as of the date of such purported filing. The applicant may treat the Agency's notification that an application is incomplete as a denial of the application for purposes of review, pursuant to Section 40 of the Act [415 ILCS 5/40]. 35 Ill. Adm. Code 201.158.

Section 201.160(a)(1) of the Board's air pollution regulations provides that

No construction permit shall be granted unless the applicant submits proof to the Agency that:

- 1) The emission unit or air pollution control equipment will be constructed or modified to operate so as not to cause a violation of the Act or of this Chapter [I: Pollution Control Board]. 35 Ill. Adm. Code 201.160(a)(1).

Section 212.301 of the Board' air pollution regulations provides in its entirety that "[n]o person shall cause or allow the emission of fugitive particulate matter from any process, including any material handling or storage activity, that is visible by an observer looking generally toward the zenith at a point beyond the property line of the source." 35 Ill. Adm. Code 212.301.

Section 212.321 of the Board's air pollution regulations provides that,

[e]xcept as further provided in this Part, 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).

Subsection (b) provides an equation to determine the “[i]nterpolated and extrapolated values of the data in subsection (c).” 35 Ill. Adm. Code 212.321(b). In that equation, $E = A(P^B)$, P equals the process weight rate, and E equals the allowable emission rate. *Id.* Subsection (b) also provides separate values and units of measurement for process weight rates of up to 408 Mg/hr (450 T/hr) and equal to or greater than that threshold. *Id.* Subsection (c) establishes limits for process emission units at which construction or modification commenced on or after April 14, 1972. 35 Ill. Adm. Code 212.321(c).

Standard of Review

“The question before the Board in permit appeal proceedings is whether the applicant proves 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. EPA, PCB 01-170 (Dec. 6, 2001) (citations omitted). In this appeal, the Board determines whether the information submitted by KCBX to the Agency “sufficiently proves that issuing a permit . . . will not cause a violation of the Act and Board regulations.” Alton Pkg. Corp. v. EPA, PCB 85-145 (Apr. 24, 1985), *aff’d. sub nom Alton Pkg. Corp. v. PCB*, 162 Ill.App.3d 731, 516 N.E.2d 275 (5th Dist. 1987). “The standard of review on a permit appeal is preponderance of the evidence.” Rock River Water Reclamation Dist. v. EPA, PCB 13-11 (May 2, 2013). “A proposition is proved by a preponderance of the evidence when it is more probably true than not.” McHenry Co. Landfill, Inc. v. County Bd. of McHenry County, PCB 85-56 (Sept. 20, 1985) (citations omitted).

Burden of Proof

Section 105.112(a) of the Board’s procedural rules provides that, in appeals of final Agency decisions, “[t]he burden of proof shall be on the petitioner.” 35 Ill. Adm. Code 105.112(a); *see* 415 ILCS 5/40(a)(1) (2012). The Appellate Court has stated that the petitioner has the burden “to prove that it is entitled to a permit and that the Agency’s reasons for denial are either insufficient or improper.” ESG Watts, Inc. v. PCB, 286 Ill.App.3d 325, 331, 676 N.E.2d 299, 303 (3rd Dist. 1997).

It is well settled that the Agency’s denial letter frames the issues in a permit appeal before the Board. Pulitzer Comm. Newspapers v. EPA, PCB 90-142, slip op. at 6 (Dec. 20, 1990), citing Centralia Env’tl. Svcs., Inc. v. IEPA, PCB 89-170 (May 10, 1990), City of Metropolis v. IEPA, PCB 90-8 (Feb. 22, 1990). This limit reflects the petitioner’s burden “to demonstrate that the reasons and regulatory and statutory bases for denial are inadequate to support denial.” Midwest Generation EME v. EPA, PCB 04-185 (Apr. 19, 2007).

BOARD DISCUSSION

Denial Reason 1: 35 Ill. Adm. Code 201.152

Notice of Incompleteness

KCBX first argues that the Agency failed to issue it a Notice of Incompleteness (NOI) within 30 days under 35 Ill. Adm. Code 201.158. KCBX cites Sherex to state that, in the absence of an NOI, an application is deemed filed. The Agency must then proceed to review the application for compliance and then issue a determination by the statutory deadline. Pet. Brief at 13-14, citing Sherex Chemical Co. v. IEPA, PCB 80-66 (Dec. 19, 1980). KCBX claims that, because the Agency did not issue an NOI, it cannot deny the application solely on basis of incompleteness. Pet. Brief at 13. KCBX argues that the Agency “can only cite to missing information in support of its denial if that missing information prevented it from determining that the proposed activity would not comply with the Act and regulations.” *Id.*

The Agency’s denial letter determined that the application lacked minimum data and information, without which it “could not determine compliance” with the Act and regulations. R. at 1. Denial Reason 1(b) identified five items of information that “must be provided for the Illinois EPA to determine compliance of the ten portable conveyors, one box hopper, and one stacker with the regulations.” *Id.* at 1-2. This information includes raw materials to be used in the emissions units and quantities of emissions at the source. *Id.* at 1. The denial letter states that the application does not show whether emissions from units at the source will comply with specified Board regulations. *Id.* at 2.

The Board concludes that the Agency’s denial letter is expressed in terms of the sufficiency of the information in the application and not solely in terms of incompleteness. The Board is not persuaded that Denial Reason 1 is an untimely and impermissible NOI.

Completeness of Application

Completeness Review Worksheet. The Board notes that Agency permit analyst Mike Dragovich completed a Completeness Review Worksheet for Construction Permit Fees dated August 14, 2013, and prepared responses to Completeness Screening Questions for Application No. 07050082 received on July 23, 2013. R. at 2107, 2109; *see* R. at 24-25 (worksheet dated Jan. 16, 2014 and questions). KCBX states that this document was discovered after the conclusion of hearings in the course of reviewing documents produced by the Agency. Pet. Brief at 13 n.6.

The Completeness Review for Technical Information dated August 14, 2013, indicated “Application Complete.” *Id.* at 2107. The Completeness Review for Fees indicated “Correct.” *Id.* Under “Action To Be Taken,” the worksheet indicated “Continue with Technical Review.” *Id.*

Responding to Completeness Screening Questions, Mr. Dragovich affirmatively indicated that the application proposed and clearly identified “the annual and short-term emission limits and associated material throughput/usage limits and emission factors to be included in their new/revised permit.” R. at 2109 (emphasis in original). He also affirmatively indicated that, if the permit had been due August 14, 2013, the analyst could have written “an enforceable permit with the information provided in the application.” *Id.* While the Board notes that an analyst offers only recommendations, it considers these documents persuasive evidence that the Agency regarded the permit application as complete and warranting technical review.

Initial Application. KCBX's application includes references to an "initial application." *See, e.g.*, R. at 195. Mr. Steinert testified that this reference incorporates DTE's 2012 application for the permit transferred to KCBX. Tr. 4/29 at 148-49, citing R. at 564. Mr. Bernoteit, on the other hand, testified that he did not know what was referred to as the "initial application." Tr. 5/1 at 15. KCBX's permit application states that it seeks to revise permit No. 07050082 (R. at 191), which corresponds to the DTE application and permit. R. at 563, 574, 699-720. Mr. Dragovich testified that he reviewed and considered the DTE application in the course of analyzing the KCBX application. Tr. 4/30 at 209-12. In addition, KCBX's August 27, 2013 meeting with the Agency generated one request for additional information, which KCBX provided in Mr. Steinert's e-mail. Tr. 4/29 at 176-77; R. at 182. Mr. Steinert testified that he offered Mr. Dragovich assistance with his analysis of the application. Tr. 4/29 at 179.

The Board is not persuaded that KCBX's references to an "initial application" were unclear or that the Agency lacked opportunity to clarify references to an initial application. Under these circumstances, the Board below reviews Denial Reason 1 regarding completeness, and reviews references to an "initial application" as references to DTE's 2012 application. "It would be a somewhat capricious exercise of its powers under the Act for the Agency to deny a permit on its merits for insufficiency of information proving nonviolation while knowing that if specific additional data or information were provided or were considered it could make a better-informed decision on the application." *Sherex Chemical Co. v. EPA*, PCB 80-66, slip op. at 3 (Oct. 2, 1980).

Process Information. In Denial Reason 1, the Agency first determined that the application lacked "information concerning processes to which the emission unit . . . is related."² R. at 1 (Denial Reason 1(b)(i)). KCBX's application names its process as "material handling" and describes that process as "handling of coal and pet coke." R. at 195; *see* Tr. 4/29 at 161. The application states that it requests revision of existing permit No. 07050082 (R. at 191), which addresses a materials transloading system handling coal and petcoke. R. at 130-49. KCBX's cover letter states that the application seeks to revise page 1 of its revised construction permit to allow installation of specified additional equipment and does not request changes to throughput or emissions limitations or "related testing, monitoring, recordkeeping and reporting requirements." R. at 187. The Agency's Permit Calculation Sheet identifies KCBX's facility as "bulk material handling" and identifies coal, coke, and salt as materials. R. at 4-5. In response to a request for a "Flow Diagram Designation of Emission Unit," the application referred to Figure 1 of the initial application (R. at 195), which is entitled "Conveyor Transfer Points Process Flow Diagram" showing conveyor transfer of materials. R. at 212, 590. In response to requests to explain compliance, the application referred to the Narrative, Section 1.0 of the initial application (R. at 199), which addresses applicability of regulations to operations, emissions, and requested permit limitations for storage and handling of coal and pet coke. R. at 205-08.

² While 35 Ill. Adm. Code 201.152 and the Agency's denial letter both refer to an emission unit or air pollution control equipment, Mr. Steinert testified that the ten portable conveyors, one stacker, and one portable hopper that are the subject of the application do not perform an air pollution control functions and are not air pollution control equipment. Tr. 4/29 at 160.

Beyond the application, the administrative record is clear that the Agency did not lack information concerning KCBX's processes. KCBX's response to the Agency's Wells letter reports that the equipment at issue is to be used "to relocate coal and petroleum coke to and from staging piles." R. at 12. Under "Background," the Environmental Justice Fact Sheet states that KCBX's South Facility "stores and transfers bulk sold materials and primarily handles coal and coke products. The facility's operations include loading and unloading of materials from railcars, trucks and barges and conveying those materials to and from storage piles onsite." R. at 125.

Based on its review of the record, the Board concludes that KCBX's application contained sufficient information concerning the processes to which the emission units are related. The Board finds that KCBX has met its burden of demonstrating that the Agency's Denial Reason 1(b)(i) is insufficient.

Raw Materials. The Agency next determined that KCBX's application lacked "quantities and types of raw materials to be used in the emission unit. . . ." R. at 1 (Denial Reason 1(b)(ii)). As described in the preceding subsection, the Board concluded that the application and the Agency's permit calculation sheet sufficiently identified coal and petroleum coke as types of raw materials. R. at 4-5, 188, 195; *see* Tr. 4/29 at 161. Regarding quantities, KCBX's cover letter states that its application for a permit revision does not request "any changes to the annual and monthly throughput limitations and/or the emission limitations in the Revised Construction Permit." R. at 187; *see id.* at 140 (limitations). Under "Material Usage Information," the application requests information including maximum rates for raw materials. R. at 196. KCBX responded by referring to "Tables 5 & 6 in initial application," which provide information including maximum material handling rates. R. at 213-19, 602-08; *see* Tr. 4/29 at 162-63.

Based on its review of record, the Board concludes that KCBX's application contained sufficient information regarding quantities and types of raw materials to be used in the emission units. The Board finds that KCBX has met its burden of demonstrating that the Agency's Denial Reason 1(b)(ii) is insufficient.

Nature, Points, and Quantities of Emissions. The Agency next determined that KCBX's application lacked information regarding "the nature, specific points of emission and quantities of uncontrolled and controlled air contaminant emission at the source that includes the emission unit. . . ." R. at 1 (Denial Reason 1(b)(iii)).

In KCBX's application, the Process Emission Unit Data and Information form identifies the emission units as "Ten additional portable conveyors, one Box Hopper, one Stacker." R. at 195. The cover letter to the application identifies the same types of equipment. *Id.* at 187. The cover letter further states that the application for a permit revision does not request "any changes to the annual and monthly throughput limitations and/or the emission limitations in the Revised Construction Permit." R. at 187; *see id.* at 140 (limitations).

In response to a request for a "Flow Diagram Designation of Exhaust Point," KCBX's application referred to Figure 1 of the initial application (R. at 204), which is entitled "Conveyor

Transfer Points Process Flow Diagram.” R. at 212, 590. The diagram shows particulate matter emissions from conveyor transfer points. *Id.* The application also refers to Table 5 in the initial application, which includes calculations for process emissions including conveyor transfer points and conveyor drop points. R. at 213-16. While the Board notes Mr. Kolaz’s testimony that the table does not include the equipment that is the subject of application, the application does not seek an increase in throughput or emission limitations. Tr. 4/30 at 48-49. In addition, the Agency’s permit calculation sheet included emission limits from material storage, transfer, conveying, and loadout from the current permit. R. at 4-5, 140; *see* Tr. 4/30 at 50-56.

In addition, Mr. Estadt testified that the conveying equipment does not have a stack, vent, monitor, or other engineered opening through which to exhaust emissions. Tr. 4/29 at 164-65. He further testified that, because that equipment is moved within the site and does not have a fixed point of emission, the response to request for “Description of Exhaust Point” reported “Varies.” R. at 204; Tr. 4/29 at 164-65.

Based on its review of record, the Board concludes that KCBX’s application contained sufficient information regarding the nature, points, and quantities of emission at the source including the emission units. The Board finds that KCBX has met its burden of demonstrating that the Agency’s Denial Reason 1(b)(iii) is insufficient.

Specification of Proposed Emission Unit. The Agency next determined that KCBX’s application lacked information regarding “the type, size, efficiency and specifications (including engineering drawings, plans and specifications) of the proposed emission unit. . . .” R. at 2 (Denial Reason 1(b)(iv)).

In KCBX’s application, the Process Emission Unit Data and Information form identifies the emission units as “Ten additional portable conveyors, one Box Hopper, one Stacker.” R. at 195. The cover letter to the application identifies the same equipment. *Id.* at 187. The record clarifies that KCBX has identified the equipment addressed in its application. Mr. Steinert listed the equipment to be moved from the North Facility to the South Facility in an e-mail to the Agency permit reviewer. R. at 182. These designations are consistent in form and detail with KCBX’s current revised permit. *See* R. at 130. KCBX’s response to the Wells letter similarly states that it seeks to relocate specified equipment from its north to its south facility. R. at 12. The Agency’s environmental justice fact sheet also reflects this relocation. R. at 125. Mr. Dragovich testified that his review of the permit application included review of the permit issued to the North Facility. Tr. 4/20 at 202; *see* R. at 538-61.

Also, the Board again notes that the cover letter to KCBX’s application states that it does not request “any changes to the annual and monthly throughput limitations and/or the emission limitations in the Revised Construction Permit.” R. at 187. These limitations include “50% control for wet suppression,” which would remain in effect in the requested revision. R. at 4, 140 (limitations).

Based on its review of record, the Board concludes that KCBX’s application contained sufficient information regarding the type, size, efficiency and specifications of the proposed

emission units. The Board finds that KCBX has met its burden of demonstrating that the Agency's Denial Reason 1(b)(iv) is insufficient.

Maps, Statistics, and Other Data. The Agency next determined that KCBX's application lacked information regarding "maps, statistics, and other data reasonably sufficient to describe the location of the emission unit. . . ." R. at 2 (Denial Reason 1(b)(v)). In response to a request for a "Flow Diagram Designation of Exhaust Point," the application referred to figure 1 of the initial application (R. at 204), which is entitled "Conveyor Transfer Points Process Flow Diagram." R. at 212, 590. In response to a request for a "Description of Exhaust Point," KCBX reported "Varies" as the location for portable equipment. R. at 204. KCBX's current permit authorizes the construction of portable emissions sources. R. at 130; *see* R. at 1757 (application listing "portable" exhaust point). In addition, the Board notes Mr. Kolaz's testimony that any diagram of portable equipment "would be an illustration of one possible configuration." Tr. 4/30 at 64-65.

Based on its review of record, the Board concludes that KCBX's application contained sufficient information regarding a sufficient description of the location of the emissions unit. The Board finds that KCBX has met its burden of demonstrating that Denial Reason 1(b)(v) is insufficient.

Summary

Having reviewed the record, the Board finds that KCBX has met its burden of showing that its application did not lack information cited by Agency in Denial Reason 1. The Board finds that KCBX has met its burden of proving that that the Agency's Denial Reason 1 is inadequate to support denial of the permit application on the basis of Section 210.152 of the Board's rules.

Denial Reason 3: 35 Ill. Adm. Code 212.301

The Agency's denial letter stated that KCBX's application failed to show compliance with 35 Ill. Adm. Code 212.301. Specifically, "[b]ased upon the observations made by the Division of Air Pollution Control's field staff and citizen pollution complaint forms, emissions from the source may violate 35 Ill. Adm. Code 212.301" regarding emission of fugitive particulate matter. R. at 2 (Denial Reason 3); *see* R. at 30.

Inspection Reports

The Board has reviewed reports of inspections of the South Facility conducted by the Agency on September 5, September 11, September 13, November 6, and November 19 of 2013. R. at 31-35 (November 6 and 19), 40-58 (September 11 and 13), 164-66 (Sept. 5).

The report of the Agency's September 5, 2013 inspection notes operations including "[m]aterial conveying and transfer to storage piles" but does not address Section 212.301. R. at 164-66.

The report of the Agency's inspections on September 11 and 13 of 2013 addresses Section 212.301. That report states that "[t]here is a threat of visible emissions crossing the property line from storage piles." R. at 45. With regard to traffic areas and roadways, the report states that "[v]isible emissions from truck traffic were observed at the entrance road. . . . These visible PM emissions may have crossed a property line at the guard shack but the KCBX official was unclear where the property line is by the guard shack." R. at 47. Notably, the report makes no reference to Section 212.301 with regard to categories of operations including "Conveyor Loading." R. at 46-47.

While the Agency's report of inspections on November 6 and 19 of 2013 noted portable conveyors at the site, the report did not allege violation of Section 212.301 from any units at South Facility. R. at 31-35; *see* Tr. 4/30 at 86-87, 91. While it does not overlook reports that generated Agency inspections, the Board cannot conclude that these inspection reports support an allegation that operation of equipment specifically addressed in the application "may violate 35 Ill. Adm. Code 212.301."

Complaints

The Board recognizes that the Agency has received a number of citizen complaints, which are reviewed above under "Factual Background." Among these complaints are those describing piles of petcoke attributed to KCBX as the owner. *E.g.*, R. at 273-74, 295-96, 336-37, 519-20. The Board recognizes the significance of these complaints to Agency functions including inspection and enforcement. While the Board does not expect complaints of this nature to cite specific legal authority or to demonstrate specific knowledge of KCBX's operations, the Board cannot conclude that they support a specific allegation that operation of the equipment identified in KCBX's application "may violate 35 Ill. Adm. Code 212.301."

Fugitive Dust Plan

KCBX submitted a revised November 1, 2013 fugitive dust program. R. at 150-63. That program specifically addresses potential emissions from material transfers and conveying equipment and from bulk solid material loading. R. at 155-56. The program plainly indicates that a water cannon system would apply to conveyors and transfer points. *Id.* at 156; *see* Tr. 5/1 at 198. The plan also addresses emissions from stockpiles, including a description of the water cannon system. R. at 152-55. In addition, the program refers to ongoing monitoring and implementation of Best Management Practices. R. at 157.

KCBX specifically addressed the November 1 plan in detail in its response to the Agency's Wells letter. R. at 14. Contrary to the Agency's position that KCBX "failed to provide any actual data regarding the emission control used at the South Site" (Agency Brief at 12-13), KCBX described its system in that response in part as "forty-two oscillating water cannons mounted on sixty-foot high poles that operate on a computer-controlled, pre-programmed schedule to apply up to 1,800 gallons of water per minute to the entire storage area at the site." R. at 14.

The Agency's reports of its November inspections demonstrated construction and operation of the plan. The Agency's inspector observed the operation of water cannons. R. at 33-34. Mr. Estadt testified that he ran a full cycle of all 42 water cannons during the inspection. Tr. 4/29 at 52-53. He also testified to his description of the weather station and data. Tr. 4/29 at 47-48. He also described the manner in which weather data lead to the adjustment of water application. Tr. 4/29 at 47.

Summary

Having reviewed the record, the Board finds that KCBX has shown that complaints and inspection reports do not persuasively support a claim that emissions from sources addressed in the application "may violate 35 Ill. Adm. Code 212.301," as determined by the Agency in Denial Reason 3. The Board finds that KCBX has met its burden of proving that Denial Reason 3 is inadequate to support denial of the permit application on the basis of Section 212.301.

Denial Reason 4: 35 Ill. Adm. Code 212.321

The Agency's Denial Reason 4 states that

[t]he 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 212.122, 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 [sic] would be allowed by this rule. R. at 2.

Initial review of the permit application by Mr. Dragovich determined that the application was complete for technical review. R. at 2107-09. Mr. Dragovich testified that he examined and considered other permits, revisions, and applications under permit No. 07050082, including DTE's September 2012 application referred to as the "initial application." Tr. 4/30 at 209-12. He prepared a draft revised permit setting limits based on standard emission factors. R. at 661 (Condition 14.c.i, ii citing Table 13.2.4, AP 42)

Ample evidence in the record shows that KCBX relied upon USEPA's AP-42 emission factor to compute estimated emissions based on throughput. *See* Tr. 4/29 at 163. The record shows that the Agency understood and has relied on the same emission factor. Narrative Section 1.0 of Initial application specifically relies on an emission factor of 0.00064 tons/hour derived from AP-42. R. at 208; *see* Tr. 4/30 at 101. KCBX's application also refers to Table 5 of the initial application, which refers to the same emission factor derived from AP-42 with regard to various sources. R. at 213-16. Mr. Bernoteit testified that, in his opinion, the information in Tables 5 and 6 "would be a good example of what we would seek to determine emissions and to assess whether units would comply with Section 212,321." Tr. 5/1 at 20. The Agency's permit calculations refer to Table 13.2.4 AP42 emission factors and employed those factors. R. at 4, 5, 6. In addition, this emission factor appears in KCBX's current permit with specific reference to Table 13.2.4 AP-42. R. at 140 (Condition 14.c.i, ii). The Board notes that KCBX is not

requesting revision of its current throughput or emissions limitations or related requirements. R. at 187.

Narrative Section 1.0 of the Initial Application includes a calculation based on a single transfer point with throughput of 2,500 pounds per hour. R. at 207; *see* 35 Ill. Adm. Code 212.321. That calculation shows that actual emissions derived from AP 42 (0.79 pounds per hour) would be substantially below the allowable rate of 165.70 pounds per hour. R. at 207; *see* Tr. 4/29 at 169-70; *but see* Tr. 4/30 at 105-60 (applying incorrect process weight rate without changing conclusion). The Board notes that a control efficiency of 50% for wet suppression is incorporated into KCBX's current revised permit. R. at 140 (Condition 14.c.i). In addition, the Board notes Mr. Kolaz's testimony that, even if this calculation includes no credit for wet suppression, actual emissions are projected to be well below the allowable rate. Tr. 4/30 at 101-02. He estimated a process weight rate of 660,000 tons per hour as the rate at which a violation would occur. Tr. 4/30 at 101. He testified that operation at this rate for one hour would represent approximately 60% of the monthly throughput limit for the facility. Tr. 4/30 at 101.

The Board finds that KCBX has met its burden of proving that its application included information sufficient to determine whether granting the permit application would result in a violation of Section 212.321. The Board finds that KCBX has met its burden of proving that Denial Reason 4 is insufficient to support denial of the permit application on the basis of Section 212.321.

Denial Reason 5: 415 ILCS 5/39(c), 39.2

The Agency's Denial Reason 5(c) states that, "[b]ased upon the observations made by the Bureau of Land's field staff, storage pile #8 was determined to be a waste pile due to vegetative growth observed during the inspection on November 6, 2013." R. at 3. The Agency viewed storage pile #8 as a pollution control facility requiring local approval of its site under Section 39.2 of the Act. *Id.* at 2.

The Narrative report of the November 6, 2013 inspection by the Agency's Bureau of Land states that "some expired vegetation was observed on a coal pile identified as Storage Pile #8. I was informed that this pile was on the site prior to purchasing the property." R. at 88. The narrative did not otherwise address this observation except to cite an apparent open dumping violation of Section 21(a) of the Act on the basis that "Storage Pile #8 has been determined a waste pile due to vegetative growth observed during the inspection." *Id.* at 89; *see id.* at 77-84 (violation notices).

Mr. Estadt testified that the material in Storage Pile #8 is not owned by KCBX but is staged and shipped for its customer as part of an "ongoing process." Testimony shows that Storage Pile #8 contains coal owned by a KCBX customer. Tr. 4/29 at 56, 77. Testimony also shows that KCBX has shipped 80-90% of the original volume of material in the pile. *Id.* at 57. Testimony also indicates that the observed vegetative growth has not caused any coal transferred from Storage Pile #8 to be rejected by its owner. *Id.* at 58.

The Agency argues that the Board cannot consider Mr. Estadt's testimony because it was not presented to the Agency before it issued the denial letter. Agency Brief at 22, citing Community Landfill Co. v. IEPA, PCB 01-170, slip op. at 4 (Dec. 6, 2001), citing Alton Packaging Corp. v. PCB, 162 Ill. App. 3d 731,738, 516 N.E.2d 275,280 (5th Dist. 1987), *aff'd. sub nom. Community Landfill Co. & City of Morris v. PCB & IEPA*, 331 Ill. App. 3d 1056, 772 N.E.2d 231 (3rd Dist. 2002). It is just as well settled, however, that

it is the hearing before the Board that provides a mechanism for the petitioner to prove that operating under the permit if granted would not violate the Act or regulations. Further, the hearing affords the petitioner the opportunity "to challenge the reasons given by the Agency for denying such permit by means of cross-examination and the Board the opportunity to receive testimony which would 'test the validity of the information (relied upon by the Agency).'" Community Landfill Co. v. IEPA, PCB 01-170, slip op. at 4 (Dec. 6, 2001), citing Alton Packaging Corp. v. PCB, 162 Ill. App. 3d 731,738, 516 N.E.2d 275,280 (5th Dist. 1987), *aff'd. sub nom. Community Landfill Co. & City of Morris v. PCB & IEPA*, 331 Ill. App. 3d 1056, 772 N.E.2d 231 (3rd Dist. 2002).

The Act defines "pollution control facility" in pertinent part as "any waste storage site, sanitary landfill, waste disposal site, waste transfer station, waste treatment facility, or waste incinerator." 415 ILCS 5/5.330 (2012). The Board's solid waste regulations define "waste pile" in pertinent part as "an area on which non-containerized masses of solid, non-flowing wastes are placed for disposal." 35 Ill. Adm. Code 810.103. By definition a waste pile contains "waste," which the Act defines in pertinent part as "any garbage . . . or other discarded material." 415 ILCS 5/3.535 (2012).

Testimony in this case plainly shows that the coal comprising Storage Pile #8 is neither "garbage" nor "discarded material." That testimony shows that the coal is temporarily stored and ultimately moved off-site at customers' direction. The record includes persuasive evidence that Storage Pile #8 does not contain "waste," is not a "waste pile," and is not a "pollution control facility" subject to local approval of the site under Section 39.2 of the Act.

The Board can imagine a case in which the presence of vegetation on stored material provides persuasive evidence that waste is being stored at a site, but this is not that case.

The Board finds that KCBX has met its burden of showing that Denial Reason 5 is insufficient to justify denial of the permit application on the bases of Sections 39(c) and 39.2 of the Act.

Section 9 of the Act

The first paragraph of the Agency's denial letter states that KCBX's application was 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." R. at 1. Denial Reasons 1-5 do not refer specifically to Section 9 and provide no specific reason why Section 9 "might be violated." *Id.* at 1-2.

In City of Joliet v. IEPA, the Board stated that, although the language in a denial letter is arguably “boilerplate,” the Board “cannot simply ignore it, picking and choosing which words of the letter to give effect.” City of Joliet v. IEPA, PCB 09-25, slip op. at 23 (May 7, 2009). The Board “must examine the record to determine whether denial is supported for the reason given.” Rock River Water Reclamation Dist. v. IEPA, PCB 13-11 slip op. at 40 (May 2, 2013).

The Agency’s brief states that it “has not relied on any subsection of Section 9 of the Act, other than subsection (a).” Agency Brief at 11. Section 9(a) of the Act provides that no person shall “[c]ause or threaten or allow the discharge or emission of any contaminant into the environment in any State so as to cause or tend to cause air pollution in Illinois, either alone or in combination with contaminants from other sources, *or so as to violate regulations or standards adopted by the Board under this Act.*” 415 ILCS 5/9(a) (2012) (emphasis added).

Each of the other provisions listed in the first paragraph of the Agency’s denial letter is addressed in some detail in one of the five denial reasons. R. at 1-2. Denial Reason #4, for example, refers to specific data the Agency believed to be missing from the application and states specific reasons why Section 212.321 of the Board’s regulations might not be met. *See id.* at 2.

In the absence of reasons supporting denial specifically on the basis of Section 9, the Board does not view the Agency’s denial letter as relying on Section 9 as an independent basis for denial. This reading of the denial letter gives effect to language citing a possible violation of Section 9. However, it does not deprive KCBX of notice under Section 39 and an opportunity to establish its case. *See Centralia Env’tl. Svcs. v. IEPA*, PCB 89-170, slip op. at 6-7 (May 10, 1990).

Section 9 provides in pertinent part that no person shall “[c]ause or threaten or allow the discharge or emission of any contaminant into the environment in any State . . . so as to violate regulations or standards adopted by the Board under this Act.” 415 ILCS 5/9(a) (2012).

The Agency has determined that four regulatory provisions adopted by the Board under the Act may be violated by granting the permit application. R. at 1-2. Under this view, granting the application would violate each of those regulations, which in turn would constitute a violation of Section 9 of the Act. As the Board has found above that KCBX has met its burden with regard to all of the denial reasons based on the Board’s regulations, the Board cannot conclude that granting the permit would necessarily violate those regulations and constitute a violation of Section 9.

The Board finds that KCBX has met its burden of showing that Denial Reason 2 is insufficient to justify denial of the permit application on the basis of Section 9 of Act.

Denial Reason 2: 35 Ill. Adm. Code 210.160(a)

The Agency argues that Section 201.160(a) prevents it from granting a permit unless the applicant demonstrates that emissions units will not operate so as to cause a violation of the Act

or regulations. Agency Brief at 31. Having argued that KCBX failed to submit proof that construction of the requested equipment would not cause a violation of various statutory and regulatory provisions, the Agency claims that “KCBX has failed to satisfy its burden of proving that Section 210.160(a) . . . was an improper basis to deny KCBX’s construction permit application.” *Id.*

KCBX claims that Section 201.160(a) merely sets forth “standards of issuance” for construction permits and suggests that it is not an independent basis for denial. Pet. Brief at 23. The Board above has found that KCBX met its burden of showing that the Agency’s reliance on violations of Sections 9, 39(c), and 39.2 of Act and Sections 201.152, 212.301, and 212.321 of the Board’s regulations were inadequate to support denial. The Board concludes based on these findings that KCBX has met its burden of showing that Section 201.160(a) is also an inadequate basis to deny its application.

CONCLUSION

The Board first denies the Agency’s motion to reconsider the Board’s order of May 1, 2014. The Board also denies KCBX’s motion for leave to file a reply. Having determined that KCBX has demonstrated that the Agency’s reasons for denial are insufficient, the Board finds that the submitted application does not demonstrate violations of the provisions of the Act and rules cited by the Agency in its denial letter. The Agency’s January 17, 2014 determination to deny the permit is therefore reversed, and the Board remands this case to the Agency. As the Agency’s denial was based substantially on a lack of information, the Board remands for additional consideration of the information in the application consistent with this order and with the requirements of the Act and applicable regulations rather than remanding with a direction to issue the permit.

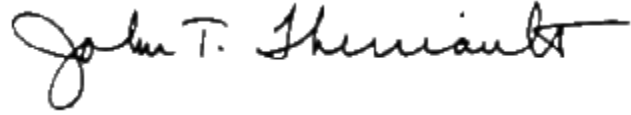
ORDER

KCBX’s application is remanded to the Agency for additional consideration of the information in the application consistent with this order and with the requirements of the Act and applicable regulations.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2012); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board’s procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on June 19, 2014 by a vote of 4-0.

A handwritten signature in black ink that reads "John T. Therriault". The signature is written in a cursive style with a long horizontal stroke at the end.

John T. Therriault, Clerk
Illinois Pollution Control Board