

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

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

(SEE PERSONS ON ATTACHED SERVICE LIST)

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board **PETITIONER'S POST-HEARING BRIEF**, copies of which are herewith served upon you.

Respectfully submitted,

KCBX TERMINALS COMPANY,
Petitioner,

Dated: May 9, 2014

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

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CERTIFICATE OF SERVICE

I, Katherine D. Hodge, the undersigned, hereby certify that I have served the attached PETITIONER'S POST-HEARING BRIEF upon:

Mr. John Therriault
Assistant Clerk of the Board
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100 West Randolph Street
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via electronic mail on May 9, 2014 and upon:

Mr. Bradley P. Halloran
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by depositing said documents in the United States Mail, postage prepaid, in Springfield, Illinois on May 9, 2014 and upon:

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

via facsimile and by depositing said document in the United States Mail, postage prepaid, in Springfield, Illinois on May 9, 2014.

/s/ Katherine D. Hodge
Katherine D. Hodge

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PETITIONER'S POST-HEARING BRIEF

NOW COMES Petitioner, KCBX TERMINALS COMPANY ("KCBX"), a North Dakota corporation, by and through its attorneys, HODGE DWYER & DRIVER and QUINN EMANUEL URQUHART SULLIVAN LLP, pursuant to the Hearing Officer's March 25, 2014 Order, and submits its Post-Hearing Brief to the Illinois Pollution Control Board ("Board").

I. INTRODUCTION

This appeal stems from a straightforward permit application to transfer portable conveyer equipment from one permitted KCBX facility to another KCBX permitted facility two miles away. The application requested no changes to the permit limits for either material throughput or emissions. The only revision requested to the existing construction permit was to add twelve pieces of portable equipment to be located from KCBX's North Terminal to KCBX's South Terminal. The Illinois Environmental Protection Agency ("Illinois EPA" and "Agency") initially recognized this permit application as straightforward, determined the application to be complete, and recommended granting the permit. Illinois EPA prepared a revised permit incorporating the equipment and this permit would have issued if the Chief of the Bureau of Air, Ms. Armitage, had not decided to deny the permit. The only problem with that decision is that

the Agency had no legitimate basis to deny the permit. Instead, the Agency impermissibly denied the application after manufacturing technical deficiencies in the application and inappropriately considering unadjudicated complaints, unrelated sentences from inspection reports, and the fact that a separate enforcement action had been initiated. None of the reasons the Agency identified can serve as a basis for denying the permit at issue. If the existence of a separate enforcement action or unverified complaints could justify denial of a permit, then KCBX's due-process rights to defend itself against allegations would be eliminated.

The Record clearly establishes that Illinois EPA never sent a Notice of Incompleteness ("NOI"), recognizing it was "too late" to send an NOI by October 2013. Illinois EPA chose instead to send a Wells Letter to try to justify its decision to deny this permit. The law is clear that Illinois EPA may not rely upon an "incomplete" application when it failed to issue an NOI. As a consequence, none of the alleged deficiencies Illinois EPA contends should have been part of the application can form the basis for denial; all of these deficiencies were manufactured almost five months after the permit application was filed when the permit manager was told to take a closer look and find reasons to deny the permit.

II. SUMMARY OF ARGUMENT

The Board must find that Illinois EPA erred in its permit denial and direct Illinois EPA to issue the revised construction permit to KCBX. The analysis and calculations by Mr. Dragovich (the permit engineer assigned to the application) led to the conclusion that this revision to the construction permit should be granted. The Agency then impermissibly changed its position following the initiation of a separate enforcement action. In response to Mr. Dragovich's request to send the proposed draft permit to KCBX, counsel for the Agency instructed Mr. Dragovich to

“hold off on sending,” explaining that the Illinois Attorney General is pursuing enforcement and “permitting issues are involved.”

However, the Agency is not permitted to combine enforcement with permitting by considering unadjudicated allegations in an enforcement action as the reason to deny a permit under Section 39(a) of the Illinois Environmental Protection Act (“Act”), 415 ILCS 5/39(a). Instead of keeping these activities separate, the Chief of the Bureau of Air at Illinois EPA told the permitting section to deny this permit and to go back, after the permitting section had decided to grant the permit, and take a closer look at the application. Mr. Bernoteit looked at the application file for the first time on December 5, 2013, and then tried to identify reasons to justify a denial based on incompleteness of the application. But Mr. Bernoteit acknowledged it was “too late” at that point for Illinois EPA to send the required NOI. Further, Mr. Bernoteit admitted at the hearing that the Illinois EPA would not even utilize the allegedly “missing” information (manufacturer, model and serial number) to analyze the permit for the transfer of this portable equipment.

The Illinois EPA also impermissibly denied the permit based on alleged unadjudicated violations in the form of unverified citizen complaints, a recently filed enforcement action, and unrelated statements about truck dust in otherwise positive inspection reports.

The enforcement action is just that, an enforcement action. If Illinois EPA, or the Illinois Attorney General, contends that KCBX does not comply with existing regulations consistent with its existing permit, then it must bring an enforcement action; the Agency cannot deny the permit and, thereby, sidestep the due-process rights that KCBX has to refute the allegations in the context of the enforcement action.

Finally, KCBX had no reason to believe (and the Agency never indicated) that KCBX needed to submit any additional information related to the revised construction permit application to relocate this portable equipment. The Wells Letter did not ask for any other information because that is not its purpose. Its purpose is simply to identify what information outside the record may be considered by the Agency. The problem with the information outside the record that was considered in this case is that none of it constituted a prior adjudication of noncompliance, and none of it can form the basis for a permit denial.

III. BACKGROUND

KCBX filed its Request for Revision to the Revised Construction Permit on July 23, 2013. R-186-R-204. The Request for Revisions seeks to add ten portable conveyors, one box hopper, and one stacker to its South Terminal as part of the Conveyor Addition Project. R-186-R-204. KCBX specifically notes in the cover letter 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-187. The Request for Revision requested to revise an existing construction permit, R-191, which authorized the construction and operation of other portable conveyors, a box hopper, and stackers. R-130-R-149. As described in KCBX’s Request for Revision, KCBX did not request any change to its throughput limitations or emission limitations. R-187. Thus, limits in Special Condition 14 of the Request for Revision would remain the same, and KCBX would still be limited to throughputs of 11,000,000 tons per year of coal and pet coke and 1,100,000 tons per month of coal and pet coke. Id.; R-140. As explained by Mr. Estadt at hearing, the addition of portable conveyors, box hopper, and stacker will allow

the South Terminal to operate more efficiently. Apr. 29 Tr. at 36. Currently, if the South Terminal is transferring material on a string of portable conveyors, operators must first break down the line of portable conveyors and move them to another location. *Id.* By adding additional portable conveyors, one line of portable conveyors could be operating, and operators could position other conveyors for the next transfer. *Id.*

On August 14, 2013, the Illinois EPA permit analyst to which the application was assigned, Mr. Dragovich, completed the initial Completeness Screening Checklist and Completeness Review Worksheet in which he determined the Request for Revision to be complete. R-2107-R-2109.

On August 27, 2013, Illinois EPA met with KCBX representatives and discussed the Request for Revision. R-183. Illinois EPA requested equipment ID numbers for the equipment. R-182, R-784; Apr. 29 Tr. at 177. On September 3, 2013, Mr. Steinert e-mailed Mr. Dragovich equipment ID numbers and identified the equipment from the North Terminal that would be moved to the South Terminal. R-182; Apr. 29 Tr. at 177. Mr. Steinert followed up his e-mail with a telephone call to Mr. Dragovich. Apr. 29 Tr. at 177-179. During that telephone conversation, Mr. Dragovich told Mr. Steinert that he did not need any additional information or help analyzing the application. *Id.*

Mr. Dragovich completed the Permit Calculation Sheet for the application on September 5, 2013, and recommended granting the Request for Revision. R-766.

On September 5, 2013, Illinois EPA field staff inspected the South Terminal and "saw no sign of dust blowing anywhere." R-164-R-165. On September 11 and 13, 2013, Illinois EPA field staff inspected the South Terminal. R-40-R-70. Ms. Armitage provided comments to field staff on their inspection report and indicated that certain language and conclusions be removed

from a draft inspection report. May 1 Tr. at 244-249. She recommended deleting, among other things, the inspector's observation that the new dust suppression system was "major," a phrase indicating that the new dust suppression system "should be superior in design and accomplish the goal of fugitive PM control of stockpiles, roadways and transfer points," and a phrase noting that "it appeared they are working diligently to apply water throughout the plant." *Id.*; R-1309, R-1311. Ms. Armitage also suggested deleting a section in the draft inspection report finding that the new dust suppression system "will improve fugitive PM control tremendously." R-1316.

On September 19, 2013, Mr. Dragovich circulated a draft permit among Illinois EPA staff. Apr. 30 Tr. at 199-200; R-650-670. However, on October 10, 2013, Illinois EPA attorney Mr. Pressnall e-mailed Mr. Dragovich and instructed him to "hold off" on sending a draft permit to KCBX. R-2093. Mr. Pressnall explained that the Illinois Attorney General was pursuing enforcement against KCBX and "permitting issues are involved." *Id.* On October 18, 2013, KCBX issued Illinois EPA a waiver of the decision deadline. R-178.

On November 1, 2013, KCBX provided a revised fugitive dust plan to Illinois EPA. R-647; fugitive dust plan at R-150. The transmittal e-mail also explained that the new dust suppression system at the South Terminal was operational on a "full manual and/or limited automated basis." R-647. KCBX added the new dust suppression, which cost at least \$10,000,000, after it purchased the South Terminal. Apr. 29 Tr. at 30. KCBX was permitted to operate at the South Facility without the new system, so it was under no obligation to install it. See R-130-R-149.

On November 4, 2013, the Illinois Attorney General filed a Complaint against KCBX in Cook County alleging air pollution and the failure to amend and maintain a current fugitive particulate matter operating program. R-103-R-118.

In a November 5, 2013, e-mail from Assistant Attorney General Pamerter to KCBX counsel, Ms. Hodge, Ms. Pamerter noted that they were performing a review of the KCBX fugitive dust plan submitted on November 1, 2013. R-2050. Mr. Pressnall of the Illinois EPA was copied on this e-mail.

On November 6 and 19, 2013, Illinois EPA field staff inspected the South Terminal. R-31-R-39. During an inspection, Mr. Estadt cycled the water cannons and showed Illinois EPA field staff the system operator interface and associated weather system. Apr. 29 Tr. at 45-46.

On November 14, 2013, Illinois EPA held an environmental justice outreach meeting. Factsheet at R-125.

On November 15, 2013, KCBX notified Illinois EPA that the new dust suppression system at the South Terminal was operational. R-648.

On November 19, 2013, KCBX granted Illinois EPA another waiver of the decision deadline. R-73.

On December 5, 2013, KCBX met with representatives of Illinois EPA and the Illinois Attorney General's Office and made a presentation on the new dust suppression system and related procedures at the South Terminal. Apr. 29 Tr. at 39-43; 112-123; R-2054-R-2092. Mr. Bernoteit, who was the State and FESOP Unit Manager and Acting Permit Section Manager during a portion of the permit application review period, attended that meeting and heard KCBX's presentation. May 1 Tr. at 70-77. Later on December 5, 2013, Ms. Armitage instructed Mr. Bernoteit to draft a Wells Letter and Permit Denial. May 1 Tr. at 46-47. On that same day, Mr. Bernoteit looked at the application file for the first time. *Id.*

On December 10, 2013, Illinois EPA issued KCBX a Wells Letter and asked KCBX to respond in eight days. R-30. KCBX was required to request the information referenced in the Wells Letter through a Freedom of Information Act ("FOIA") request. See Petition Exhibit 27.

On December 18, 2013, KCBX sent its initial response to the Wells Letter and granted Illinois EPA an additional waiver of Illinois EPA's decision deadline. R-18. On January 13, 2014, KCBX sent its Second Wells Letter response to Illinois EPA. R-11-R-16.

On January 16, 2014, Mr. Dragovich completed a second Completeness Review Worksheet. R-25. A second and undated Completeness Screening Checklist accompanying the Completeness Review Worksheet indicates that Illinois EPA finds the Request for Revision to be incomplete. R-24. On January 17, 2014, a second Permit Calculation Sheet was completed, which recommended that the Request for Revision be denied.

On January 17, 2013, Permit Denial Letter issued by Illinois EPA. R-1.

IV. BOARD REVIEW OF A PERMIT DENIAL

Pursuant to Section 105.112(a) of the Board's procedural rules, 35 Ill. Admin. Code § 105.112(a), the burden of proof shall be on the petitioner in appeals of final agency decisions. The Board has made clear that "[t]he standard of review in a permit appeal is preponderance of the evidence." *Rock River Water Reclamation Dist. v. Illinois EPA*, PCB No. 13-11, 2013 Ill. ENV LEXIS 134, at *32, (Ill.Pol.Control.Bd. May 2, 2013). Specifically, in permit appeals, the Board determines "whether the information provided by [the applicant] to the Agency sufficiently proves that issuing a permit...will not cause a violation of the Act and Board regulations." *Alton Pkg. Corp. v. Illinois EPA*, PCB 85-145 (Ill.Pol.Control.Bd. Apr. 24, 1986) *aff'd Alton Pkg. Corp. v. IPCB*, 162 Ill.App.3d 731, 516 N.E.2d 275, 114 Ill. Dec. 120 (5th Dist. 1987). Therefore, "the Board places the burden on the petitioner to prove that it is entitled to a

permit and that the Agency's reasons for denial are either insufficient or improper." *ESG Watts v. IPCB and IEPA consolidated with IEPA v. IPCB*, 286 Ill. App. 3d 325, 676 N.E.2d 299, 221 Ill. Dec. 778 (3d Dist. 1997).

Further, "[i]t is well-established that the issues before the Board in a permit review are framed by the Agency's denial letter." *Jack Pease d/b/a Glacier Lake Extraction v. Illinois EPA*, PCB No. 95-118, 1995 Ill. ENV LEXIS 739, at *38 (Ill.Pol.Control.Bd. July 20, 1995); *Centralia Environmental Services, Inc. v. Illinois EPA*, PCB 89-170, 1990 Ill. ENV LEXIS 471, *6 (Ill.Pol.Control.Bd. May 10, 1990). This limits the issues to the information contained in the denial letter, which limitation "is necessary to satisfy principles of fundamental fairness because it is the applicant who has the burden of proof before the Board to demonstrate that the reasons and regulatory and statutory bases for denial are inadequate to support permit denial." *Midwest Generation EME, LLC v. Illinois EPA*, PCB No. 04-185, 2007 Ill. ENV LEXIS 150, at *31-32 (Ill.Pol.Control.Bd. Apr. 19, 2007), quoting *Pulitzer Community Newspapers, Inc. v. IEPA*, PCB No. 90-142, slip op. at 6 (Dec. 20, 1990). Implicit grounds for a denial statement are impermissible. *Midwest Generation* at *30.

V. ILLINOIS EPA IMPROPERLY DENIED THE REQUEST FOR REVISION

Illinois EPA provides five "specific reasons" for its denial.¹ R-1-R-3. All five of those reasons are improper bases for denying the Request for Revision.²

¹ The list of "specific reasons" in the Permit Denial includes a sixth numbered paragraph which states: "[t]he denial of this application for the stated reasons does not change the status of the previously issued permit for the equipment and operations that this application covers." R-3. This statement by the Agency does not provide a basis for denial.

² In addition to listing "specific reasons" for its decision in the Permit Denial, Illinois EPA references Section 9 of the Illinois Environmental Protection Act, 415 ILCS 5/9, in the introduction to the Permit Denial. See R-1. Illinois EPA does not cite to Section 9 under any of the "specific reasons" it lists for denying the permit, however. See R-1-R-3. Therefore, any attempt by Illinois EPA to rely on Section 9 of the Act is also improper.

A. Illinois EPA Improperly Denied the Request for Revision Based on 35 Ill. Admin. Code § 212.152 (“Denial Reason 1”).

In its Denial Reason 1, Illinois EPA claims that KCBX did not provide certain information in its Request for Revision and argues that, as a result, Illinois EPA “could not determine compliance” with the Act and regulations. R-1. However, in Denial Reason 1, Illinois EPA does not describe the provisions of the Act and regulations with which it could not determine compliance. Therefore, Denial Reason 1 is simply an allegation that information listed in Section 201.152 is missing from the Request for Revision, i.e. that the Request for Revision was incomplete.

Since Illinois EPA did not issue an NOI to KCBX, it cannot base its denial of the permit now on a claim of incompleteness. Further, even if Illinois EPA had issued an NOI, the Request for Revision was complete. Much of the information listed in Denial Reason 1(b) as missing was in fact provided by KCBX to Illinois EPA. Any remaining information that KCBX may not have supplied was not necessary for Illinois EPA to determine that granting the Request for Revision would not result in a violation of the Act or regulations.

1. Regulations at Issue

Section 201.152 lists information that an application for a construction permit “shall contain.” It states in relevant part as follows:

An application for a construction permit shall contain, as a minimum, the following data and information: the nature of the emission unit and air pollution control equipment, including the expected life and deterioration rate; information concerning processes to which the emission unit or air pollution control equipment is related; the quantities and types of raw materials to be used in the emission source or air pollution control equipment; the nature, specific points of emission and quantities of uncontrolled and controlled air contaminant emissions at the source that includes the emission unit or air pollution control equipment; the type, size, efficiency and specifications (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. Admin. Code § 201.152.

Notably, Illinois EPA may waive the submission of information listed in Section 201.152. Illinois EPA claims that the following information is missing from the Request for Revision:

- (i) information concerning processes to which the emission unit or air pollution control equipment 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.

R-1.

35 Ill. Admin. Code § 201.158 addresses incomplete applications, stating as follows:

An 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. Admin. Code § 201.158.

2. Illinois EPA Cannot Deny the Permit Simply on the Basis of Incompleteness, because Illinois EPA Did Not Issue an NOI.

If Illinois EPA does not issue an NOI within thirty days after an application is submitted, the application is deemed “filed.” 35 Ill. Admin. Code § 201.158. The Board has interpreted Section 201.158³ and has distinguished between completeness and sufficiency.⁴ In particular, the Board has stated:

Under Rules 103(a)(3) and 103(b)(4) of Chapter 2, permit applicants are entitled to notification by the Agency within 30 days if the information submitted does not meet the requisites set out in Rules 103(a)(2) and 103(b)(3), in which case the notification acts as a denial of the application for purposes of review. These rules address the completeness of the application and not its sufficiency. The Agency did not notify Sherex under this procedure; therefore, it appears that the Agency deemed [*3] the applications to be complete under Rules 103(a)(2) and 103(b)(3). The Board notes that the Agency argues that § 39(a)(3) of the Act authorizes it to deny a permit application on its merits if it is incomplete. However, *a more proper construction of that section allows denial on the merits only if the incompleteness relates to sufficiency of proof of the to-be-permitted activity's not causing a violation of the Act or of Board regulations.*

*Sherex at *2-3 (emphasis added).*

In ruling on a motion for reconsideration in the *Sherex* matter, the Board clarified that the duty to notify an applicant regarding incompleteness is not absolute.⁵ The Board, nevertheless, explained that when the Agency does not issue an NOI, “the filing date of the application is unchanged and the Agency must proceed to determine whether the application has demonstrated

³ Section 201.158 was previously codified in Rules 103(a)(3) (for construction permits) and 103(b)(4) (for operating permits).

⁴ *Sherex Chemicals Co. v. Illinois EPA*, PCB 80-66, 1980 Ill. ENV LEXIS 179 at *2-3 (Ill.Pol.Control.Bd. Oct. 2, 1980), *affd. sub nom. IEPA v. IPCB*, 100 Ill. App. 3d 730, 426 N.E. 2d 1255 (1981).

⁵ *Sherex*, PCB 80-66, 1980 Ill. ENV LEXIS 331 at *1-2 (Ill.Pol.Control.Bd. Dec. 19, 1980).

nonviolation.” *Id.* at *1. Therefore, the distinction between completeness and sufficiency remains.

Here, Illinois EPA did not issue an NOI, so it cannot deny the Request for Revision solely on the grounds that certain information allegedly is not present in the application. Instead, the application is deemed filed, and Illinois EPA 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 the regulations. A Denial Reason based solely on Section 201.152 is inappropriate.

3. The Request for Revision was Both Complete and Sufficient.

The Request for Revision was both complete and sufficient.

a. Illinois EPA Found that the Request for Revision was Both Complete and Sufficient.

Mr. Dragovich, who has been an environmental protection engineer at Illinois EPA for twelve years, was the permit analyst for the Request for Revision, and recommended issuing the permit. Apr. 30 Tr. at 191-192, 200; R-766. His initial permit calculation sheet states: “[i]t is recommended that this revised construction be granted.” R-766. Mr. Dragovich completed a Completeness Screening Checklist and Completeness Review Worksheet on August 14, 2013, and concluded the application complete. R-2107-R-2109.⁶ In filling out the initial completeness form, he concluded that “the application propose[s] and clearly identif[ies] the annual and short-term emissions limits and associated material throughput/usage limits and emission factors to be

⁶ An undated Completeness Screening Checklist was initially provided in the Record at R-24 along with a Completeness Review Worksheet dated January 16, 2014. R-25. However, a Completeness Screening Checklist and a Completeness Review Worksheet, both dated August 14, 2013, were discovered by counsel for KCBX through the course of reviewing documents produced by Illinois EPA in response to a request under the Freedom of Information Act. R-2107-R-2109. The discovery occurred after the conclusion of hearings; thus, KCBX was precluded from questioning Illinois EPA witnesses on these documents.

included in their new/revised permit.” R-2107-R-2109. He also concluded that “[i]f the permit was due today, [he] could [] write an enforceable permit with the information provided in the application.” R-2107-R-2109. In fact, Mr. Dragovich prepared a draft permit and circulated it internally at the Agency on September 19, 2013. Apr. 30 Tr. at 199-200; R-650-R-670.

KCBX representatives met with Illinois EPA on August 27, 2013. R-183. At Hearing, Mr. Steinert testified that, at that meeting, KCBX asked if Illinois EPA needed any additional information to be able to consider the Request for Revision, and Illinois EPA asked only for equipment ID numbers. Apr. 29 Tr. at 176-177. Mr. Steinert sent Mr. Dragovich an e-mail on September 3, 2013, which included equipment ID numbers and explained that KCBX intends to move the equipment at issue from its North Terminal (where the equipment has already permitted by Illinois EPA) to the South Terminal. Apr. 29 Tr. at 177; R-182. Mr. Steinert also testified that he called Mr. Dragovich approximately one week later to follow up. Apr. 29 Tr. at 179. Mr. Steinert testified, that during that call, Mr. Dragovich stated that he received the e-mail and confirmed that he did not need any additional information. *Id.* Mr. Steinert also noted that he asked Mr. Dragovich if he had any questions about the application and offered to help him with his analysis, but Mr. Dragovich indicated he had no questions. *Id.*

During the course of his review of the Request for Revision, Mr. Dragovich reviewed other permits, revisions, and applications in the file for permit number 07050082, including the information in the September 2012 DTE Application at R-564-R-623. Apr. 30 Tr. at 209-212. He also reviewed the Federally Enforceable State Operating Permit (“FESOP”) for the North Terminal. Apr. 30 Tr. at 202.

But, then, Illinois EPA changed course. Mr. Dragovich was told in an October 10, 2013 e-mail from Mr. Pressnall to “hold off” on sending a draft permit to KCBX and that the Illinois

Attorney General was pursuing enforcement against KCBX, and permitting issues are involved. R-2093. Thereafter, on December 5, 2013, Ms. Armitage instructed Mr. Bernoteit to draft a Wells Letter and a Permit Denial, and Mr. Bernoteit picked up the file for the first time. May 1 Tr. at 46-47. He testified that he did not look at the Narrative section of the September 2012 DTE Application in the course of his review of the Request for Revision. May 1 Tr. at 56. He also did not consider the information reviewed by Mr. Dragovich from the file for either this construction permit or the FESOP for the North Terminal. May 1 Tr. at 57-58. In fact, prior to the day he received direction to draft a Wells Letter and a Permit Denial, he did not ask Mr. Dragovich about the September 2012 DTE Application or what was meant by a reference in the Request for Revision to the initial application. May 1 Tr. at 50-52. He did, however, instruct Mr. Dragovich not to talk to KCBX. Apr. 30 Tr. at 214.

During this same period, KCBX granted Illinois EPA several waivers of the permit application review deadline under Section 39 of the Act, 415 ILCS 5/39(a). R-18-R-19, R-175, R-177. In fact, Illinois EPA specifically asked for at least one waiver, according to an e-mail from Agency Attorney Mr. Pressnall. R-2094. The initial deadline for Illinois EPA to act on KCBX's permit was October 21, 2013, but KCBX granted three extensions of this deadline, totaling 91 days—until January 20, 2014. R-18-R-19. Also during this period, Illinois EPA inspected the South Terminal five times. R-31, R-40, and R-164. Illinois EPA also held an environmental justice outreach meeting to discuss and answer questions from the public about the construction permit. R-125.

Since Illinois EPA did not issue an NOI, determined that the Request for Revision was complete, indicated to KCBX that no additional information was needed, independently gathered

information about the South Terminal, and requested waivers of the decision deadline, Illinois EPA is precluded from denying the Request for Revision simply based on completeness grounds.

b. Much of the Information that Illinois EPA Identified as Missing in Denial Reason 1 was provided by KCBX.

In addition, much of the information that Illinois EPA claims is missing in Denial Reason 1 was in fact provided to Illinois EPA by KCBX, and reviewed and considered by Illinois EPA.

As an initial point, Illinois EPA claims that they did not know what was meant by references to “initial application” in the Request for Revision. For example, at hearing Mr. Bernoteit claims that he does not know what was meant by references to “initial application” in the Request for Revision. May 1 Tr. at 16-18. As explained by Mr. Steinert, KCBX intended “initial application” to be a reference to the September 2012 DTE Application beginning at R-564. Apr. 29 Tr. at 148-149. KCBX clearly indicated on Form APC628 in its application that it requests a revision to its existing permit, No. 07050082. R-191. This is the same permit number as the September 2012 DTE Application. R-563-R-623. Mr. Steinert testified that during a telephone call, he asked Mr. Dragovich if he had any questions about the application and stated that he would help him with his analysis, but that Mr. Dragovich indicated he had no questions. Apr. 29 Tr. at 179. During the course of his review of the Request for Revision, Mr. Dragovich reviewed other permits, revisions, and applications in the file for permit number 07050082, including the information in the September 2012 DTE Application at R-564-R-623. Apr. 30 Tr. at 209-212. The September 2012 DTE Application forms contained similar references (e.g. “See Narrative, Section 1.0,” R-584) as the Request for Revision forms, and as discussed below, the Agency found those references sufficient to grant a permit to DTE.

But prior to the day he was instructed to draft a Wells Letter and Permit Denial, however, Mr. Bernoteit had not discussed what was meant by “initial application” with Mr. Dragovich. May 1 Tr. at 50-54. Mr. Bernoteit testified that he did not look at the Narrative Section of the September 2012 DTE Application in the course of his review of the Request for Revision. May 1 Tr. at 56. He also did not consider the information reviewed by Mr. Dragovich from the file for either this construction permit or the North Terminal. May 1 Tr. at 57-58.

Further, when Illinois EPA filed the Record for this proceeding, portions of the 2012 DTE Construction Permit Application referenced in KCBX’s Request for Revision were inserted into the record immediately after KCBX’s Request for Revision. R-205-R-221. Mr. Bernoteit believes Agency Attorney Jim Morgan prepared the Record. May 1 Tr. at 55. When KCBX filed a Motion to Supplement the Record with the entire application, Illinois EPA acknowledged that “[i]t is undisputed that the ‘initial application’ is the September 17, 2012 Construction Permit Application.”⁷ Illinois EPA did not object to the addition of Tables 1-4 and 7-12 of that permit application into the Record. *Id.* Therefore, it is untenable for Illinois EPA to now argue that Illinois EPA did not know what “initial application” meant simply based on the testimony of Mr. Bernoteit, who unlike Mr. Dragovich, did not review the file in full.

First, Illinois EPA claims that the Request for Revision does not contain “information concerning processes to which the emission unit or air pollution control equipment is related.” R-1. But the Request for Revision cover letter describes KCBX’s request to revise its existing construction permit to add equipment consisting of ten portable conveyors, one box hopper, and one stacker. R-186-R-178. KCBX explains:

⁷ Respondent’s Response to KCBX Terminals Company’s Motion to Supplement the Record, *KCBX Terminals Co. v. Illinois Environmental Protection Agency*, PCB 14-110 at 4 (Ill.Pol.Control.Bd. Apr. 14, 2014).

Thus, KCBX is requesting revisions to page 1 of the Revised Construction Permit to allow the installation of this additional equipment. Finally, on this point, please note, that KCBX 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-187 (emphasis in original).

In addition, KCBX indicates on Form APC628 in its application that it requests a revision to its existing permit, No. 07050082. R-191. That permit describes, among other things, conditions for handling coal and pet coke. R-130-R-149. On another form in KCBX's Request for Revision, KCBX names the process as "material handling" and describes it as "[h]andling of coal and pet coke." R-195. KCBX also references Figure 1 in the 2012 DTE Permit Application, which is a conveyor transfer point process flow diagram. R-195, R-590. KCBX confirmed in its response to the Wells Letter that the equipment is used at the North Terminal to "relocate coal and petroleum coke to and from staging piles" and that it would be used "for exactly the same purpose" at KCBX's South Terminal. R-12. The environmental justice fact sheet in the Record – which the Agency prepared – indicates that the South Terminal stores and transfers bulk materials and primarily handles coal and coke products. R-125. It also explains that "[t]he facility's operations include loading and unloading materials from railcars, trucks and barges and conveying those materials to and from storage piles onsite." R-125. Therefore, it is clear that KCBX provided Illinois EPA sufficient information as to the processes related to the emission units, and Illinois EPA reviewed and understood that information.

Next, Illinois EPA claims that the Request for Revision does not contain "the quantities and types of raw materials to be used in the emission unit or air pollution control equipment." R-1. First, KCBX provided the type of material managed by the equipment: pet coke and coal, as

discussed above. See R-12, R-195. Second, as to the quantities of materials, KCBX specifically explained in the cover letter of the Request for Revision that it was not requesting any changes to the throughput limitations or any other changes to other applicable requirements in its existing permit. R-187. Therefore, KCBX provided, and Illinois EPA was well aware of, the quantities and types of raw materials to be used in the equipment.

Third, Illinois EPA claims that the Request for Revision does not contain “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-1. Both the cover letter and a form in the Request for Revision described the equipment to be added to the South Terminal as ten portable conveyors, one box hopper, and one stacker. R-187, R-195. And again, the cover letter to the Request for Revision specifically explained that KCBX was not seeking changes to throughput or emission limitations, or any other conditions in its existing permit. R-187. Just as in a prior application for this permit number, the exhaust point was identified as “varies,” given the portable nature of this equipment. R-204, R-589. Finally, the Request for Revision referenced Figure 1 in the initial application. R-204. Figure 1 is a conveyor transfer point process flow diagram and shows PM being emitted from a transfer point. R-212.

Fourth, Illinois EPA claims that the Request for Revision does not contain “the type, size, efficiency and specifications (including engineering drawings, plans and specifications) of the proposed emission unit or air pollution control equipment. R-2. Both the cover letter and a form in the Request for Revision described the equipment to be added to the South Terminal as ten portable conveyors, one box hopper, and one stacker. R-187, R-195. KCBX also identified the equipment at issue as the equipment that is currently operated at the North Terminal. This was relayed to Illinois EPA in the September 3, 2013 e-mail from Mr. Steinert to Mr. Dragovich, in

which Mr. Steinert identified the exact ID numbers of the equipment to be moved from the North Terminal. Apr. 29 Tr. at 177; R-182. Likewise, notes taken by Mr. Bernoteit at the August 27, 2013 meeting indicate that equipment would be moved from the North Terminal. May 1 Tr. at 63. The environmental justice information sheet, R-169, and the environmental justice fact sheet, R-125, prepared by Illinois EPA, indicate that the equipment would be moved from the North Terminal. Finally, KCBX's response to the Wells Letter on January 13, 2014, indicates that the equipment is currently operated at the North Terminal and would be used at the South Terminal for the same purposes. R-12. Mr. Dragovich testified that he reviewed the FESOP for the North Terminal. Apr. 30 Tr. at 202. By doing so, he would have been able to match the equipment identified in the e-mail with the equipment listed in the FESOP for the North Terminal. R-538. In addition, the existing permit bases limits on emissions on "50% control for wet suppression." R-140. Since KCBX specifically asked for no change in its permit conditions, this efficiency would continue to be used in the requested permit.

Fifth and finally, Illinois EPA claims that the Request for Revision does not contain "maps, statistics and other data reasonably sufficient to describe the location of the emission unit or air pollution control equipment." R-2. Since the equipment at issue is portable, KCBX described the exhaust point from this equipment as "varies." R-204. As discussed below, this was sufficient for Illinois EPA to grant a permit for this same type of equipment at the South Terminal, and is likewise sufficient for Illinois EPA to have granted this permit.

c. Remaining Information Identified as Missing by Illinois EPA in Denial Reason 1 is Not Necessary to Determine that Issuance of the Request for Revision would not Result in a Violation of the Act or Regulations.

Despite Illinois EPA's repeated questioning of KCBX witnesses at Hearing regarding information such as serial number and manufacturer information for the equipment at issue (e.g. Apr. 29 Tr. at 197-199), Illinois EPA's own witness, Mr. Bernoteit, acknowledged that such information was not needed to approve a permit for equipment such as portable conveyors. May 1 Tr. at 61. Similarly, other information identified by Illinois EPA as missing is not necessary for Illinois EPA to have determined that issuance of the Request for Revision would not result in a violation of the Act or Regulations.

This is confirmed by past permitting transactions that are part of the same permit number that is being addressed here. Similar to the Request for Revision, the September 2012 DTE Application lists the manufacturer, model number, and serial number of conveyors that DTE wanted to install at what is now the KCBX South Terminal as "[t]o be determined." R-195, R-580. Like the Request for Revision, the September 2012 DTE Application also describes the exhaust point as "varies," the distance to the nearest plant boundary as "varies," and the discharge height above grade as "varies." R-204, R-589. Finally, like the Request for Revision, the September 2012 DTE Application answers "N/A" in response to question #40: "If the project is at a source that has not previously received a permit from the BOA, does the application include a source description, plot plan, and site map?" R-192, R-575. Nevertheless, Illinois EPA issued a permit to DTE as requested by the September 2012 DTE Application without this information. R-699. If Illinois EPA did not need this issue to grant DTE a permit to

install conveyors, it did not need this information to consider KCBX's request for a permit to install conveyors and related equipment.

4. Denial Reason 1 is Insufficient to Justify Illinois EPA's Permit Denial.

As Illinois EPA's counsel noted at Hearing, "[t]he Illinois EPA was considering granting KCBX's construction permit application." Apr. 30 Tr. at 219. Based on a completeness screening form, Mr. Dragovich, an experienced permit engineer, determined that the application was complete on August 14, 2013. R-2107-R-2109. Consistent with that finding, and after KCBX provided equipment ID numbers pursuant to Illinois EPA's request, Mr. Dragovich told Mr. Steinert that the Agency did not need any additional information. Apr. 29 Tr. at 177-179. Illinois EPA then held a public meeting, pursuant to its environmental justice policy, visited the South Terminal five times to gather information, and requested waivers for its permit application review deadline. In the *Sherex* case, the company reached out to Illinois EPA and offered to provide more information. *Id.* at *6. The Board ruled that "[i]t 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 information were provided or were considered it could make a better-informed decision on the application." *Id.* at *5-6. Likewise, here it would be a capricious exercise of its powers for Illinois EPA to determine that the Request for Revision was complete, relay this opinion to KCBX, independently gather information about the facility, request waivers for its decision deadline, and then deny the permit on the basis of incompleteness.

Again, Illinois EPA did not issue an NOI to KCBX, and therefore cannot cite incompleteness alone as a basis for denying the permit, particularly. Further, the Request for Revision was not incomplete – KCBX provided all information that Illinois EPA requested, and

the information that Illinois EPA references as missing either was provided or is not necessary for the equipment at issue. Thus, the Board must find that Illinois EPA erred in its Denial Reason 1.

B. Illinois EPA Improperly Denied the Request for Revision Based on a Citation to Section 201.160(a) (“Denial Reason 2”).

Denial Reason 2 merely restates 35 Ill. Admin. Code § 201.160(a), which sets forth “standards for issuance” for construction permits. Denial Reason 2 does not assert that granting the Request for Revision would result in a violation of the Act or the regulations, or otherwise state a specific reason for denying the Request for Revision, instead it merely restates a provision in the Illinois Administrative Code. As such, Denial Reason 2 does not provide any justification for denying the Request for Revision.

C. The Illinois EPA Improperly Denied the Request for Revision Based on 35 Ill. Admin. Code § 212.301 (“Denial Reason 3”).

In its third reason for denial, the Illinois EPA impermissibly 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. R-2 (emphasis added). Not only was it improper as a matter of law for the Illinois EPA to consider speculative noncompliance in the field inspection reports and citizen complaints, but neither the reports nor the complaints support the Illinois EPA’s conclusion that KCBX’s conveyance equipment may violate Section 212.301. Further, KCBX has affirmatively demonstrated compliance with Section 212.301 by operation of its fugitive dust plan. Because it lacks a basis in law and fact, the Illinois EPA’s third reason for denial must be reversed.

1. The Illinois EPA's Reliance on Unadjudicated Allegations as the Basis of Denial Reason 3 is Improper as a Matter of Law.

In contravention of well-settled law, the Illinois EPA utilized the permitting process to achieve its enforcement objectives by denying a routine request for revision to a construction permit based on unadjudicated allegations. It is impermissible for the Illinois EPA to deny a permit as a substitute for instituting an enforcement action. *ESG Watts, Inc. v. Illinois EPA*, PCB 92-54 at 5 (Ill.Pol.Control.Bd. Oct. 29, 1992) (“It is equally well established that permit denial is an improper substitute for an enforcement action.”), *aff'd sub nom. Illinois EPA v. IPCB*, 624 N.E.2d 402 (Ill. App. Ct. 1993); *Centralia Env'tl. Servs. v. Illinois EPA*, PCB 89-170 at 10-11 (Ill.Pol.Control.Bd. Oct. 25, 1990) (“The Board has repeatedly stated that permit denial cannot take the place of an enforcement action.”); *Waste Mgmt., Inc. v. Illinois EPA*, PCB 84-45, 84-61, 84-68 at 36 (Ill.Pol.Control.Bd. Oct. 1, 1984) (the substitution of a permit denial for an enforcement action “acts in derogation of the rights of the permittee and the public, and in fact infringes upon the ability of the Agency to function effectively”), *aff'd sub nom. Illinois EPA v. IPCB*, 486 N.E.2d 293 (Ill. App. Ct. 1985), *aff'd* 503 N.E.2d 343 (Ill. 1986).⁸ Any alleged violations of the Act and Board regulations reflected in the inspection reports and citizen complaints may properly constitute the basis of an enforcement action, but may not be relied upon in the context of a permit denial. “[I]t is well-established that the Agency cannot consider unadjudicated violations in determining to deny a permit application.” *ESG Watts, Inc. v. Illinois EPA*, PCB No. 95-109 at 3 (Ill.Pol.Control.Bd. Mar. 16, 2000) (citing *Martell v. Mauzy*, 511 F. Supp. 729 (N.D. Ill. 1981)).

⁸ Effective January 1, 2004, Section 39(a) of the Act was amended to authorize Illinois EPA to consider “prior adjudicated violations” in making its determinations on permit applications. See P.A. 93-0575. This amendment in no way altered the prohibition against relying upon alleged violations of the Act or Board regulations to make its permit decision. Since no prior adjudicated violations are at issue here, the new provision is not relevant to Illinois EPA's Permit Denial.

In *ESG Watts, Inc.*, the Illinois EPA denied the applicant's permit applications based on "conduct which ha[d] allegedly already taken place, or [was] allegedly still occurring, at the site." *ESG Watts, Inc. v. Illinois EPA*, PCB 92-54 at 6. The Illinois EPA reasoned that granting the permits would exacerbate the existing alleged violations. *Id.* The Board reversed the Illinois EPA and ordered it to issue the permits, holding that the permit denials were "an improper use of the permit process as a means of enforcement." *Id.* at 11. On appeal, the Illinois Appellate Court affirmed the Board's decision, reasoning that "the procedures for permit denial and enforcement of the Act are separate and distinct." *Illinois EPA v. IPCB*, 624 N.E.2d at 404. Here, Ms. Armitage determined that the construction permit application should be denied, in part, because inspection reports and citizen complaints caused her to believe the facility "was of concern." May 1 Tr. at 173. Because the Illinois EPA improperly relied on the unadjudicated allegations in the inspection reports and citizen complaints to find a potential violation of Section 212.301, Denial Reason 3 must be reversed as a matter of law.

2. The Unadjudicated Allegations in the Inspection Reports Do Not Support a Potential Violation of Section 212.301.

Even if the Illinois EPA was allowed to deny permit applications based on unadjudicated allegations in inspection reports -- which it is not -- the inspection reports at issue here do not support the Illinois EPA's conclusion that KCBX's conveyance equipment may violate Section 212.301. The Illinois EPA inspected KCBX's South Terminal five separate times in September and November 2013 and documented its observations in three reports. R-164-R-166, R-40-R-58, R-31-R-35. *None of the reports allege an actual violation of Section 212.301. Id.* In fact, only the report relating to the September 11th and September 13th inspections even refers to Section 212.301. That report concludes that emissions from the material piles and traffic at the South

Terminal *may* violate Section 212.301. R-45, R-47. That determination, however, has no bearing on whether the conveyance equipment at issue in KCBX's application - the ten conveyors, one box hopper, and one stacker - may also allegedly violate Section 212.301. As Mr. Kolaz⁹ testified:

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.

Apr. 30 Tr. at 178.

The Illinois EPA may not rely on allegations that some operations at the Site may violate Section 212.301 to then conclude that KCBX's conveyance equipment may somehow also violate the same section.

In addition to being irrelevant, the allegations relating to Section 212.301 in the September 11th and September 13th inspection report are unreliable. The report states that "[t]here is a threat of visible emissions crossing the property line from storage piles." R-45. That statement is both unsupported by and contradictory to other observations in the report. One page later, the inspector writes that "[n]o visible emissions were observed from storage piles at the source on Sep 11 and 13, 2013," R-46 (emphasis added), including during sustained winds during which the inspector observed the piles for an extended period of time. R-44. The

⁹ Petitioner presented expert testimony and opinions from Mr. Dave Kolaz. Mr. Kolaz's disclosed opinions and Curriculum Vitae, Petitioner's Exhibits 1 and 2, respectively, were admitted in to evidence at the close of the Record. May 2 Tr. at 9-10, May 2, 2014. Mr. Kolaz is the former chief of the Bureau of Air at IEPA. Apr. 29 Tr. at 253. Mr. Kolaz holds a B.S. from University of Illinois in aeronautical and astronautical engineering as well as an M.S. in Engineering, with a specialty in thermal and environmental engineering from Southern Illinois University at Edwardsville. A Registered Professional Engineer in Illinois since 1977, Mr. Kolaz rose through the ranks at Illinois EPA from permit review analyst in 1971 to the Bureau Chief in 2004, before retiring. April 29 Tr. at 254; Pet. Exh. 2. Since retiring from the Illinois EPA in 2004, Mr. Kolaz has provided environmental consulting services individually and as an employee of Conestoga Rovers and Associates, a consulting firm with offices in Springfield, Illinois. Apr. 29 Tr. at 274, 276; Pet. Exh. 2. Mr. Kolaz has experience with permitting the type of equipment at issue here and with material handling facilities including the handling of cal. Apr. 29 Tr. at 281-286.

inspector testified that the “mere existence” of a large material pile at any facility presents a threat of visible emissions (Apr. 30 Tr. at 294.)—under this standard, the Illinois EPA could deny any permit from KCBX simply because of the nature of KCBX’s operations. This general and overly broad conclusion cannot be the basis for a permit denial. The report also states that “[v]isible emissions from truck traffic were observed at the entrance road at approximately 1:30 PM on 9/11. These visible PM emissions may have crossed a property line at the guard shack but KCBX official was unclear where the property line is by the guard shack.” R-47. *Even if the emissions crossed the property line, the inspector was incorrectly positioned at the time that he made that observation to render an opinion on compliance with Section 212.301. According to Mr. Kolaz:*

301 states that to determine compliance with 301, a person must be outside the plant boundaries, and must make an observation generally near the zenith of a plume passing overhead. So he would have to be offsite . . . *Simply the presence of visible emissions on the plant boundary in itself is not evidence that there is a threat to 301.*

Apr. 30 Tr. at 87 (emphasis added).

The inspection reports also cannot be relied upon as a basis for denying the permit due to the failure to follow Illinois EPA rules for measuring particulate matter and opacity. Petitioner’s expert Mr. Kolaz testified that the measurements regarding opacity and fugitive particulate matter were not taken as required by the Board’s regulation at §§ 212.109 and 212.301, and thus are of no value to any permit or compliance evaluation. Apr. 30 Tr. at 75-76.; 84-87; R-31-R-39, R-40-R-61. Even the inspector who took the measurements admitted that the readings were not conducted as required by the above-referenced regulations. Apr. 30. Tr. at 266, 294.

The inspection reports do not allege a violation of Section 212.301, and do not provide any reliable evidence of noncompliance with the same. In light of this, and absent *any*

observations relating to visible emissions from the twelve pieces of equipment that are actually at issue or similar equipment – as opposed to material piles and traffic – there is no basis in the inspection reports for Illinois EPA’s conclusion that “emissions from the source may violate 35 Ill. Adm. Code 212.301.” R-2.

3. The Unadjudicated Allegations in the Citizen Complaints Do Not Support a Potential Violation of Section 212.301.

The Illinois EPA’s reliance on the citizen complaints as support for its claim that KCBX’s application may result in a violation of Section 212.301 fares no better. The citizen complaints do not address compliance with Section 212.301, visible emissions at the property line, or the location of the observer. *See* R-222-R-537. And like the inspection reports, the content of the citizen complaints in no way indicates that adding the requested equipment will cause a violation of the act. *Id.* As explained by Mr. Kolaz, “it has to be directly related to what is being requested by the applicant. And I cannot see how the observations made by the citizens would impact a decision to add ten portable conveyors, one hopper and one stacker at this facility. I just don’t see how it bears on it, whatsoever.” Apr. 30 Tr. at 97-98.

Even setting aside the fact that the citizen complaints are not relevant to compliance with Section 212.301, the authenticity and veracity of the complaints are suspect as well. Ms. Armitage admitted that the Illinois EPA did not seek to verify any of the information in the complaints. May 1 Tr. at 205-206. Many of the complaints are on a form that is dated September 2012 – *three months before KCBX even acquired the South Terminal* – without any indication of when the form was actually completed. R-222-R-265, R-268-R-271, R-354-R-355, R-358-R-518. In addition to being undated, a number of the complaints do not even identify KCBX as the responsible party. R-222, R-226, R-250, R-283, R-317, R-324, R-348, R-352, R-

354, R-360. Further, the majority of the complaints do not include descriptions of the problem, and thus fail to provide *any detail whatsoever* on the nature, date, time, or location of the complained-of activity. R-222-R-223, R-230-R-239, R-243-R-245, R-248-R-249, R-252-R-265, R-352-R-353, R-362-R-373, R-376-R-387, R-392-R-441, R-444-R-453, R-456-R-465, R-468-R-471, R-474-R-481, R-484-R-504, R-507-R-510, R-513-R-518. And what little content there is in a substantial number of the complaints appears to have been the result of photocopying. For example, the handwritten identification of the “Responsible Party/Company Name” as “KCBX – Koch,” the address of the South Terminal, and the checkmarks in the “Nature of the Complaint” boxes appear to be identical on at least R-358-R-359, R-362-R-367, R-374-R-375, R-382-R-383, R-392-R-405, R-408-R-413, R-416-R-419, R-430-R-439, R-444-R-445, R-448-R-471, R-474-R-477, R-486-R-487, R-492-R-493, R-496-R-502, R-505-R-514, and R-517-R-518, and identical on R-368-R-373, R-376-R-381, R-384-R-387, R-406-R-407, R-420-R-429, R-446-R-447, R-472-R-473, R-478-R-485, R-488-R-491, R-494-R-495, R-503-R-504, and R-515-R-516. The Illinois EPA cannot reasonably rely on undated, photocopied, and blank complaints to determine that 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.” 35 Ill. Admin. Code § 212.301.

Lastly, to the extent that the Illinois EPA relied on the citizen complaints to deny the permit, KCBX was entitled to a meaningful opportunity to respond. *Wells Mfg. Co. v. Illinois EPA*, 552 N.E.2d 1074, 1077 (Ill. App. Ct. 1990). Despite receipt of a Wells letter, R-30, KCBX was deprived of that opportunity because the complaints were produced in a heavily redacted form, even when the complainant indicated on the form that he or she consented to the disclosure of his or her identity by the Illinois EPA. R-224-R-225, R-228- R-231, R-244- R-245, R-250- R-

251, R-266- R-271, R-273- R-274, R-277- R-292, R-297- R-314, R-317- R-318, R-324- R-339, R-342- R-349, R-354- R-361, R-366- R-367, R-374- R-375, R-390- R-391, R-400- R-401, R-246- R-429, R-438- R-439, R-448- R-453, R-462- R-463, R-466- R-467, R-472- R-473, R-480- R-483, R-505- R-506, R-511- R-512, R-519- R-522, R-525- R-526, R-528- R-533, R-536- R-537. Without any identifying information with respect to the complainant, including whether the complainant lives within the proximity of the South Terminal, and if so, where, it was impossible for KCBX to substantively respond to the complaints.

4. The Additional Unadjudicated Allegations that the Illinois EPA Relied Upon Without Notifying KCBX Do Not Support a Potential Violation of Section 212.301.

Although the Wells letter sent by the Illinois EPA only notified KCBX of the Agency's intent to consider the inspection reports and citizen complaints, R-30, the Agency apparently also relied upon additional unadjudicated violations, including an enforcement action filed by the Attorney General of the State of Illinois against KCBX, May 1 Tr. at 255-256; R-101-R-118, and correspondence from politicians and non-governmental organizations. May 1 Tr. at 207-208; R-29, R-119-R-120, R-172-R-173. Like the inspection reports and citizen complaints, the enforcement action and correspondence constitute unadjudicated allegations that may not provide the basis for a permit denial as a matter of law. But even to the extent that the Illinois EPA relied on the enforcement action and correspondence nevertheless, it still has no basis for concluding that the transfer of equipment to the South Site may cause a violation of Section 212.301. Neither the enforcement action nor the correspondence addresses Section 212.301, visible emissions at the property line, or emissions from a conveyor, box hopper, or stacker. See R-103-R-118, R-29, R-119-R-120, R-172-R-173.

5. KCBX Demonstrated its Compliance with Section 212.301 to the Illinois EPA.

KCBX demonstrated compliance with Section 212.301 via the fugitive dust plan that it submitted to the Illinois EPA on November 1, 2013. R-150-R-163. There, KCBX clearly explains that it operates fixed water cannons and portable water trucks to control potential fugitive emissions from its conveyance equipment – the same type of equipment that KCBX requested to transfer to the South Site:

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

R-156.

The plan also states that “drop distances are minimized as an additional control.” R-156. KCBX provides a detailed description of its water cannons in the fugitive dust plan:

[T]he permanent, fixed-pole water application system consist[s] of 42 water cannons set on 4- and 6-inch diameter risers mounted inside poles approximately 60 feet above grade. At 100 psi, the cannons provide design throw radii of 170 feet and 250 feet for 4-inch and 6-inch feed lines . . . and deliver 235 gallons per minute (gpm) and 660 gpm for the 4-inch and 6-inch feed lines, respectively.

R-152.

Despite recognizing that “a 43 to 44 cannon system at the plant could, if utilized in a prescribed fashion, serve to control emissions from the plant,” May 1 Tr. at 252 (emphasis added), Ms. Armitage issued Denial Reason 3, claiming 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. See May 1 Tr. at 200.

The Illinois EPA's claimed ignorance as to the operation of KCBX's water cannons, water trucks, and other emission controls is contradicted by the record. First, the fugitive dust plan submitted by KCBX clearly sets forth its Best Management Practices – including the application of water to its conveyance equipment – and states that such practices are “*implemented*” each day. R-157 (emphasis added). Second, the Illinois EPA inspected the South Terminal five times, during both the construction and after the implementation of KCBX's new fugitive dust suppression system. R-164-R-166, R-40-R-58, R-31-R-35. And third, KCBX met with no fewer than *six* individuals from the Illinois EPA on December 5th, 2013 – including Mr. Bernoteit of the Bureau of Air Permits Section – and gave a detailed presentation on its dust suppression system. R-2053; R-2055-R-2092.

During the November inspections, the Illinois EPA observed KCBX's water cannons in operation and reviewed data on the operations. In the November 6th inspection narrative, the inspector reported that:

Estadt had an operator start the water cannon system. The cannon observed in operation near the river has a 250-foot radius throw, according to Estadt. This is the reach of the 6-inch water line. Another cannon to the east was observed in operation and had a 170-foot radius which is the reach of the 4-inch lines.

R-33-34.

Michael Estadt, operations manager at the South facility, testified that he ran a full cycle while the inspector was on-site, cycling through all 42 water cannons. Apr. 29 Tr. at 52-53. Estadt also testified that he described the Site's weather station to the inspector. Apr. 29 Tr. at 48. The weather station measures wind speed, wind direction, and barometric pressure. *See* Apr. 29 Tr. at 47. It operates in tandem with the water cannons to adjust the application of water depending on the weather conditions measured. *See* Apr. 29 Tr. at 47. According to the inspector's

November 19th narrative, "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 operation during the event which brought precipitation as well." R-35.

Unedited draft inspection reports demonstrate that the inspector was impressed by KCBX's dust suppression system. For example, in the draft September 11th and September 13th report, the inspector described KCBX's new water spray system as "extensive," "major," and "elaborate." R-1308-1309, R-1319, R-1326. He stated that the new water spray system "should be superior in design and accomplish the goal of fugitive PM control of stockpiles, roadways and transfer points," R-1311, and that the installation of water cannons at the site "will improve fugitive PM control tremendously." R-1316. The inspector's observations do not appear in the final report because Ms. Armitage deleted the above language, despite the fact that she has never been to the South Terminal. May 1 Tr. at 247.

In addition to demonstrating the water cannons to the inspectors on-site, KCBX also met with the Illinois EPA on December 5th and presented a set of powerpoint slides entitled "Dust Mitigation System Overview." R-2055-R-2092; Apr. 29 Tr. at 113-123. That powerpoint provides detailed information on the water cannons, including a map of the Site reflecting the comprehensive coverage of the cannons. R-2081. It also contains a picture of one of three water trucks at the South Terminal, which Mr. Estadt stated was discussed at the meeting. R-2083; Apr. 29 Tr. at 42. According to Mr. Estadt, the water trucks carry between 5,000 and 8,000 gallons of water, Apr. 29 Tr. at 29, are equipped with a water cannon capable of spraying water up to 60 feet, Apr. 29 Tr. at 31, and are capable of driving on the material piles. Apr. 29 Tr. at 31.

Because KCBX has demonstrated to the Illinois EPA on multiple occasions that its dust suppression system – including the water cannons, portable water trucks, and weather monitoring system – is equipped to comply with Section 212.301, the Illinois EPA’s Denial Reason 3 should be reversed.

D. Illinois EPA had Sufficient Information from the Request for Revision and Other Information it Reviewed during the Permit Application Review Period to Conclude that Section 212.321 would not be Violated (“Denial Reason 4”).

In Denial Reason 4, Illinois EPA claims that the Request for Revision “does not show whether the particulate matter emissions from the ten portable conveyors, one box hopper, and one stacker will comply with Section 212.321,” also known as the process weight rate rule. R-2. Specifically, Illinois EPA claims that because the Request for Revision “did not include data that would prove actual emission levels, pursuant to [Section] 201.122, or any other information that could be used to estimate emissions, the Illinois EPA could not assess whether these emission units have a particulate matter emission” rate allowed by Section 212.321. *Id.*

Illinois EPA incorrectly claims that KCBX did not provide information sufficient to determine compliance with Section 212.321. In fact, Illinois EPA’s permit analyst, Mr. Dragovich, reviewed the appropriate information to determine compliance and recommended issuing the permit.

As described above, Mr. Dragovich, who has been an environmental protection engineer at Illinois EPA for twelve years, was the permit analyst for the Request for Revision and recommended issuing the permit. Apr. 30 Tr. at 191-192, 200. According to a recently discovered document, he determined that the application was complete on August 14, 2013. R-2107-R-2109. This required him to conclude that “the application propose[s] and clearly identif[ies] the annual and short-term emissions limits and associated material throughput/usage

limits and emission factors to be included in their new/revised permit.” Mr. Dragovich was able to draft a permit based on his understanding of the Request for Revision. R-650-R-670; Apr. 30 Tr. at 199-200. To reach his conclusion and prepare the draft permit, he looked at other permits, revisions, and applications in the file for permit number 07050082, including the information in the September 2012 DTE Application at R-564-R-623. Apr. 30 Tr. at 209-212. He also reviewed the FESOP for the North Terminal. Apr. 30 Tr. at 202. As described below, based on this information, Illinois EPA was able to conclude Section 212.321 would not be violated.

In contrast, Mr. Bernoteit picked up the file for the first time on December 5, 2013, after Ms. Armitage instructed him to draft a Wells Letter and the Permit Denial. May 1 Tr. at 46-47. He testified that he did not look at the Narrative Section of the September 2012 DTE Application in the course of his review. May 1 Tr. at 56. He also did not consider the information reviewed by Mr. Dragovich from the file for either this construction permit or the North Terminal FESOP even though that information demonstrated compliance with Section 212.321. May 1 Tr. at 57-58.

Illinois EPA cites to Section 201.122, which states:

Notwithstanding other provisions of this Chapter, evidence that specified air contaminant emissions, as calculated on the basis of standard emission factors or other factors generally accepted as true by those persons engaged in the field of air pollution control, exceed the limitations prescribed by this Chapter shall constitute adequate proof of a violation, in the absence of a showing that actual emissions are in compliance.

35 Ill. Admin. Code § 201.122.

KCBX referred to, and Illinois EPA used, “standard emission factors” to compute estimated emissions from equipment at both the North and South Terminals. These emission

factors demonstrate that there is no possibility that the equipment described in the Request for Revision would violate Section 212.321.

There is no question about the appropriate emission factor that should be used for the equipment. Reference to the appropriate emission factor appears in KCBX's existing permit (R-140), and the cover letter to the Request for Revision makes clear that KCBX is not requesting any changes to the South Terminal's annual and monthly coal and petroleum coke throughput limitations or emission limitations; related testing, monitoring, recordkeeping and reporting requirements; or any other applicable requirements in its existing construction permit. R-187.

Also, KCBX's Request for Revision, submitted July 23, 2013, refers to the Narrative Section 1.0 in the September 2012 DTE Application to explain how initial compliance and ongoing compliance are demonstrated. R-199. Notably, this same narrative is what the September 2012 DTE Application references as its basis for compliance. R-584. Illinois EPA granted DTE a permit as a result of that justification. R-699. The Narrative Section 1.0 refers to the use of the United States Environmental Protection Agency's ("USEPA") emissions factors from AP-42 Section 13.2.4.3. See R-208 (clarification under *Table-Transfer and Conveying and Loadout-Requested Permit Limitations*). A calculation below the table demonstrates that a PM emission factor of 0.00064 lbs/ton is appropriate for equipment operated at the South Terminal. As Mr. Kolaz explained, this factor is determined based on a certain wind speed and moisture content. Apr. 30 Tr. at 101.

In addition, KCBX references Table 5 of the September 2012 DTE Application. R-196. Table 5 refers to the same USEPA emission factor in footnote 3. R-216. The emission factor column in Table 5 shows the same value of 0.00064 lbs/ton in the column for PM for unloading emissions, transfer point emissions, conveyor emissions, stacker emissions, and loadout

emissions for coal and petroleum coke. R-213-R-216. This emission factor applies to batch or continuous drop operations from a variety of types of equipment including, but not limited to, conveyors (portable or fixed), hoppers, and stackers. Therefore, the Agency knew from KCBX's Request for Revision that KCBX intended to use USEPA's AP-42 emission factor from Section 13.2.4.3.

Illinois EPA, in fact, used this USEPA emission factor to evaluate KCBX's Request for Revision, as shown in the Agency's Permit Calculation Sheet for the Request for Revision. R-4, R-5, and R-8, R-761-R-762, R-765. In Section 4 of the calculation sheet, the Agency references AP-42 13.2.4 (Aggregate Handling and Storage Piles) and lists the equation found in AP-42 13.2.4.3. R-4. On the following page under 14(c)(ii), the Agency again references AP-42 13.2.4. R-5. On that same page, the Agency lists the emission factor value for PM of 0.00064 lbs/ton in the Table at 14(c)(i), which KCBX referenced in its application as described above. In Section 6 of the calculation sheet, the Agency states that "[t]he facility's application used emission factors from AP-42 13.2." R-8. Consequently, it is clear that the Agency knew that KCBX was continuing to use the same emission factor calculation procedure for determining its emissions as it had previously used and which is the type of "standard emission factor[s]" referred to in Section 201.122.

As noted above, Illinois EPA used this emission factor in the Table in Special Condition 14 of KCBX's existing permit. R-140. The subsection, labeled 14(c)(ii) of KCBX's existing permit, clearly states that the "standard emission factors" from AP-42 13.2.4 were used. The exact emission factor of 0.00064 lbs/ton that KCBX determined for PM is shown in the table at 14(c)(i). R-140.

Likewise, the FESOP for the North Terminal (R-538-R-561) describes the “standard emission factors” to be used by the North Terminal. R-549. Section 10(a) references AP-42 Section 13.2.4. This is significant in as much as the ten portable conveyors, the portable hopper, and the stacker to be added at the South Terminal are coming from the North Terminal.

The draft permit prepared by Mr. Dragovich in September 2013 contains the additional equipment requested by KCBX in its July 23, 2013 application, as well as the terms and conditions that KCBX requested. *See* R-651-R-670. Specifically, the PM emission factor of 0.00064 lbs/ton was included in the draft permit. So, again, there is no question that the Agency fully understood the method that KCBX intended to use to calculate emissions.

The narrative section of the September 2012 DTE Application, which was referenced in the Request for Revision, contains an example calculation to demonstrate compliance with Section 212.321. R-207. This example calculation shows the value for allowable emissions for a single transfer point with a throughput of 2,500 tons per hour. This value is then contrasted with the actual emissions determined from the USEPA AP-42 emission factor mentioned earlier. Actual emissions are a product of the emission factor and the process weight rate. The substantial difference between the allowable rate and the actual emissions is used to demonstrate compliance for all of the pieces of equipment at the facility that have batch or continuous drop operations. R-207.

The allowable emission rate calculation from Section 212.321 and the actual emission rate calculated (from the standard emission factor equation from USEPA’s AP-42 Compilation of Air Pollutant Emission Factors Chapter 13.2.4 (Aggregate Handling and Storage Piles)) are both a function of the process weight rate. At 4,000 tons per hour, the allowable rate from 35 Ill. Admin. Code § 212.321 would be 93.5 pounds per hour ($24.8 * (4,000 \text{ tons/hr})^{0.16}$). The actual

emissions determined from USEPA's AP-42 document would be 1.3 pounds per hour based on a 50% control efficiency credit taken for water suppression ($0.5 * 4,000 \text{ tons/hr} * 0.00064 \text{ lbs/ton}$). A 50% control efficiency is incorporated into KCBX's current permit in section 14(c) following “*” after the emission limits table. R-140. Even if no credit is taken for water suppression, the actual emissions would be 2.6 pounds per hour, which is still well below the allowable rate of 93.5 pounds per hour. Apr. 30 Tr. at 101-102.

As a practical matter, these two equations show that a violation of Section 212.321 for batch or continuous drop operations such as these would not occur. The AP-42 equation is used to determine the actual emission rate, based on actual throughput. The process weight rate equation, from Section 212.321, is used to determine allowable emission rate. When you use the inputs in the AP-42 calculation that Illinois EPA relied upon for calculating actual emission limits for the KCBX South Terminal (and much inputs were accepted by the permit engineer, as described above), one can determine the process weight rate at which the actual emission rate will equal the allowable emission rate by comparing the two equations. Apr. 30 Tr. at 101. That is, the process weight rate at which a violation of the rule would occur and, here, that would be at 660,000 tons per hour (as compared to conveyor rates of 3,000-4000 tons per hour). Apr. 30 Tr. at 101.

For equipment such as conveyors, you “don't remotely come close” to this. Apr. 30 Tr. at 101. As an example, one of the throughput limits in KCBX's existing permit is 1,100,000 tons per month. R-140. Operating a piece of equipment at a rate of 666,000 tons per hour for one hour would result in approximately 60% of the monthly throughput limit. Even at an unlikely rate of 8,000 tons per hour, which is twice the rate of the highest capacity equipment at the South Facility (See R-213-R-216 (Table 5)), the allowable emission rate from Section 212.321 would

be 104.5 pounds per hour as compared to the actual emissions, as determined from USEPA's standard emission factor, which would be 2.6 pounds per hour.

Mr. Kolaz concluded that, based on this reasoning, Illinois EPA had adequate information to demonstrate compliance with Section 212.321. Apr. 30 Tr. at 110-11. Similarly, Mr. Steinert concluded that Illinois EPA had sufficient information in the Request for Revision and the items referenced therein to determine compliance with the process weight rate rule. Apr. 29 Tr. at 170-171.

The 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 standard emission factor, is clear. The relationship demonstrates that the process weight rate limit would not be violated in this case. Thus, the Board also should find that Illinois EPA erred in its Denial Reason 4.

E. Illinois EPA Improperly Denied KCBX's Request for Revision Based on its Claim that Storage Pile #8 is a Waste Pile ("Denial Reason 5").

Illinois EPA's Permit Denial Reason 5 claims that Storage Pile #8 was determined to be a waste pile due to vegetative growth observed during the Illinois EPA Bureau of Land inspection conducted on November 6, 2013. R-2-R-3. On March 26, 2014, Illinois EPA filed with the Board a Notice of Withdrawal of Permit Denial Reason #5. On April 3, 2014, the Board issued an Order stating that it was taking no action on Illinois EPA's Notice. Illinois EPA apparently originally concluded, prior to withdrawing the basis of denial, that such a designation qualifies the pile as a pollution control facility that requires local siting under Section 39.2(c) of the Act, 415 ILCS 5/39.2(c), and therefore under Section 39(c) of the Act, that it could not grant the Request for Revision because KCBX did not submit proof to the Illinois EPA "that the location

of the facility has been approved by ... the governing body of the municipality ... in which [the South Terminal] is ... located.” R-2.

KCBX and Illinois EPA seemingly now agree that Denial Reason 5 lacks merit. Because, however, the Board has not yet taken action on Illinois EPA’s withdrawal, KCBX notes the following reasons as to why Denial Reason 5 must fail. First, as described above, an unadjudicated alleged violation is not proper grounds for denying a permit, and is an unpermitted use of the Permit Denial as an enforcement mechanism. Such a practice has been repeatedly rejected by the Board and Illinois Appellate Courts in the past.

Second, this alleged observation from the November 6, 2013 Bureau of Land inspection was not presented to KCBX as information relied upon by Illinois EPA during the application review period. Therefore KCBX did not have the appropriate opportunity to rebut the information during the Permit Denial.

Third, Storage Pile #8 at the South Terminal contains coal, which is a valuable commodity that is routinely sold and shipped off site to fill the needs of customers. Coal is not waste, and the coal in Storage Pile #8 has not been discarded. Therefore, Storage Pile #8 is neither a waste pile nor a pollution control facility that requires local siting.

Accordingly, Reason 5 in Illinois EPA’s Permit Denial does not provide a proper basis for denying KCBX’s Request for Revision. As evidenced by its filing of the Notice of Withdrawal of Permit Denial Reason #5 on March 26, 2014, Illinois EPA appears to agree.¹⁰

¹⁰ PCB 14-110 (Ill.Pol.Control.Bd. Mar. 26, 2014).

1. Illinois EPA Improperly Denied the Request for Revision Based on Unadjudicated Alleged Violations Related to Waste Provisions in the Act and Board Regulations, which Instead Must be the Subject of Enforcement Actions.

As explained above, "it is well-established that the Agency cannot consider unadjudicated violations in determining to deny a permit application." *ESG Watts, Inc. v. Illinois EPA*, PCB No. 95-109 (Ill.Pol.Control.Bd. Mar. 16, 2000) (citing *Martell v. Mauzy*, 511 F. Supp. 729 (N.D. Ill. 1981)). A permit denial cannot substitute for an enforcement action. *ESG Watts, Inc. v. Illinois EPA*, PCB 92-54 at 5 (Ill.Pol.Control.Bd. Oct. 29, 1992); *aff'd sub nom. Illinois EPA v. IPCB*, 252 Ill. App. 3d 828; 624 N.E.2d 402; 191 Ill. Dec. 553 (3d Dist. 1993). Board and Illinois Appellate Court decisions have made it clear that Illinois EPA is prohibited from denying a permit on the basis of past or existing unadjudicated alleged violations of the Act or regulations. Such allegations should instead be the subject of enforcement actions. *ESG Watts, Inc.*, PCB 92-54 at 7 (Ill.Pol.Control.Bd. Oct. 29, 1992); *Central Environmental Services v. Illinois EPA*, PCB 89-170 (Ill.Pol.Control.Bd. Oct. 25, 1990); *Waste Management v. Illinois EPA*, PCB 84-45 (Ill.Pol.Control.Bd. Oct. 1, 1984), *aff'd sub nom. Illinois EPA v. IPCB*, 138 Ill. App. 3d 550, 486 N.E.2d 293 (3d Dist. 1985), *aff'd* 115 Ill.2d 65, 503 N.E.2d 343 (1986). Relying on such unadjudicated allegations would deny the due process rights of the permit applicant. *See Martell v. Mauzy*, 511 F. Supp. 729 (N.D. Ill. 1981).

In Denial Reason 5, Illinois EPA is denying the Request for Revision based on unadjudicated alleged waste violations. Illinois EPA's Permit Denial Reason 5 is similar to a denial basis in a previous air permit denial, which the Board determined to be an inappropriate. In *Grigoleit Co. v. Illinois EPA*,¹¹ Illinois EPA denied an application for renewal of an air

¹¹ PCB No. 89-184 (Ill.Pol.Control.Bd. Nov. 29, 1990).

operating permit in part for the following reason: “You have been previously notified by the Agency’s Division of Land Pollution Control of apparent violations of 35 Ill. Am. Code Sections 722.111, 722.112, 722.134, 725.152, 725.116 and 725.273. Since these violations are still outstanding, pursuant to sections 21 and 39 of the Act, no permit may be granted.” *Id.* at 1-2. There, the Board again noted that a permit denial cannot take the place of an enforcement action. *Id.* at 16. The Board explained 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.” *Id.* (emphasis added). Therefore, the Board found that Illinois EPA’s reason for denial was an inappropriate basis for a permit denial.

Just as in *Grigoleit Co.*, Illinois EPA is attempting to enforce an unadjudicated alleged waste violation through the Permit Denial. Similar to *Grigoleit Co.*, Illinois EPA is simply relying on observations that form the basis of unadjudicated violations alleged by the Bureau of Land. *See* Wells Letter at R-30 (which asserts that KCBX had “previously been informed of the existence of these alleged violations” through Violation Notices L-2013-01304 and L-2013-01305¹² issued by the Bureau of Land). The allegation that Storage Pile #8 contains waste is made in Violation Notice L-2013-01305. R-81-R-89. This alleged violation remains the subject of an administrative enforcement action that is still unresolved. As such, KCBX has not had the opportunity to fully contest the allegations and defend itself before the Board or in court.

Simply put, the alleged violations remain unadjudicated. And just as in *Grigoleit Co.* and the numerous other Board and Appellate Court cases, the Board must find that the unadjudicated alleged land violation does not provide an adequate basis for denying an air permit. To find otherwise would violate KCBX’s due process rights.

¹² Violation Notice L-2013-01304 was issued to the owner of the South Terminal, KM Railways, LLC but otherwise contains the same waste allegations as Violation Notice L-2013-01305, which was issued to KCBX. R-77.

2. Illinois EPA Failed to Notify KCBX of Observations from a Bureau of Land Inspection Relied Upon During the Application Review Period.

Illinois EPA alerted KCBX to its intent to consider information in its files during its review of the Request for Revision in the December 10, 2013 Pilapil Letter. The information listed did not include observations from the Bureau of Land's field staff. Therefore, KCBX did not have adequate opportunity to respond to information in Illinois EPA's files upon which it considered during its review of the Request for Revision, as required by the court in *Wells Manufacturing Co.* and by subsequent cases.

In the Wells Letter, Illinois EPA identified the following information that it would consider in its review of the Request for Revision: "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." R-30 (emphasis added). Illinois EPA asserted that "[t]hese documents and other available information" indicated violations of the Act and underlying regulations. *Id.* Notably, none of the documents referenced by Illinois EPA in the list assert that Storage Pile #8 is a waste pile, or that it qualifies as a pollution control facility. In fact, the documents cited in this paragraph assert the opposite. In particular, two Bureau of Air Inspection Reports cited in that list, the September 11th and 13th Inspection Report and the November 6th and 19th Inspection Report both identify Storage Pile #8 simply as "coal," which is a valuable product. R-41; R-32.

KCBX was not alerted to Illinois EPA's consideration of the Bureau of Land inspection observations. Thus, KCBX was not given the appropriate opportunity to rebut Bureau of Land

field staff observations related to Storage Pile #8. *See Wells Manufacturing Co. v. Illinois EPA*, 195 Ill. App. 3d 593, 552 N.E.2d 1074, 142 Ill. Dec. 333 (1st Dist. 1990).

KCBX acknowledges that the Wells Letter referenced Violation Notices issued by the Bureau of Land. Specifically, Illinois EPA explained that KCBX had “previously been informed of the existence of these alleged violations, 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 Notices L-2013-1304 and L-2013-01305 dated November 20, 2013.” R-30. But Illinois EPA 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. Mere knowledge of the existence of the Violation Notices does not mean KCBX knew Illinois EPA was using that information when considering its Request for Revision. *See Douglas Furniture of Cal. V. Illinois EPA*, PCB 90-22 (Ill.Pol.Control.Bd. Dec. 4, 1990) (where the Board explained that it does not limit *Wells Manufacturing Co.* to cases where the applicant does not have knowledge of the information upon which Illinois EPA bases its denial). KCBX was not properly informed of the information upon which Illinois EPA relied.

Furthermore, the Wells Letter referenced a violation of Section 39.2 of the Act, but such a violation is not referenced anywhere in the Violation Notice. So the Wells Letter was the first time KCBX was aware of an alleged violation of Section 39.2 of the Act, and it was not tied to any specific allegations, which left KCBX no opportunity to respond.

Illinois EPA did not alert KCBX that it was relying on observations from Bureau of Land field staff when reviewing the Request for Revision. Illinois EPA did not provide KCBX adequate notice and opportunity to respond to information in its files related to Storage Pile #8

upon which it based its Permit Denial. *See Wells Manufacturing Co.* Therefore, Illinois EPA improperly denied the Request for Revision and violated KCBX's right to due process.

3. Storage Pile #8 is a Storage Pile of Coal, which is a Valuable Product.

Illinois EPA asserts that Storage Pile #8 was determined to be a waste pile due to vegetative growth observed during an inspection conducted on November 6, 2013. R-3. In the inspection report prepared by Mr. Harris documenting his November 6, 2013 visit to the South Terminal, Mr. Harris claims that "some expired vegetation" was present on coal in Storage Pile #8. R-88. This observation alone does not support Illinois EPA's claim that Storage Pile #8 contains waste. Indeed, Mr. Estadt confirmed that Storage Pile #8 contains coal owned by KCBX's customer The C. Reiss Coal Company ("CRCC"). Apr. 29 Tr. at 56. KCBX stages its customer's product for outbound shipments and sends it out at the customer's direction. *Id.* Mr. Estadt noted that Storage Pile #8 was initially around 90,000 tons when KCBX took over the facility and is now approximately 8,000 to 10,000 tons. *Id.* at 57. Coal is shipped from Storage Pile #8 to locations specified by the customer. *Id.* No coal from Storage Pile #8 has been rejected. *Id.* at 58.

The coal is not discarded as it has never left the stream of commerce. Illinois case law clarifying the definition of waste does not address products that remain in the stream of commerce. But even when applying the principles presented in Illinois case law regarding waste, which do not apply to products, it is clear that the coal in Storage Pile #8 is not waste. Since the coal is not waste, Storage Pile #8 is not a waste pile or a pollution control facility requiring permitting under Section 39(c) of the Act.

"Waste pile" is defined as follows:

an area on which non-containerized masses of solid, non-flowing wastes are placed for disposal. For the purposes of this Part and 35 Ill. Adm. Code 811 through 815, a waste pile is a landfill, unless the operator can demonstrate that the wastes are not accumulated over time for disposal. At a minimum, such demonstration must include photographs, records, or other observable or discernable information, maintained on a yearly basis, that show that within the preceding year the waste has been removed for utilization or disposal elsewhere.

35 Ill. Admin. Code § 810.103. Therefore, a waste pile contains waste.

The Act defines “waste” as follows:

any garbage, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility or other discarded material, including solid, liquid, semi-solid, or contained gaseous material resulting from industrial, commercial, mining and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows, or coal combustion by-products as defined in Section 3.135, or industrial discharges which are point sources subject to permits under Section 402 of the Federal Water Pollution Control Act, as now or hereafter amended, or source, special nuclear, or by-product materials as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 921) or any solid or dissolved material from any facility subject to the Federal Surface Mining Control and Reclamation Act of 1977 (P.L. 95-87) or the rules and regulations thereunder or any law or rule or regulation adopted by the State of Illinois pursuant thereto.

415 ILCS 5/3. 535 (emphasis added).

Pollution control facility means “any waste storage site, sanitary landfill, waste disposal site, waste transfer station, waste treatment facility, or waste incinerator.” 415 ILCS 5/3.330.

Coal in the stream of commerce does not qualify as “garbage” or “sludge.” *See* 415 ILCS 5/3.200; 415 ILCS 5/3.465. Instead, Illinois EPA’s allegation appears to be based on the theory that Storage Pile #8 qualifies as “other discarded material.”

The ordinary meaning of the word “discard” is “to throw away; reject.”

<http://www.thefreedictionary.com/discard> (last accessed Mar. 18, 2014). Illinois courts have also interpreted the term “other discarded material” as it relates to the definition of “waste.” *See*

Alternate Fuels, Inc. v. Director of the Illinois Environmental Protection Agency, 215 Ill. 2d 219, 830 N.E.2d 444, 294 Ill. Dec. 32 (2004).

The coal in Storage Pile #8 is not discarded under that word's plain meaning. The coal is not thrown away or rejected. Instead, it is temporarily staged for shipment to customers. Similarly, the coal in Storage Pile #8 never left the stream of commerce, so it is not discarded pursuant to Illinois case law either. Roughly 80 to 90% of the coal initially contained in Storage Pile #8 has been shipped to CRCC customers. Apr. 29 Tr. at 57. This demonstrates that CRCC has sold coal from Storage Pile #8 to customers, and that the coal has been moved off site in connection with those sales. The mere fact that vegetation existed on one side of the coal pile is of no consequence.

Storage Pile #8 does not contain waste. Therefore it is not a waste pile, and the South Terminal is not a pollution control facility. The South Terminal is instead a bulk material terminal where valuable product is staged for future shipment. Accordingly no local siting is necessary. Thus, Reason 5 is an improper basis for denying the Request for Revision.

F. Illinois EPA Gives no Reason Why Granting the Request for Revision Might Violate Section 9 of the Act.

As noted above, the introduction to Illinois EPA's Permit Denial states that the Request for Revision "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." Section 9 contains numerous prohibited activities. *See* 415 ILCS 5/9. However, in the "specific reasons" it lists in its Permit Denial, Illinois EPA does not state specifically how Section 9 of the Act might be violated if it approved the Request for Revision. Therefore, Illinois EPA does not provide justification for denying the Request for Revision based on Section 9. Accordingly,

Illinois EPA's reference to Section 9 is improper and does not provide an adequate basis for denying the Request for Revision.

V. CONCLUSION

WHEREFORE Petitioner, KCBX TERMINALS COMPANY, for the above-stated reasons, respectfully prays that the Board, based upon its review of the Record, testimony at hearing, and arguments presented herein, find that Illinois EPA: a) may not rely upon incompleteness as a denial basis when it failed to issue a Notice of Incompleteness; b) had sufficient information to grant the Request for Revision to KCBX TERMINAL COMPANY's existing construction permit for the South Terminal; and c) improperly relied upon unadjudicated noncompliance in denying the permit. Further, based upon the foregoing, KCBX TERMINALS COMPANY prays that the Board issue an Order directing Illinois EPA to issue the requested revised construction permit to KCBX TERMINAL COMPANY upon entry of the Board's Order, and that the Board award KCBX TERMINALS COMPANY all other relief just and proper in the premises.

Respectfully submitted,

KCBX TERMINALS COMPANY
Petitioner,

Dated: May 9, 2014

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