

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

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

(SEE PERSONS ON ATTACHED SERVICE LIST)

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board **PETITIONER'S MOTION FOR LEAVE TO FILE A REPLY TO RESPONDENT'S RESPONSE TO PETITIONER'S SECOND MOTION IN LIMINE REGARDING FUGITIVE DUST PLANS, A/K/A "FUGITIVE PARTICULATE OPERATING PROGRAMS"** and **PETITIONER'S REPLY TO RESPONDENT'S RESPONSE TO PETITIONER'S SECOND MOTION IN LIMINE REGARDING FUGITIVE DUST PLANS, A/K/A "FUGITIVE PARTICULATE OPERATING PROGRAMS"**, copies of which are herewith served upon you.

Respectfully submitted,

KCBX TERMINALS COMPANY,
Petitioner,

Dated: April 24, 2014

By: /s/ Edward W. Dwyer
Edward W. Dwyer

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

CERTIFICATE OF SERVICE

I, Edward W. Dwyer, the undersigned, hereby certify that I have served the attached PETITIONER'S MOTION FOR LEAVE TO FILE A REPLY TO RESPONDENT'S RESPONSE TO PETITIONER'S SECOND MOTION IN LIMINE REGARDING FUGITIVE DUST PLANS, A/K/A "FUGITIVE PARTICULATE OPERATING PROGRAMS" and PETITIONER'S REPLY TO RESPONDENT'S RESPONSE TO PETITIONER'S SECOND MOTION IN LIMINE REGARDING FUGITIVE DUST PLANS, A/K/A "FUGITIVE PARTICULATE OPERATING PROGRAMS" upon:

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

via electronic mail on April 24, 2014 and upon:

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

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

by depositing said documents in the United States Mail, postage prepaid, in Springfield, Illinois on April 24, 2014 and upon:

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

via facsimile and by depositing said document in the United States Mail, postage prepaid, in Springfield, Illinois on April 24, 2014.

/s/ Edward W. Dwyer
Edward W. Dwyer

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**PETITIONER’S MOTION FOR LEAVE TO FILE A REPLY TO
RESPONDENT’S RESPONSE TO PETITIONER’S SECOND
MOTION IN LIMINE REGARDING FUGITIVE DUST PLANS, A/K/A
“FUGITIVE PARTICULATE OPERATING PROGRAMS”**

NOW COMES Petitioner, KCBX TERMINALS COMPANY (“KCBX”), a North Dakota corporation, by and through its attorneys, HODGE DWYER & DRIVER, pursuant to 35 Ill. Admin. Code § 101.500, hereby files the following Motion for Leave to File a Reply to Respondent’s Response to Petitioner’s Second Motion in Limine Regarding Fugitive Dust Plans, a/k/a “Fugitive Particulate Operating Programs” (“Second Motion in Limine”). In support thereof, Petitioner states as follows:

1. On January 17, 2014, Illinois Environmental Protection Agency (“Illinois EPA”) issued a Permit Denial letter to KCBX in response to KCBX’s Request for Revision.
2. On February 21, 2014, KCBX initiated this proceeding by filing with the Illinois Pollution Control Board (“Board”) its Petition for Review (“Petition”) regarding the Permit Denial. A Hearing Officer Order was entered scheduling a hearing on April 29, 2014.

3. On April 22, 2014, KCBX filed its Second Motion in Limine. On April 23, 2014, the Illinois EPA filed a Response to the Second Motion in Limine.

4. KCBX respectfully prays for leave to file a brief reply to the arguments set forth in the Illinois EPA's Response to the Second Motion in Limine. The proposed reply is attached.

WHEREFORE Petitioner, KCBX TERMINALS COMPANY, for the above stated reasons, respectfully prays that the Hearing Officer grant it leave to file its Reply to Respondent's Response to Petitioner's Second Motion in Limine Regarding Fugitive Dust Plans, a/k/a "Fugitive Particulate Operating Programs," and that the Hearing Officer award KCBX TERMINALS COMPANY all other relief just and proper in the premises.

Respectfully submitted,

KCBX TERMINALS COMPANY,
Petitioner,

Dated: April 24, 2014

By: /s/ Edward W. Dwyer
One of Its Attorneys

Katherine D. Hodge
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**PETITIONER’S REPLY TO RESPONDENT’S RESPONSE TO PETITIONER’S
SECOND MOTION IN LIMINE REGARDING FUGITIVE DUST PLANS, A/K/A
“FUGITIVE PARTICULATE OPERATING PROGRAMS”**

NOW COMES Petitioner, KCBX TERMINALS COMPANY (“KCBX”), a North Dakota corporation, by and through its attorneys, HODGE DWYER & DRIVER, pursuant to 35 Ill. Admin. Code § 101.500, hereby files the following Reply to Respondent’s Response to Petitioner’s Second Motion in Limine Regarding Fugitive Dust Plans, a/k/a “Fugitive Particulate Operating Programs” (“Second Motion in Limine”). In support thereof, Petitioner states as follows:

1. On July 23, 2013 KCBX applied for a Request for Revision of its existing Construction Permit (“Request for Revision”). On January 17, 2014, the Illinois Environmental Protection Agency (“Illinois EPA”) denied KCBX’s Request for Revision. Denial Reason 3 states as follows: “The application does not show compliance with 35 Ill. Adm. Code 212.301 (Fugitive Particulate Matter). Based upon the observations made by the Division of Air Pollution Control’s field staff and citizen pollution complaint forms, emissions from the source may violate 35 Ill. Adm. Code 212.301.”

2. On February 21, 2014, KCBX initiated this proceeding by filing with the Illinois Pollution Control Board (“Board”) its Petition for Review (“Petition”) regarding the Permit Denial. A Hearing Officer Order was entered scheduling a hearing on April 29, 2014.

3. On April 22, 2014, KCBX filed its Second Motion in Limine requesting that the Hearing Officer issue an Order allowing evidence, testimony or argument relating to the fugitive dust plans, a/k/a Fugitive Particulate Operating Programs (“FPOPs”) contained in the Record and documents related to same that the Illinois EPA considered and either relied upon or should have relied upon in reviewing KCBX’s Request for Revision.

4. On April 23, 2014, the Illinois EPA filed a Response to the Second Motion in Limine. In this response, the Illinois EPA states that Julie K. Armitage, the Chief of the Bureau of Air, testified in her deposition that “she relied upon KCBX’s fugitive particulate matter operating programs in the decision-making process to deny KCBX’s construction permit application.” Response, p. 1. Thus, “the Illinois EPA does not object to testimony or argument relating to documents contained in the Administrative Record that concern fugitive particulate matter operating programs.” *Id.* at pp. 1-2.

5. The Illinois EPA further argues, however, that the Permit Denial did not set forth fugitive particulate matter regulations (35 Ill Adm. Code §§ 212.309, 212.310, and 212.312) as bases for denial and, therefore, “whether KCBX’s fugitive particulate matter operating program is sufficient or adequate is not at issue before the Board in this Permit Appeal.” Response, p. 2. The Illinois EPA therefore does not object to the

Hearing Officer allowing testimony or argument regarding FPOPs and related documents contained in the Record, “provided, that the Board does not determine in this Permit Appeal the sufficiency or adequacy of KCBX’s fugitive particulate matter operating programs which is at issue before the Circuit Court of Cook County.” *Id.* p. 3.

6. The Illinois EPA’s position is untenable. As stated in KCBX’s Second Motion in Limine, during the discovery depositions of Illinois EPA employees, counsel for Illinois EPA, on multiple occasions, objected to questions related to the fugitive dust plans or “FPOPs” in the Record, including questions regarding the “adequacy” of same, on the basis that this was at issue in a separate proceeding. The Illinois EPA admits, however, that Julie Armitage testified in her deposition that she relied, in part, upon KCBX’s FPOPs in denying the permit.

7. Denial Reason 3 stated, in part, that: “[t]he application does not show compliance with 35 Ill. Adm. Code § 212.301” and “emissions from the source may violate 35 Ill. Adm. Code 212.301.” FPOPs must describe, among other things, best management practices used to comply with fugitive particulate matter regulations in 35 Ill. Admin. Code Part 212, Subpart K, which includes Section 212.301. 35 Ill. Admin. Code § 212.310(e). As described in her deposition, assessment of KCBX’s November 2013 FPOP is how Ms. Armitage reached her conclusion that compliance with Section 212.301 is not shown and that Section 212.301 may be violated. In addition, observations from field staff, as documented in inspection reports in the Administrative Record, and cited to as support in the Permit Denial, describe “alleged” deficiencies in the FPOP. Administrative Record at R-000051-R-000053. Thus, it certainly appears that the Illinois EPA intends to argue that it considered the adequacy of KCBX’s FPOP as a

basis for its denial. The Illinois EPA cannot rely on an “alleged” inadequacy as a basis for denial of the permit, and then attempt to preclude KCBX from introducing evidence at the hearing as to the adequacy of its FPOP.

8. KCBX must be able to refute the Illinois EPA’s reliance upon an “alleged” inadequacy of its FPOPs to prove that Denial Reason 3 was not a proper basis for denial of the permit. Accordingly, the Illinois EPA’s arguments should be rejected, and KCBX’s Second Motion in Limine should be granted.

WHEREFORE Petitioner, KCBX TERMINALS COMPANY, for the above-stated reasons, and for the reasons set forth in the Second Motion in Limine, respectfully prays that the Hearing Officer issue an Order allowing evidence, testimony or argument relating to the fugitive dust plans, a/k/a FPOPs, contained in the Record and documents related to same that the Illinois EPA considered and either relied upon or should have relied upon in reviewing KCBX’s Request for Revision of Construction Permit Application.

Respectfully submitted,

KCBX TERMINALS COMPANY,
Petitioner,

Dated: April 24, 2014

By: /s/ Edward W. Dwyer
One of Its Attorneys

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