

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 SECOND MOTION TO SUPPLEMENT THE RECORD**, a copy of which is herewith served upon you.

Respectfully submitted,

KCBX TERMINALS COMPANY,
Petitioner,

Dated: April 28, 2014

By: /s/ Matthew C. Read
Matthew C. Read

Katherine D. Hodge
Edward W. Dwyer
Matthew C. Read
HODGE DWYER & DRIVER
3150 Roland Avenue
Post Office Box 5776
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CERTIFICATE OF SERVICE

I, Matthew C. Read, the undersigned, hereby certify that I have served the attached PETITIONER'S SECOND MOTION TO SUPPLEMENT THE RECORD 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 28, 2014 and upon:

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

Stephen A. Swedlow, Esq.
Quinn Emanuel Urquhart Sullivan LLP
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Chicago, Illinois 60661

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 28, 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 hand delivery on April 28, 2014.

/s/ Matthew C. Read
Matthew C. Read

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PETITIONER'S SECOND MOTION TO SUPPLEMENT THE RECORD

NOW COMES Petitioner, KCBX TERMINALS COMPANY ("KCBX"), a North Dakota corporation, by and through its attorneys, HODGE DWYER & DRIVER, and hereby moves to supplement the record before the Illinois Pollution Control Board ("Board") with certain documents the Illinois Environmental Protection Agency ("Illinois EPA") relied upon or should have relied upon in making its determination regarding KCBX's July 23, 2013, Request for Revision to Revised Construction Permit ("Request for Revision") for KCBX's bulk solids materials terminal located at 10730 South Burley Avenue, Chicago, Illinois 60617 ("South Terminal"). In support of its Motion, KCBX states as follows:

1. On January 17, 2014, 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 Board its Petition for Review ("Petition") regarding the Permit Denial.
3. On March 24, 2014, Illinois EPA filed the Administrative Record ("Record") with the Board in this permit appeal.

4. On April 7, 2014, KCBX filed a Motion to Supplement the Record. On April 11, 2014, KCBX filed a Motion for Leave to File Amendment to its Motion to Supplement the Record.

5. On April 14, 2014, Illinois EPA filed its Response to KCBX Terminals Company's Motion to Supplement the Record. On April 15, 2014, Illinois EPA filed its Response to KCBX Terminals Company's Motion for Leave to File Amendment to Motion to Supplement the Record.

6. On April 15, 2014, KCBX filed its Motion for Leave to File a Reply and a corresponding Reply to Illinois EPA's Response to KCBX Terminals Company's Motion to Supplement the Record.

7. On April 17, 2014, the Board granted KCBX's Motion for Leave to File Amendment to its Motion to Supplement the Record and KCBX's Motion for Leave to File a Reply. The Board also granted in part and denied in part, KCBX's Motion to Supplement the Record. In addition, the Board affirmed an April 8, 2014 hearing officer order in its entirety.

8. Since the Board's April 17, 2014 Order, Illinois EPA supplemented the Record with documents by filing a Supplement to the Administrative Record on April 21, 2014, a Second Supplement to the Administrative Record on April 23, 2014, a Third Supplement to the Administrative Record on April 24, 2014, and a Fourth Supplement to the Administrative Record on April 25, 2014.

9. Since KCBX filed its Motion to Supplement the Record, KCBX has taken depositions of Illinois EPA employees Michael Dragovich, Robert Bernoteit, Raymond Pilapil, Joseph Kotas, and Julie Armitage.

10. Since KCBX filed its Motion to Supplement the Record, Illinois EPA has produced and supplemented the Record with numerous documents.

11. In light of these developments, KCBX now moves to supplement the Record with additional documents.

12. Section 40(d) of the Illinois Environmental Protection Act (“Act”) provides that when the Board hears a permit appeal, the Board’s decision must “be based exclusively on the record before the Agency including the record of the hearing, if any, held pursuant to paragraph (f)(3) of Section 39 unless the parties agree to supplement the record.” 415 ILCS 5/40(d).

13. Section 105.212 of the Board's Rules provides, in relevant part, that “[t]he Agency must file its *entire record of its decision* with the Clerk in accordance with Section 105.116 of this Part. The record must include . . . [*a*]ny other information the Agency relied upon in making its final decision.” 35 Ill. Admin. Code § 105.212(a) and (b)(5) (emphasis added).

14. Further, the Board has explained that the record must include “all documents on which the Agency relied *or reasonably should have relied.*” *Ameren Energy Resources Generating Co. v. Illinois EPA*, PCB 14-41, 2014 Ill. ENV LEXIS 100 at *23 (Ill.Pol.Control.Bd. Mar. 20, 2014) (citing *United Disposal of Bradley, Inc. v. IEPA*, PCB 03-235, slip op. at (June 17, 2004); *Joliet Sand and Gravel v. IEPA*, PCB 86-159, slip op. at 4 (Feb. 8, 1987), *aff'd*, 163 Ill. App. 3d 830, 516 N.E.2d 955 (3d Dist. 1987)) (emphasis added).

15. For permit appeals, “[i]t is the Agency's responsibility to file the complete record that is before it” *KCBX Terminals Co. v. Illinois EPA*, PCB Nos. 10-110, 11-

43, 2011 Ill. ENV LEXIS 155, at *7 (Ill.Pol.Control.Bd. May 19, 2011) (quoting *Industrial Salvage, Inc. v. IEPA*, PCB Nos. 93-60, 93-61, slip op. at 2 (Ill.Pol.Control.Bd. Feb. 17, 1994)); *see also* 35 Ill. Admin. Code § 105.116 (requiring Illinois EPA to “file with the Board the entire record of its decision”).

16. The Board requires Illinois EPA to file the complete record of its decision in permit appeals because “[t]he filing of a partial record places the Board in a difficult situation, causing the Board to be faced with making its decision based upon the incomplete record and pleadings as they stand.” *Industrial Salvage, Inc.*, slip op. at 2-3.

17. When Illinois EPA has not filed a complete record in a permit appeal, petitioners have been afforded the opportunity to supplement the record. *See, e.g., KCBX Terminals Co.*, 2011 Ill. ENV LEXIS 155, at *18.

18. KCBX attached the following documents as exhibits to its Petition and hereby seeks to have these documents included in the Record in order to make available to the Board all documents relevant to this matter:

A. Petition Exhibit 6 – February 2, 2009 Joint Construction and Operating Permit Application for DTE Fuels Terminal, LLC (“DTE”), Application No. 07050082. Attached hereto as Exhibit A.

Justification: The Request for Revision seeks to revise an existing construction permit, which was revised multiple times prior to this request. The construction and operating permit application attached as Exhibit A sought to revise a previous version of this same construction permit (Application No. 07050082). As such, Exhibit A is part of the same ongoing application as the Request for Revision and is relevant to the continuing modification of the construction permit. It was also before Illinois EPA during the permit application review period. Mr. Dragovich explained the procedure for receiving a construction permit application for review along with the file and noted that the file clerk “tries to put together a file she requests from the file room, and *there is an existing file for this place because it’s a revision, so it comes together in a big file.*” Exhibit B, Discovery Deposition of Michael Dragovich, April 9, 2014 at 34

(emphasis added). This confirms that previous construction permits and construction permit applications sharing this construction permit application number were in fact before Illinois EPA at the time of its decision. In fact, the Board has already ordered Illinois EPA to supplement the Record with a subsequent construction permit application seeking to revise this same permit (R-000563). Therefore, this document was relied upon or reasonably should have been relied upon by Illinois EPA.

- B. Petition Exhibit 29 – May 21, 2009, Joint Construction and Operating Permit, Application No. 07050082 (issued May 21, 2009).** Attached hereto as Exhibit C.

Justification: The Request for Revision seeks to revise an existing construction permit, which was revised multiple times prior to this request. The joint construction and operating permit attached as Exhibit C is a previous version of this same construction permit (Application No. 07050082) that KCBX now seeks to revise. As such, it is relevant to the ongoing modification of the construction permit. It was also before Illinois EPA during the permit application review period. Mr. Dragovich explained the procedure for receiving a construction permit application for review along with the file and noted that the file clerk “tries to put together a file she requests from the file room, and *there is an existing file for this place because it’s a revision, so it comes together in a big file.*” Exhibit B at 34 (emphasis added). This confirms that previous construction permits and construction permit applications sharing this construction permit application number were in fact before Illinois EPA at the time of its decision. Therefore, this document was relied upon or reasonably should have been relied upon by Illinois EPA.

19. KCBX hereby seeks to have the following additional documents included in the Record in order to make available to the Board all documents relevant to this matter:

- A. March 11, 2013, Supplement to Pending Construction Permit Application, Application No. 07050082 (issued May 21, 2009).** Attached hereto as Exhibit D.

Justification: The Request for Revision seeks to revise an existing construction permit, which was revised multiple times prior to this request. The supplement to the pending construction permit application attached as Exhibit D was a supplement to a pending construction permit application that sought to revise a previous version of this same construction permit (Application No. 07050082). As such, it is part of the same ongoing

application as the Request for Revision and is relevant to the continuing modification of the construction permit.

Exhibit D was sent to Illinois EPA as a supplement to the (at the time) pending¹ September 17, 2012 Construction Permit Application submitted by DTE, which is included in the Record beginning at R-000563. Therefore, Exhibit D led to the existing construction permit (Application No. 07050082).

It was also before Illinois EPA and considered during the permit application review period. Robert Bernoteit addresses this application supplement in a November 14, 2013 e-mail to Julie Armitage in the Record at R-000698 and attaches a portion of the application to his e-mail. R-000721 – R-000742.

Further, Mr. Dragovich explained the procedure for receiving a construction permit application for review along with the file and noted that the file clerk “tries to put together a file she requests from the file room, and *there is an existing file for this place because it's a revision, so it comes together in a big file.*” Exhibit B at 34 (emphasis added). This further confirms that this supplement was in fact before Illinois EPA at the time of its decision. Therefore, this document was relied upon or reasonably should have been relied upon by Illinois EPA.

B. Federally Enforceable State Operating Permit (“FESOP”) Applications for KCBX Terminal at 3259 East 100th Street, Chicago, Illinois 60617 (“North Terminal”). Attached hereto as Exhibit E.

Justification: The equipment described in the Request for Revision is currently operated at KCBX’s North Terminal pursuant to a FESOP. KCBX noted its intent to transfer the equipment from the North Terminal to the South Terminal in its cover letter to the Request for Revision (R-000186 – R-000187, the September 3, 2013 e-mail from Terry Steinert to Mike Dragovich (R-000182), and its January 13, 2014 letter to Raymond E. Pilapil (R-000011 – R-000016). The cover letter to the Request for Revision alerts Illinois EPA to the FESOP issued to the North Terminal. The January 13, 2014 letter explained that the equipment at issue in the Request for Revision is operated pursuant to the FESOP issued to the North Terminal, and the North Terminal FESOP appears in the Record at R-000538 – R-000561.

¹ Due to concerns related to the December 20, 2012, Construction Permit issued to KCBX (R-000624), KCBX filed a Joint Request for Ninety-Day Extension of Appeal Period with the Board on January 18, 2013. *KCBX Terminals Co. v. Illinois Environmental Protection Agency*, PCB 13-39 (Ill.Pol.Control.Bd. Jan. 18, 2013). The current existing Revised Construction Permit (Application No. 07050082) was issued during this extension period on April 18, 2013, following the March 11, 2013, supplement from KCBX.

Further, the permit engineer assigned to the Request for Revision, Michael Dragovich, explained during his deposition that he did, in fact, look at permits and permit applications for the North Terminal when he reviewed the Request for Revision. Exhibit B at 82-83. Moreover, Illinois EPA has supplemented the Record with a Consolidated Fugitive Particulate Operating Program and Contingency Measures Plan from the North Terminal (R-001390), so it is clear that Illinois EPA considered operations at the North Terminal in its review of the Request for Review. Therefore, this document was relied upon or reasonably should have been relied upon by Illinois EPA.

- C. Consolidated Fugitive Particulate Operating Programs and Contingency Measures Plans for the North Terminal dated September 4, 2008 (rev. 8), November 10, 2008 (rev. 9), May 4, 2010 (rev. 11), May 16, 2011 (rev. 12), February 24, 2012 (rev. 13), May 29, 2013 (rev. 14).** Attached hereto as Exhibit F.

Justification: The equipment described in the Request for Revision is currently operated at KCBX's North Terminal pursuant to a FESOP. KCBX noted its intent to transfer the equipment from the North Terminal to the South Terminal in its cover letter to the Request for Revision (R-000186 – R-000187, the September 3, 2013 e-mail from Terry Steinert to Mike Dragovich (R-000182), and its January 13, 2014 letter to Raymond E. Pilapil (R-000011 – R-000016).

Illinois EPA has supplemented the Record with a Consolidated Fugitive Particulate Operating Program and Contingency Measures Plan from the North Terminal (R-001390). Other revisions of this Consolidated Fugitive Particulate Operating Program and Contingency Measures Plan were also before Illinois EPA at the time of its decision. Therefore, these documents were relied upon or reasonably should have been relied upon by Illinois EPA.

- D. November 5, 2013 e-mail from Kathryn Pamerter to Katherine Hodge regarding People v. KCBX Terminals Company.** Attached hereto as Exhibit G.

Justification: This e-mail correspondence was in response to KCBX's submittal to Illinois EPA of its "Operating Program for Fugitive Particulate Control-Revision1" for the KCBX South Terminal and indicates that the Illinois EPA was "separately reviewing the Operating Program for Fugitive Particulate Control – Revision 1 that KCBX Terminals Company submitted on November 1, 2013." Both of the

Operating Programs for Fugitive Particulate Control are already in the Record. See R-001197 and R-000150.

E. December 5, 2013 Meeting Sign-in sheet. Attached hereto as Exhibit H.

Justification: This sign-in sheet is for a meeting during the permit review period when Illinois EPA learned of the fully operational status and facility-wide capability of the dust suppression system at the KCBX South Terminal.

F. Slides Presented to Illinois EPA on December 5, 2013. Attached hereto as Exhibit I.

Justification: These slides were presented to Illinois EPA on December 5, 2013.

WHEREFORE Petitioner, KCBX TERMINALS COMPANY, for the above stated reasons, respectfully prays that the Illinois Pollution Control Board will enter an Order granting this Motion to Supplement the Record, and mandating Respondent to promptly supplement the administrative record with the documents described and identified above, and that the Illinois Pollution Control Board award KCBX TERMINALS COMPANY all other relief just and proper in the premises.

Respectfully submitted,

KCBX TERMINALS COMPANY,
Petitioner,

Dated: April 28, 2014

By: /s/ Matthew C. Read
One of Its Attorneys

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