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
Assistant Clerk of the Board
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601
(VIA ELECTRONIC MAIL)

Mr. Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601
(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 POST-HEARING REPLY BRIEF** and **PETITIONER'S REPLY TO RESPONDENT'S POST-HEARING BRIEF**, copies of which are herewith served upon you.

Respectfully submitted,

KCBX TERMINALS COMPANY,
Petitioner,

Dated: May 20, 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 MOTION FOR LEAVE TO FILE POST-HEARING REPLY BRIEF and PETITIONER'S REPLY TO RESPONDENT'S POST-HEARING BRIEF 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 May 20, 2014 and upon:

Mr. Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
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Division of Legal Counsel
Illinois Environmental Protection Agency
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by depositing said documents in the United States Mail, postage prepaid, in Springfield, Illinois on May 20, 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 May 20, 2014.

/s/ Katherine D. Hodge
Katherine D. Hodge

KCBX:004/Filing Permit Appeal/NOF & COS – Reply Brief

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PETITIONER'S MOTION FOR LEAVE TO FILE POST-HEARING REPLY 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, and pursuant to 35 Ill. Admin. Code § 101.500(e), hereby files the following Motion for Leave to File Post-hearing Reply Brief. In support thereof, Petitioner states as follows:

1. Section 101.500(e) of the Illinois Pollution Control Board's ("Board's) procedural rules, 35 Ill. Admin. Code § 101.500(e), provides that a person may have the right to reply "as permitted by the Board or the hearing officer to prevent material prejudice." 35 Ill. Admin. Code § 101.500(e).

2. On May 9, 2014, KCBX filed a Post-hearing Brief addressing the issues framed by the permit denial reasons, cited to specific evidence in the record supporting how it met its burden of proof, and addressed potential arguments that the Illinois Environmental Protection Agency ("Agency") may raise in response to these specific denial reasons.

3. On May 16, 2014, KCBX filed a Motion to Revise the Hearing Officer Schedule to Complete the Record in anticipation that it would be necessary to file a reply brief in order "to prevent material prejudice."

4. Also, on May 16, 2014, the Agency submitted its Response Brief in this matter mischaracterizing KCBX legal arguments, raising genuinely new arguments not detailed in the permit denial letter, and mischaracterizing facts in the record.

5. On May 19, 2014, the Agency filed a response to KCBX's Motion to Revise the Hearing Officer Schedule, in which the Agency argued (1) that KCBX's request should be denied because KCBX has waived the opportunity to file a reply brief and (2) that this late filing would result in a material prejudice if the Agency is not allowed the opportunity to file a sur-reply brief. Respondent's Resp. to Pet's Mot. to Rev. Schedule at 4.

6. On May 20, 2014, the hearing officer denied the Motion to Revise the Hearing Officer Schedule stating that "KCBX does not allege that it would be materially prejudiced should I deny their motion." Hearing Officer Order, *KCBX Terminals Co. v. Illinois EPA*, PCB No. 14-110, slip op. at 2 (Ill.Pol.Control.Bd. May 20, 2014).

7. The Board's rules provide that a party may reply "to prevent material prejudice." 35 Ill. Admin. Code § 101.500(e). KCBX Post-hearing Reply Brief is necessary "to prevent material prejudice" for the reasons set forth below.

8. First, the Agency's Response Brief mischaracterizes KCBX's legal arguments. *City of Quincy v. Illinois EPA*, PCB No. 08-86, 2010 Ill. ENV LEXIS 213, at *5 (Ill.Pol.Control.Bd. June 17, 2010). For example, the Agency's Response Brief mischaracterizes KCBX's discussion regarding the burden of proof and claims that

KCBX is shifting the burden of proof on the Agency. Resp. Br. at 2. Prior to May 16, 2014, KCBX could not have contemplated that the Agency would mischaracterize KCBX's legal arguments in its Response Brief and must be afforded the opportunity to respond in order "to prevent material prejudice."

9. Second, the Agency's Response Brief presents genuinely new arguments not raised in the denial letter. For example, the Agency's Response Brief simply states the KCBX offered nothing at hearing or in its Post-hearing Brief to demonstrate that KCBX complied with Section 9 of the Act, 415 ILCS 5/9. Resp. Br. at 10-12. Regarding this point, KCBX has already discussed the Agency's five detailed reasons for denying the permit in its Post-hearing Brief. *See* Post-hearing Br. at 12-48. None of permit denial reasons explicitly detail reasons for denying the permit pursuant to Section 9 of the Act, 415 ILCS 5/9. *Id.* Thus, KCBX had no reason to respond to this statement in its Post-hearing Brief. In the Response Brief, the Agency now raises a new implicit reason for denying the permit, pursuant to Section 9 of the Act, 415 ILCS 5/9. Resp. Br. at 10. Prior to May 16, 2014, KCBX could not contemplate that the Agency's Response Brief would raise implicit reasons for denying the permit in direct contradiction with 415 ILCS § 5/39(a). If denied the opportunity to respond to these additional arguments, KCBX would be denied the opportunity to address these issues before the Board and preserve these issues on appeal.

10. Third, the Agency's Post-hearing Response Brief mischaracterizes evidence submitted into the record as a basis for this permit denial. *Elmhurst Memorial Healthcare v. Chevron U.S.A., Inc.*, PCB No. 09-066, 2009 Ill. ENV LEXIS 300, * 4 (Ill.Pol.Control.Bd. Aug. 6, 2009). One example is that the Agency's Response Brief

mischaracterizes KCBX's Wells Response letter as simply legal in nature and asserted that KCBX "chose not to" address Illinois EPA's concern regarding 35 Ill. Admin. Code § 212.301. Resp. Br. at 14. Prior to May 16, 2014, KCBX could not have contemplated the necessity to respond to this, as well as other mischaracterizations of fact, in the Response Brief.

11. The Post-hearing Reply Brief is respectfully filed today, May 20, 2014, to allow the Board thirty days to make its decision, which is scheduled to be on June 19, 2014.

12. For the reasons provided above, KCBX respectfully requests the Board grant this motion in order "to prevent material prejudice" and to ensure that the proceedings in this permit appeal are fundamentally fair.

WHEREFORE Petitioner, KCBX TERMINALS COMPANY, for the above stated reasons, respectfully prays that the Illinois Pollution Control Board enter an Order granting this Motion for Leave to File Reply Brief 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: May 20, 2014

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

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PETITIONER'S REPLY TO RESPONDENT'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 and, pursuant to 35 Ill. Admin. Code § 101.500, hereby files the following Reply to Respondent's Post-Hearing Brief. In support thereof, Petitioner states as follows:

On May 16, 2014, the Illinois Environmental Protection Agency ("Illinois EPA" or "Agency") filed its Post-Hearing Brief. In its Brief, Illinois EPA mischaracterized arguments presented by KCBX. Illinois EPA also mischaracterized facts and raised new arguments beyond the scope of KCBX's Post-Hearing Brief. Therefore, KCBX submits this reply brief to clarify.

I. Illinois EPA Mischaracterizes KCBX's Response to the Wells Letter and the Information Requested by the Wells Letter

The Illinois EPA claims that KCBX's January 13, 2014, Wells Letter response included legal arguments but did not provide any actual data. Resp. Br. at 12-13. Illinois EPA further claims that KCBX "chose not to" address Illinois EPA's concern regarding 35 Ill. Admin. Code § 212.301. Resp. Br. at 14. Neither of these is the case. KCBX's response demonstrates that issuing a revised construction permit would not violate the Illinois Environmental Protection Act

("Act") or regulations. Given the language of the Wells Letter, KCBX's response was appropriate and sufficient.

The Wells Letter cites generally to Part 212, Subpart K, which addresses fugitive particulate matter. R-30. Therefore, in its response to the Wells Letter, KCBX described its dust suppression system. R-14. Notably, KCBX explained that

> Moreover, as described on multiple occasions with Illinois EPA personnel, since acquisition in December 2012, KCBX has made significant investment in, and implemented a number of dust suppression improvements at, KCBX South, including pile management procedures and surfactant application capability. KCBX also designed and installed an advanced programmable water cannon system to even further control dust emissions, which system commenced operation in early November 2013. The new system consists of forty-two oscillating water cannons mounted on sixty-foot high poles that operate on a computer-controlled, pre-programmed schedule to apply up to 1,800 gallons of water per minute to the entire storage area at the site. This system at KCBX South is at least as robust as the water spray system in place at KCBX North, where Illinois EPA already has concluded that the Equipment can operate with no concern.

R-14.

This description is consistent with Mr. Estadt's previous demonstration of the water cannon system for an Illinois EPA inspector. Apr. 29 Tr. at 48, 52-53. It is also consistent with the data Mr. Estadt presented to an Illinois EPA inspector that was obtained from KCBX's wind gauge during a high wind event that showed water cannons were cycling and in operation during the event. R-35. Further, it is consistent with KCBX's discussion with Illinois EPA on December 5, 2013 regarding the new dust suppression system and the related operation of same at the South Terminal. Apr. 29 Tr. at 39-43; 112-123; R-2054-R-2092.

But Illinois EPA apparently views the Wells Letter as KCBX's only opportunity to defend against every unknown allegation or concern dreamed up by Illinois EPA. As Ms.

Armitage explained during her deposition, "[t]o my mind, when one gets one of these letters, we're not just providing notice that we are going to consider something beyond the application...It's implicit that I don't have information that speaks to that point." Apr. 16, 2014 Discovery Deposition of Julie Armitage Tr. at 75, excerpt attached as Exhibit 1. Illinois EPA states that the Wells Letter provided KCBX with an opportunity to demonstrate that granting the permit application would not violate Section 212.301. Resp. Br. at 12. Illinois EPA claims that KCBX had an opportunity to submit a response, "addressing the Illinois EPA's concern regarding 35 Ill. Adm. Code 212.301." Resp. Br. at 14. However, Illinois EPA's Wells Letter did not cite specifically to Section 212.301. R-30. Instead, it cited to Part 212, Subpart K generally.

Illinois EPA also points to provisions in KCBX's fugitive dust plan that it finds deficient. Resp. Br. at 16-17. Illinois EPA argues that KCBX did not address these alleged deficiencies in its fugitive dust plan when responding to the Wells Letter. Resp. Br. at 18-19. However, Illinois EPA did not identify KCBX's fugitive dust plan as a concern in the Wells Letter. *See* R-30. Illinois EPA does appear to have had a concern with KCBX's November 1, 2013 dust plan – the Agency independently went outside KCBX's application to look at that dust plan and determined it was deficient. In the Wells Letter, however, the Agency was silent on the matter and, instead, referenced complaint forms and inspections. Illinois EPA could not reasonably expect KCBX to address its secret concerns with the fugitive dust plan.

Similarly, Illinois EPA claims that KCBX's response failed to provide any "actual data regarding the emission controls used at the South Site, such as emission control logs, water cannon system or water truck application summaries or any spreadsheet or log that described

whether and how the dust suppression controls were actually utilized at the South Site." Resp. Br. at 12-13. Illinois EPA claims that KCBX "chose not to attach any emission control logs or other dust control data for conveyors, box hoppers or stackers at the South Site that would also serve as the controls for the new equipment KCBX was seeking to install there." Resp. Br. at 35-36. Notably, there is no requirement in Part 212, Subpart K that requires the submission of such information. Instead of attaching such information on past operation of its fugitive dust plan, KCBX chose to present Illinois EPA with a description of its current system, which KCBX was operating at the time, and continues to operate.

II. Illinois EPA Selectively Chose to Rely on Some, but not all, Enforcement-Related Information It Received and Arbitrarily Ignored Other Enforcement-Related Information

Illinois EPA argues that the denial letter does not substitute for an enforcement action. Resp. Br. at 12-15. Illinois EPA portrays the line between enforcement and permitting in this case as clear. However, Illinois EPA's actions belie its words. First, Illinois EPA asserts that Ms. Armitage and Mr. Bernoteit did not speak about the information conveyed to Illinois EPA during the December 5, 2013 meeting because it was provided in the context of enforcement. Resp. Br. at 18. Next, Illinois EPA claims that KCBX submitted its November 1, 2013 fugitive dust plan to Illinois EPA, "though not to the Illinois EPA's Permit Section." Resp. Br. at 7. Ms. Armitage clarifies that the transmittal e-mail was sent to an attorney in the enforcement action. May 1 Tr. at 191. But as demonstrated below, Illinois EPA did consider the November 1, 2013 fugitive dust plan and other information apparently gathered in the course of enforcement in its review of KCBX's Request for Revision. There was clear comingling of enforcement and review of KCBX's Request for Revision. Illinois EPA selectively chose what it considered from

the enforcement case. By relying on information such as the November 1, 2013 fugitive dust plan but apparently ignoring information provided during the December 5, 2013 meeting, Illinois EPA intentionally ignored relevant facts.

Illinois EPA acknowledges that it considered the November 1, 2013 fugitive dust plan submitted by KCBX in its review of KBX's Request for Revision. Resp. Br. at 35. In its Brief, Illinois EPA cites to alleged deficiencies of the November 1, 2013 fugitive dust plan in an attempt to demonstrate why Illinois EPA claims that KCBX failed to prove that it demonstrated compliance with Section 212.301. Resp. Br. at 16-17. For example, Illinois EPA points to testimony from Ms. Armitage in which she claims that she assumed that the water cannon system would be shut down during certain months based on a review of the November 1, 2013 fugitive dust plan. Resp. Br. at 16. Illinois EPA argues that "KCBX's November 1, 2013 Operating Program failed to provide sufficient information regarding how fugitive emissions would be controlled from conveyors, stackers, and box hoppers at the South Site." Resp. Br. at 16. Illinois EPA claims that "Ms. Armitage testified at length" that provisions in the November 1, 2013 fugitive dust plan failed to provide sufficient information regarding emission controls for the conveyors, stackers, and box hoppers related to § 212.301.[1] Resp. Br. at 17.

At hearing, Ms. Armitage explained that "[w]e took it upon ourselves to say 'Hey, we've going to look at the fugitive dust plan.' We looked at this November 1st fugitive dust plan." May 1 Tr. at 196. In fact, Ms. Armitage explained that "this fugitive program, to me, was a very

[1] During the course of its review of the Request for Revision, Illinois EPA assessed the sufficiency of the fugitive dust plan. However, the Board specifically "did not give the Agency approval power over the programs or subsequent amendments to those program" *Illinois Power Co. v. Illinois EPA*, PCB No. 83-53 at 3-4 (Ill. Pol. Control Bd. Dec. 1, 1983). This was likely to avoid delegating to Illinois EPA its exclusive authority under Section 5 of the Act to set emission or equipment standards and to retain jurisdiction over the review of fugitive dust plans. *Id.*

pivotal part of an assessment of what the facility's compliance status was relative to 212.301 at a minimum." May 1 Tr. at 202. The November 1, 2013 fugitive dust plan was submitted to Assistant Attorney General Ms. Pamenter and Illinois EPA Attorney Mr. Pressnall. R-647. Ms. Armitage points out that it was submitted to an attorney in the enforcement action. May 1 Tr. at 191. Illinois EPA makes it clear that it does not believe that it was submitted to the permit section. Resp. Br. at 7. Therefore, Illinois EPA acknowledges that it relied on information submitted to individuals involved in the enforcement action.

Illinois EPA also considered inspection reports that were prepared in the enforcement context in its review of the Request for Revision. Ms. Armitage explained that she got involved with KCBX's Request for Revision around August 30, 2013, when a wind event "seemed to have caused air pollution in the vicinity." May 1 Tr. at 118. Illinois EPA became aware of the event from the Attorney General and non-governmental organizations. May 1 Tr. at 119. As a result of those telephone calls and comments, Ms. Armitage requested that the operations section conduct an inspection of the South Terminal. *Id* She requested the inspection because she wanted to "take a look at the compliance status of the facility...." May 1 Tr. at 120. Additional September inspections were conducted following a telephone call on behalf of KCBX regarding a high wind notice. May 1 Tr. at 122. These inspections were conducted to "see what the compliance status of the facility was," May 1 Tr. at 123, and Illinois EPA considered these inspections in the permitting context as demonstrated by the Wells Letter. R-30. There is no question that the inspections were performed for purposes of enforcement.

Similarly, Illinois EPA acknowledges that Ms. Armitage testified that she considered the Complaint filed against KCBX on November 4, 2013, in the Circuit Court of Cook County.

Resp. Br. at 10, FN2. The permit writer was also directed to "hold off" on sending a draft permit to KCBX. R-2093. In the same e-mail, he was informed that the Illinois Attorney General was pursuing enforcement against KCBX and permitting issues were involved. *Id.* This e-mail was sent by Mr. Presnall, Illinois EPA legal counsel. *Id.*

Illinois EPA also presented information in the Environmental Justice factsheet for this permit application review that demonstrates it was mixing permitting with enforcement. *See* R-125-R-126. Under a heading labeled "Fugitive emissions and Enforcement," Illinois EPA explains that it "recognizes that there are incidents where fugitive dust emissions have left the property and has been working with the Illinois Attorney General's office to bring an enforcement action to correct the problem of fugitive dust leaving the facility." R-125. Illinois EPA goes on to solicit complaint logs from residents that are "helpful *in enforcement actions* to show the impact of the emissions offsite." R-126 (emphasis added).

The above actions make it clear that Illinois EPA considered information from the enforcement action in certain circumstances. But, as shown below, in other circumstances, Illinois EPA attempted to exclude information presented in the same context.

Specifically, Mr. Bernoteit, from the permit section, acknowledges that KCBX described its plan for controlling fugitive dust on December 5, 2013. May 1 Tr. at 75-76. In fact, Mr. Bernoteit noted that "[t]here was a long description and discussion about that." May 1 Tr. at 76. He saw pictures of the water cannons, the street sweeper, and water trucks. *Id.* As noted by Mr. Estadt, KCBX presented information to Illinois EPA on December 5, 2013, related to, among other things, a terminal overview, a dust mitigation overview, the best practice management practices, proactive system operation, a daily weather forecast review, training, recap system

components, proactive weather monitoring, surfactant and encrusting product addition, pile management and grooming, winter operation dust mitigation, reduced traffic, treatment of inactive piles before onset of freezing, the use of the water truck as needed in winter operation, and suspending operations as needed. Apr. 29 Tr. at 113-123.

But Mr. Bernoteit, the FESOP unit manager in the permit section, did not consider this information when determining whether or not a violation of the Act might result from the transfer of equipment from the North Terminal to the South Terminal. He explained that it was his understanding that he was not to consider the information outside of the meeting. May 1 Tr. at 78. He further noted, however, that he "certainly thought about it and I thought it would have been nice to have that information in the application file, but there was nothing in the application to relate the new conveyors to the dust suppression system." May 1 Tr. at 77-78.

Similarly, Ms. Armitage reviewed the November 1, 2013 fugitive dust plan but did not know whether she reviewed the e-mail transmitting it that notified Illinois EPA of the operational status of the new cannon system. R-647; May 1 Tr. at 191-192. Ms. Armitage also did not know whether she reviewed the subsequent letter dated November 15, 2013, noting the dust suppression improvements at the South Terminal, including pile management and surfactant applications and the operational, advanced, programmable water cannon system. R-648; May 1 Tr. at 192. Instead, she claims that the correspondence was addressed to Ms. Pamenter as the attorney for the enforcement action. May 1 Tr. at 191. Recall, though, that the November 1, 2013 e-mail transmitted the November 1, 2013 fugitive dust plan, which was scrutinized by Ms. Armitage.

Therefore, Illinois EPA selectively considered some information it claims was introduced through enforcement, while at the same time ignoring information that could help alleviate Illinois EPA's concerns such as KCBX's presentation at the December 5, 2013 meeting or operational status updates in November 2013. Illinois EPA was willfully blind to information that was beneficial to KCBX in the context of the Request for Revision. As set forth below, the Board has already determined that the slides from the December 5, 2013 meeting were "before the Agency during its review of KCBX's request and that the Agency either relied upon or should have relied upon them in reviewing that request." Board Order, *KCBX Terminals Co. v. Ill. Envt'l Prot. Agency*, PCB 14-110 (Ill.Pol.Control.Bd. May 1, 2014) (permit appeal hereinafter cited as "PCB 14-110").

III. Illinois EPA Fails to Satisfy the Requirements of Section 39(a) of the Act with Respect to Its Reference to Section 9 of the Act in Its Permit Denial

KCBX addresses all of Illinois EPA's specific reasons for denial. Nevertheless, Illinois EPA argues that KCBX failed to satisfy its burden of proving that it submitted sufficient information to demonstrate that Section 9 of the Act would not be violated. Resp. Br. at 10-12. However, Illinois EPA provided no explanation of why Section 9 of the Act serves as a denial basis in its denial letter. Illinois EPA simply includes a reference to Section 9 in its introductory paragraph. R-1. Therefore, Illinois EPA's reference to Section 9 of the Act fails to satisfy Section 39(a) of the Act, and should be stricken.

Section 39(a) of the Act requires that Illinois EPA provide a detailed denial statement, which includes, "at a minimum, the sections of the Act or regulations which may be violated if the permit were granted; the specific type of information, if any, which the Agency deems the applicant did not provide the Agency; and a statement of specific reasons why the Act and the

regulations would be violated if the permit were granted." *West Suburban Recycling and Energy Center, L.P. v. Illinois Envtl. Prot. Agency*, PCBX 95-119 and 95-125, 1996 Ill. ENV LEXIS 718 at *8 (Oct. 17, 1996) (citing 415 ILCS 5/39(a)(1)-(4)). The Board has explained that "[t]he Illinois Supreme Court itself has held that each denial point be supported by identification of the specific provisions in the Act or Board regulations that the Agency believes may be violated if the permit were to issue." *Id.* at *25-*36 (citing *IEPA v. IPCB*, 86 Ill. 2d 390, 405-406, 427 N.E.162, 169-170 (1981).

Illinois EPA's denial "frames the issue in a permit appeal to the Board" *ESG Watts, Inc. v. Pollution Control Bd.*, 286 Ill. App. 3d 325, 335 (3d Dist. 1997) and must give the applicant "sufficient information to determine the bases for the Agency's permit denial." *Centralia Envtl. Servs. v. IEPA*, IPCB No. 89-170 (Ill.Pol.Control.Bd. Oct. 25, 1990).

Here, Illinois provided five specific denial points that all reference provisions of the Act or regulations. None of those specific denial points relates back to Section 9 of the Act. That is, they don't contain a reference to language in Section 9 or Section 9 itself. Similarly, the introductory paragraph does not indicate how Section 9 of the Act might be violated. Therefore, there is no way to know by reading the denial letter why Illinois EPA finds that Section 9 might be violated. Illinois EPA should be precluded from denying a permit based on a simple reference to a section of the Act. Simply stating that an application for a permit is denied because Section 9 might be violated, with no other reference to a specific reason or the statutory language, does not provide the applicant sufficient information to determine the bases for Illinois EPA's denial.

Different from the case at hand, Board cases cited by Illinois EPA where Section 12 was cited as permit denial reasons (Resp. Br. at 11) included reference to specific statutory language as a specific reason for denial. For example, in *City of Joliet v. Illinois Envtl. Prot. Agency*, PCB 09-25 at 23 (Ill.Pol.Control.Bd. May 7, 2009), the denial letter referenced Section 12 and stated that Illinois EPA cannot grant a permit for a facility that "would threaten, cause or allow the discharge of contaminants which might cause or tend to cause water pollution in Illinois." Therefore, in that case Illinois EPA gave a specific reason for its denial under Section 12. Likewise, in *Rock River Water Reclamation Dist. V. Illinois Envtl. Prot. Agency,* PCB 13-11 at 11 (Ill.Pol.Control.Bd. May 2, 2013), the permit denial explained that Sections 12 and 39 of the Act "prohibit the Agency from issuing a permit for any facility which would threaten, cause or allow the discharge of contaminants which might cause or tend to cause water pollution in Illinois."

A simple reference to Section 9, without any other information, does not provide the applicant sufficient information and violates Section 39(a) of the Act. Therefore, the Board should strike Illinois EPA's reference to Section 9.

IV. Additional Arguments Presented by Illinois EPA Mischaracterize KCBX'S Arguments or Facts at Issue

Additional arguments or statements presented in Illinois EPA's Brief mischaracterize KCBX's arguments or facts. Therefore, KCBX briefly clarifies those mischaracterizations.

First, Illinois EPA alleges that KCBX shifts the burden of proof to Illinois EPA to show that a violation occurred. Resp. Br. at 2. But that is not the case. Illinois EPA's argument that KCBX shifts its burden to Illinois EPA is nothing more than an attempt to distract the Board from the clear and dispositive fact that Illinois EPA improperly comingled permitting and

enforcement. KCBX argues that Illinois EPA was precluded from relying on unadjudicated noncompliance but still meets its obligation to demonstrate the Request for Revision would comply with the Act and regulations. *See* Petitioner's Brief at 31-33.

Second, Illinois EPA appears to suggest that the 30-day deadline to issue a notice of incompleteness ("NOI") holds no significance. Resp. Br. at 24. Regardless of Illinois EPA's affirmative obligation to issue a NOI, it is clear from the language of Section 201.158 that the consequence of not issuing an NOI is that the application is deemed filed. The Board in *Sherex* makes clear that a subsequent denial on the merits is allowed only if incompleteness relates to sufficiency. *Sherex Chemicals Co. v. Illinois EPA*, PCB 80-66, 1980 Ill. ENV LEXIS 179 at *2-*3 (Ill.Pol.Control.Bd. Oct. 2, 1980), *aff'd. sub nom.* IEPA v. IPCB, 100 Ill. App. 3d 730, 426 N.E. 2d 1255 (1981). As acknowledged by Mr. Bernoteit, information such as manufacturer and serial number are not needed to approve a permit for portable conveyors. May 1 Tr. at 61. Instead, the only information he claimed to need was the hourly process rate information and the emissions from the new equipment. May 1 Tr. at 60. But as demonstrated by KCBX, Illinois EPA had sufficient information to determine that issuance of a revised construction permit would not cause a violation of the Act or regulations.

Third, Illinois EPA states that KCBX "envisioned 1.13 million tons/month and 11.25 million tons/year of material handled through the South Site." Resp. Br. at 4. Illinois EPA cites to KCBX's existing permit pages R-139 and R-140 for this statement. To be clear, this is the amount of material that KCBX is currently permitted to handle. KCBX is not attempting to increase its material throughput limits. R-187.

Fourth, Illinois EPA continues to argue that it was unaware of what was meant by the reference to "initial application" and that, aside from a conveyor Transfer Points Process Flow Diagram that DTE prepared, KCBX did not attach any tables or supporting documents to its permit. Resp. Br. at 4, 25. But KCBX indicated in its Request for Revision on Form APC628 that it requests a revision to its existing permit, No. 07050082. R-191. During the course of his review, Mr. Dragovich reviewed other permits, revisions, and applications in the file for this permit number, including information in the September 2012 DTE Application. Apr. 30 Tr. at 209-212. And in a telephone call with Mr. Steinert, Mr. Dragovich indicated that he did not have any questions about the Request for Revision. Apr. 29 Tr. at 179. Based on this, it is apparent that Mr. Dragovich knew exactly which permit application was referenced in the Request for Revision.

In fact, based on his understanding of the application, 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. Since this document was not initially produced as part of the Record but was, instead, discovered by KCBX following the hearing, KCBX was unable to ask Illinois EPA witnesses questions about the document.[2] So although the September 2012 DTE Application was not attached to the Request for Revision, it was appropriately before Illinois EPA as part of the application that was referenced in the application and actually reviewed by the permit writer.

[2] Prior to hearing, KCBX was only aware of a subsequent Completeness Review Worksheet dated January 16, 2014 and an alternative undated Completeness Screening Checklist. R-24, R-25.

Fifth, Illinois EPA repeatedly references an e-mail from Ms. Armitage reacting to a September 12, 2013, telephone call in which counsel for KCBX phoned in a high wind notice. Resp. Br. at 6, 12, 27-28. This telephone call was made as a courtesy to Illinois EPA, and Illinois EPA provides no evidence following the telephone call that an issue with fugitive dust actually occurred or was threatened. It is also considered squarely in the context of enforcement. Ms. Armitage acknowledged that additional September inspections were conducted following the telephone call on behalf of KCBX regarding a high wind notice. May 1 Tr. at 122. Additional inspections were conducted to "see what the compliance status of the facility was." May 1 Tr. at 123. Further, the new dust suppression system was put into place and operational following the date of this telephone call, i.e. November 1, 2013, which makes previous operations at the South Terminal irrelevant. Ms. Armitage noted that she did not consider previous fugitive dust plans because she "didn't see the relevance." May 1 Tr. at 184. Instead, she gave KCBX "the benefit" of the most recent fugitive dust plan that they had. *Id.* Similarly, only the new system and procedures implemented by KCBX, and not the system in place on September 12, 2013 is relevant to the operational status of the South Terminal.

Sixth, Illinois EPA appears to manufacture a distinction between a dust suppression system that is "operable" and one that is "operating." For example, Illinois EPA claims that, in November, it conducted a further inspection of the South Terminal, which showed that the water cannon system was "operable but not necessarily operating." Resp. Br. at 12. Similarly, Illinois EPA points to testimony of Ms. Armitage where she claims that based on the November inspection report, "the 42 water cannons and the surfactant system at the South Site were operable, but not necessarily operating." Resp. Br. at 17. Illinois EPA attempts to create a

distinction where one does not exist. Mr. Estadt demonstrated the water cannon system to inspectors by running a full cycle while inspectors were on-site, cycling through all 42 water cannons. Apr. 29 Tr. at 52-53. Mr. Estadt also testified that he described the South Terminal's weather station to the inspector. Apr. 29 Tr. at 48. According to the inspector, "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.[3] Thus, Illinois EPA had evidence that KCBX was operating its system. Moreover, KCBX met with Illinois EPA on December 5, 2013, and presented a set of powerpoint slides entitled "Dust Mitigation System Overview." R-2055-R-2092[4]; Apr. 29 Tr. at 113-123. This presentation described capabilities that were actually being implemented at the South Terminal. Apr. 29 Tr. at 128. Indeed, why would KCBX invest at least $10,000,000 (Apr. 29 Tr. at 30) in a system just to have it sit idle?

Seventh, it is notable that Illinois EPA does not make affirmative arguments based on the substance or content of either the inspection reports (*see* Petitioner's Brief at 25-28) or the citizen complaints (*see* Petitioner's Brief at 28-30), and did not respond to KCBX's arguments that the reports were not specific to the equipment-at-issue and that the complaints were unreliable (*see* Petitioner's Brief at 26-28). Illinois EPA does not address these points but still relied heavily on the Wells Letter – the subject of which was the reports and complaints – to argue that there was not enough information.

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[3] This is the same weather event that delayed a Chicago Bears football game. Apr. 29 Tr. at 54.

[4] The slides incorporated into the Record at R-2055-2092 are not in color and, likely due to the scanning or copying process, do not include the level of detail present in the original slides filed by KCBX in its Second Motion to Supplement the Record. Those original slides are available on the Board's electronic docket at http://www.ipcb.state.il.us/documents/dsweb/Get/Document-84206 (last accessed May 20, 2014).

V. The Board Should Consider the Testimony of KCBX Experts Steinert and Kolaz and Evidence Regarding the December 5, 2013 Meeting.

A. The Hearing Officer Properly Ruled that Mr. Steinert and Mr. Kolaz's Opinions Were Not Improper Legal Conclusions.

On April 22, 2014, Illinois EPA filed motions *in limine* seeking to exclude the expert opinions of KCBX witnesses Mr. Steinert and Mr. Kolaz. In an April 28, 2014 order, the Hearing Officer ruled that the experts' opinions were admissible. Apr. 28 Hearing Officer Order at 3-4. The Hearing Officer reiterated his ruling during the hearing when Illinois EPA objected to the expert testimony. Apr. 29 Tr. at 170-174 (Mr. Steinert); 250 (Mr. Kolaz). Illinois EPA again argues in its Post-Hearing Brief that the opinions of Messrs. Steinert and Kolaz should have been excluded, claiming that their opinions constituted improper conclusions of law. Resp. Br. at 31-33. Respondent again confuses conclusions of law with ultimate issues in the case, and Respondent's objection should again be overruled.

"The question before the Board in permit appeal proceedings is whether the applicant proves that the application, as submitted to the Agency, demonstrated that no violation of the Environmental Protection Act (Act) (415 ILCS 5 *et seq.* (2000)) or rules under the Act would have occurred if the requested permit had been issued." *Community Landfill Co. v. IEPA*, PCB No. 01-170, 2001 Ill. ENV LEXIS 553, *7 (Dec. 6, 2001).

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." ILL. R. EVID. 702. "An expert witness may generally express an opinion as to the ultimate issue in a case. The test for whether to admit an expert's opinion on the ultimate

issue is whether that opinion will aid the trier of fact to understand the evidence or determine a fact in issue." *Townsend v. Fassbinder*, 372 Ill. App. 3d 890, 905, 866 N.E.2d 631, 646 (2nd Dist. 2007).

Recently enacted Illinois Rule of Evidence 704 provides that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." ILL. R. EVID. 704. Even prior to adoption of this rule, however, it had "been settled for some time that expert opinion testimony on an ultimate fact or issue does not impermissibly intrude on the fact finder's role, as long as all of the other requirements for the admission of the testimony are met." *Jackson v. Seib*, 372 Ill. App. 3d 1061, 1071, 866 N.E.2d 663, 674 (5th Dist. 2007) (citing *Zavala v. Powermatic, Inc.*, 167 Ill. 2d 542, 545 (1995)). "The reason for this is that the trier of fact is not required to accept the expert's conclusion." *Id.*

"When a petitioner in a permit appeal is the permit applicant, the petitioner has the burden of proving that the requested permit would not violate the Act or the Board's regulations." *Prairie Rivers Network v. Illinois Pollution Control Bd.*, 335 Ill. App. 3d 391, 400-01, 781 N.E.2d 372, 379 (4th Dist. 2002). "The Board has determined that it is the denial letter which frames the issue in a permit appeal to the Board." *ESG Watts, Inc. v. Pollution Control Bd.*, 286 Ill. App. 3d 325, 335, 676 N.E.2d 299, 306 (3rd Dist. 1997) (citing *Pulitzer Community Newspapers v. Illinois Environmental Protection Agency,* PCB 90-142 (Ill.Pol.Control.Bd. Dec. 20, 1990); *Centralia Environmental Services, Inc. v. Illinois Environmental Protection Agency,* PCB 89-170 (Ill.Pol.Control.Bd. May 10, 1990)).

Thus, while the legal conclusion to be determined by the Board is whether KCBX proved that the application demonstrated that no violations would have occurred if the requested permit had been issued, the "ultimate issues" in the case were framed by the denial letter. KCBX had the burden to prove these issues by showing that the alleged deficiencies or purported violations set forth in the denial letter were inaccurate. KCBX consequently had the burden of presenting evidence to the Board explaining its position on the "ultimate issues" – that these regulations as applied to the facts of this case did not justify denial of the permit. The Board will now consider all the ultimate issues together to reach the legal conclusion as to whether KCBX met its burden of proof as a matter of law.

In *Glasgow v. Granite City Steel*, PCB No. 00-021, 2002 Ill. ENV LEXIS 112 (Mar. 7, 2002), a nuisance case, the Board overruled a Hearing Officer's order barring an expert from testifying. The respondent argued that the hearing officer properly barred an expert's testimony regarding unreasonable noise interference "since it is the ultimate issue in the case." *Glasgow*, 2002 Ill ENV LEXIS 112, *11. The Board noted that, "[a]s part of its nuisance analysis, the Board determines if the noise at issue caused an unreasonable interference with the enjoyment of life." *Id.* The Board found that although it "makes the ultimate determination on whether or not nuisance noise is unreasonable," it would nonetheless admit the expert's testimony on that subject. *Id.* at *12 (citing 35 Ill. Admin. Code § 101.626(b) ("When the admissibility of evidence depends upon a good faith argument as to the interpretation of substantive law, the hearing officer will admit the evidence.")

Here, Messrs. Steinert and Kolaz did not opine on the legal conclusion the Board will ultimately reach. Neither offered the opinion that KCBX has, as a matter of law, *met its burden*

of proof of showing that the application as submitted demonstrated that no violation of any provision of the Act or any regulations would have occurred if the requested permit were issued. Instead, the opinions of KCBX's experts relate to the "ultimate issues" in this case – how materials in the Record relate to the content of the very specific regulations set forth in the Permit Denial. These ultimate issues framed by the denial letter are the same issues Illinois EPA incorrectly claims are "legal conclusions." Resp. Br. at 32. Since KCBX had the burden of proving these "ultimate issues," the Hearing Officer properly permitted KCBX to submit testimony to the Board that assists it in understanding the evidence related to these issues, i.e., expert testimony.

The opinions Mr. Steinert and Mr. Kolaz provided at the hearing were not legal conclusions. Expert testimony regarding the ultimate issues before the Board is specifically permitted by Illinois law. Thus, the Hearing Officer properly ruled in his April 28, 2014 order that the disclosed opinions of Messrs. Steinert and Kolaz were admissible and properly allowed them to testify at the hearing as to the ultimate issues in this appeal. Accordingly, the Board should consider the testimony and opinions of KCBX's experts in their entirety in rendering its decision.

B. Evidence Regarding the December 5, 2013 Meeting was Properly Admitted.

On April 28, 2014, KCBX filed its Second Motion to Supplement the Record. Among the exhibits KCBX sought to include in the record were a December 5, 2013 Meeting Sign-In Sheet (Exhibit H) and Slides Presented to Illinois EPA on December 5, 2013 (Exhibit I). KCBX argued that these documents should be included in the record because the sign-in sheet was "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" and the "slides were presented to Illinois EPA on December 5, 2013." Second Motion to Supplement the Record, PCB 14-110 at 8. On May 1, 2014, the Board entered an order granting the Second Motion to Supplement the Record as to these two exhibits. Order, PCB 14-110 at 9-10.

Illinois EPA objected to the use of these materials and testimony regarding them at the hearing (*see* Resp. Br. at 33, FN12.) and argues that the Board should not consider these matters in making its determination in this appeal. Resp. Br. at 33-34. Illinois EPA claims that these topics were inadmissible because "the December 5, 2013 meeting was a confidential settlement meeting" regarding the Cook County enforcement action filed against KCBX. *Id.* at 33. The Illinois EPA further argues that these slides were stamped as "Confidential Business Information" and "Confidential Settlement Communication," that Mr. Bernoteit had to return the slides at the end of the meeting, and that KCBX did not subsequently submit the slides to the Illinois EPA. *Id.* at 34. The only authority cited by the Illinois EPA in support of its arguments is *Community Landfill Co. v. IEPA*, 2001 Ill ENV LEXIS 553 (Dec. 6, 2001), which is cited for the proposition that "[t]he Board may only consider information that KCBX presented to the Illinois EPA between July 23, 3013 through January 17, 2014." Resp. Br. at 34.

"[T]he Board's review of permit appeals is limited to information before the Agency during the Agency's statutory review period." *Community Landfill*, 2001 Ill ENV LEXIS at *7. As acknowledged by Illinois EPA, the review period in this appeal is July 23, 2013 through January 17, 2014. The meeting in question was held on December 5, 2013, and the slides were

presented to Illinois EPA at that time. Thus, the Board correctly ruled in its May 1, 2014 order that "the sign-in submitted as Exhibit H was before the Agency during its review of KCBX's request and that the Agency either relied upon or should have relied upon it in reviewing that request." May 1 Order at 9. Similarly, the Board correctly ruled that "the slides submitted as Exhibit I were before the Agency during its review of KCBX's request and that the Agency either relied upon or should have relied upon them in reviewing that request." *Id.* at 10. Accordingly, the Board properly granted KCBX's Second Motion to Supplement the Record as to these two exhibits. *Id.* at 9-10. Moreover, since these items are in the record, the Hearing Officer properly permitted testimony discussing them. The Illinois EPA provides no authority to the contrary, and the Board should consider these exhibits for these reasons alone.

Although the Illinois EPA failed to provide the Hearing Officer or the Board with any authority on this subject, the sign-in sheet and slides are indeed admissible under Illinois law. Illinois Rule of Evidence 408 provides as follows:

> Rule 408. Compromise and Offers to Compromise
>
> **(a) Prohibited Uses.** Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:
>
> (1) furnishing or offering or promising to furnish--or accepting or offering or promising to accept--a valuable consideration in compromising or attempting to compromise the claim; and
>
> (2) conduct or statements made in compromise negotiations regarding the claim.
>
> **(b) Permitted Uses.** This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of settlement negotiations. This rule also does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness' bias or prejudice; negating an assertion of undue delay;

> establishing bad faith; and proving an effort to obstruct a criminal investigation or prosecution.

ILL. R. EVID. 408.

"Illinois courts generally do not admit matters concerning settlement and negotiations." *County of Cook v. Illinois Labor Relations Bd.*, 2012 IL App (1st) 111514, ¶ 32. "The prohibition of admission of such evidence is based on two major concerns: (1) admitting evidence of settlements and negotiations contravenes public policy by discouraging litigants from settling their disputes without the need for trial; and (2) negotiations and settlements do not constitute an admission of guilt for any reason and are, therefore, irrelevant." *Id.* "Illinois courts have routinely adopted and applied the federal evidentiary rule dealing with the admissibility of information and statements generated during settlement negotiations between the parties." *Id.* at ¶ 33.

The Court of Appeals for the Seventh Circuit has noted that:

> Rule 408 is not an absolute ban on all evidence regarding settlement negotiations. The rule permits evidence that is otherwise discoverable or that is offered for a purpose other than establishing liability. Courts have admitted evidence of offers or agreements to compromise for purposes of rebuttal...; for purposes of impeachment ...; *to show the defendant's knowledge* and intent ...; to show a continuing course of reckless conduct and negate the defense of mistake ...; and to prove estoppel ....

Bankcard Am., Inc. v. Universal Bancard Sys., Inc., 203 F.3d 477, 484 (7th Cir. 2000) (emphasis added) (citations omitted).

The Advisory Committee Notes to Federal Rule of Evidence 408 (as to the 2006 amendment of the rule) state that:

> The amendment does not affect the case law providing that Rule 408 is inapplicable when evidence of the compromise is offered to prove notice. *See, e.g., United States v. Austin*, 54 F.3d 394 (7th Cir. 1995) (no error to admit

> evidence of the defendant's settlement with the FTC, because it was offered to prove that the defendant was on notice that subsequent similar conduct was wrongful); *Spell v. McDaniel*, 824 F.2d 1380 (4th Cir. 1987) (in a civil rights action alleging that an officer used excessive force, a prior settlement by the City of another brutality claim was properly admitted to prove that the City was on notice of aggressive behavior by police officers).

FED. R. EVID. 408, Advisory Committee Notes to 2006 amendment. Federal courts have held that evidence related to settlement negotiations may be admissible for the purpose of demonstrating notice or knowledge of a fact that was discussed in the settlement negotiations. *United States v. Austin*, 54 F.3d 394, 399-400 (7th Cir. 1995) (prior settlement was admissible to show, among other things, that the defendant had no notice that certain prints were forgeries); *Kraft v. St. John Lutheran Church of Seward, Neb.*, 414 F.3d 943, 947 (8th Cir. 2005) (settlement negotiations admissible to show plaintiff's knowledge, for statute of limitations purposes, of a causal connection between his injuries and alleged abuse); *Barnes v. D.C.*, 924 F. Supp. 2d 74, 86-91 (D.D.C. 2013) (evidence of prior settlement with correctional facility was admissible for purpose of showing that facility had notice of problems in facility); *Perri v. Daggy*, 776 F. Supp. 1345, 1349 (N.D. Ind. 1991) ("Rule 408 does not prohibit the use of a settlement to show a defendant's knowledge (particularly a defendant not claimed to have been involved in the compromise) or to demonstrate the unreasonableness of (or deliberate indifference inherent in) subsequent conduct."); *Wiener v. Farm Credit Bank of St. Louis*, 759 F. Supp. 510, 521 (E.D. Ark. 1991) ("the prohibition in Rule 408 is directed at excluding proof of a compromise for the purpose of showing liability on the part of the offeror. In this instance, plaintiffs' purpose is to show Eastern and Garrott had notice of plaintiffs' options to purchase the farms. Consideration of the information in this light does no violence to the purpose or spirit of Rule 408.")

One issue raised by the Illinois EPA in its denial letter, and thus one issue in this appeal, was whether the KCBX South Terminal had in place a sufficient dust suppression system. The slides presented at the December 5, 2013 meeting showed the operational status and facility-wide capability of the dust suppression system at the KCBX South Terminal, and the sign-in sheet evidenced the individuals at the Illinois EPA who were present to witness the slides and learn this information. KCBX properly included the slides in the record to use them as evidence at the hearing to prove that the Illinois EPA had knowledge and notice of the updated and operational dust suppression system at KCBX South. The Illinois EPA does not argue, nor could it, that the sign-in sheet and the slides contain any actual settlement negotiations.

Based on the above authority, even if the Illinois EPA sought to exclude this evidence under Illinois Rule of Evidence 408 (although it did not cite this rule), the evidence still would have been admissible. KCBX did not offer it for an improper purpose under Rule 408(a) but rather utilized it to prove notice and knowledge on the part of the Illinois EPA as of December 5, 2013 (within the review period) of the operational status of KCBX South's new dust suppression system. The Illinois EPA's knowledge on this subject is not diminished or negated by the fact that the information was presented in the context of a settlement meeting regarding a different case, that the slides were returned after the meeting, or that KCBX did not later submit the same information to the Illinois EPA. Nor do any of these arguments by the Illinois EPA render the evidence inadmissible under the applicable law. Therefore, the Illinois EPA's unsupported arguments should be rejected and the Board should consider the sign-in sheet and presentation slides in this Permit Appeal.

WHEREFORE Petitioner, KCBX TERMINALS COMPANY, respectfully prays that the Illinois Pollution Control Board find that KCBX met its burden and demonstrated that issuance of the permit would not cause a violation of the Act or regulations and that Illinois EPA inappropriately denied the Request for Revision. 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 TERMINALS COMPANY upon entry of the Board's Order, and award KCBX TERMINALS COMPANY all other relief just and proper in the premises.

Respectfully submitted,

KCBX TERMINALS COMPANY,
Petitioner,

Dated: May 20, 2014

By:/s/ Katherine D. Hodge
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Exhibit 1

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

KCBX TERMINALS COMPANY, Petitioner, v. ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	No. PCB 14-110 (Permit Appeal-Air)

Discovery Deposition of Julie Armitage, produced, sworn and examined on behalf of the Petitioner, on April 16, 2014, scheduled for the hour of 1:30 P.M., at Hodge, Dwyer & Driver, 3150 Roland Avenue, Springfield, Illinois, before CYNTHIA M. SMITH, an Illinois Certified Shorthand Reporter and Notary Public.

Cynthia M. Smith, Owner
cindy-m-smith@att.net
217-523-6559
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A Uh-huh.

Q Okay.

A The things that we looked at were fugitive dust plans from other facilities. California regulations. Things that would potentially give us insight into measures that could be taken to address fugitive dust.

Q Okay. Let's focus on -- I think that I recall, but, Julie, is the date of that letter December the 10th of 2013?

A Yes.

Q All right. And is the signatory of that letter -- is it Mr. Raymond Pilapil?

A Yes.

Q And before December 10th -- well, before today had you seen that letter?

A Yes.

Q Okay. And did you see that letter on -- prior to December the 10th?

A I -- I don't -- I -- I may have seen a draft of it.

Q But -- and that's actually what I was going to ask you. Did you -- to the extent that you can recall, did you participate in the drafting of the December 10th

what we've referred to as the Wells letter?

A I did not draft the document.

Q Okay. Let me ask you this, Julie. Does the Wells letter anywhere in it advise KCBX that its application or the information that the agency had was insufficient for it to make a determination of whether or not the permit, if issued, would or would not have violated the Act?

(At which time, said exhibit was reviewed by the deponent.)

THE DEPONENT: Arguably, yes.

MR. DWYER: Okay. Well, can you help me with arguably yes? Where does it indicate in there that KCBX has provided insufficient information?

A What it indicates, starting with Paragraph 1, is that we intend to consider information outside of the application in making our determination. Then it specified some of the information that we intend to consider. And it proceeds to say that we believe that the documentation that -- that's specified and other documents that we intend to consider indicate violations. The next paragraph suggests that KCBX may have previously formed this information by way of either

filing of the complaint and/or issuance of violations from the Bureau of Land. And then the next paragraph indicates that the facility may respond.

Q Okay.

A To my mind --

Q Go ahead.

A To my mind, when one gets one of these letters, we're not just providing notice that we are going to consider something beyond the application. We are providing notice that we are going to consider something beyond the application. And I think it's -- this is how I view it. It's implicit that I don't have information that speaks to that point. And that's why I'm asking you to provide the information that speaks to the point because I either have something that doesn't speak to the point or it inadequately speaks to the point. Or I -- so it's either a complete lack of information or there may be some existence of information, but it's -- it isn't adequate.

Q So you used the term implicit in there. If you would tell me where in there it asks KCBX for any additional information because of insufficiency in what's already been submitted?

A It does not expressly note a deficiency.

Q Do you want to take a break right now?

A No, I'm fine.

Q Okay. All right. Were these other things that you considered -- you said that you looked at -- I mean you tell me if you're comfortable with FPOPs or fugitive dust plans, whatever terminology you want to use.

A Either works.

Q You indicated that some of the other information that the state was considering was regulations from California and fugitive dust plans for other facilities?

A (Nods affirmatively.)

Q Why aren't those in the record?

A I -- I will say that we didn't necessarily rely -- in fact, we didn't rely upon them on their face. But they were certainly documents that we at least looked at to shore up my opinion that the Fugitive Dust Plan in this matter seemed to have inadequacies.

Q Okay. And so, in terms of this information, when did -- Julie, when did you look at the Fugitive Dust Plans from other facilities?

A It varied.

Q Well, let me ask you this. Did you review

that information prior to the -- the date of the Wells letter?

A Yes.

Q A week prior? Two weeks prior? If you can recall.

A I just can't recall.

Q Can you recall when you first --

A I -- I probably started looking at that sort of documentation as early as September the 1st.

Q And --

MS. PAMENTER: Can I just clarify for the record are we talking about -- because I don't want to get into the enforcement actions. Are we talking about the enforcement action or are we talking about the permit application/appeal process? I just want to be clear for the record because she said that she wears a lot of hats. I want to make sure that we understand what hat you are wearing.

MR. DWYER: Well, the documents that we were just discussing, Julie, reviewing other facilities fugitive dust plans, the California regulations, were you looking at those in relation to permit decisions or for some other purpose?

(Pause.)