

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
<b>(VIA ELECTRONIC MAIL)</b>	<b>(VIA FIRST CLASS MAIL)</b>

**(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 RECONSIDERATION AND MODIFICATION and AFFIDAVIT OF KATHERINE D. HODGE SUPPORTING PETITIONER'S MOTION FOR RECONSIDERATION AND MODIFICATION**, copies of which are herewith served upon you.

Respectfully submitted,

KCBX TERMINALS COMPANY,  
Petitioner,

Dated: July 28, 2014

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

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

Stephen A. Swedlow, Esq.  
Michelle Schmit, Esq.  
Quinn Emanuel Urquhart Sullivan LLP  
500 West Madison Street, Suite 2450  
Chicago, Illinois 60661

**CERTIFICATE OF SERVICE**

I, Katherine D. Hodge, the undersigned, hereby certify that I have served the attached PETITIONER'S MOTION FOR RECONSIDERATION AND MODIFICATION and AFFIDAVIT OF KATHERINE D. HODGE SUPPORTING PETITIONER'S MOTION FOR RECONSIDERATION AND MODIFICATION 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 July 28, 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 July 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 facsimile and by depositing said document in the United States Mail, postage prepaid, in Springfield, Illinois on July 28, 2014.

/s/ Katherine D. Hodge  
Katherine D. Hodge

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

**PETITIONER'S MOTION FOR RECONSIDERATION AND MODIFICATION**

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 35 Ill. Admin. Code §§ 101.500, 101.520, and 101.902, and submits its Motion for Reconsideration and Modification ("Motion") to the Illinois Pollution Control Board ("Board").

1. On June 19, 2014, the Board issued its final order reversing and remanding the Illinois Environmental Protection Agency's ("Illinois EPA" or "Agency") decision to deny KCBX's July 23, 2013 Request for Revision to its Revised Construction Permit ("Request for Revision"). Opinion and Order, KCBX Terminals Co. v. Illinois EPA, PCB 14-110 at 57 (Ill.Pol.Control.Bd. June 19, 2014) (hereinafter "Final Order") (permit appeal hereinafter cited as "PCB 14-110"). Specifically, the Board found: "KCBX has demonstrated that the Agency's reasons for denial are insufficient, the Board finds that the submitted application does not

demonstrate violations of the provisions of the Act and rules cited by the Agency in its denial letter.” *Id.*

2. In the nearly 40 days since the Board issued its Final Order, Illinois EPA has not acted formally on KCBX’s Request for Revision, despite KCBX’s repeated requests. As noted by the Board in its Final Order, “Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order.” Illinois EPA did not appeal the Board’s Final Order, and its time to do so has lapsed. Therefore, KCBX respectfully requests that the Board direct Illinois EPA to issue the requested revised construction permit immediately.

3. Alternatively, to the extent the Illinois EPA contends that the Board did not issue a final order, then the Board did not take a final action within 120 days of receiving the February 21, 2014, Petition for Review (“Petition”), and KCBX may deem the requested revised construction permit issued. *See* 415 ILCS 5/40(a)(2).

**I. BACKGROUND**

4. On February 21, 2014, KCBX filed its Petition appealing the Permit Denial issued to KCBX by the Illinois Environmental Protection Agency on January 17, 2014. Illinois EPA issued the Permit Denial in response to KCBX’s Request for Revision. KCBX filed the Request for Revision to authorize the installation and operation of additional equipment at its bulk materials terminal located at 10730 South Burley Avenue, Chicago, IL 60617 (“South Terminal”). *See* Request for Revision, R-186 – R-204.

5. On March 6, 2014, the Board accepted the Petition for hearing, acknowledged the decision deadline of June 23, 2014, and noted that “[i]f the Board fails to take final action by the decision deadline, KCBX ‘may deem the permit issued.’” Order, PCB 14-110 (Ill.Pol.Control.Bd. Mar. 6, 2014), citing 415 ILCS 5/40(a)(2).

6. Following discovery, the Board held a hearing beginning on April 29, 2014 and continuing until May 2, 2014.

7. Pursuant to the Hearing Officer’s March 25, 2014 Order, KCBX filed its Post-Hearing Brief on May 9, 2014, and requested that the Board 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 TERMINALS COMPANY’S existing construction permit for the South Terminal; and c) improperly relied upon unadjudicated noncompliance in denying the permit.” Petitioner’s Post-Hearing Brief, PCB 14-110 at 49 (Ill.Pol.Control.Bd. May 9, 2014). KCBX also requested that the Board direct Illinois EPA to issue the requested permit upon entry of the Board’s Order. *Id.* Illinois EPA filed its Post-Hearing Brief on May 16, 2014.

8. On June 19, 2014, the Board issued its Final Order. *See* Final Order at 57 (noting that the Illinois Environmental Protection Act (“Act”) and regulations allow for the appeal, reconsideration, or modification of “final Board orders”). The Board found that the Request for Revision “does not demonstrate violations of the provisions of the Act and rules cited by the Agency in its denial letter.” *Id.* By doing

so, the Board reversed Illinois EPA's January 17, 2014 determination to deny the permit. *Id.*

9. The Board further found that the denial "was based substantially on a lack of information" and remanded KCBX's application to the Agency "for additional consideration of the information in the application consistent with this order and with the requirements of the Act and applicable regulations." *Id.* at 57.

10. KCBX's counsel received the Board's Order by certified mail on June 23, 2014. *See* Certified Mail Receipt of Board Order of June 19, 2014, mailed to Michelle Schmit and Stephen A. Swedlow, PCB 14-110 (Ill.Pol.Control.Bd. June 25, 2014).

11. Illinois EPA has not taken formal action on KCBX's Request for Revision, despite KCBX's repeated requests. Illinois EPA did not appeal the Board's Final Order, and the time to do so has lapsed.

12. A motion for reconsideration is intended to bring to the Board's attention newly-discovered evidence, changes in the law, or errors in the application of the existing law. *Broderick Teaming Co. v. Illinois EPA*, PCB No. 00-187, 2001 Ill. ENV LEXIS 159, 4\*-5\* (Ill.Pol.Control.Bd. Apr. 5, 2001).

13. KCBX now requests that the Board modify its Final Order with specific direction to Illinois EPA to immediately issue the requested revised construction permit.

14. Alternatively, if the Board's Final Order is not a final action, KCBX respectfully requests that the Board clarify its Final Order to so state.

II. **THE BOARD SHOULD DIRECT ILLINOIS EPA TO ISSUE THE PERMIT SINCE, AT THIS TIME, THE BOARD'S FINDINGS DO NOT ALLOW FOR ANY OTHER OUTCOME**

15. The Agency has the duty to issue a permit "upon proof by the applicant that the facility, equipment...will not cause a violation of this Act or the regulations hereunder." 415 ILCS 5/39(a). Illinois EPA identified reasons why it claimed certain provisions of the Act and Illinois Administrative Code "might" be violated if it issued the Request for Revision. See Permit Denial, R-1 – R-3. The Board disagreed. Final Order at 57. The Board found that KCBX met its burden with regard to all the denial reasons stated by Illinois EPA. *Id.* at 56. Specifically, the Board found that the Request for Revision "does not demonstrate violations of the provision of the Act and rules cited by the Agency in its denial letter." *Id.* at 57.

16. Illinois EPA must "specify all reasons for its denial of a permit, and is precluded from raising new reasons for the first time before the Board." *Joliet Sand and Gravel Co. v. Illinois EPA*, PCB No. 86-159 (Ill.Pol.Control.Bd. Feb. 5, 1987) (citing *Illinois EPA v. IPCB*, 86 Ill. 2d 390, 404-405, 427 N.E.2D 162 (1981)). Illinois EPA cannot reconsider its final decision. *Reichhold Chemicals, Inc. v. IPCB*, 204 Ill. App. 3d 674, 678-80, 561 N.E.2d 1343, 1345-46 (3d Dist. 1990).

17. Further, Illinois EPA may not develop additional reasons for denial on remand. In *Grigoleit Co.*, the Board struck all of Illinois EPA's denial reasons except one and remanded the case to Illinois EPA so it could elicit the information it requested in its denial letter to determine compliance with 35 Ill. Admin. Code § 215.301. *Grigoleit Co. v. Illinois EPA*, PCB 89-184, 1991 Ill. ENV LEXIS 1022 (Ill.Pol.Control.Bd. Dec. 6, 1991); *aff'd in part, rev'd in part Grigoleit Co. v. IPCB*,

245 Ill. App. 3d 337, 613 N.E.2d 371 (4th Dist. 1993). After declaring a subsequent denial letter null and void, the Board again remanded the matter to Illinois EPA for the same purpose. *Id.* at 4\*-5\*. Rather than focus solely on the provision that was the subject of the remand, Illinois EPA expressed concern over additional regulatory sections. *Id.* at 7\*. The company filed a motion for sanctions against Illinois EPA.

The Board explained:

Although we did not explicitly state that our November 29, 1990 mandate was limited in scope, it is implicit in any remand order that the order is limited to only those facts that were before the Agency when it denied the permit. To hold otherwise would allow the Agency, in effect, to conduct a de novo permit review on remand. As for the Agency's argument that Section 39(a) of the Environmental Protection Act would not allow the Agency to issue a permit if Grigoleit's operations would cause violations, we remind the Agency that it already made its 39(a) determination in this case when it reviewed Grigoleit's permit application and chose not to list its concerns about Grigoleit's additional operations in its October 11, 1989 permit denial letter. Accordingly, we will strike the Agency's citation in its July 29, 1991 denial letter to these two regulatory sections.

*Id.* at 7\*-8\* (internal citations omitted).

18. In *Grigoleit Co.*, the Board also found that the company supplied the necessary information to Illinois EPA to show compliance with 35 Ill. Admin. Code § 215.301 and ordered Illinois EPA to issue the permit. *Id.* On appeal, the Fourth District Appellate Court affirmed the Board's order except to the extent that the Board refused to award attorney fees to the company. *Grigoleit Co.*, 613 N.E.2d 37, 378.

19. To summarize, here the Board found that the Request for Revision did not lack information as stated by the Illinois EPA in Denial Reason 1. Final Order at



51. Similarly, the Board found that the application included sufficient information to determine compliance with 35 Ill. Admin. Code § 212.321, and that 35 Ill. Admin. Code § 201.160(a) also was an inadequate basis for denial. Final Order at 54, 57.

20. Therefore, Illinois EPA had all the necessary information before it, but failed to articulate a valid reason to deny the permit. Any subsequent decision by Illinois EPA denying the permit would be an improper reconsideration of its final decision. As explained by the Board in *Grigoleit Co.*, Illinois EPA may not conduct such a de novo review.

21. The Board notes that Illinois EPA's denial was "based substantially on a lack of information." Final Order at 57. However, Illinois EPA chose not to issue a notice of incompleteness pursuant to 35 Ill. Admin. Code § 201.158, but instead, reviewed the Request for Revision on its merits. See *Sherex Chemical Co. v. Illinois EPA*, PCB 80-66 at 2 (Ill.Pol.Control.Bd. Oct. 2, 1980); see also Final Order at 47. In essence, Illinois EPA missed its opportunity to deny the Request for Revision solely on incompleteness grounds and now is bound by the determination it made on the merits, which, as the Board has found, was a determination made with all necessary information.

22. Furthermore, the Board's Final Order is a final action. It reverses Illinois EPA's Permit Denial. Thus, the Final Order cannot serve as a means to allow Illinois EPA to clarify its denial or develop further denial reasons. To find otherwise would allow the Final Order to act as an interim order. If the Final Order serves as an interim order, then the Board did not take a final action within 120 days of receiving the Petition, and KBCX may deem the permit issued. See 415 ILCS 5/40(a)(2).

23. The Permit Denial must specify all the reasons for its denial. In this case, the Board found that the denial reasons stated were insufficient and did not find it necessary to require KCBX to submit any additional information. The Agency may not revisit its decision. The Agency's appeal deadline has passed. Therefore, there is nothing left for Illinois EPA to consider. It must issue the requested permit.<sup>1</sup>

**III. AN ORDER REMANDING THE MATTER TO ILLINOIS EPA WITH DIRECTION TO ISSUE THE PERMIT IS CONSISTENT WITH PAST BOARD ORDERS AND PREVENTS UNNECESSARY DELAY**

24. In the past, the Board has issued orders requiring Illinois EPA to issue permits when Illinois EPA's decision to deny a permit is overturned. For example, the Board directed Illinois EPA to issue a permit to develop and operate a landscape waste compost facility after the Board found that a facility satisfied the setback requirement that was the basis of Illinois EPA's denial. *Van Zelst Landscape Compost Facility v. Illinois EPA*, PCB 11-7 (Ill.Pol.Control.Bd. Aug. 4, 2011).

25. Likewise, where the Board found that a power plant was not a pollution control facility requiring siting – which was the only basis for Illinois EPA's permit denial – it remanded the matter to the Agency for issuance of the revised operating permit. *Ill. Power Co. v. Illinois EPA*, PCB 97-35, 97-36 (Consolidated) at 15 (Ill.Pol.Control.Bd. Jan. 23, 1997); *see also West Suburban Recycling and Energy Center, L.P. v. Illinois EPA*, PCB 95-119, 95-125

---

<sup>1</sup> Absent a final decision by Illinois EPA 90 days after the filing of an application for permit, an applicant may deem the permit issued. 415 ILCS 5/39(a)(iv). The Board has found that Illinois EPA did not provide a valid reason for denying the permit within this period. Therefore, this provision offers further support for the conclusion that after Illinois EPA's final decision was found to be invalid, and the Agency's appeal deadline has passed, the Agency must issue the requested permit.

(Consolidated) (Ill.Pol.Control.Bd. June 3, 1999) (where the Board ordered Illinois EPA to issue land and air permits).

26. And, as described above, the Board in *Grigoleit Co.* also ordered Illinois EPA to issue a permit.

27. Unless the Board directs Illinois EPA to issue the requested permit, the Board is allowing Illinois EPA to continue to delay in this matter. KCBX filed its Request for Revision more than one year ago, but still has no permit. In essence, because of Illinois EPA's inaction, Illinois EPA's Permit Denial continues to be effective even though the Board found that it was invalid. The Board must remedy this situation by directing Illinois EPA to issue immediately the requested revised construction permit.

IV. **ALTERNATIVELY, IF THE BOARD'S FINAL ORDER IS NOT A FINAL ACTION, THE BOARD SHOULD SO STATE, AND KCBX MAY DEEM ITS REQUESTED REVISED CONSTRUCTION PERMIT ISSUED BY OPERATION OF LAW**

28. Alternatively, Illinois EPA may argue that the Board's Final Order does not constitute "final action" for purposes of 415 ILCS 5/40(a)(2).

29. If Illinois EPA makes this argument, and the Board agrees, then the Board did not take final action within 120 days after the date on which the Board received KCBX's Petition, and under Section 40(a)(2), KCBX "may deem the permit issued."

30. If the Board finds that its Final Order was not final action, the Board should clarify its Order to make this clear, and KCBX will deem its requested revised construction permit issued by operation of law.

WHEREFORE, for the reasons stated herein, KCBX respectfully requests that the Board grant this Motion, reconsider its June 19, 2014 order, and modify it to direct Illinois EPA to issue immediately the revised construction permit requested in KCBX's Request for Revision. In the alternative, KCBX respectfully requests that, should the Board find that its June 19, 2014 order did not constitute final action, the Board modify that order to so state, and KCBX will consider its requested revised construction permit issued by operation of law.

Respectfully submitted,

KCBX TERMINALS COMPANY  
Petitioner,

Dated: July 28, 2014

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

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

Stephen A. Swedlow  
Michelle Schmit  
QUINN EMANUEL URQUHART  
SULLIVAN LLP  
500 W Madison St  
Suite 2450  
Chicago, Illinois 60661  
(312) 705-7484

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

**AFFIDAVIT OF  
KATHERINE D. HODGE SUPPORTING  
PETITIONER'S MOTION FOR RECONSIDERATION AND MODIFICATION**

Katherine D. Hodge, being first duly sworn, deposes and states as follows:

1. I have been counsel to the Petitioner at all times pertinent to this matter.
2. I participated in the preparation of Petitioner's Motion for Reconsideration and Modification, and I reviewed the same prior to filing.
3. The statements set forth in Petitioner's Motion for Reconsideration and Modification are true and correct, to the best of my knowledge.

FURTHER AFFIANT SAYETH NOT.

\_\_\_\_\_  
Katherine D. Hodge

Subscribed and sworn to before  
me this \_\_\_\_ day of July 2014.

\_\_\_\_\_  
Notary Public