

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

KCBX TERMINALS COMPANY,)	
)	
Petitioner,)	
)	
v.)	PCB 11-____
)	(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)

(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 an **ENTRY OF APPEARANCE OF KATHERINE D. HODGE, ENTRY OF APPEARANCE OF LAUREN C. LURKINS, PETITION FOR REVIEW and MOTION TO CONFIRM AUTOMATIC STAY OF EFFECTIVENESS OF FEDERALLY ENFORCEABLE STATE OPERATING PERMIT OR, IN THE ALTERNATIVE, TO REQUEST STAY OF EFFECTIVENESS**, copies of which are herewith served upon you.

Respectfully submitted,

KCBX TERMINALS COMPANY,

Dated: February 1, 2011

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

Katherine D. Hodge
Lauren C. Lurkins
HODGE DWYER & DRIVER
3150 Roland Avenue
Post Office Box 5776
Springfield, Illinois 62705-5776
(217) 523-4900

THIS FILING SUBMITTED ON RECYCLED PAPER

CERTIFICATE OF SERVICE

I, Katherine D. Hodge, the undersigned, hereby certify that I have served the attached ENTRY OF APPEARANCE OF KATHERINE D. HODGE, ENTRY OF APPEARANCE OF LAUREN C. LURKINS, PETITION FOR REVIEW and MOTION TO CONFIRM AUTOMATIC STAY OF EFFECTIVENESS OF FEDERALLY ENFORCEABLE STATE OPERATING PERMIT OR, IN THE ALTERNATIVE, TO REQUEST STAY OF EFFECTIVENESS 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 February 1, 2011 and upon:

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

by depositing said documents in the United States Mail, postage prepaid, in Springfield, Illinois on February 1, 2011.

/s/ Katherine D. Hodge
Katherine D. Hodge

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

KCBX TERMINALS COMPANY,)	
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v.)	PCB 11-____
)	(Air Permit Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

ENTRY OF APPEARANCE OF KATHERINE D. HODGE

NOW COMES Katherine D Hodge, of the law firm of HODGE DWYER & DRIVER, and hereby enters her appearance on behalf of Petitioner, KCBX TERMINALS COMPANY.

Respectfully submitted,

KCBX TERMINALS COMPANY,
Petitioner,

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

Dated: February 1, 2011

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KCBX:002/Fil/FESOP Permit Appeal/EOA-KDH

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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v.)	PCB 11-_____
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PROTECTION AGENCY,)	
)	
Respondent.)	

ENTRY OF APPEARANCE OF LAUREN C. LURKINS

NOW COMES Lauren C. Lurkins, of the law firm of HODGE DWYER & DRIVER, and hereby enters her appearance on behalf of Petitioner, KCBX TERMINALS COMPANY.

Respectfully submitted,

KCBX TERMINALS COMPANY,
Petitioner,

By: /s/ Lauren C. Lurkins
 Lauren C. Lurkins

Dated: February 1, 2011

Lauren C. Lurkins
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3150 Roland Avenue
Post Office Box 5776
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(217) 523-4900

KCBX:003/Fil/FESOP Permit Appeal/EOA-LCL

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

KCBX TERMINALS COMPANY,)	
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Petitioner,)	
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v.)	PCB 11-_____
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PETITION FOR REVIEW

NOW COMES Petitioner, KCBX TERMINALS COMPANY (“KCBX”), a North Dakota corporation, by and through its attorneys, HODGE DWYER & DRIVER, pursuant to Section 40(a)(1) of the Illinois Environmental Protection Act (“Act”) (415 ILCS 5/40(a)(1)) and 35 Ill. Admin. Code § 105.Subpart B, and petitions the Illinois Pollution Control Board (“Board”) for review of the Federally Enforceable State Operating Permit – Renewal (“Renewed FESOP”) issued to KCBX on December 29, 2010, by the Illinois Environmental Protection Agency (“Illinois EPA”), pursuant to Section 39 of the Act.

In support of its Petition, KCBX states as follows:

1. KCBX owns and operates a bulk materials terminal located at 3259 East 100th Street, Chicago, Illinois (Facility ID No. 031600AHI) (“Facility”).
2. Pursuant to Section 39(a) of the Act, on January 27, 2005, KCBX timely submitted an application to Illinois EPA for renewal of the FESOP for the Facility.

3. Since that time, KCBX representatives met with representatives of Illinois EPA on a number of occasions and provided additional information to Illinois EPA for renewal of the FESOP.

4. On June 24, 2009, KCBX received an informal preliminary draft FESOP for renewal ("Preliminary Draft") from Illinois EPA for review.

5. On August 7, 2009, KCBX submitted its comments regarding the Preliminary Draft to Illinois EPA for review.

6. On June 16, 2010, Illinois EPA published a public notice of the draft FESOP for renewal ("Public Notice Draft"), which did not entirely address KCBX's concerns.

7. On July 16, 2010, KCBX submitted its comments regarding the Public Notice Draft to Illinois EPA. The July 16, 2010 correspondence is attached hereto as Exhibit A.

8. On August 26, 2010, representatives of KCBX and Illinois EPA met to discuss issues related to the FESOP renewal, including a number of the issues discussed herein and which are the subject of this appeal.

9. On October 13, 2010, KCBX submitted additional information to Illinois EPA in follow up to the August 26, 2010 meeting. The October 13, 2010 correspondence is attached hereto as Exhibit B.

10. On December 29, 2010, Illinois EPA issued the Renewed FESOP, which is attached hereto as Exhibit C.

11. As KCBX discussed with Illinois EPA with regard to the Preliminary Draft and the Public Notice Draft, the Renewed FESOP neither accurately reflects the information KCBX provided to Illinois EPA since the original application for renewal of the FESOP, nor does it accurately reflect the actual operations of the Facility. Moreover, Illinois EPA failed to provide KCBX with any response to its comments.

12. Additionally, Illinois EPA included conditions in the Renewed FESOP that are arbitrary and capricious, are not required by the Act or regulations promulgated thereunder, and are not necessary to correct, detect, or prevent noncompliance with, or to otherwise accomplish the purposes of, the Act or regulations.

13. KCBX specifically objects to, and hereby appeals, the following conditions in the Renewed FESOP on the following bases:

a. Emissions Limitations (Conditions 1a, 10a, 10b and Attachment A).

i. The emissions limitations included in the Renewed FESOP, with the exception of Nitrogen Oxides (“NO_x”), are arbitrary and capricious, and are not required by the Act or regulations promulgated thereunder. For the Board’s review, the following table compares the emissions limitations, in tons per year (“tpy”), for Carbon Monoxide (“CO”), NO_x, Particulate Matter (“PM”), PM with an aerodynamic diameter less than or equal to 10 micrometers (“PM₁₀”), Sulfur Dioxide (“SO₂”) and Volatile Organic Matter (“VOM”), contained in various air permits Illinois EPA has issued to KCBX over the past several years:

**COMPARISON OF EMISSIONS LIMITATIONS
INCLUDED IN VARIOUS KCBX AIR PERMITS (in tpy)**

	CO	NO _x	PM	PM ₁₀	SO ₂	VOM
Renewed FESOP (Issued December 29, 2010)	92.0	92.0	88.0	88.0	21.9	40.1
Construction Permit-Revised (Issued May 25, 2010) ("May 2010 Revised Construction Permit") (Attached hereto as Exhibit D)	N/A	N/A	160.0	79.0	N/A	N/A
Construction Permit-Revised (Issued October 17, 2008) ("October 2008 Revised Construction Permit") (Attached hereto as Exhibit E)	N/A	N/A	160.0	79.0	N/A	N/A
Construction Permit Grant- Operating Permit Denial- NSPS Source (Issued May 23, 2008) ("May 2008 Construction Permit") (Attached hereto as Exhibit F)	N/A	N/A	160.0	79.0	N/A	N/A
FESOP-Revised (Issued April 8, 2004) ("Existing FESOP") (Attached hereto as Exhibit G)	N/A	99.0	95.2	5.0 (from generators and other fuel combustion units)	66.8	N/A

ii. As detailed in the table above, the permits Illinois EPA has issued to KCBX over the past several years have included a variety of emissions limitations for a variety of pollutants, which conflict with each other.

iii. Specifically, in the Renewed FESOP, CO emissions are limited to 92.0 tpy, SO₂ emissions are limited to 21.9 tpy, and VOM emissions are

limited to 40.1 tpy. Such emissions limitations are not necessary because the Facility is genuinely a “minor source” for these pollutants. *See* Exhibit A. Therefore, these limits, as contained in the Renewed FESOP, are arbitrary and capricious, and are not required by the Act or regulations promulgated thereunder.

iv. Also, PM and PM₁₀ emissions are both limited to 88 tpy in the Renewed FESOP, while the May 2008 Construction Permit, the October 2008 Revised Construction Permit and the May 2010 Revised Construction Permit included a PM emissions limitation of 160.0 tpy and a PM₁₀ emissions limitation of 79.0 tpy, as detailed in the table above. *See* Exhibits C, D, E and F. As discussed in more detail below and as KCBX previously communicated to Illinois EPA, the limitations on the emissions of PM and PM₁₀ included in the Renewed FESOP are arbitrary and capricious. *See* Exhibits A (including the attachments thereto) and B. Additionally, the conditions limiting KCBX’s PM and PM₁₀ emissions are not required by the Act or regulations promulgated thereunder. *See id.*

b. Fugitive Emissions (Conditions 1a, 2c, 2d, 2i, 2m, 2n, 2o, 2p, 7b, 8c, 8d, 8e and 13b.i).

i. Moreover, with regard to the PM and PM₁₀ limitations included in the Renewed FESOP, the emissions from material storage and handling, including conveying operations, at the Facility are fugitive in nature. *See* Exhibits A (including the attachments thereto) and B. Therefore, under federal and state law, these emissions are not considered when making the determination of whether the Facility is a “major source.” To reflect that fact, KCBX suggested language for the Renewed FESOP.

Apparently Illinois EPA, in a change from its prior determinations with regard to the construction permits, did not agree with KCBX's position regarding fugitive emissions. Such action is reflected by the fact that the only change made in the Renewed FESOP with regard to this issue was a lowering of the PM limit from the May 2010 Revised Construction Permit. *See Exhibit D.* Further, Illinois EPA did not indicate to KCBX which of the Facility's emissions Illinois EPA considers to be fugitive and which it does not, thus causing practical problems with, among other issues, the implementation of a Fugitive Particulate Operating Program as required by 35 Ill. Admin. Code § 212.309(a) and implementation of contingency measures as required by 35 Ill. Admin. Code § 212.703(a). Therefore, Illinois EPA's decision with regard to fugitive emissions is arbitrary and capricious, and is not required by the Act or the regulations promulgated thereunder.

ii. Additionally, Conditions 8c.i and 8c.ii of the Renewed FESOP, through their reference to 35 Ill. Admin. Code § 212.308, specifically designate emissions from "crushers, grinding mills, screening operations, bucket elevators, conveyor transfer points, conveyors, bagging operations, storage bins and fine product truck and railcar loading operations" as fugitive. However, as noted above, other conditions of the Renewed FESOP indicate that Illinois EPA has concluded otherwise.

c. **Moisture Language (Condition 9).** On several occasions, KCBX has attempted to describe to Illinois EPA its issues related to the moisture content of materials handled at the Facility and proposed language for the Renewed FESOP that would reflect the same. *See Exhibit B.* Nonetheless, Illinois EPA included moisture

language in Condition 9 of the Renewed FESOP that is arbitrary and capricious, not required by or necessary for compliance with the Act or regulations promulgated thereunder, and limits business opportunities for KCBX. Additionally, the May 2008 Construction Permit, the October 2008 Revised Construction Permit and the May 2010 Revised Construction Permit issued to KCBX by Illinois EPA each contained different moisture requirements, thus causing confusion for KCBX.¹ See Exhibits D, E and F.

d. Failure to Include All Applicable Regulations (Conditions 2i and 5).

i. Condition 2i of the Renewed FESOP lists the emission units subject to an operating program for fugitive emissions, as listed in 35 Ill. Admin. Code § 212.309(a), but omits emission units described in 35 Ill. Admin. Code § 212.316, which include, among other units, fugitive emissions from screening of coke and coal, fugitive emissions from roadways and parking areas, and fugitive emissions from storage piles, all of which are present at KCBX, and were covered in the application for the Renewed FESOP. Therefore, Condition 2i is arbitrary and capricious, and is not required by the Act or regulations promulgated thereunder.

ii. Condition 5 of the Renewed FESOP states that the permit is issued based on the two electric conveyors not being subject to NSPS Subpart Y because the conveyors will not be used to convey coal to machinery at the coal preparation plant.²

¹ The conditions regarding moisture content included in the May 2010 Revised Construction Permit, specifically Conditions 6a and 6a.ii., are also issues in the appeal of the May 2010 Revised Construction Permit currently before the Board. See *KCBX Terminals Company v. Illinois EPA*, PCB 10-110; see also Exhibit D.

² The October 2008 Revised Construction Permit and the May 2010 Revised Construction Permit issued to KCBX by Illinois EPA include this same language. See Exhibits D and E.

The language is not relevant or necessary. Instead, the Renewed FESOP should discuss the applicability of NSPS Subpart Y to the coal screener operated at the Facility. *See* Exhibit A (including the attachments thereto). Therefore, Condition 5 is arbitrary and capricious, and is not required by the Act or regulations promulgated thereunder.

e. Frequency of Compliance Determinations (Conditions 10c and 14a.vi). KCBX's Existing FESOP requires that KCBX determine compliance with the annual limits on a monthly basis. *See* Exhibit G. However, in Condition 10c of the Renewed FESOP, Illinois EPA requires that KCBX determine compliance with the annual limits on a weekly basis. The weekly frequency is not justified and it presents operational difficulties for KCBX. KCBX, therefore, requests that a monthly frequency for such compliance determination be maintained in the Renewed FESOP. *See* Exhibit A (including the attachments thereto). Therefore, Conditions 10c and 14a.vi. are arbitrary and capricious, and are not required by the Act or regulations promulgated thereunder.

f. Failure to Supersede and/or Appropriately Incorporate Other Operating Authorities (Condition 1c). In Condition 1c, the Renewed FESOP rightfully states that it supersedes prior operating permits, but does not speak to operating authorities granted under construction permits, such as the May 2010 Revised Construction Permit. And, Illinois EPA has failed to appropriately incorporate other operating authorities. Conflicts between the Renewed FESOP and the construction permits result in confusion for KCBX. Therefore, Condition 1c is arbitrary and capricious, and is not required by the Act or regulations promulgated thereunder.

g. Miscellaneous Errors.

i. Opening Paragraph. In the opening paragraph of the Renewed FESOP, Illinois EPA incorrectly lists the horsepower of KCBX's generators as 425 kW and 450 kW. One generator is 750 horsepower and the other generator is 760 horsepower. Standard conversions indicate these units to be 559 kW and 567 kW, respectively.

ii. Equipment List (Condition 2q). Illinois EPA incorrectly listed the equipment located at the Facility in Condition 2q of the Renewed FESOP. Condition 2o correctly lists the equipment to which 35 Ill. Admin. Code § 212.322 applies. However, in lieu of generating a long list of equipment and processes, KCBX requested that Condition 2q contain language stating that all equipment not specifically named in Condition 2o is covered by Condition 2q. *See* Exhibit B. With the current language in Condition 2q, there are several pieces of equipment and processes that are not covered by a process weight rate limit contained in 35 Ill. Admin. Code § 212.321.

iii. Emission Equations and Exclusions (Conditions 2o, 10a and 10b). Illinois EPA made mistakes in the factors associated with emission equations located in Condition 2o of the Renewed FESOP. The factors, or constants, listed in Conditions 2o.i and 2o.ii were apparently copied from Condition 2q without being changed. Therefore, they are not consistent with the factors listed in 35 Ill. Admin. Code § 212.322. In addition, Illinois EPA did not afford KCBX the exclusion of stockpile emissions granted in 35 Ill. Admin. Code § 212.323 when calculating process emissions under 35 Ill. Admin. Code §§ 212.321 and 212.322. In Condition 10a of the Renewed

FESOP, Illinois EPA provided only a partial reference to emission factor sources in Condition 10a. In Condition 10b of the Renewed FESOP, Illinois EPA omitted a variable in the equation. Use of the equation in Condition 10b, as provided in the Renewed FESOP, will produce incorrect results. Finally, the emission factors for NO_x from the combustion of diesel at the end of Condition 10b are reversed for engines less than or equal to 600 horsepower and engines that are greater than 600 horsepower. Use of the emission factors as stated in the Renewed FESOP will produce incorrect results.

14. The current appeal has been timely filed within the 35-day appeal deadline period prescribed by Section 40(a)(1) of the Act (415 ILCS 5/40(a)(1)).

15. In addition, as noted above, also currently before the Board is KCBX's appeal of the May 2010 Revised Construction Permit issued to KCBX by Illinois EPA with regard to the construction of two portable conveyors at the Facility. *See KCBX Terminals Company v. Illinois EPA*, PCB 10-110. The issues that are the subject of the appeal of the May 2010 Revised Construction Permit are related, but not identical, to the issues discussed herein.

16. Therefore, Illinois EPA included conditions in the Renewed FESOP that are arbitrary and capricious, are not required by the Act or regulations promulgated thereunder, and are not necessary to correct, detect, or prevent noncompliance with, or to otherwise accomplish the purposes of, the Act or regulations. Moreover, Illinois EPA failed to include certain conditions in the Renewed FESOP that are necessary to accurately reflect the information KCBX has provided to Illinois EPA and to accurately reflect the actual operations of the Facility. Finally, Illinois EPA made a number of

“miscellaneous errors” that must be corrected to accurately reflect the operations of the Facility.

WHEREFORE Petitioner, KCBX TERMINALS COMPANY petitions the Illinois Pollution Control Board for a hearing on the Illinois Environmental Protection Agency’s action to issue the Renewed FESOP, and for such other relief as the Board deems appropriate.

Respectfully submitted,

KCBX TERMINALS COMPANY,
Petitioner,

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

Dated: February 1, 2011

Katherine D. Hodge
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KCBX:003/Fil/FESOP Permit Appeal/Petition for Review

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**MOTION TO CONFIRM AUTOMATIC STAY OF EFFECTIVENESS
OF FEDERALLY ENFORCEABLE STATE OPERATING PERMIT
OR, IN THE ALTERNATIVE, TO REQUEST STAY OF EFFECTIVENESS**

NOW COMES Petitioner, KCBX TERMINALS COMPANY (“KCBX”), a North Dakota corporation, by and through its attorneys, HODGE DWYER & DRIVER, and hereby requests the Illinois Pollution Control Board (“Board”) confirm the automatic stay of effectiveness of KCBX’s recently renewed Federally Enforceable State Operating Permit (“Renewed FESOP”) or, in the alternative, grant a stay of effectiveness of the entire Renewed FESOP.

In support thereof, KCBX states as follows:

1. On December 29, 2010, Illinois Environmental Protection Agency (“Illinois EPA”) issued the Renewed FESOP (Application No. 95050167) for KCBX’s bulk materials terminal in Chicago, Illinois (Facility ID No. 031600AHI) (“Facility”).
2. Simultaneously herewith, KCBX has filed a Petition for Review seeking Board review of the Renewed FESOP.

3. The Administrative Procedure Act (“APA”), 5 ILCS 100/1, *et seq.*, states the following, in part, with regard to licensing¹:

- (a) When any licensing is required by law to be preceded by notice and an opportunity for a hearing, the provisions of this Act concerning contested cases shall apply.
- (b) When a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, the existing license shall continue in full force and effect until the final agency decision on the application has been made unless a later date is fixed by order of a reviewing court.

- (d) Except as provided in subsection (c), no agency shall revoke, suspend, annul, withdraw, amend materially, or refuse to renew any valid license without first giving written notice to the licensee of the facts or conduct upon which the agency will rely to support its proposed action and an opportunity for a hearing in accordance with the provisions of this Act concerning contested cases. At the hearing, the licensee shall have the right to show compliance with all lawful requirements for the retention, continuation, or renewal of the license. If, however, the agency finds that the public interest, safety, or welfare imperatively requires emergency action, and if the agency incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action. Those proceedings shall be promptly instituted and determined.
- (e) Any application for renewal of a license that contains required and relevant information, data, material, or circumstances that were not

¹ The APA defines “license” to include “the whole or part of any agency permit . . .” 5 ILCS 100/1-35. “Licensing” includes “the agency process respecting the grant, denial, renewal, revocation, suspension, annulment, withdrawal, or amendment of a license.” 5 ILCS 100/1-40.

contained in an application for the existing license shall be subject to the provisions of subsection (a).

5 ILCS 100/10-65. (Emphasis added.)

4. In *Borg-Warner Corporation v. Mauzy*, 100 Ill. App. 3d 862 (3d Dist. 1981), the only Illinois appellate case to interpret the APA licensing provision in the context of the Act and its regulations, the petitioner filed a timely application to renew its National Pollutant Discharge Elimination System (“NPDES”) permit. Although the appellate court addressed several issues, it did determine that Section 10-65 of the APA applied to NPDES permits and concluded that the petitioner’s original NPDES permit continued in effect until the Board issued a final decision on the NPDES permit appeal.

5. More recently, the Board has held that the APA’s automatic stay provision applies to Clean Air Act Permit Program (“CAAPP”) permits. *United States Steel Corporation v. Illinois EPA*, PCB 10-23 (Ill.Pol.Control.Bd. Nov. 19, 2009); *In the Matter of: Dynegy Midwest Generation, Inc. (Havana Power Station) v. Illinois EPA*, PCB 06-71 at *7 (Ill.Pol.Control.Bd. Feb. 16, 2006).

6. The Board has not directly addressed the issue of the application of the APA’s automatic stay to FESOPs; however, the analyses in the cases referenced above would appropriately apply to FESOPs.

7. Applying the analyses of the cases referenced above, the Renewed FESOP issued to KCBX on December 29, 2010, is automatically stayed, and the Renewed FESOP is not currently effective. Further, the Renewed FESOP for KCBX will not be effective until a final order is issued by the Board on KCBX’s Petition for Review, and Illinois EPA acts in accordance with the Board’s order. Thus, the stay of the KCBX

Renewed FESOP was automatic by operation of law on the day of issuance, December 29, 2010.

8. KCBX, therefore, requests confirmation from the Board that the Renewed FESOP was automatically stayed, pursuant to the APA, until the final Board decision on the permit has been made. Accordingly, the Renewed FESOP was never effective, and KCBX's existing permits will continue in full force and effect. In addition, KCBX remains subject to all applicable federal and state regulations.

9. In the alternative, should the Board determine that the automatic stay in accordance with the APA does not apply in this instance, KCBX requests that the Board exercise its discretion and stay the effectiveness of the entire Renewed FESOP in order to prevent irreparable harm to KCBX and to protect the clearly ascertainable right of KCBX to appeal permit conditions. The Board has stated:

In determining whether a discretionary stay is appropriate, the Board may refer to four factors: (1) a certain and clearly ascertainable right needs protection; (2) irreparable injury will occur without the stay; (3) no adequate remedy at law exists; and (4) there is a probability of success on the merits.

Board Order, *Bridgestone/Firestone Off-Road Tire Co. v. Illinois EPA*, PCB 02-31 at *6 (Ill.Pol.Control.Bd. Nov. 1, 2001) (hereinafter cited as "*Bridgestone*"). (Citations omitted); *see also* Board Order, *Oasis Industries, Inc. v. Illinois EPA*, PCB 04-166 at *1 (Ill.Pol.Control.Bd. May 6, 2004) (hereinafter cited as "*Oasis*"). The Board has also held that "it is not required to specifically address each of these factors in making a stay determination." *Oasis* at *1 (citing *Bridgestone*).

10. As noted above, KCBX has a certain and clearly ascertainable right to appeal FESOP conditions. 415 ILCS 5/40(a)(1); *see also Bridgestone* at *7 (stating the “Board finds that the petitioner’s right to appeal the permit condition is a certain and ascertainable right that needs protection”). The Renewed FESOP does not accurately reflect the information KCBX has provided to Illinois EPA over the course of the last several years, nor does it accurately reflect the actual operations of the Facility. Further, the Renewed FESOP includes conditions that are arbitrary and capricious, are not required by the Illinois Environmental Protection Act (“Act”) or regulations promulgated thereunder, and are not necessary to correct, detect, or prevent noncompliance with, or to otherwise accomplish the purpose of, the Act or regulations. KCBX would be irreparably harmed if required to implement the requirements of the Renewed FESOP. *See id.* (stating “the Board is persuaded that the petitioner’s appeal of the permit condition would be rendered moot if it had to comply with the contested condition during appeal”). In addition, the issuance of a stay of the entire Renewed FESOP will not harm the public or the environment as the Facility will continue to operate in accordance with all applicable federal and state regulations, and the Facility’s existing permits remain in full force and effect.

WHEREFORE Petitioner, KCBX TERMINALS COMPANY requests the Board to confirm the automatic stay of effectiveness of KCBX's Renewed FESOP or, in the alternative, grant a stay of effectiveness of the entire Renewed FESOP until the Board's final action in this matter.

Respectfully submitted,

KCBX TERMINALS COMPANY,
Petitioner,

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

Dated: February 1, 2011

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