

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 RESPONSE IN OPPOSITION TO RESPONDENT'S INTERLOCUTORY APPEAL FROM HEARING OFFICER APRIL 8, 2014 ORDER DENYING MOTION FOR PROTECTIVE ORDER**, a copy of which is herewith served upon you.

Respectfully submitted,

KCBX TERMINALS COMPANY,  
Petitioner,

Dated: April 15, 2014

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

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

**CERTIFICATE OF SERVICE**

I, Edward W. Dwyer, the undersigned, hereby certify that I have served the attached PETITIONER'S RESPONSE IN OPPOSITION TO RESPONDENT'S INTERLOCUTORY APPEAL FROM HEARING OFFICER APRIL 8, 2014 ORDER DENYING MOTION FOR PROTECTIVE ORDER upon:

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

via electronic mail on April 15, 2014 and upon:

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

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

by depositing said documents in the United States Mail, postage prepaid, in Springfield, Illinois on April 15, 2014 and upon:

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

via facsimile and by depositing said document in the United States Mail, postage prepaid, in Springfield, Illinois on April 15, 2014.

/s/ Edward W. Dwyer  
Edward W. Dwyer

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

**PETITIONER'S RESPONSE IN OPPOSITION TO  
ILLINOIS EPA'S INTERLOCUTORY APPEAL FROM HEARING OFFICER  
APRIL 8, 2014 ORDER DENYING MOTION FOR PROTECTIVE ORDER**

NOW COMES Petitioner, KCBX TERMINALS COMPANY ("KCBX"), a North Dakota corporation, by and through its attorneys, HODGE DWYER & DRIVER, and for its Response in Opposition to Illinois EPA's Interlocutory Appeal from Hearing Officer April 8, 2014 Order Denying Motion for Protective Order, states as follows:

**I. INTRODUCTION**

On February 21, 2014, KCBX filed with the Illinois Pollution Control Board ("Board") its Petition for Review ("Petition") of the Permit Denial issued to KCBX by the Illinois Environmental Protection Agency ("Illinois EPA") on January 17, 2014, in response to its July 23, 2013 Request for Revision to Revised Construction Permit ("Request for Revision"). The Illinois EPA filed the Administrative Record in this permit Interlocutory Appeal with the Board on March 24, 2014. A Hearing Officer Order was entered scheduling a hearing on April 29, 2014 and ordering the close of discovery on or before April 18, 2014.

On March 28, 2014, KCBX filed Notices of Depositions for Illinois EPA employees as follows: Robert W. Bernoteit on April 9, 2014, Michael Dragovich on

April 9, 2014, Raymond Pilapil on April 10, 2014, and Joseph Kotas on April 11, 2014. Based on the obvious omission of certain documents from the Record, KCBX attached to each of the deposition notices a narrowly focused "Deposition Rider" ("*Riders*") requesting production of certain documents, including notes related to the deponents' review of the July 23, 2013 construction permit application, draft permits that address the activities described in the Request for Revision, notes related to observations of the KCBX facility, and notes taken during meetings, telephone calls, or discussions where the Request for Revision or the decision to grant or deny the Request for Revision was discussed.<sup>1</sup>

On April 2, 2014, the Illinois EPA filed a Motion for Protective Order ("MPO") regarding the Riders. On April 4, 2014, KCBX filed its response to the MPO. On April 8, 2014, the Hearing Officer entered an Order denying the MPO. On April 14, 2014, the Illinois EPA filed an "Interlocutory Appeal from Hearing Officer April 8, 2014 Order Denying Motion for Protective Order" (hereinafter "Interlocutory Appeal"). The Illinois EPA did not file a written motion requesting leave to file an Interlocutory Appeal.

KCBX opposes allowance of the Interlocutory Appeal. If the Interlocutory Appeal is allowed, then the Hearing Officer's denial of the MPO should be upheld and the Illinois EPA should be ordered to produce, immediately, the requested documents. Alternatively, the Board should review the responsive documents *in camera* and issue a ruling as to whether the documents are discoverable.

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<sup>1</sup> The Deposition Rider for Mr. Kotas sought slightly different information due to his position as an inspector.

**II. THE INTERLOCUTORY APPEAL WAS IMPROPERLY FILED WITHOUT LEAVE**

“Interlocutory Appeals from a ruling of the hearing officer may be taken to the Board. The Board may consider an Interlocutory Appeal *upon the filing of a written motion.*” This filing did not comply with 35 Ill. Admin. Code § 101.518, which provides that the “Board may consider an Interlocutory Appeal upon the filing of a written motion.” (Emphasis added.) 35 Ill. Admin. Code § 101.518. Illinois EPA did not file “a written motion” requesting the Board to consider an Interlocutory Appeal; it merely filed its Interlocutory Appeal without leave. Illinois EPA’s purported Interlocutory Appeal is, therefore, procedurally improper and should be denied on this basis alone. In the alternative, KCBX requests that the Board deny Illinois EPA’s Interlocutory Appeal for the reasons set forth below.

**III. THE DELIBERATIVE PROCESS PRIVILEGE DOES NOT APPLY**

Illinois EPA argues that the deliberative process privilege precludes production of the information requested in the deposition Riders, claiming that the Board recognized this privilege in *Rochelle Waste Disposal LLC v. City of Rochelle*, PCB 03-218 (April 15, 2004) and *Fox Moraine, LLC v. United City of Yorkville*, PCB 07-146 (October 1, 2009). Interlocutory Appeal, p. 2. These Board decisions do not support Illinois EPA’s claims.

Both *Rochelle* and *Fox Moraine* were landfill siting decisions. In both, the issue was whether the siting decision process was conducted with “fundamental fairness,” and the petitioner sought to elicit testimony from elected officials (city council members) as to their mental processes in arriving at the decisions to attempt to establish that improper *ex parte* contact influenced the decisions. The Board held that under those circumstances, the petitioner would not be permitted to elicit testimony regarding the

mental processes of the decision-maker. *Rochelle*, 2004 WL 916231, \*16; *Fox Moraine*, 2009 WL 6506730, \*60.

This is a permit Interlocutory Appeal, not an Interlocutory Appeal of a landfill siting decision. As acknowledged by Illinois EPA (Interlocutory Appeal, pp. 3-4), the issues in *Rochelle* and *Fox Moraine* are significantly different from those in this case. The issue is not “fundamentally fairness” but rather whether Illinois EPA’s permit decision was correct. *See id.* This issue must be decided based exclusively on the record, which must contain both materials that Illinois EPA relied upon and materials Illinois EPA reasonably should have relied upon. *See* discussion below. Thus, in permit Interlocutory Appeals, the information that formed, or should have formed, the basis of Illinois EPA’s decision is a central issue. Moreover, KCBX is not seeking to elicit the testimony of Illinois EPA’s employees regarding their “mental processes,” but rather is seeking documentation containing information that was relied upon or should have been relied upon by Illinois EPA.

The Appellate Court for the Second District made this distinction in *Fox Moraine, LLC v. United City of Yorkville*, 2011 IL App (2d) 100017. The court found that while the Illinois EPA would not be allowed to have city council members *testify* “regarding their processes in reaching their decisions,” if the Illinois EPA were instead *seeking production of documents*, the court was “inclined to agree” that in light of *Birkett*, the court would not be warranted in “extending this privilege to the council.” *Fox Moraine, LLC v. United City of Yorkville*, 2011 IL App (2d) 100017, ¶¶ 72-73. Again, KCBX is not asking to interrogate elected officials regarding their mental impressions; it is seeking documents that should rightfully be contained within the record.

Illinois EPA also understates the ruling of the Supreme Court of Illinois in *People ex rel. Birkett v. City of Chicago*, 184 Ill. 2d 521, 526 (1998). The issue in *Birkett* was whether the court would “adopt a common law deliberative process privilege to exempt from discovery ‘confidential advice given to those involved in making [decisions and] policy for state and local government.’” *Birkett*, 184 Ill. 2d at 526. The court concluded “that in light of the range of competing policies underlying the deliberative process privilege, its adoption should be left to the General Assembly.” *Id.* at 533. Thus, the court affirmed the appellate court’s judgment “rejecting the deliberative process privilege.” *Id.* at 534. The opinion contained a “vigorous dissent to the majority opinion which refuses to recognize a deliberative process privilege.” *Id.* at 534 (Bilandic, J. dissenting). The Supreme Court of Illinois thus unequivocally rejected the privilege claimed by Illinois EPA, ruling that it was up to the legislature to create such a privilege. Illinois EPA does not claim that *Birkett* has been overruled, and it cites to no statute in support of its claim. Accordingly, the Board should rule that Illinois EPA cannot rely upon a privilege that the Supreme Court of Illinois has held does not exist.

To attempt to minimize the Supreme Court of Illinois’ complete rejection of Illinois EPA’s theory, Illinois EPA quotes *Harwood v. McDonough*, 344 Ill. App. 3d 242, 247 (1st Dist. 2003) as stating that “[t]he *Birkett* court did not hold that a deliberative process *exemption* did not exist in Illinois.” Interlocutory Appeal, p. 3 (emphasis added). The First District in *Harwood* actually distinguished between the deliberative process *exemption* under the Freedom of Information Act and the deliberative process *privilege* Illinois EPA claims here:

In *Birkett*, the City of Chicago had argued that information exempt from disclosure to the general public under the [Freedom of Information] Act’s

deliberative process *exemption* should also be undiscoverable by a civil litigant as a deliberative process litigation *privilege*. The *Birkett* court refused to recognize such a deliberative process *privilege*, but only after recognizing that the *exemption* did exist. Thus, to the extent plaintiff relies on *Birkett* as standing for the proposition that Illinois does not recognize a deliberative process *exemption* under the Act, his reliance is misplaced. The actual issue addressed by the *Birkett* court was “whether the legislature sought to create an *analogous evidentiary privilege*.” (Emphasis added.) *Birkett*, 184 Ill.2d at 529, 235 Ill.Dec. 435, 705 N.E.2d at 51. The *Birkett* court did not hold that a deliberative process exemption did not exist in Illinois.

*Harwood*, 344 Ill. App. 3d at 247. Thus, contrary to Illinois EPA’s argument, the court in *Harwood* acknowledged that the Supreme Court of Illinois has “refused to recognize” the evidentiary privilege asserted by Illinois EPA in this case.

Based on the above, the Hearing Officer correctly ruled that the “predecisional deliberative process privilege does not apply to the production requested by KCBX here.” Hearing Officer Order (April 8, 2014), p. 5. Illinois EPA has failed to demonstrate otherwise, and its Interlocutory Appeal should be denied.

Even if the Board were to find that the deliberative process privilege exists in Illinois and applies to this case, KCBX is still entitled to discover the “factual aspects of predecisional communications.” *Birkett*, 184 Ill. 2d at 526 (discussing the federal deliberative process privilege and noting that “[e]xcluded from the privilege are any factual aspects of predecisional communications.”) *See also West Suburban Recycling and Energy Center v. Illinois Environmental Protection Agency*, PCB 95-119 and 95-125 (October 17, 1996), 1996 WL 633368, \*6 (in a pre-*Birkett* decision, the Board notes that the deliberative process privilege is not absolute, only protects expressions of opinions or recommendations, and does not protect purely factual material; “disclosing facts would not hinder the free flow of advice in government decision making, nor involve improper judicial interference with that process.”) Consequently, even if the Board rules in favor

of Illinois EPA, application of the deliberative process privilege would not automatically require non-production of the documents claimed to be privileged. Instead, the Board, in order that it is assured that it has a complete record, should review the documents claimed to be privileged *in camera* and allow production of any *factual* matters contained in the documents. *See id.* (“The courts qualify the privilege by balancing competing interests. The court can examine the official information *in camera* to determine whether the government's interest in non-disclosure outweighs the interests of the litigants and public disclosure.”)

**IV. THE DOCUMENTS REQUESTED ARE RELEVANT**

“All relevant information and information calculated to lead to relevant information is discoverable.” 35 Ill. Admin. Code § 101.616(a), ILL. S. CT. RULE 201(b)(1) (requiring “full disclosure regarding any matter relevant to the subject matter involved in the pending action.”) Indeed, “great latitude is allowed in conducting discovery and the concept of relevance is broader for discovery purposes than for purposes of admitting evidence at trial.” *Ramos v. Kewanee Hosp.*, 2013 IL App (3d) 120001 ¶ 76. “Relevance for discovery purposes includes not only what is admissible at trial, but also that which leads to admissible evidence.” *Id.*

The Hearing Officer correctly ruled that the information requested in KCBX’s deposition notice Riders “is clearly relevant to this proceeding” and constitutes “information that the Agency relied on, or should have relied on, in making its decision regarding the Request for Revision.” Hearing Officer Order (April 8, 2014), p. 5. Illinois EPA argues that because the “sole issue before the Board” is “the correctness of” the Agency’s decision denying the permit, the requested information is not relevant

(Interlocutory Appeal, p. 5); however, this argument merely underscores the fact that the record in this matter must contain all information that was relied upon or should have been relied upon by the Board so that the “correctness” of its decision may be assessed.

Further, Illinois EPA’s claim that the requests for deponents to produce documents at their depositions are “simply an attempt to avoid the deadlines forced by its own refusal to extend the date for hearing” (Interlocutory Appeal, p. 5) ignores the fact that Illinois Supreme Court Rule 204 specifically provides that “[s]ervice of notice of the taking of the deposition of a party or person who is currently an officer, director, or employee of a party is sufficient to require the appearance of the deponent *and the production of any documents or tangible things listed in the notice.*” ILL. S. CT. RULE 204(a)(3) (emphasis added). *See also* 35 ILL. ADM. CODE § 101.616 (“For purposes of discovery, the Board may look to the Code of Civil Procedure and the Supreme Court Rules for guidance where the Board's procedural rules are silent.”) KCBX did not “waive the right to engage in written discovery.” Interlocutory Appeal, p. 5. Instead, KCBX utilized the tools available to it under the applicable rules given the “expedited schedule in this matter” (Interlocutory Appeal, p. 6) based on non-waiver of the statutory deadline, of which Illinois EPA repeatedly reminds the Board. Interlocutory Appeal, pp. 2, 5, 6.

Illinois EPA further asserts that because KCBX has had the opportunity to depose the witnesses as to whom the Riders applied, without the benefit of the documents requested in the Riders, KCBX should be barred from further inquiry regarding the documents. Interlocutory Appeal, pp. 5-6. Asking a witness questions in a deposition regarding yet to be seen documents is not a substitute for production of the actual

documents. The purpose of the Riders was to ask the deponents questions about the requested documents. Further, if the documents are produced, then KCBX will still have the opportunity to utilize the documents at the hearing in this matter. The Board should reject Illinois EPA's suggestion that the Board should ignore the documents missing from the record due to "the extremely short time frame dictated by Petitioner's insistence on an early hearing" (Interlocutory Appeal, p. 6) and because the depositions of the witnesses have already been taken.<sup>2</sup>

Illinois EPA's reference to *Joliet Sand & Gravel Co. v. IEPA*, PCB 86-159 (Dec. 23, 1986), is to no avail. There, unlike here, the petitioner's request for discovery "was essentially one for discovery of every item of information contained in the Agency's files and computer system concerning [petitioner's] operation, whenever generated and whether or not considered in the process of the Agency's review of the instant permit application." *Joliet Sand & Gravel*, 1986 WL 27226, \*1. The petitioner also, unlike in this case, requested depositions of not only Agency employees with knowledge of relevant facts, but also depositions of a data input witness, the Director of the Agency, and various other employees. *Id.*

The Board noted that "[w]hat is 'reasonable' discovery must be determined in the light of ... practical time constraints as well as the legislative 120 day constraint." *Id.* at \*2. Although the Board did not rule that the requested discovery was necessarily improper in a permit appeal, the Board ultimately decided under the circumstances to

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<sup>2</sup> KCBX would normally request a supplemental deposition of the witnesses regarding the documents that the deponents failed to produce at their initial deposition despite a proper deposition rider, but under the circumstances of this case, KCBX will likely need to examine the witnesses with the benefit of the documents for the first time at the hearing. KCBX specifically reserved its right to reopen each deposition pending the ruling on the State's MPO. Nonetheless, KCBX is entitled to a hearing based upon a complete record in this matter.

limit the discovery to documents “relied upon by Illinois EPA in acting upon the permit application which is the subject of this litigation.” *Id.* at \*2-3. Incidentally, that is exactly how KCBX narrowly tailored the Riders to its deposition notices—by only requesting documents relied upon (or that should have been relied upon) by Illinois EPA. Thus, *Joliet Sand & Gravel* supports KCBX’s position.

Moreover, Illinois EPA’s speculation regarding the “relevance” of the documents requested in the KCBX Deposition Riders has no bearing on its obligation to file the complete administrative record in this proceeding. Section 105.212 of the Board’s Rules provides, in relevant part, as follows:

Agency Record

- a) The Agency must file its *entire record of its decision* with the Clerk in accordance with Section 105.116 of this Part.
- b) The record must include: \* \* \*
  - 5) *Any other information the Agency relied upon in making its decision.*

35 Ill. Admin. Code § 105.212(a) and (b)(5) (emphasis added); *see also Estate of Gerald Slightom v. Illinois EPA*, PCB No. 11-25, 2012 Ill. ENV LEXIS 148, \*30-31 (April 19, 2012) (Board denied Illinois EPA request for Interlocutory Appeal of Board order mandating the inclusion of additional documents in the administrative record, noting that “[e]ach of the documents previously requested by the Board is a document submitted to the Agency, prepared by the Agency, and/or relied upon by the Agency in making its final determination of the Estate’s reimbursement claim.”).

It is undisputed that the documents requested in the KCBX Deposition Riders were prepared by Illinois EPA personnel during the review of the Request for Revision

and are directly related to the Request for Revision. Therefore, these are documents that should have been included in the administrative record filed by Illinois EPA. In fact, if Illinois EPA had filed a complete administrative record in this proceeding, the KCBX Deposition Riders likely would have been unnecessary.

Equally important, by withholding the requested documents based on its own determination of "relevance," Illinois EPA is not only depriving KCBX of the opportunity to review the entire administrative record related to its denial of the Request for Revision, but is also divesting the Board of its authority to make determinations regarding the relevance of certain information and evidence which should be included in the administrative record. Illinois EPA maintains that "Petitioner has already been able to make extensive inquiry into the subject matter of the requested documents at deposition." *Interlocutory Appeal*, p. 5. But the transcripts of the depositions demonstrate that KCBX was improperly precluded by counsel for Illinois EPA from reviewing or inquiring into documents referenced in Riders or the Privilege Log. Exhibit A, Certified Questions from Deposition of Robert Bernoteit, Michael Dragovich, Raymond Pilapil, and Joseph Kotas.

V. **THE ILLINOIS EPA HAS FAILED TO ESTABLISH THAT THE ATTORNEY-CLIENT PRIVILEGE ALLOWS NON-PRODUCTION**

The Board has found that the party claiming the attorney-client privilege must prove the following:

- (1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are at his instance permanently protected, (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived.

*Illinois EPA v. Celotex Corp.*, PCB No. 79-145, (Dec. 6, 1984) (citing 8 Wigmore, Evidence, Sec. 2292). In addition, regarding the confidentiality requirement, the Board has held that "the factual basis for Agency decision-making on permits *does not result in an expectation of confidentiality.*" *Waste Management, Inc. v. Illinois EPA*, PCB Nos. 84-45,84-61,84-68, (Aug. 10, 1984). (emphasis added.)

The Illinois EPA contends that "considering the expedited schedule in this matter, the Board should find that Illinois EPA's disclosure [of its privilege log] adequately establishes its claims of attorney-client privilege." Interlocutory Appeal, p. 6. The privilege log, however, fails to establish that the documents are, in fact, privileged. Listing the authors and recipients of the communications, and noting that KCBX's counsel is familiar with the individuals (Interlocutory Appeal, pp. 6-7), does not establish that the communications were made for the purpose of legal advice and does not establish that the communications were *not* a part of the Illinois EPA's *factual basis* for its decision-making. The Illinois EPA essentially asks the Board to assume that these factors are satisfied merely because it produced a privilege log. *Id.* p. 7. The Illinois EPA's submissions are insufficient to establish the privilege and are insufficient to warrant overturning the Hearing Officer's order on this subject.

Moreover, the administrative record filed by Illinois EPA in this proceeding raises questions regarding certain documents listed on the Illinois EPA privilege log. For instance, document P000001 is described as an e-mail "re FESOP application" from C. Pressnall to M. Dragovich and V. Brodsky. There is no FESOP application contained in the administrative record filed by Illinois EPA, so it is unclear what this email refers to and why the information contained in the e-mail would be covered by the attorney-client

privilege. Similarly, document P000002-P000022 is an "Email re draft revised construction permit," but there is no draft revised construction permit found in the administrative record filed by Illinois EPA, and no indication in the privilege log as to why a draft revised construction permit would be covered by the attorney-client privilege. Mr. Dragovich confirmed that he did prepare a Draft permit. Exhibit B, Transcript of Discovery Deposition of Michael Dragovich, Apr. 9, 2014, pp. 70-71.

The Illinois EPA then acknowledges that *in camera* inspection of the documents is a possible remedy, but asserts that such an exercise would be pointless because it is only 15 days before the hearing in this case. Interlocutory Appeal, p. 7. Thus, Illinois EPA requests that the Board assume that Illinois EPA has established the privilege, refrain from ever looking at the documents to see if they are actually privileged or instead relate to the *factual basis* for the decision, and require KCBX to proceed to hearing where questions remain as to whether the record in this matter is complete. If the Board accepts the Interlocutory Appeal and finds that the Hearing Officer's ruling on the attorney-client privilege was erroneous, in the very least the Board should examine the documents listed in the privilege log (e-mails and attachments) to determine if they—or portions of them that contain factual matters and not attorney's mental impressions or advice—should be produced to KCBX prior to the hearing, as well as any other documents that the Illinois EPA assert are entitled to the attorney-client privilege. *Johnson v. Frontier Ford, Inc.*, 68 Ill. App. 3d 315, 321, 386 N.E.2d 112, 116 (1979) ("In the absence of other sufficient proof of the claimed privilege the *in camera* examination of the disputed documents ordered by the trial court appears to us to be a reasonable effort by it to find a basis to protect the privilege if it existed, and to prevent its application where it might not exist.")

**VI. CONCLUSION**

“To the extent that the Agency has relied upon information beyond that contained in the application, such information *must* be included in the permit record filed with the Board; if it is not, the applicant may properly submit such information to the Board during the course of the Board's hearing.” *Joliet Sand & Gravel Co. v. IEPA*, PCB 86-159, (Feb. 5, 1987) 1987 WL 55908, \*4 (emphasis added). “Additionally, if there was information in the Agency's possession upon which it reasonably should have relied, the applicant may also submit such information to the Board for the Board's consideration.” *Id.* Indeed, “[i]t is proper to inquire, and discovery should be allowed, to insure that the record filed by the Agency is complete and contains all of the material concerning the permit application that was before the Agency when the denial statement was issued.” *Chicago Coke Company v. IEPA*, PCB 10-75 (March 28, 2012), 2012 WL 1071491, \*6 (quoting *Owens-Illinois, Inc. v. IEPA*, PCB 77-288 (Feb. 2, 1978)).

KCBX is merely asserting its right to, and the Board requirement of, a complete record in this matter. The Illinois EPA failed to establish that there are sufficient grounds for the entry of a protective order with respect to the deposition Riders; the deliberative process privilege does not exist; the documents requested are relevant and discoverable; and it has not been established that the attorney-client privilege applies. The Hearing Officer properly denied the motion, and the Board should either deny the Interlocutory Appeal or accept the Interlocutory Appeal and affirm the ruling of the Hearing Officer. Alternatively, the Board should conduct *in camera* inspection of the documents claimed to be privileged to ensure that all documents the Illinois EPA relied upon or could have relied upon are in the record.

WHEREFORE Petitioner, KCBX TERMINALS COMPANY, respectfully prays that the Board deny Illinois EPA's Interlocutory Appeal or, if the Board accepts the Interlocutory Appeal, affirm the Hearing Officer's rulings in his April 8, 2014 Order or, alternatively, conduct *in camera* inspection of the documents claimed to be privileged and issue a ruling as soon as practicable.

Respectfully submitted,

KCBX TERMINALS COMPANY,  
Petitioner,

Dated: April 15, 2014

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

Katherine D. Hodge  
Edward W. Dwyer  
Matthew C. Read  
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Post Office Box 5776  
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Exhibit A

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KCBX TERMINALS COMPANY, )  
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Petitioner, )  
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vs. )  
ILLINOIS ENVIRONMENTAL )  
PROTECTION AGENCY, )  
 )  
Respondent. )

PCB 14-110  
(Permit Appeal-Air)

CERTIFIED QUESTION FROM THE DEPOSITION OF  
ROBERT BERNOTEIT, BEFORE DONNA M. DODD, CSR AND  
NOTARY PUBLIC ON APRIL 9, 2014, ON PAGE NUMBER 11  
LINE NUMBER 17.

DONNA M. DODD, CSR  
6631 Ryan Court  
Cantrall, Illinois 62625  
(217) 652-2474

1 PAGE 11 LINE 17:

2

3 BY MR. DWYER:

4 Q. So, Mr. Bernoteit, if I were to ask you  
5 questions regarding the information in Exhibit 2, I  
6 just want to confirm that, on advice of counsel,  
7 you would not be answering any of those questions?

8 THE DEPONENT: That is correct.

9 MR. DWYER: Just certify that for me.

10 (Whereupon the question will be  
11 certified.)

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1 STATE OF ILLINOIS )

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3 COUNTY OF SANGAMON )

4 C E R T I F I C A T E

5 I, DONNA M. DODD, a Certified Shorthand  
6 Reporter and Notary Public, do hereby certify that  
7 the attached questions were asked of the Deponent  
8 herein, ROBERT BERNOTEIT, during the course of  
9 taking said deposition on April 9, 2014.

10 I further certify that said Deponent,  
11 ROBERT BERNOTEIT, refused to answer said questions.

12 Given under my hand and seal this 11th  
13 day of April, A.D., 2014.

14 \_\_\_\_\_  
15 Certified Shorthand Reporter  
16 and Notary Public  
17 CSR # 084-003912

18  
19 My commission expires  
20 May 19, 2014.

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22  
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24



1 PAGE 8 LINE 18 to PAGE 10 LINE 2

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3 BY MR. DWYER:

4 Q. Okay. So did you not know that those  
5 categories of documents were requested from you  
6 when you came today?

7 MS. PAMENTER: Objection. It calls for  
8 attorney/client privilege information.

9 MR. DWYER: Are you instructing him not to  
10 answer?

11 MS. PAMENTER: Well, we're getting into an  
12 area with respect to this deposition rather than,  
13 as you know, we've indicated that we're filing a  
14 Notice of Appeal of Mr. Halloran's decision of  
15 August 8th, 2012 -- excuse me, 2014 with respect to  
16 our Motion for Protective Order.

17 We advised you at the status hearing  
18 yesterday that we would not be producing any  
19 documents with respect to that until there is a  
20 final order that's been issued by the Illinois  
21 Pollution Control Board with respect to the issue.  
22 So Mr. Dragovich will not be answering questions  
23 with respect to the documents at issue.

24 MR. DWYER: Okay. Just so I'm clear, is

1 counsel instructing him not to answer the question?

2 MS. PAMENTER: Can you repeat the  
3 question?

4 (Whereupon, the requested portion  
5 of the record was read back.)

6 MS. PAMENTER: I'm instructing the witness  
7 not to answer, that's correct.

8 MR. DWYER: Okay. Would you certify that  
9 question for the record?

10 (Whereupon the question will be  
11 certified.)

12

13 PAGE 25 LINE 10 TO PAGE 27 LINE 5:

14

15 BY MR. DWYER:

16 Q. Okay. Do you recall this e-mail?

17 MS. PAMENTER: I'm going to object with  
18 respect to the privilege log. We provided you a  
19 privilege log. We set forth the basis with respect  
20 to all of these. There's a pending -- there's a  
21 pending motion. There's a pending Notice of Appeal  
22 with respect to certain of the documents that are  
23 set forth on the privilege log. For those that you  
24 have not filed a motion yet, that's available to

1 you. I'm going to instruct the witness not to  
2 answer questions with respect to the privilege log.

3 MR. DWYER: Okay. So, if you would,  
4 certify that question.

5 (Whereupon the question will be  
6 certified.)

7 BY MR. DWYER:

8 Q. The next question, Mike, is regarding the  
9 third e-mail listed. Does that indicate that the  
10 third e-mail on the list was authored by you?

11 MS. PAMENTER: Objection. The document  
12 speaks for itself in terms of who is set forth with  
13 respect to every single e-mail or document that is  
14 set forth on this privilege log. I'm instructing  
15 the witness not to answer questions with respect to  
16 the privilege log given the pending motion and  
17 Notice of Appeal and the availability for KCBX  
18 Terminals Company to file additional motions with  
19 respect to the privilege log document.

20 MR. DWYER: And I will -- please certify  
21 that question, and I will continue with these  
22 questions, and I'm fine, we can certify each one.

23 (Whereupon the question will be  
24 certified.)

1 BY MR. DWYER:

2 Q. With respect to the third e-mail on the  
3 list, Mike, on the far right column does it  
4 indicate that that e-mail is approximately 20 pages  
5 in length?

6 MS. PAMENTER: Objection. The document  
7 speaks for itself. I'm instructing the witness not  
8 to answer the question.

9 MR. DWYER: Please certify that question.  
10 (Whereupon the question will be  
11 certified.)  
12

13 PAGE 28 LINE 20 TO PAGE 29 LINE 15:  
14

15 BY MR. DWYER:

16 Q. Okay. Is that a reference to a draft  
17 permit calculation sheet you prepared regarding the  
18 permit in this proceeding?

19 MS. PAMENTER: Objection. The privilege  
20 log, Exhibit 2 I believe that we're on, speaks for  
21 itself. This is part of a pending motion with  
22 respect to the pre-deliberative process privilege  
23 that is both part of a motion for protective order  
24 currently before the court -- excuse me, a Motion

1 to Supplement currently before the Court and a  
2 Notice of Appeal with respect to a Motion for  
3 Protective Order. As such, I'm instructing the  
4 witness not to answer.

5 MR. DWYER: And the objection is based  
6 upon the predecisional privilege just to be clear?

7 MS. PAMENTER: Yes.

8 MR. DWYER: All right. And let's certify  
9 that question as well.

10 (Whereupon the question will be  
11 certified.)

12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24

1 STATE OF ILLINOIS )

2 )

3 COUNTY OF SANGAMON )

4 C E R T I F I C A T E

5 I, DONNA M. DODD, a Certified Shorthand  
6 Reporter and Notary Public, do hereby certify that  
7 the attached questions were asked of the Deponent  
8 herein, MICHAEL DRAGOVICH, during the course of  
9 taking said deposition on April 9, 2014.

10 I further certify that said Deponent,  
11 MICHAEL DRAGOVICH, refused to answer said  
12 questions,

13 Given under my hand and seal this 11th  
14 day of April, A.D., 2014.

15

16 \_\_\_\_\_  
17 Certified Shorthand Reporter  
18 and Notary Public  
19 CSR # 084-003912

20

21 My commission expires  
22 May 19, 2014.

23

24

24



BEFORE THE ILLINOIS POLLUTION CONTROL BOARD  
KCBX TERMINALS COMPANY, )

)

Petitioner,)

vs. ) PCB 14-110

) (Permit Appeal - Air)

ILLINOIS ENVIRONMENTAL )  
PROTECTION AGENCY, )

)

Respondent.)

The discovery deposition of JOSEPH N. KOTAS,  
taken in the above-entitled cause, before Ronda L. Jones, a  
notary public of Cook County, Illinois, on the 11th day of  
April, 2014, at 69 West Washington Street, Suite 1800,  
Chicago, Illinois, at the hour of 9:28 a.m., pursuant to  
notice. (Proceedings concluded at 11:20 a.m.)

Reported by: Ronda L. Jones, CSR, RPR

License No.: 084-002728

1 APPEARANCES:

2 HODGE, DWYER & DRIVER  
3 BY: MR. EDWARD W. DWYER  
4 MR. MATTHEW C. READ  
5 3150 Roland Avenue  
6 Post Office Box 5776  
7 Springfield, Illinois 62705-5776  
8 (217) 523-4900  
9 edwyer@hddattorneys.com  
10 mread@hddattorneys.com  
11 Representing the Petitioner;

12  
13 OFFICE OF THE ATTORNEY GENERAL  
14 STATE OF ILLINOIS  
15 BY: MR. CHRISTOPHER J. GRANT  
16 MS. KATHRYN A. PAMENTER  
17 69 West Washington Street, Suite 1800  
18 Chicago, Illinois 60602  
19 (312) 964-3013  
20 cgrant@atg.state.il.us  
21 kpamenter@atg.state.il.us  
22 Representing the Respondent.

23  
24

1 Q. Who do you report directly to?

2 A. Emilio Salis, S-a-l-i-s.

3 Q. What is his position?

4 A. He's public service administrator.

5 Q. Which office is he in?

6 A. Des Plaines.

7 Q. What other positions have you held at Illinois EPA?

8 A. None.

9 Q. Do you hold any special certifications related to  
10 your position?

11 A. Yes. I am certified in -- well, I'm a licensed  
12 asbestos inspector, and I've had certifications for Method 9  
13 visible emission reading, but currently it's an expired  
14 certificate. That's all.

15 Q. Are you a P.E.?

16 A. No.

17 Q. In preparing for this deposition did you speak with  
18 anyone?

19 A. Yes.

20 Q. Who did you speak with?

21 A. Christopher Grant.

22 Q. And that's it?

23 A. Yes.

24 Q. I'd like to show you what's marked as Exhibit 1.

1     Could you please turn to the third page of that document?

2     Have you ever seen this document before?

3         A. Yes.

4         Q. When was the first time you saw it?

5         A. I'm not sure. A few weeks ago.

6         Q. Could you skip ahead two pages? Do you see the  
7 three categories of information on this page?

8         A. Yes.

9         Q. Are you aware of these categories of documents  
10 existing?

11         A. Yes.

12         Q. Did you bring those with you?

13         A. No.

14         MR. GRANT: For the record we directed Mr. Kotas to not  
15 bring the documents attached on the rider pursuant to our  
16 pending motion with the hearing officer for a protective  
17 order and which at this point there's probably an appeal of  
18 the hearing officer order to the board. So he didn't bring  
19 it at our direction I guess is what I'm saying.

20         BY MR. READ:

21         Q. Mr. Kotas, did you rely on any of the documents in  
22 those three categories during the course of your inspections?

23         A. Yes.

24         Q. Can you explain how you relied on those documents?

1 MR. GRANT: I'm going to object and direct him not to  
2 answer any more questions about the deposition rider because  
3 it's an issue that we're litigating before the board, and we  
4 don't think the questions authenticating; for example,  
5 exhibits that are not going to be produced, is relevant or  
6 appropriate. So I'll direct him not to answer the question.

7 MR. READ: I'd like to certify the last question.

8 BY MR. READ:

9 Q. Mr. Kotas, are you familiar with the KCBX Terminals  
10 Company?

11 A. Yes.

12 Q. How?

13 A. I performed inspections at the KCBX north plant and  
14 KCBX south plant.

15 Q. Did you inspect the south facility before July  
16 23rd, 2013?

17 A. Before when?

18 Q. July 23rd, 2013.

19 A. Not while it was owned by KCBX.

20 Q. But you inspected that facility owned by a  
21 different party?

22 A. Yes.

23 Q. And who is that party?

24 A. DTE Energy.

Exhibit B

04/09/2014

<p>1 BEFORE THE ILLINOIS POLLUTION CONTROL BOARD</p> <p>2 KCBX TERMINALS COMPANY,</p> <p>3 Petitioner,</p> <p>4 vs.</p> <p>5 ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,</p> <p>6 Respondent.</p> <p>7</p> <p>8</p> <p>9 Discovery Deposition of MICHAEL DRAGOVICH,</p> <p>10 taken at the instance of the Petitioner, on April</p> <p>11 9, 2014, scheduled for the hour of 9:00 a.m., at</p> <p>12 3150 Roland Avenue, Springfield, Illinois, before</p> <p>13 Donna M. Dodd, Certified Shorthand Reporter and</p> <p>14 Notary Public, pursuant to the attached</p> <p>15 stipulation.</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21 DONNA M. DODD, CSR</p> <p>22 donnadoddcsr@att.net</p> <p>23 (217) 652-8474</p> <p>24 (217) 467-7715</p>	<p style="text-align: right;">3</p> <p style="text-align: center;"><u>INDEX</u></p> <p style="text-align: center;"><u>PAGE</u></p> <p>1</p> <p>2</p> <p>3 Direct Examination by Mr. Dwyer 4</p> <p>4</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10 <u>EXHIBITS</u> <span style="float: right;"><u>MARKED</u></span></p> <p>11 Deposition Exhibit Nos. 1-13 4</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16 (Exhibits retained by Mr. Dwyer.)</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p>
<p>1 APPEARANCES:</p> <p>2</p> <p>3 EDWARD W. DWYER</p> <p>4 KATHERINE D. HODGE</p> <p>5 MATTHEW C. READ</p> <p>6 Hodge, Dwyer &amp; Driver</p> <p>7 Attorneys at Law</p> <p>8 3150 Roland Avenue</p> <p>9 Springfield, Illinois 62701</p> <p>10 edwyer@hddattorneys.com</p> <p>11</p> <p>12 Appeared on behalf of the Petitioner,</p> <p>13</p> <p>14</p> <p>15</p> <p>16 KATHRYN A. PAMENTER</p> <p>17 CHRISTOPHER J. GRANT</p> <p>18 Assistant Attorney Generals</p> <p>19 Attorney General's Office</p> <p>20 68 West Washington Street, 18th Floor</p> <p>21 Chicago, Illinois 60602</p> <p>22 (312) 814-0608</p> <p>23 kpamenter@atg.state.il.us</p> <p>24</p> <p>Appeared on behalf of the Respondent.</p> <p>ALSO PRESENT:</p> <p>Mr. James Lee Morgan, IEPA</p> <p>Mr. Jeff Culver, Koch Companies</p>	<p style="text-align: right;">4</p> <p>1 (Deposition Exhibit Nos.</p> <p>2 1-13 were marked for</p> <p>3 identification prior to the</p> <p>4 start of the deposition.)</p> <p>5 IT IS HEREBY STIPULATED AND AGREED by and</p> <p>6 between Counsel for the Petitioner and Counsel for</p> <p>7 the Respondent that this deposition may be taken in</p> <p>8 shorthand by DONNA M. DODD, an Illinois Certified</p> <p>9 Shorthand Reporter and Notary Public, and</p> <p>10 afterwards transcribed into typewriting, and the</p> <p>11 signature of the Witness is waived by agreement.</p> <p>12 (The witness was sworn by the Reporter.)</p> <p>13 MICHAEL DRAGOVICH,</p> <p>14 called as a witness herein, at the instance of the</p> <p>15 Petitioner, having been duly sworn upon his oath,</p> <p>16 testified as follows:</p> <p>17 DIRECT EXAMINATION</p> <p>18 BY MR. DWYER:</p> <p>19 Q. Mike, my name is Ed Dwyer. I'm an</p> <p>20 attorney representing KCBX Terminals. I want to</p> <p>21 let the record reflect that this is the discovery</p> <p>22 deposition of Mr. Mike Dragovich taken pursuant to</p> <p>23 notice to all parties and in accordance with the</p> <p>24 Rules of the Pollution Control Board, the Code of</p>

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1 But my question is, do you recall  
 2 whether or not you typed this information into  
 3 Section 7, this part of the document, before or  
 4 after December 18th?  
 5 **A. I don't know. I'd say before.**  
 6 **Q. Okay. And if we then look to Section 8,**  
 7 **Mike, which is the last section referred to as**  
 8 **conclusions and recommendation, it says that,**  
 9 **indicate your final recommendation (e.g., NOI,**  
 10 **which means Notice of Incompleteness, is that**  
 11 **correct?**  
 12 **A. Yes.**  
 13 **Q. Okay. And then it says, or denial or**  
 14 **issue permit with conditions, etc., and indicate**  
 15 **the reason or reasons for that action.**  
 16 **So if we go to the last page, page 9,**  
 17 **the first paragraph there it says that, it's**  
 18 **recommended that the revised permit be granted and**  
 19 **it goes on to describe the equipment, is that**  
 20 **correct?**  
 21 **A. That's what it reads.**  
 22 **Q. Okay. And then after that paragraph, the**  
 23 **last paragraph on this page says, it begins, it is**  
 24 **recommended that this permit denial be issued. And**

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1 so what I want to talk to you about right now,  
 2 Mike, is the initial recommendation in the document  
 3 is to grant the revised construction permit. And  
 4 my question to you first on that is, when did you  
 5 prepare that portion of this document?  
 6 **A. When? I could have prepared it in**  
 7 **September.**  
 8 **Q. Is there any way -- do you have any notes**  
 9 **or documents from which you could refresh your**  
 10 **recollection as to when you prepared that first**  
 11 **paragraph on page 9?**  
 12 **A. I don't remember.**  
 13 **Q. But you think it may have been in**  
 14 **September?**  
 15 **A. Yes.**  
 16 **Q. Okay. And did you prepare a draft permit**  
 17 **at or near the time that you drafted the first**  
 18 **paragraph on page 9?**  
 19 **A. I prepare a lot of things.**  
 20 **Q. Well, it's -- I think it's a**  
 21 **straightforward question, Mike.**  
 22 **Did you prepare a draft permit at or**  
 23 **near the time that you drafted the paragraph at the**  
 24 **top of page 9 that recommends that the permit be**

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1 granted?  
 2 **A. Yes.**  
 3 **Q. Okay. And, to the best of your**  
 4 **recollection, when did you prepare that draft**  
 5 **permit?**  
 6 **A. A few days after I received the**  
 7 **information from Terry Steinert.**  
 8 **Q. Okay. And did you provide that draft**  
 9 **permit to anyone else at the agency?**  
 10 **A. Yes.**  
 11 **Q. Okay. And to whom did you provide it?**  
 12 **A. Baleriy Brodsky.**  
 13 **Q. Okay. And did you discuss the draft**  
 14 **permit with Mr. Brodsky at all?**  
 15 **A. Yes.**  
 16 **Q. And tell me what the substance of those**  
 17 **discussions were.**  
 18 **A. That we sat in a meeting August 27th. I**  
 19 **was trying to look at what was in the application,**  
 20 **previous application. I was trying to figure out**  
 21 **really what he was asking in the application,**  
 22 **because he was talking about KCBX North and South.**  
 23 **So I took the information that I had from Terry**  
 24 **Steinert.**

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1 **Q. And let me stop you. That was -- that was**  
 2 **the list of the equipment and the equipment**  
 3 **numbers, is that correct?**  
 4 **A. Yes.**  
 5 **Q. And that was provided to you by e-mail, we**  
 6 **discussed earlier, several days after the August**  
 7 **27th, 2013 meeting?**  
 8 **A. Within a few days I think, a day or**  
 9 **something. During the meeting Terry said he was**  
 10 **going to get me some information. He said he was**  
 11 **going to have it by Friday. It didn't come until a**  
 12 **few days later. And in the meeting I was under the**  
 13 **understanding that they were wanting this thing,**  
 14 **conditions, and --**  
 15 **Q. I'm sorry. Could you say that again,**  
 16 **Mike? At the meeting you understood --**  
 17 **A. They was asking us to proceed with this**  
 18 **permit process soon, that they needed this**  
 19 **equipment for in the North, because in the**  
 20 **application it says something about, they had a**  
 21 **throughput and they weren't able to -- they**  
 22 **couldn't produce what they was wanting to produce**  
 23 **with the equipment.**  
 24 **Q. They couldn't produce or they couldn't**