

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

PCB No. 14-110
(Air Permit Appeal)

NOTICE OF ELECTRONIC FILING

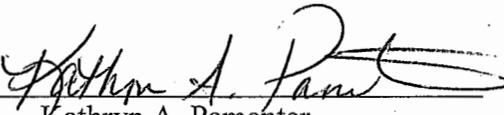
To: *Via Facsimile*
Katherine D. Hodge
Edward W. Dwyer
Matthew C. Read
Hodge Dwyer & Driver
3150 Roland Avenue
Springfield, IL 62705

Via Email
Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 W. Randolph Street
Chicago, Illinois 60601

Via Facsimile
Stephen A. Swedlow
Quinn Emanuel
500 West Madison Street, Suite 2450
Chicago, IL 60661

PLEASE TAKE NOTICE that on the 28th day of April, 2014, the Respondent's Response to Petitioner's Motion to Compel Production of Documents Responsive to Deposition Rider for Julie Armitage was filed with the Illinois Pollution Control Board, a true and correct copy of which is attached hereto and is hereby served upon you.

ILLINOIS ENVIRONMENTAL PROTECTION
AGENCY

By: 
Kathryn A. Pamerter
Christopher J. Grant
Robert Petti
Assistant Attorneys General
Environmental Bureau
69 W. Washington St., 18th Floor
Chicago, IL 60602

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

**RESPONDENT'S RESPONSE TO PETITIONER'S MOTION TO COMPEL
PRODUCTION OF DOCUMENTS RESPONSIVE
TO DEPOSITION RIDER FOR JULIE ARMITAGE**

On Friday, April 25, 2014 at 5:23 p.m., one business day prior to the scheduled hearing in this permit appeal, KCBX Terminals Company ("Petitioner") faxed a Motion to Compel Production of Documents Responsive to Deposition Rider for Julie Armitage ("Motion to Compel"), asserting that the Illinois Environmental Protection Agency (the "Illinois EPA") has taken "disingenuous" positions in this matter and failed to include certain documents in the Administrative Record, and accusing Attorney Kathryn Pamerter of making a misrepresentation to the Hearing Officer on April 22, 2014.¹ (Motion to Compel at pp. 4-5.) Despite the serious nature of its allegations, Petitioner's basis for its assertions and accusation is only a phrase from a sentence from a paragraph in an email dated Thursday, April 24, 2014. (*Id.* at p. 4, ¶ 12.) Despite having all day on Friday, April 25, 2014 to do so, Attorney Matthew Read, the signator to the Motion to Compel, did not contact counsel to the Illinois EPA to discuss the April 24, 2014 email before filing a pleading with the Illinois Pollution Control Board making

¹ Contrary to Petitioner's contention, Ms. Pamerter stated during the April 21, 2014 status call, that she understood Ms. Armitage had been out-of-the-office on April 17 and 18, 2014. As such, Ms. Pamerter was uncertain whether the documents responsive to Ms. Armitage's deposition rider would be filed as a supplement on April 21 or 22, 2014. Ms. Pamerter confirmed during the status call on April 22, 2014, that she was continuing to work on filing an additional supplement to the Administrative Record.

unsubstantiated allegations of unethical conduct. A simple review of the correspondence between counsel and the April 21 and 22 Supplements to the Administrative Record evidences that the Motion to Compel is baseless.

On Thursday, April 24, 2014, Ms. Pamenter responded in order to each of the five bulleted items set forth in Mr. Read's April 24, 2014 correspondence. (*Compare* April 24, 2014 email from Kathryn Pamenter to Matthew Read, a true and correct copy of which is attached hereto as Exhibit A, with April 24, 2014 correspondence from Matthew Read to Kathryn Pamenter, a true and correct copy of which is attached hereto as Exhibit B.) In addition, Ms. Pamenter wrote, in its entirety, as follows:

The last paragraph of your correspondence requested that the redacted documents included in the Supplements to the Administrative Record dated April 21 and 22, 2014 be filed in unredacted form as a further supplement. First, the remaining redacted documents that were included in the Privilege Log are the subject of the Motion for Reconsideration pending before the Illinois Pollution Control Board. Second, the redacted portions of the documents not originally listed in the Privilege Log are not responsive to the depositions riders. Further, the Board's April 17, 2014 Order did not require the production of documents concerning other cases, and did not address the deposition rider attached to Julie Armitage's Notice of Deposition.

(Exhibit A.) This paragraph is in response to Mr. Read's last paragraph in his April 24, 2014 letter, demanding that the Illinois EPA file unredacted versions of the redacted documents in the April 21 and 22 Supplements to the Administrative Record. Specifically, Mr. Read's last paragraph of his April 24, 2014 letter provides, in its entirety:

Therefore, we request that Illinois EPA produce these documents to us, and move to supplement the record with these documents, immediately. In addition, *the supplements to the Administrative Record filed by Respondent on April 21 and 22, 2014, include documents that have been redacted or withheld for various reasons, including attorney-client privilege and as exempt under the Freedom of Information Act.* In light of the Board's order on April 17, 2014, we again renew our request for *these documents* to be provided in full.

(Exhibit B at p.2. (emphasis added).) Mr. Read's last paragraph concerned only documents already included in the supplements to the Administrative Record, not the deposition rider to Ms. Armitage's Notice of Deposition discussed in the Motion to Compel. As with the bulleted items in Mr. Read's letter, Ms. Pamenter responded directly to the subject matter of Mr. Read's last paragraph, namely the redacted documents included in the April 21 and 22 supplements to the Motion to Compel.² (Exhibit A.) Only by ignoring the express language of Mr. Read's last paragraph and selectively quoting Ms. Pamenter's email can Petitioner contend that the Illinois EPA did not produce documents responsive to Ms. Armitage's deposition rider.

In filing the Motion to Compel, Petitioner also ignored its own correspondence dated April 22, 2014, a true and correct copy of which is attached hereto as Exhibit C. In the April 22, 2014 correspondence, Petitioner demands that documents discussed during Ms. Armitage's deposition responsive to her deposition rider be included in the Administrative Record. (Exhibit C, seeking for example, other facilities' fugitive dust plans, California regulations and correspondence to elected officials.) In the Motion to Compel, Petitioner states that it reviewed the April 21 and 22 Supplements to the Administrative Record. (Exhibit A at ¶ 10.) As a result, at the time of filing the Motion to Compel, Petitioner was aware that the Illinois EPA's letter to Congresswoman Kelly, other facilities' fugitive dust plans and other regulation examples were included in the April 22, 2014 supplement to the Administrative Record. (See R000845-

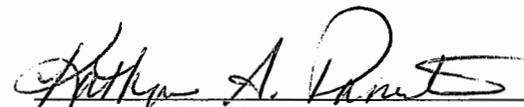
² As Petitioner is aware, neither the Hearing Officer in its April 8, 2014 Order, nor the Illinois Pollution Control Board in its April 17, 2014 Order could have addressed the applicability of any privilege asserted with respect to the redacted documents in the April 22, 2014 Supplement to the Administrative Order, as those documents were first filed in this matter on April 22, 2014 after the April 8, 2014 and April 17, 2014 Orders.

R1427.)³ Petitioner was also aware that included therein are pages of handwritten notes, emails and pages of documents containing handwritten notes. (*Id.*)

Petitioner failed to contact counsel for Illinois EPA regarding Petitioner's apparent misreading of the April 24, 2014 email and then selectively quoted the April 24, 2014 email in a Motion to Compel. Petitioner also ignored its own April 22, 2014 correspondence and its review of the supplements to the Administrative Record filed in this matter. In fact, Ms. Pamenter did respond to the specific request included in Mr. Read's last paragraph of his April 24, 2014 letter, which did not concern Ms. Armitage's deposition rider. Accordingly, the Petitioner's Motion to Compel is baseless and must be denied.

ILLINOIS ENVIRONMENTAL PROTECTION
AGENCY

By:



KATHRYN A. PAMENTER

CHRISTOPHER J. GRANT

ROBERT PETTI

Assistant Attorneys General

Environmental Bureau

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Chicago, Illinois 60602

(312) 814-0608

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³ On April 25, 2014, prior to the filing of the Motion to Compel, the Illinois EPA filed and served its Fourth Supplement to the Administrative Record, which included the Illinois refineries' fugitive dust plans referenced during Ms. Armitage's deposition.

EXHIBIT A

Pamenter, Kathryn

From: Pamenter, Kathryn
Sent: Thursday, April 24, 2014 4:06 PM
To: Matthew C. Read (mread@hddattorneys.com)
Cc: Katherine D. Hodge (khodge@hddattorneys.com); Edward W. Dwyer (edwyer@hddattorneys.com); Morgan, James (James.Morgan@illinois.gov); Grant, Christopher J.; Petti, Robert
Subject: KCBX Terminals Company v. Illinois Environmental Protection Agency (14-110)
Attachments: Notice of Electronic Filing and Third Supplement to the Administrative Record 4.24.14.pdf; Letter to E. Dwyer 4.17.14.pdf

Matthew

Reference is made to your correspondence of 10:56 am earlier today. The Illinois EPA responds to KCBX's bulleted items in that letter as follows:

- The Illinois EPA has not located a response letter to Senator Durbin's and Congresswoman Kelly's December 16, 2013 letter.
- Please see the email in the first attachment (R1428).
- Except for documents that are already included in the Administrative Record and supplements thereto, Mr. Kotas has advised that he has not been able to locate any e-mails or notes responsive to your third bulleted item.
- Except for the documents labeled R1429 – R1431 and the documents that are already included in the Administrative Record and supplements thereto, Mr. Kotas has advised that he has not been able to locate any additional drafts of the inspection reports.
- Please see my correspondence to Mr. Dwyer dated April 17, 2014, a copy of which is attached hereto as a courtesy.

The last paragraph of your correspondence requested that the redacted documents included in the Supplements to the Administrative Record dated April 21 and 22, 2014 be filed in unredacted form as a further supplement. First, the remaining redacted documents that were included in the Privilege Log are the subject of the Motion for Reconsideration pending before the Illinois Pollution Control Board. Second, the redacted portions of the documents not originally listed in the Privilege Log are not responsive to the deposition riders. Further, the Board's April 17, 2014 Order did not require the production of documents concerning other cases, and did not address the deposition rider attached to Julie Armitage's Notice of Deposition.

Please contact me if you have any questions.

Sincerely,
Katie Pamenter

Kathryn A. Pamenter
Assistant Attorney General
Environmental Bureau
69 W. Washington St., 18th Floor
Chicago, IL 60602

Phone: 312-814-0608

Fax: 312-814-2347

Email: KPamenter@atg.state.il.us

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EXHIBIT B



HODGE DWYER & DRIVER

MATTHEW C. READ

E-mail: mread@hddattorneys.com

April 24, 2014

VIA FACSIMILE

(Original via U.S. Mail)

Kathryn A. Pamenter, Esq.
Assistant Attorney General
Illinois Attorney General's Office
69 W. Washington St., 18th Floor
Chicago, Illinois 60602

RE: Follow up from Depositions
KCBX Terminals Company v. Illinois EPA, PCB 2014-110
Our File No. -- KCBX:195.004

Dear Katie,

During discovery depositions, Julie Armitage and Joseph Kotas discussed documents related to the review of the July 23, 2013 Request for Revision that do not appear in the Administrative Record. Those documents, in addition to redacted or additional withheld documents are described in more detail below. KCBX Terminals Company now requests that the Illinois Environmental Protection Agency ("Illinois EPA") immediately produce these documents and incorporate them into the Administrative Record.

- In her deposition, Ms. Armitage described responses to letters from Senator Dick Durbin and Congresswoman Robin Kelly. With regard to a letter from both Senator Durbin and Congresswoman Kelly dated December 16, 2013 (R-000029), Ms. Armitage confirmed that a response was prepared and that she worked with others to prepare it. Discovery Deposition of Julie Armitage at 37 (Apr. 16, 2014). In Illinois EPA's Second Supplement to the Administrative Record, a letter to Congresswoman Kelly dated November 25, 2013 is provided (R-000845). However, no response to the December 16, 2013 letter to either Senator Durbin or Congresswoman Kelly has been provided or incorporated into the Administrative Record.
- In his deposition, Mr. Kotas explained that he was instructed by e-mail to visit the South Terminal by Jim Ross or Harish Narayan. Deposition of Joseph Kotas at 23 (Apr. 11,

Kathryn A. Pamenter, Esq.
April 24, 2014
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2014). However, no such e-mails have been produced or incorporated into the Administrative Record.

- Mr. Kotas explained that he discussed the November FPOP in the Administrative Record (R-000150) with others at Illinois EPA. *Id.* at 48. Mr. Kotas was unable to recall when those discussions occurred, but noted that notes or e-mails would probably be able to refresh his recollection about when they occurred. *Id.* at 49. No such e-mails or notes have been produced or incorporated into the Administrative Record.
- Mr. Kotas explained that he shared a draft inspection report with Jim Morgan, Harish Narayan, and Emilio Salis, and that those individuals recommended revisions to the draft inspection report. *Id.* at 34. The Administrative Record does not contain comments from Mr. Morgan, Mr. Narayan, or Mr. Salis regarding the inspection report, any e-mails or other written communications regarding these persons' review, or any draft inspection reports shared with these individuals.
- Ms. Armitage explained that she reviewed a draft of her witness disclosure and the final version of her witness disclosure. Deposition of Julie Armitage at 21-22 (Apr. 16, 2014). However, the draft of her witness disclosure and any correspondence related to the same have not been produced or incorporated into the Administrative Record.

Therefore, we request that Illinois EPA produce these documents to us, and move to supplement the record with these documents, immediately. In addition, the supplements to the Administrative Record filed by the Respondent on April 21 and 22, 2014, include documents that have been redacted or withheld for various reasons, including attorney-client privilege and as exempt under the Freedom of Information Act. In light of the Board's order on April 17, 2014, we again renew our request for these documents to be provided in full.

Please contact me if you would like to discuss this request.

Sincerely,



Matthew C. Read

MCR:jrs

EXHIBIT C



HODGE DWYER & DRIVER

EDWARD W. DWYER
E-mail: edwyer@hddattorneys.com

April 22, 2014

VIA FACSIMILE

Kathryn A. Pamenter, Esq.
Assistant Attorney General
Illinois Attorney General's Office
69 W. Washington St., 18th Floor
Chicago, Illinois 60602

RE: Follow up from Deposition of Julie Armitage (Apr. 16, 2014)
KCBX Terminals Company v. Illinois EPA, PCB 2014-110
Our File No. - KCBX:195.004

Dear Katie,

During the discovery deposition of Julie Armitage, Ms. Armitage discussed documents related to the review of the July 23, 2013 Request for Revision that do not appear in the Administrative Record. Those documents are described in more detail below. KCBX Terminals Company now requests that the Illinois Environmental Protection Agency ("Illinois EPA") immediately produce these documents and incorporate them into the Administrative Record.

First, Ms. Armitage noted that other fugitive dust plans and California regulations were used as "points of reference" during the review of the July 23, 2013 Request for Revision. Discovery Deposition of Julie Armitage at 42 (Apr. 16, 2014). Ms. Armitage described these documents as "[t]hings that would potentially give us insight into measures that could be taken to address fugitive dust." Id. at 43. She explained that she specifically looked at fugitive dust plans for the following facilities: Vulcan McCook, Chemetco, Beelman, Illinois refineries, and BP Whiting. Id. at 69-70. She also explained that these other fugitive dust plans were used by Joseph Kotas for purposes of compliance and enforcement when conducting his inspection of the South Terminal. Id. at 72. Illinois EPA relied on these other fugitive dust plans and California regulations during the course of its review of the Request for Revision and, therefore, these documents should be produced and incorporated into the Administrative Record.

Second, Ms. Armitage described responses to letters from Senator Dick Durbin and Congresswoman Robin Kelly. With regard to a letter from both Senator Durbin and Congresswoman Kelley dated December 16, 2013 (R-000029), Ms. Armitage confirmed that a

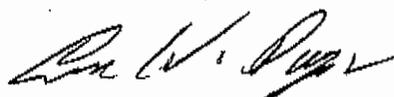
Kathryn A. Pamerter, Esq.
April 22, 2014
Page 2

response was prepared and that she worked with others to prepare it. Id. at 37. Ms. Armitage was unsure whether Illinois EPA prepared a separate response to Congresswoman Kelly's letter dated November 15, 2013 (R-000073-000074). It is reasonable to conclude that Illinois EPA relied on or should have relied on responses prepared to Senator Durbin and Congresswoman Kelly. Therefore, these documents should be produced and incorporated into the Administrative Record.

As you know, the hearing in this matter starts next Tuesday, April 29. Therefore, we request that Illinois EPA produce these documents to us, and move to supplement the record with these documents, immediately.

Please contact me if you would like to discuss this request.

Sincerely,



Edward W. Dwyer

EWD:MCR:jrs

KCBX:004/Corr/Pamerter01 - J. Armitage

CERTIFICATE OF SERVICE

I, KATHRYN A. PAMENTER, an Assistant Attorney General, do certify that I caused to be served this 28th day of April, 2014, the attached Notice of Electronic Filing and Respondent's Response to Petitioner's Motion to Compel Production of Documents Responsive to Deposition Rider for Julie Armitage upon (a) Edward W. Dwyer, Katherine D. Hodge and Matthew C. Read *via facsimile*, (b) Bradley P. Halloran *via email* and (c) Stephen A. Swedlow *via facsimile*.


KATHRYN A. PAMENTER