

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

KCBX TERMINALS COMPANY,)
)
Petitioner,)
)
v.) PCB 11-43
) (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
(VIA ELECTRONIC MAIL) **(VIA FIRST CLASS MAIL)**

(SEE PERSONS ON ATTACHED SERVICE LIST)

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board **PETITIONER'S RESPONSE IN OPPOSITION TO RESPONDENT'S MOTION TO QUASH SUBPOENA**, a copy of which is herewith served upon you.

Respectfully submitted,

KCBX TERMINALS COMPANY,
Petitioner,

Dated: April 5, 2011

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

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

CERTIFICATE OF SERVICE

I, Katherine D. Hodge, the undersigned, hereby certify that I have served the attached PETITIONER'S RESPONSE IN OPPOSITION TO RESPONDENT'S

MOTION TO QUASH 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 5, 2011 and upon:

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

Christopher Grant, Esq.
Illinois Attorney General's Office
69 West Washington Street
Suite 1800
Chicago, Illinois 60602

Christopher R. Pressnall, Esq.
Illinois Environmental Protection Agency
Division of Legal Counsel
1021 North Grand Avenue East
Post Office Box 19276 - mail code #21
Springfield, Illinois 62794-9276

by depositing said documents in the United States Mail, postage prepaid, in Springfield,

Illinois on April 5, 2011.

/s/ Katherine D. Hodge
Katherine D. Hodge

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

KCBX TERMINALS COMPANY,)	
)	
Petitioner,)	
)	
v.)	PCB 11-43
)	(Air Permit Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

**PETITIONER'S RESPONSE IN OPPOSITION
TO RESPONDENT'S MOTION TO QUASH SUBPOENA**

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 the Illinois Environmental Protection Agency's ("Illinois EPA") Motion to Quash Subpoena ("Motion"), states as follows:

1. On February 1, 2011, KCBX initiated this proceeding by filing with the Illinois Pollution Control Board ("Board") its Petition for Review ("Petition") regarding the Renewed Federally Enforceable State Operating Permit ("Renewed FESOP") issued to KCBX by Illinois EPA on December 29, 2010.
2. In its Motion, Illinois EPA claims that KCBX "has demanded an early hearing" in this matter.
3. However, on February 17, 2011, Illinois EPA filed a Request for Extension of Time to File Record, requesting a 30-day extension of the deadline to file the Record, or until April 4, 2011.

4. On February 24, 2011, KCBX agreed to Illinois EPA's Request for Extension of Time to File Record, and also agreed to a corresponding 30-day limited waiver of the Board's statutory decision deadline until July 1, 2011.

5. Thereafter, on March 8, 2011, KCBX filed with the Board a Notice of Waiver of 120-Day Decision Deadline for an Additional 48 Days, or until August 18, 2011.

6. Therefore, KCBX did not insist on an early hearing date in this matter, but instead, agreed to two extensions of the statutory 120-day decision deadline. In addition, KCBX agreed to the additional extensions in order to allow additional time for the parties to prepare for hearing and to brief the issues remaining after hearing in advance of the Board's decision deadline.

7. On March 4, 2011, the parties submitted to the Hearing Officer an agreed Discovery Schedule calling for discovery to be completed by April 19, 2011.

8. On March 9, 2011, KCBX served upon Illinois EPA written discovery requests, including Requests for Admission, Interrogatories and a single Request for Production of Documents, responses to which are due 28 days from the date of service thereof.

9. On March 15, 2011, Illinois EPA filed with the Board its Motion for Additional Time to Respond to Discovery, requesting an additional 30 days to respond to the written discovery requests.

10. In its Motion for Additional Time to Respond to Discovery, Illinois EPA claimed that the written discovery requests propounded on it by KCBX were "extensive

and burdensome.” Further, Illinois EPA claimed the requests consisted of a “massive amount of discovery,” and that KCBX had insisted on an early hearing date in the matter, creating an “unnecessary hardship” on Illinois EPA. Further, Illinois EPA claimed that KCBX was “harassing” Illinois EPA “with overwhelming discovery requests.”

11. On March 22, 2011, KCBX filed its Response in Opposition to Respondent’s Motion for Additional Time to Respond to Discovery. Therein, KCBX noted, in part, that KCBX prepared and served its written discovery requests consistent with the Board rules, the Illinois Code of Civil Procedure and the Illinois Supreme Court Rules.

12. Furthermore, KCBX noted that its written discovery requests were relevant and necessary. They were not “massive” in scope or breadth, did not create an “unnecessary hardship” on Illinois EPA, and were in no way “overwhelming.” Further, it was not the intent of KCBX, in serving the written discovery requests, to harass Illinois EPA in any way. The discovery requests propounded by KCBX were based directly upon the issues raised in its Petition and the terms of the Renewed FESOP that is the subject of this appeal.

13. More importantly, on information and belief, George Kennedy is a former Illinois EPA employee. KCBX believes that, prior to his retirement, Mr. Kennedy was directly involved in drafting the Renewed FESOP as the Permit Engineer assigned to write the Renewed FESOP that is the subject of this appeal. Therefore, his involvement with the Renewed FESOP is extremely relevant to the issues raised by KCBX in this appeal.

14. In its Motion here, Illinois EPA acknowledges that Mr. Kennedy will be out of the country on the date of the hearing in this matter, which is June 1, 2011.

15. Illinois EPA also acknowledges that, on March 24, 2011, KCBX served upon Illinois EPA two deposition subpoenas directed to Mr. Kennedy: one for a discovery deposition and one for an evidence deposition.

16. As the Board is aware, Illinois law provides for two types of oral depositions: those to be used for discovery and those to be used for evidence. See Ill. S. Ct. Rule 212; see also Estate of Rennick, 181 Ill. 2d 395, 401, 692 N.E.2d 1150, 1154 (1998). “The purpose of a discovery deposition is to explore the facts of the case, and for this reason wide latitude is given in the scope and manner of questioning. In contrast, an evidentiary deposition is generally used for the purpose of preserving testimony for trial, and questioning is therefore limited by the rules of evidence.” Id.

17. Illinois EPA also notes in its Motion that the subpoenas KCBX directed to Mr. Kennedy for both the discovery deposition and the evidence deposition included a reference to a three hour time limit.

18. The subpoenas KCBX directed to Mr. Kennedy for the discovery deposition and evidence deposition, however, made no reference to time limits.

19. Section 101.622(f) of the Board rules states as follows:

Unless the hearing officer orders otherwise, any witness subpoenaed for a deposition may be required to attend only in the county in which he resides or maintains an office address. In accordance with Supreme Court Rule 206(d), all depositions must be limited to 3 hours in length unless the parties and the non-party deponent by stipulation agree to a longer time

frame or unless the hearing officer orders otherwise after a showing of good cause. (See Ill. S. Ct. Amended Rule 206(d).)

35 Ill. Admin. Code § 101.622(f). (Emphasis added.)

20. Illinois Supreme Court Rule 206(d) states in pertinent part as follows:

(d) *Duration of Discovery Deposition.* No discovery deposition of any party or witness shall exceed three hours regardless of the number of parties involved in the case, except by stipulation of all parties or by order upon showing that good cause warrants a lengthier examination.

Ill. S. Ct. Rule 206(d). (Emphasis added.)

21. Illinois Supreme Court Rule 206(d), and thus Section 101.622(f) of the Board's rules through incorporation by reference, only contemplates a three hour time limit for discovery depositions. Illinois Supreme Court Rule 206 does not include a time limit for evidence depositions.

22. Moreover, Illinois EPA notes in its Motion that "KCBX has requested that the undersigned waive the 3 hour deposition limit contained in Section 101.622(f) of the Board Procedural Rules."

23. In its request, however, KCBX did not reference any three hour time limit with regard to evidence depositions, but only referenced the time limit with regard to discovery depositions.

24. In its Motion, Illinois EPA also claims that KCBX is attempting to "harass and abuse" Illinois EPA employees, and "double up" with regard to Mr. Kennedy "in an attempt to circumvent the Board's deposition limitation."

25. KCBX is in no way attempting to harass or abuse Illinois EPA employees and is also not attempting to circumvent the Board rules. As noted above, the Board rules

and the Illinois Supreme Court Rules include no time limit for evidence depositions. Additionally, the Board rules and the Illinois Supreme Court Rules do not limit parties to take only one deposition of a witness per day. KCBX seeks to utilize the discovery deposition of Mr. Kennedy to determine whether Mr. Kennedy has relevant testimony with regard to his involvement with Illinois EPA's determinations regarding KCBX's Renewed FESOP. Further, KCBX seeks to utilize the evidence deposition of Mr. Kennedy to preserve his testimony for hearing, since he will be unavailable for hearing on June 1, 2011.

26. In its Motion, Illinois EPA requests that the Hearing Officer limit KCBX to an evidence deposition lasting no more than three hours in duration.

27. The applicable Board rule allows KCBX to take a discovery deposition, limited to three hours in duration, absent the agreement of Illinois EPA to extend the duration of the same, or unless the Hearing Officer orders otherwise (after a showing of good cause). In contrast, neither the Board rules nor the Illinois Supreme Court rules contain limitations on the duration of evidence depositions.

28. Illinois EPA, through both its Motion and its Motion for Additional Time to Respond to Discovery, is seeking to unfairly limit KCBX's access to written discovery responses and oral testimony at deposition, both of which KCBX is entitled to obtain pursuant to the Board rules. As noted above, at the evidence deposition of Mr. Kennedy, KCBX's questioning is "limited by the rules of evidence," because the purpose of the evidence deposition is to preserve testimony for introduction as evidence at hearing. By asking the Hearing Officer to limit KCBX to only an evidence deposition – where its

questioning will be so limited – Illinois EPA is seeking to prevent KCBX from exploring the facts of the case by way of the “wide latitude ... given in the scope and manner of questioning” during a discovery deposition, prior to taking an evidence deposition to preserve whatever testimony of Mr. Kennedy is relevant for introduction at hearing. Illinois EPA’s attempt to so limit KCBX is improper.

29. The purpose of permit appeal proceedings before the Board is to provide the petitioner the opportunity to challenge the information relied upon by, and the reasons given by, Illinois EPA for denying the permit. Alton Packaging Corp. v. PCB, 162 Ill. App. 3d 731, 738, 516 N.E.2d 275, 280 (5th Dist. 1987), citing IEPA v. PCB, 115 Ill. 2d 65, 70, 503 N.E.2d 343, 345 (1986). Furthermore, the permit applicant may appeal conditions of permits issued under Section 39(a) of the Illinois Environmental Protection Act. The courts have held that in order to prevail on its claim, a petitioner must show that Illinois EPA’s imposed modifications:

were not necessary to accomplish the purposes of the Act, or, stated alternatively, [the petitioner] had to establish that its plan would not result in any future violation of the Act and the modifications, therefore, were arbitrary and unnecessary.

Browning-Ferris Industries of Illinois, Inc. v. PCB, 179 Ill. App. 3d 598, 603, 534 N.E.2d 616, 620 (2d Dist. 1989).

30. Circuit courts, or the Board in this case, “may properly stay or quash a discovery request when it has sufficient information upon which to rule” on the merits. Evitts v. DaimlerChrysler Motors Corp., 359 Ill. App. 3d 504, 513, 834 N.E.2d 942, 951 (1st Dist. 2005). However, a discovery request should not be refused “where it reasonably appears discovery might assist the nonmoving party.” Id. at 513-14, 952.

31. The Deposition Notices served by KCBX are in accord with applicable rules, case law and issues raised in its Petition. Therefore, KCBX opposes Illinois EPA's request that the Hearing Officer limit KCBX to an evidence deposition lasting no more than three hours in duration. Rather, KCBX is entitled to both a discovery deposition and an evidence deposition of Mr. Kennedy, and such evidence deposition cannot be limited in time.

WHEREFORE Petitioner, KCBX TERMINALS COMPANY, respectfully prays that the Hearing Officer deny the Respondent's Motion to Quash Subpoena, and provide it all other relief just and proper in the premises.

Respectfully submitted,

KCBX TERMINALS COMPANY,
Petitioner,

Dated: April 5, 2011

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

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

KCBX:003/Fil/FESOP Permit Appeal/Response to Motion to Quash Subpoena