

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

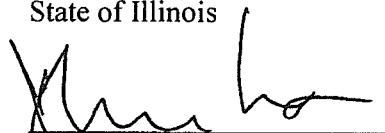
KCBX TERMINALS COMPANY)	
)	
Petitioner,	)	PCB No. 10-110
	)	PCB No. 11-43
	)	(Consolidated)
)	
v.	)	(Permit Appeal-Air)
)	
)	
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY)	
)	
Respondent.)	

NOTICE OF ELECTRONIC FILING

PLEASE TAKE NOTICE that on May 23, 2011, the Respondent filed its Motion to Bar Testimony of Newly Disclosed Witness. A true and accurate copy of the document so filed is attached hereto and herewith served upon you.

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By LISA MADIGAN
Attorney General of the
State of Illinois



Christopher J. Grant
Assistant Attorney General
Environmental Bureau
69 W. Washington Street
Suite 1800
Chicago Illinois, 60602
(312)814-5388

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

KCBX TERMINALS COMPANY,)	
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Petitioner,)	
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)	PCB No. 10-110
v.)	PCB No. 11-43
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ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY)	
)	
Respondent.)	

MOTION TO BAR TESTIMONY OF NEWLY DISCLOSED WITNESS

Now comes Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ("Illinois EPA"), by LISA MADIGAN, Attorney General of the State of Illinois, and respectfully requests that the Hearing Officer bar Respondent from calling any witnesses not named on its March 14, 2011 disclosure. The Hearing Officer should bar additional witnesses for several reasons. First, Petitioner has refused to respond to Respondent's witness and document interrogatories. Also, the late disclosure both violates the schedule set by the Hearing Officer. Finally, the Hearing Officer should sanction this attempt by the Petitioner to gain an unfair advantage by late disclosure of a surprise witness. To enforce the discovery rules and ensure a fair and accurate record for the Board, the Hearing Officer should bar the additional witness disclosed on May 19, 2011.

I. Violation of Discovery Rules

On April 19, 2011, Respondent served petitioner with witness and document Interrogatories. The Interrogatories sought disclosure and identification of expert and fact

witnesses, and production of any documents to be used at hearing¹. Opposing counsel did not respond or object to Respondent's interrogatories until May 18, 2011, when the undersigned received a letter refusing to identify witnesses or produce documents².

Petitioner's refusal to answer simple witness and document interrogatories is a violation of the Board and Supreme Court discovery rules. The Hearing Officer has recognized that barring undisclosed witnesses from testifying is an appropriate sanction³. Respondent requests that the Hearing Officer, in accordance with 35 Ill. Adm. Code 101.800, bar Petitioner from calling any witness besides those disclosed on March 15, 2011.

II. Violation of Hearing Officer Order: Late Witness Disclosure

On March 8, 2011, the Hearing Officer directed that all opinion witnesses be disclosed by Petitioner by March 15, 2011⁴. On that date, Petitioner disclosed three witnesses, all current or former employees of Illinois EPA⁵. Petitioner never moved to extend the deadline for witness disclosure. At the May 17, 2011 telephone status in this matter, counsel for Petitioner confirmed that the only witnesses to be called at hearing would be Mr. Bernoteit and Mr. Kennedy (via deposition)⁶.

However, on May 19, 2011, KCBX filed its "Amended Opinion Witness Disclosure" with the Board. Buried on page four of this document is the disclosure of a new opinion

¹ Illinois EPA was compelled to answer one hundred six Requests to Admit, nineteen Interrogatories, defend four depositions, and search documents. By contrast, Illinois EPA's sole discovery requests to KCBX total four witness interrogatories and disclosure of documents to be used at hearing. A copy of Illinois EPA's requests is attached as Exhibit A.

² See: Exhibit B.

³ See: *Joseph and Victory Morrissey v. Geoff Pahios et al.*, PCB 09-10, May 5, 2010.

⁴ Exhibit C

⁵ Petitioner disclosed Robert Bernoteit, George Kennedy, and Ed Bakowski. All three were subsequently deposed by Petitioner.

⁶ The Hearing Officer Order for this status notes that "there will be no more than two witnesses to testify at hearing". Respondent believes that the Hearing Officer was referring to Mr. Bernoteit and Mr. Kennedy, who were discussed at this status. Certainly there was no discussion of KCBX 'opinion witness' Terry Steinert.

witness: Mr. Terry Steinert, Petitioner's Environmental Compliance Manager⁷.

Respondent is prejudiced by the improper late disclosure, and strongly objects. On May 20th, counsel for Respondent met at Illinois EPA offices in Springfield, Illinois, putting together exhibits and setting up Illinois EPA's case based on the evidence then available. On May 25th, the undersigned will be in circuit court on a long-scheduled Rule to Show Cause in another enforcement matter. On May 26th and 27th, the undersigned will be on vacation for the holiday weekend. There is simply no opportunity to schedule and take Mr. Steinert's deposition prior to the June 1, 2011 commencement of hearing in this matter.

Moreover, the Board should not countenance such behavior. Illinois EPA is entitled to a full and fair hearing, including the opportunity to depose KCBX's witnesses on appropriate notice. The Board, which will be the final arbiter on the issues in this case, is entitled to a complete and accurate record. This cannot be accomplished through 'ambush tactics' and surprise witnesses. To prevent an injustice to Illinois EPA and its defense, the Hearing Officer must bar Mr. Steinert's testimony at the June 1-2, 2011 hearing in this matter.

III. Conclusion

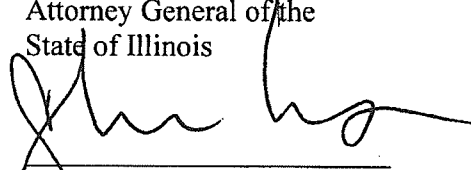
Petitioner's refusal to comply with discovery rules through its refusal to answer interrogatories violated the Board and Supreme Court Discovery Rules. Barring testimony from any witness not disclosed in response (aside from those named on March 15, 2011) is the appropriate sanction. Petitioner's attempt to add a new opinion witness disclosure through its May 19th "Amended Disclosure" violates the discovery orders in this case, contradicts its prior statements in statuses, and unfairly prejudices Illinois EPA's case. Newly disclosed witness Terry Steinert should not be allowed to testify at hearing in this matter.

⁷ Exhibit D. As of the date of filing this Motion, Respondent has not been served with the 'Amended Disclosure' by mail.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

by LISA MADIGAN
Attorney General of the
State of Illinois

A handwritten signature in black ink, appearing to read "Chris Grant", written over a horizontal line.

Christopher J. Grant
Assistant Attorney General
Environmental Bureau
69 West Washington Street
Suite 1800
Chicago, Illinois 60602
(312) 814-5388

COPY

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

KCBX TERMINALS COMPANY,)	
)	
Petitioner,)	
)	
v.	)	PCB No. 11-43
	)	(Permit Appeal-Air)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY)	
)	
Respondent.)	

RESPONDENT'S FIRST SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS TO PETITION KCBX TERMINALS COMPANY

Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, by LISA MADIGAN, Attorney General of the State of Illinois, propounds the following interrogatories and request for production of documents upon Petitioner KCBX Terminals Company, to be answered in writing and under oath within twenty-eight (28) days.

INTERROGATORIES

1. Identify the person answering these Interrogatories on behalf of Petitioner.

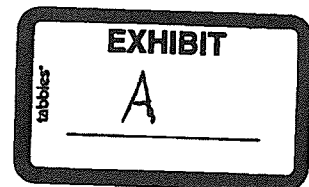
ANSWER:

2. Identify each lay witness, as defined by Illinois Supreme Court Rule 213(f)(1), who will testify at hearing. State the subjects of each lay witness' expected fact testimony at trial and any lay opinion testimony you expect to elicit from each lay witness.

ANSWER:

3. Identify each independent expert witness, as defined by Rule 213(f)(2), who will testify at trial. State the subjects on which the independent expert witness will testify at hearing and any opinions you expect to elicit at trial from each independent expert witness.

ANSWER:



4. Identify each controlled expert witness, as defined by Rule 213(f)(3), who will testify at hearing. State whether such witness is the party, the party's current employee, or the party's retained expert. For each controlled expert witness identified, please state or provide as follows
 - (a) The subject matter on which he witness is expected to testify at trial;
 - (b) The conclusions and opinions of the witness and the bases that will be testified on at trial;
 - (c) The qualifications of the witness, including a curriculum vitae and/or resume;
 - (d) Any reports, notes, memorandum, or writings of any kind prepared by the witness regarding this case;
 - (e) Identify all materials the witness have reviewed and/or relied upon in forming his/her opinions;
 - (f) Identify by dates all correspondence exchanged between Defendant, Defendant's counsel, and the witness.

ANSWER:

REQUEST FOR THE PRODUCTION OF DOCUMENTS

1. Any and all documents which Frontier intends to use at any hearing in this matter.

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

Christopher R. Pressnall
Special Assistant Attorney General
Illinois EPA
1021 N. Grand Ave., East
P.O. Box 19276.
Springfield, Illinois 62794-9276
(217) 524-3003

Dated: April 18, 2011



HODGE DWYER & DRIVER
ATTORNEYS AT LAW

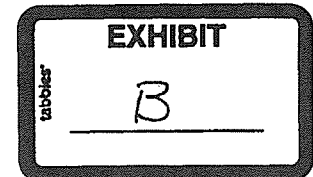
KATHERINE D. HODGE
E-mail: khodge@hddattorneys.com

RECEIVED

MAY 18 2011

ATTORNEY GENERAL
Environmental

May 16, 2011



Christopher R. Pressnall, Esq.
Assistant Counsel
Illinois Environmental Protection Agency
Division of Legal Counsel
1021 North Grand Avenue East
Post Office Box 19276, Mail Code #21
Springfield, Illinois 67294-9276

RE: Discovery Requests
KCBX Terminals Company v. IEPA,
PCB Nos. 10-110 and 11-43
Our File No. – KCBX:003

Dear Chris:

This letter is written in response to Respondent's First Set of Interrogatories and Request for Production of Documents to Petition[er] KCBX Terminals Company ("Discovery Requests"), which you served on Lauren Lurkins and me by first class mail on April 19, 2011. We received the Discovery Requests on April 20, 2011.

For the most part, the Interrogatories included in the Discovery Requests ask for KCBX Terminals Company ("KCBX") to identify its witnesses at hearing. That information has previously been provided to the Illinois Environmental Protection Agency ("Agency") in Petitioner's Opinion Witness Disclosure, which KCBX filed with the Illinois Pollution Control Board ("Board") on March 15, 2011, and will be supplemented as appropriate. Additionally, the Request for Production of Documents included in the Discovery Requests asks for "any and all documents which KCBX Terminals Company intends to use at hearing in this matter." KCBX has not yet determined what specific documents it will use at hearing in this matter; however, any documents it will use at hearing will be part of the Agency Record in this matter (including the supplements thereto), previously filings with the Board in this matter, or written or oral discovery in this matter.

Despite the information provided above, KCBX objects to the Agency's Discovery Requests as they are untimely. Section 101.616(c) of the Board's rules states that "[a]ll discovery must be completed at least 10 days prior to the scheduled hearing in the proceeding

Christopher R. Pressnall, Esq.
May 16, 2011
Page 2

unless the hearing officer orders otherwise." 35 Ill. Admin. Code § 101.616(c). The March 8, 2011 Hearing Officer Order in this matter stated that "[a]ll discovery is closed on April 19, 2011." Hearing Officer Order, KCBX Terminals Company v. IEPA, PCB. Nos. 10-110 and 11-43 (March 8, 2011 Ill.Poll.Control.Bd.). Because the Agency did not serve its Discovery Requests on KCBX until April 19, 2011, the day by which the Hearing Officer ordered all discovery to be completed, the Discovery Requests are untimely. As you are aware, KCBX filed its own discovery requests upon the Agency on March 9, 2011, so that the Agency could respond to the discovery in advance of the April 19, 2011 date set by the Hearing Officer.

In light of the information discussed above, KCBX does not intend to serve the Agency with a formal response to the Discovery Requests. Please feel free to contact Lauren Lurkins or me to discuss the same if you have any questions.

Sincerely,



Katherine D. Hodge

KDH:LCL:plt
pc: Christopher J. Grant, Esq. (via U.S. Mail)

KCBX:003/Corr/Presnall 01 Ltr - discovery requests

ILLINOIS POLLUTION CONTROL BOARD

March 8, 2011

RECEIVED
CLERK'S OFFICE

MAR - 8 2011

STATE OF ILLINOIS
Pollution Control Board

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

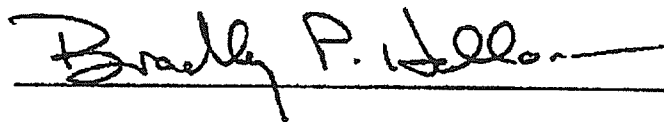
ORIGINAL

HEARING OFFICER ORDER

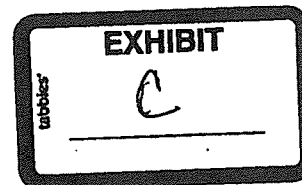
On March 4, 2011, the petitioner submitted an agreed proposed discovery schedule. The discovery schedule is accepted to the extent as follows. Petitioner's opinion witnesses and their opinions must be disclosed on or before March 15, 2011. Respondent's opinion witnesses and their opinions must be disclosed on or before March 22, 2011. Depositions must be completed on or before April 19, 2011. All discovery is closed on April 19, 2011.

The parties or their legal representatives are directed to appear at a telephonic status conference with the hearing officer on April 5, 2011, at 9:30 a.m. The telephonic status conference must be initiated by the complainant, but each party is nonetheless responsible for its own appearance. At the conference, the parties must be prepared to discuss the status of the above-captioned matter and their readiness for hearing.

IT IS SO ORDERED.



Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 W. Randolph Street
Chicago, Illinois 60601
312.814.8917



BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

KCBX TERMINALS COMPANY,)	
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Petitioner,)	
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v.)	PCB 10-110
)	PCB 11-43
ILLINOIS ENVIRONMENTAL)	(Permit Appeal - Air)
PROTECTION AGENCY,)	(Consolidated)
)	
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 **PETITIONER'S AMENDED OPINION WITNESS DISCLOSURE**, a copy of which is herewith served upon you.

Respectfully submitted,

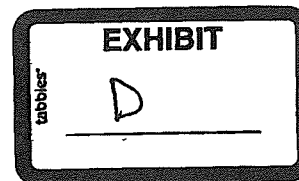
KCBX TERMINALS COMPANY,
Petitioner,

Dated: May 19, 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

THIS FILING SUBMITTED ON RECYCLED PAPER



CERTIFICATE OF SERVICE

I, Katherine D. Hodge, the undersigned, hereby certify that I have served the attached PETITIONER'S AMENDED OPINION WITNESS DISCLOSURE 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 May 19, 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 May 19, 2011.

/s/ Katherine D. Hodge
Katherine D. Hodge

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

KCBX TERMINALS COMPANY,)	
)	
Petitioner,)	
)	
v.	)	PCB 10-110
	)	PCB 11-43
ILLINOIS ENVIRONMENTAL	)	(Permit Appeal - Air)
PROTECTION AGENCY,	)	(Consolidated)
)	
Respondent.)	

PETITIONER'S AMENDED OPINION WITNESS DISCLOSURE

NOW COMES Petitioner, KCBX TERMINALS COMPANY, by its attorneys, HODGE DWYER & DRIVER, and for its Amended Opinion Witness Disclosure, states as follows:

1. On March 15, 2011, Petitioner filed its initial Opinion Witness Disclosure with the Illinois Pollution Control Board ("Board"), pursuant to the March 8, 2011 Hearing Officer Order.

2. Petitioner now provides the following amended list of opinion witnesses:

Robert W. Bernoteit
FESOP/State Permits Unit Manager
Illinois Environmental Protection Agency
Permit Section, Bureau of Air
1021 North Grand Avenue East
Post Office Box 19276
Springfield, Illinois 62794-9276

Petitioner is unable to state what opinions Mr. Bernoteit may tender at hearing.

Petitioner, however, expects to elicit testimony from Mr. Bernoteit regarding his role as the manager of the Federally Enforceable State Operating Permit ("FESOP")/State Permits Unit at the Illinois Environmental Protection Agency ("Illinois EPA"), generally. This will include his knowledge and experience with Illinois EPA policies and

procedures related to issuing permits in the Bureau of Air. More specifically, Petitioner anticipates that Mr. Bernoteit will testify regarding his supervisory and/or direct role in:

a) the review of submittals from the Petitioner regarding the FESOP permit issued by Illinois EPA to the Petitioner, dated December 29, 2010 (hereinafter "FESOP Permit"), and the construction permit issued by Illinois EPA to the Petitioner, dated May 25, 2010 ("Construction Permit"); b) preparation of responses to the Petitioner regarding submittals related to the FESOP Permit and the Construction Permit; c) communications and/or meetings between Mr. Bernoteit, his staff, and any other Illinois EPA personnel involved in preparing drafts of the FESOP Permit and the final issued FESOP Permit, and drafts of the Construction Permit and the final Construction Permit; d) communications and meetings between Mr. Bernoteit, his staff, Petitioner, and/or its representatives regarding the editing of drafts and the final issued FESOP Permit, and the editing of drafts and the final issued Construction Permit; and e) information relied upon by Illinois EPA in the inclusion or omission of certain special conditions in the FESOP Permit and Construction Permit, as well as Illinois EPA's reasoning related to the same. Testimony is also expected to include relevant discussion of State and federal statutes, e.g. the federal Clean Air Act, Section 39.5 of the Illinois Environmental Protection Act ("Act"), regulations promulgated under such statutes, as well as State and/or Federal guidance and industry publications, related to emission source classification and emission limit calculations in the Illinois EPA Bureau of Air's permitting process generally and regarding the FESOP Permit and the Construction Permit, specifically. Petitioner anticipates reviewing Mr. Bernoteit's education, training, experience, and familiarity with Petitioner's facility and industry.

George M. Kennedy, P.E.
Environmental Protection Engineer
Illinois Environmental Protection Agency
Permit Section, Bureau of Air
1021 North Grand Avenue East
Post Office Box 19276
Springfield, Illinois 62794-9276

Petitioner will likely seek to utilize the transcript of the April 14, 2011 Evidence Deposition of George M. Kennedy at hearing as Mr. Kennedy is unavailable for hearing. Petitioner expects to focus on the deposition testimony from Mr. Kennedy regarding his background, training and experience in drafting permits, and his duties and responsibilities in the FESOP/State Permits Unit at the Illinois EPA. More specifically, Petitioner expects to focus on Mr. Kennedy's deposition testimony regarding his role in:

- a) the review of submittals from the Petitioner regarding the FESOP Permit issued by Illinois EPA to the Petitioner, dated December 29, 2010, and the Construction Permit issued by Illinois EPA to the Petitioner, dated May 25, 2010;
- b) preparation of responses to the Petitioner regarding submittals related to the FESOP Permit and the Construction Permit;
- c) communications and/or meetings between Mr. Kennedy and management in the FESOP/State Permits Unit and any other Illinois EPA personnel involved in preparing drafts of the FESOP Permit and the final issued FESOP Permit, and drafts of the Construction Permit and the final Construction Permit;
- d) communications and meetings between Mr. Kennedy, other members of the FESOP/State Permits Unit and/or other Illinois EPA personnel, as well as Petitioner and/or its representatives, regarding the editing of drafts and the final issued FESOP Permit, and the editing of drafts and the final issued Construction Permit; and
- e) information relied upon by Illinois EPA in the inclusion or omission of certain special conditions in the FESOP Permit or the

Construction Permit, as well as Illinois EPA's reasoning related to the same. Petitioner also expects to focus on Mr. Kennedy's deposition testimony regarding State and federal statutes, e.g. the federal Clean Air Act, Section 39.5 of the Act, regulations promulgated under such statutes, as well as State and/or Federal guidance and industry publications, related to emission source classification and emission limit calculations in the Illinois EPA Bureau of Air's permitting process generally, and more specifically regarding the FESOP Permit issued to the Petitioner.

Terry Steinert
Environmental Compliance Manager
Koch Mineral Services LLC
4111 East 37th Street North
Wichita, Kansas 67220

Petitioner expects to elicit testimony from Mr. Steinert with regard to the following topics: a) Mr. Steinert's job description and responsibilities with regard to the Petitioner's facility; b) the operations of Petitioner's facility in Chicago, Illinois, which is at issue in this matter; c) the preparation of submittals from the Petitioner to Illinois EPA regarding the FESOP Permit and the Construction Permit; d) the review of information from Illinois EPA regarding the FESOP Permit and the Construction Permit; e) the history of communications and/or meetings between Petitioner and Illinois EPA regarding the FESOP Permit and the Construction Permit; f) with regard to authentication of any documents, knowledge or lack of knowledge on the part of the Petitioner as to matters raised during the testimony of Illinois EPA employees; and g) in rebuttal, as to any matters raised during Illinois EPA's case in chief. Testimony is also expected to include relevant discussion of State and federal statutes, e.g. the federal Clean Air Act, Section 39.5 of the Act, regulations promulgated under such statutes, as well as State

and/or Federal guidance and industrial publications, related to emission source classification and emission limit calculations.

WHEREFORE, Petitioner, KCBX TERMINALS COMPANY, makes its amended opinion witness disclosure as set forth above.

Respectfully submitted,

KCBX TERMINALS COMPANY,
Petitioner,

Dated: May 19, 2011

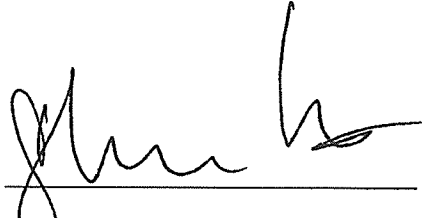
By: /s/Katherine D. Hodge
One of Its Attorneys

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 Appeal/Discovery/Amended Opinion Witness Disclosure

CERTIFICATE OF SERVICE

I, CHRISTOPHER GRANT, an attorney, do certify that I caused to be served this 23d day of May, 2011, Respondent's Motion to Bar Testimony of Newly Disclosed Witness by email and first class mail.



CHRISTOPHER GRANT

Ms. Lauren C. Lurkins
Hodge Dwyer & Driver
3150 Roland Avenue
P.O. Box 5776
Springfield, Illinois 62705-5776
(by email and first class mail)

Mr. John Therriault
Assistant Clerk
Illinois Pollution Control Board
100 W. Randolph
Chicago, Illinois 60601
(by electronic filing)

Mr. Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
100 W. Randolph
Chicago Illinois 60601
(by hand delivery)

KCBX Terminals Company v. Illinois EPA, PCB 10-110/11-43 (Consolidated)