

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

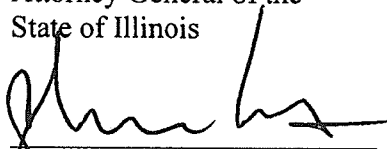
KCBX TERMINALS COMPANY	)	
	)	
Petitioner,	)	PCB No. 10-110
	)	PCB No. 11-43
	)	(Consolidated)
	)	
v.	)	(Permit Appeal-Air)
	)	
	)	
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY	)	
	)	
Respondent.	)	

**NOTICE OF ELECTRONIC FILING**

PLEASE TAKE NOTICE that on May 23, 2011, the Respondent filed its Response to Motion to Admit. 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



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**RESPONSE TO MOTION TO ADMIT**

Now comes Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ("Illinois EPA"), by LISA MADIGAN, Attorney General of the State of Illinois, and responds to Petitioners, KCBX TERMINALS COMPANY's ("KCBX's") Motion to Admit Transcript as Evidence at Hearing. For the reasons set forth herein, Respondent does not object to the admission of the transcript of George Kennedy. Nor does Respondent object to the use of the exhibits attached to transcript solely for the purpose of explaining Mr. Kennedy's testimony. However, Respondent objects to the admission of these documents as substantive evidence without foundation, and without demonstration of relevance.

**ADMISSION OF DEPOSITION TRANSCRIPT**

Illinois Supreme Court Rule 212 allows the use of evidence depositions "for any purpose" when the deponent is out of the country. Also, Rule 212(c) allows for the use of the complete deposition by an opposing party, where the initial proponent has only used portions of the evidence deposition.

On the date of hearing, Mr. Kennedy will be in Germany, which satisfies the initial requirement. Respondent also believes that, by including the "partial use" provisions of 212(c), the Supreme Court was impliedly accepting that an entire evidence deposition transcript could be entered into evidence. Accordingly, Respondent does not object to admissibility of the actual recorded testimony of Mr. Kennedy.

**USE OF EXHIBITS**

Respondent also does not object to the use of the exhibits attached to Petitioner's Motion solely for the purpose of explaining Mr. Kennedy's testimony. In other words, where reference was made in the deposition to a certain document (whether in the record, or whether relevant or admissible), it would be confusing to the Board to admit the testimony without knowing the actual subject matter of the testimony. For this reason, Respondent does not object to the *use* of the exhibits solely for the purpose of understanding Mr. Kennedy's actual testimony.

**OBJECTION TO ADMISSION**

None of the documents attached to the deposition transcript were offered into evidence at Mr. Kennedy's deposition. No foundation was laid for admissibility as business records, admissions, or any other basis for admission of written documents. Petitioner's counsel made no attempt to demonstrate relevance. Such a demonstration is necessary before these exhibits can be considered by the Board as competent evidence.

The only relevant and admissible documents now before the Board are those admitted into the record. These include the documents originally produced by Illinois EPA, the Agency's supplements thereto, and the documents admitted in the record in the Board's May 19, 2011 ruling on Petitioner's Motion to Supplement.

The undersigned originally intended to attempt an agreement with opposing counsel on

documents to be used and admitted at hearing. However, on May 18, 2011, counsel for KCBX refused to answer Illinois EPA's interrogatories, and refused to identify witnesses and documents to be used at hearing<sup>1</sup>. Despite Petitioner's continued 'trial by ambush' tactics, Illinois EPA (who by law has the sole responsibility to assemble the record), will deliver a complete copy of the Record to opposing counsel by May 27, 2011. If Petitioner seeks to enter any other materials into evidence (including the Exhibits from Mr. Kennedy's deposition), it must be required to lay a proper foundation at hearing, seek entry, and allow Respondent the opportunity to object.

WHEREFORE, Respondent respectfully requests that the Hearing Officer grant Petitioner's motion to admit the transcript of Mr. Kennedy's Evidence Deposition, allow the use of the exhibits thereto solely and strictly for the limited purpose of explaining Mr. Kennedy's testimony, but deny the admission of the exhibits attached thereto as substantive evidence.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY

by LISA MADIGAN  
Attorney General of the  
State of Illinois



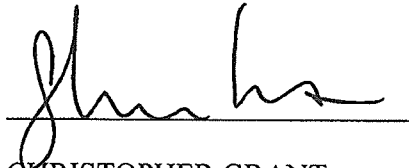
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<sup>1</sup> Respondent is separately filing a Motion for appropriate sanctions related to this refusal.

**CERTIFICATE OF SERVICE**

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



CHRISTOPHER GRANT

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Chicago Illinois 60601  
(by hand delivery)

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