

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

KCBX TERMINALS COMPANY)

Petitioner,)

v.)

ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY)

Respondent.)

PCB No. 14-110

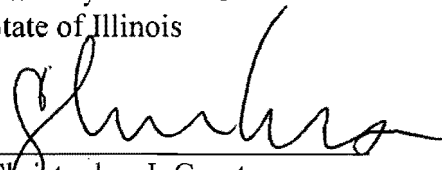
(Permit Appeal-Air)

NOTICE OF ELECTRONIC FILING

PLEASE TAKE NOTICE that on the 14th day of April, 2014, the undersigned filed Respondent's *Interlocutory Appeal from Hearing Officer April 8, 2013 Order Denying Motion for Protective Order*, by electronic filing. A copy of the document so filed is attached hereto and served upon you.

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By LISA MADIGAN
Attorney General of the
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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

KCBX TERMINALS COMPANY,)	
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Petitioner,)	
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v.)	PCB No. 14-110
)	(Permit Appeal-Air)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY)	
)	
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**INTERLOCUTORY APPEAL FROM HEARING OFFICER APRIL 8, 2014 ORDER
DENYING MOTION FOR PROTECTIVE ORDER**

Now comes Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY (“Illinois EPA”), by LISA MADIGAN, Attorney General of the State of Illinois, pursuant to Section 101.518 of the Illinois Pollution Control Board (“Board”) regulations, and requests that the Board reverse the Order issued by the Hearing Officer on April 8, 2014. The April 8, 2014 Order failed to recognize the predecisional deliberative process privilege, and improperly required the production of documents after the date for written discovery had expired and the disclosure of attorney-client privileged documents.¹ The Board should consider this Interlocutory Appeal, as the issues deal with important evidentiary privileges, and are likely to arise again at hearing in this matter.

I. INTRODUCTION

On February 21, 2014, Petitioner KCBX Terminals Company (“KCBX”) filed this permit

¹ Respondent was advised of the Hearing Officer’s ruling on the afternoon of April 8, 2014. On April 9, 10, and 11, counsel for Respondent were required to attend depositions of four Illinois EPA witnesses requested by KCBX. Accordingly, Respondent was unable to research, draft, and file this Interlocutory Appeal until April 14, 2014.

appeal, the fifth permit appeal that KCBX has filed with the Board since June 27, 2008.²

KCBX has refused to extend the statutory decision deadline, and hearing in this matter is scheduled for April 29-30, 2014. Given the schedule in this matter, Respondent filed its Motion for Protective Order regarding deposition riders attached to the Notices of Deposition of Robert Bernoteit, Michael Dragovich, Raymond Pilapil and Joseph Kotas. On April 8, 2014, KCBX served its Notice of Deposition of Julie Armitage, containing a similar deposition rider to which Respondent asserts the same objections.

II. NOTES AND NON-FINAL DETERMINATIONS BY THE AGENCY ARE IRRELEVANT AND/OR PRIVILEGED

a. Deliberative Process Privilege

Respondent has objected to production of the information requested in the deposition Riders on the basis that such production would violate the deliberative process privilege. The Board has consistently held that such privilege applies in Board hearings, even after the 1998 decision in *People ex rel. Birkett v. City of Chicago*, 184 Ill. 521 (1988). Specifically, the Board recognized the 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).

The Hearing Officer's finding that "...it is clear from Birkett that the predecisional process privilege does not apply to the production requested by KCBX here" is overbroad. (See: April 8, 2014 Order at p.5.) The issue in *Birkett* was the City of Chicago's unrestricted claim of privilege. The Supreme Court stated that "[a]lthough the privilege may be applied on a qualified basis, its scope is unreasonably broad. The City appears to claim a privilege of all "deliberative" communications regarding any proposed expansion or alteration to the airport or

² The previous cases are PCB 08-103, filed June 28, 2008; PCB 10-110, filed June 29, 2010; PCB 11-43, filed February 1, 2011; and PCB 13-39, filed January 18, 2013.

airport layout plan, no matter how trivial or routine.” 184 Ill.2d 521, 532. As noted by the Appellate Court in a post-*Birkett* FOIA decision, “[t]he Birkett court did not hold that a deliberative process exemption did not exist in Illinois.” *Harwood v. McDonough*, 344 Ill. App. 3d 242, 247 (1st Dist. 2003). Thus the question is whether the *Birkett* case, which involved specific discovery issues in a circuit court case, binds the Board in its administrative hearings. Respondent asserts that it does not, and the Board should continue to recognize such a privilege in permit appeal cases.

Respondent is aware of the 2011 Second District opinion in *Fox Moraine*, but does not believe that this case overturns the Board’s long standing recognition of the deliberative process privilege. *Fox Moraine, LLC v. United City of Yorkville*, 2011 IL App (2d) 100017 (Ill. App. Ct). First, the *Fox Moraine* Court’s decision did not overrule the Board’s use of the deliberative process privilege in all cases, and did not rely on its belief that the Board’s use of the privilege was ‘misplaced’ in this case in making its decision. *Id.* at ¶72. In fact, the Court found that inquiry into the mental process of the decision makers was improper, and upheld the Board’s underlying decision. *Id.*

Second, the *Fox Moraine* case was not a permit appeal under 415 ILCS 5/40, but a landfill siting decision pursuant to 415 ILCS 5/41. The difference is significant. In a siting matter, the Board is reviewing the record from an external public hearing, not internal Agency decision making. Also, in siting cases, the Board is required to consider issues of due process and fundamental fairness, along with the merits of the siting itself. A much more limited standard applies in permit appeals. The sole issue is whether the Agency’s final decision, as specifically laid out in the permit denial letter, was well-founded. The Agency may not

supplement its final decision with a new basis for denial. Nor may the Agency go back and include additional bases for denial that it may have considered, but did not use as a basis for its formal final decision. Regardless of other statutory sections or regulations it may have reviewed and considered and regardless of what permit actions it may have contemplated, the Agency's final decision is the sole matter at issue. Thus, the issue in this case is not the "fundamental fairness" of an extensive evidentiary siting hearing held by another governmental body. The sole issue is whether KCBX can demonstrate that granting the permit would not cause violations of the Act. *Community Landfill Company and City of Morris v. Illinois EPA*, PCB 01-170 (Dec. 6, 2001). Clearly, the issues before the *Fox Moraine* court were significantly different than those in our case.

Because the *Fox Moraine* court did not overrule the Board's application of the deliberative process privilege in permit appeal cases, and because the *Harwood* court has found that *Birkett* does not apply in all cases, the Hearing Officer's findings regarding the *Birkett* case were overbroad and incorrect.³ The Board should not deviate from its prior rulings protecting this privilege, and should find, at a minimum, that the deliberative process privilege survives in permit appeal cases.

b. Relevance

As argued above, the deliberative process privilege should continue to be recognized in permit appeal cases. However, the Board need not reach this issue in reversing the Hearing Officer's ruling on production of documents, because the information requested is not, and *cannot* be relevant to the Board's decision in this case.

³ Respondent notes that any appeal of the Board's decision in this case will be in the Appellate Court, 1st District.

As noted above, the sole issue before the Board is the validity of the Agency's decision, as described in specificity in the January 17, 2014 permit denial letter. The correctness of this final decision and the basis therefore, is the sole issue before the Board.⁴

"Relevant" evidence must be "pertinent to the issue at hand". *Black's Law Dictionary*, Seventh Edition, 1999. Because Respondent cannot change its final decision by substituting prior non-final determinations, Petitioner cannot attack such prior decisions, nor can it urge that such prior determinations be substituted for the final decision of the Agency. As such, none of the pre-decisional information requested is relevant for the purpose of the Board's decision.

Nor can Petitioner claim that the requested materials are "reasonably calculated to lead to relevant evidence". Nothing more than the final decision of the Agency is before the Board. Notably, by failing to submit requests for documents in discovery in a timely fashion, Petitioner waived the right to engage in written discovery. At bottom, the materials requested in the deposition riders are simply an attempt to avoid the deadlines forced by its own refusal to extend the date for hearing.

Finally, Petitioner has already been able to make extensive inquiry into the subject matter of the requested documents at deposition. During the depositions of Michael Dragovich (4/9/14), Robert Bernoteit (4/9/14), and Raymond Pilapil (4/10/14), Petitioner was able to inquire into all matters related to the Permit Section's evaluation of the permit application at issue. During the deposition of Inspector Joseph Kotas (4/11/14), Petitioner was able to inquire into all aspects of the inspections leading to the reports in the Administrative Record. Petitioner will take the deposition of Illinois EPA Bureau of Air Chief Julie Armitage on April 16, 2014. Because of the extremely short time frame dictated by Petitioner's insistence on an early hearing,

⁴ The Board recognizes this standard in its order accepting the Appeal in this case, PCB 14-110 (March 6, 2014).

and given the multiple opportunities to inquire into the subject matter of the documents sought at deposition, the Board should find that further inquiry into irrelevant issues is unwarranted. In doing so, the Board should take guidance from its decision in the *Joliet Sand & Gravel*, PCB 86-159 (Dec. 23, 1986). The Parties and the Board are equally entitled to a fair hearing, based solely on relevant evidence.

III. RESPONDENT HAS SUFFICIENTLY ESTABLISHED ITS CLAIM OF ATTORNEY-CLIENT PRIVILEGE

On March 25, 2014, Respondent served the Administrative Record on Petitioner. Along with the Record, Respondent included a log of withheld privileged communications.⁵ Each communication identifies the parties to the communication. Each withheld document identifies an Illinois EPA Division of Legal Counsel attorney on the communication.⁶ These are the records referred to in the Hearing Officer's Order.

Considering the expedited schedule in this matter, the Board should find that Respondent's disclosure adequately establishes its claims of attorney client-privilege. First the privilege log was not provided in responses to discovery, but rather provided specifically in dealing with the production of the Administrative Record in this case. Accordingly, the cases cited in the April 8, 2014 Hearing Officer Order are not persuasive. In accordance with 35 Ill. Adm. Code 105.212, the record contains only documents relevant to this permit decision. There is no question that the Illinois EPA attorneys listed on the privilege log provided legal advice related to this permit decision. Nor is there any question that Petitioner is fully aware of this

⁵ There is no Board rule requiring the inclusion of a privilege log. A copy of the log submitted is attached as Exhibit 1, and included solely for the purpose of this Interlocutory Appeal.

⁶ The DLC attorneys listed include Christopher Presnall, Rob Layman, and James Morgan, all of whom were involved with the subject permit application at some point. Counsel for Petitioner are professionally acquainted with these Illinois EPA attorneys, and have worked with all three on this case.

involvement. Petitioner's January 13, 2014 response to the "Wells Letter" included copies to Attorneys Pressnall and Morgan. (Administrative Record at R000011-R000016.) Petitioner sent a copy of the original permit application to Attorney Rob Layman. (*Id.* at R000188.)

Moreover, the subject matters listed in the privilege log all relate to this permit application. In addition, the other parties listed in the privilege log were all involved in either review of the permit application or the subject matter of the denial letter.

The Board should find these facts sufficient to establish the privileged nature of this correspondence. Illinois EPA Attorneys, known to be providing legal advice on this permit application, were involved in conversations, emails, and correspondence with other Illinois EPA employees, also with direct involvement in the permit application and denial. Counsel for Respondent voluntarily produced the privilege log along with the Administrative Record, the latter of which only relates to this matter. Thus, Petitioner's 'challenge' to the claim of privilege can only be characterized as disingenuous. The Board should find that the Administrative Record and the privilege log adequately establish that the correspondence was made by counsel, working on this permit application, for the purpose of giving legal advice or made to counsel for the purpose of obtaining legal advice.

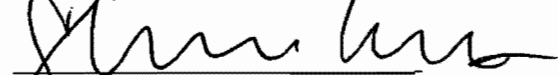
The Hearing Officer Order provides no remedy, but cites the case *Lake County Forest Preserve v. Ostro et al*, where the Board ordered an *in camera* inspection by the Hearing Officer, with the right of appeal to the full Board. However, the procedure has rarely (if ever) been ordered by the Board since the ruling in *Ostro*. There is no reason for the Board to order such an extraordinary procedure 15 days before hearing in this case.

For the reasons set forth herein, Respondent requests that the Board reverse the Hearing Officer's April 8, 2014 Order, find that the deliberative process privilege applies in this matter; alternatively find that the material sought by Petitioner is not relevant to this case; find that the Respondent has adequately established attorney-client privilege for the documents listed in the privilege log; and order such other relief that the Board finds appropriate.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

by LISA MADIGAN
Attorney General of the State of Illinois



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Kathryn A. Pamenter
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Chicago, Illinois 60602



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

March 24, 2014

Via Federal Express

Katherine D. Hodge
Edward W. Dwyer
Matthew C. Read
Hodge Dwyer & Driver
3150 Roland Avenue
Springfield, IL ~~62705~~ 62703

Re: KCBX Terminals Company v. Illinois Environmental Protection Agency
(PCB No. 14-110)

Dear Kathy, Edward and Matt:

Enclosed please a copy of the Illinois Environmental Protection Agency's privilege log in the above-referenced permit appeal.

Sincerely,

A handwritten signature in black ink, appearing to read "Kathryn A. Pamerter".

Kathryn A. Pamerter
Assistant Attorney General
Environmental Bureau
69 West Washington, 18th Floor
Chicago, Illinois 60602
(312) 814-0608

Encls.

cc: Christopher J. Grant



**KCBX TERMINALS COMPANY V. ILLINOIS EPA
PRIVILEGE LOG OF ILLINOIS EPA**

Name of Author	Name(s) of Recipients	Date of Document	Description of Document	Bates Number Range
C. Pressnall	M. Dragovich, V. Brodsky	9.19.13	Email re FESOP application	P000001
M. Dragovich	C. Pressnall, V. Brodsky, B. Bernoteit, R. Layman, J. Armitage	9.19.13	Email re FESOP application	P000001
M. Dragovich	R. Layman, V. Brodsky, B. Bernoteit	10.2.13	Email re draft revised construction permit	P000002-P000022
M. Dragovich	C. Pressnall, B. Bernoteit, R. Layman	10.10.13	Email re draft permit	P000023
C. Pressnall	M. Dragovich, B. Bernoteit, R. Layman, J. Armitage	10.10.13	Email re draft permit	P000023
C. Pressnall	M. Dragovich, B. Bernoteit, R. Layman	10.16.13	Email re waiver status	P000024
B. Bernoteit	C. Pressnall, J. Armitage, J. Ross, V. Brodsky, M. Dragovich	10.18.13	Email re waiver status	P000025
C. Pressnall	B. Bernoteit, J. Armitage, J. Ross, V. Brodsky, M. Dragovich	10.18.13	Email re waiver status	P000025
B. Frost	C. Pressnall, K. Page, K. Neibergall, V. Brodsky, M. Dragovich, S. Williams	11.5.13	Email re draft factsheet	P000026
C. Pressnall	B. Frost, K. Page, K. Neibergall, V. Brodsky, M. Dragovich, S. Williams, J. Armitage	11.6.13	Email re draft factsheet	P000026-P000028
B. Bernoteit	J. Armitage, C. Pressnall, B. Frost, V. Brodsky, M. Dragovich	11.14.13	Email re DTE permit application and KCBX April 2013 permit application	P000029
B. Bernoteit	J. Morgan, C. Pressnall, M. Dragovich	12.6.13	Email re draft wells letter	P000031, P000032, P000033-P000038
J. Morgan	B. Bernoteit, C. Pressnall, M. Dragovich	12.9.13	Email re draft wells letter	P000032
J. Morgan	J. Armitage	12.10.13	Email re draft wells letter	P000030

**KCBX TERMINALS COMPANY V. ILLINOIS EPA
PRIVILEGE LOG OF ILLINOIS EPA**

B. Bernoteit	J. Armitage, J. Morgan	12.10.13	Email re draft wells letter	P000030
J. Armitage	B. Bernoteit, J. Morgan	12.10.13	Emails re draft wells letter	P000030
B. Bernoteit	J. Morgan, C. Pressnall, M. Dragovich	12.10.13	Email re draft wells letter	P000032
J. Morgan	C. Pressnall, R. Pilapil	1.5.14	FOIA Exemption Reference Sheet re email	P000039
J. Morgan	R. Pilapil, C. Pressnall, J. Armitage, B. Bernoteit	1.15.14	Email re waiver status and 12.10.13 Letter	P000041, P000043-P000044
R. Pilapil	J. Morgan, J. Armitage, B. Bernoteit, C. Pressnall, J. Ross, M. Dragovich	1.15.14	Email re waiver status and response to permit application	P000040, P000043
B. Bernoteit	R. Pilapil, J. Morgan, J. Armitage, C. Pressnall, J. Ross, M. Dragovich	1.16.14	Email re response to permit application	P000040, P000043
J. Morgan	B. Bernoteit, R. Pilapil, J. Armitage, C. Pressnall, J. Ross, M. Dragovich	1.16.14	Email re waiver status	P000040
C. Pressnall	B. Bernoteit, R. Pilapil, J. Armitage, J. Morgan, J. Ross, M. Dragovich	1.16.14	Email re comments to draft denial letter	P000042
J. Armitage	C. Pressnall, B. Bernoteit, R. Pilapil, J. Morgan, J. Ross, M. Dragovich	1.16.14	Email re draft denial letter	P000042
B. Bernoteit	J. Armitage, C. Pressnall, R. Pilapil, J. Morgan, J. Ross, M. Dragovich	1.17.14	Email re draft denial letter	P000042
J. Morgan	B. Bernoteit, C. Pressnall	1.17.14	Email re draft denial letter	P000042

**KCBX TERMINALS COMPANY V. ILLINOIS EPA
PRIVILEGE LOG OF ILLINOIS EPA**

attorney-client
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**KCBX TERMINALS COMPANY V. ILLINOIS EPA
PRIVILEGE LOG OF ILLINOIS EPA**

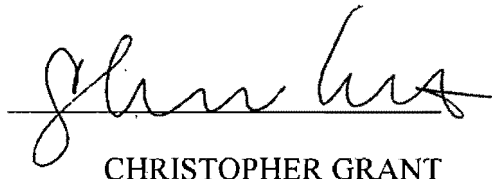
FOIA Exemption Reference Sheets		1.17.14	Re 10.18.13 and 12.10.13 emails	P000045-P000046
M. Dragovich		9.5.13	Draft Permit Calculation Sheet	P000047-P000052

attorney-client predecisional deliberative process
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**KCBX TERMINALS COMPANY V. ILLINOIS EPA
PRIVILEGE LOG OF ILLINOIS EPA**

CERTIFICATE OF SERVICE

I, CHRISTOPHER GRANT, an attorney, do certify that I caused to be served this 14th day of April, 2014, Respondent's Interlocutory Appeal from Hearing Officer April 8, 2014 Order Denying Motion for Protective Order, and Notice of Filing, upon the persons listed below by electronic mail and by placing same in an envelope bearing sufficient postage with the United States Postal Service located at 100 W. Randolph, Chicago, Illinois.


CHRISTOPHER GRANT

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