ILLINOIS POLLUTION CONTROL BOARD
April 8, 2014

KCBX TERMINALS COMPANY,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 14-110
	)	(Permit Appeal - Air)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

HEARING OFFICER ORDER

On April 2, 2014, respondent, Illinois Environmental Protection Agency (Agency), filed a motion for protective order regarding deposition riders (Agency Mot.). On April 4, 2014, petitioner, KCBX Terminals Company (KCBX), filed its response (KCBX Resp.). The Agency has not sought leave to file a reply. For the reasons discussed below, the Agency's motion is denied.

Procedural History

On February 21, 2014, KCBX timely filed a petition asking the Board to review a January 17, 2014 determination of the Agency, denying KCBX's "Request for Revision to Revised Construction Permit for its South Facility" (Request for Revision). The Agency filed the Administrative Record with the Board on March 24, 2014. A Hearing Officer Order was entered scheduling a hearing on April 29, 2014 and ordering the close of discovery on or before April 18, 2014.

On March 28, 2014, KCBX filed its Notice of Discovery Deposition of Robert W. Bemoteit on April 9, 2014, Notice of Discovery Deposition of Michael Dragovich on April 9, 2014, Notice of Discovery Deposition of Raymond Pilapil on April 10, 2014 and Notice of Discovery Deposition of Joseph Kotas on April 11, 2014. Attached to each of the Notices of Discovery Deposition is a "Deposition Rider" in which KCBX seeks the production of certain documents, including notes related to observations of the KCBX facility, notes related to the deponents' review of the July 23, 2013 construction permit application, draft permits that address the activities described in the Request for Revision, and notes taken during meetings, telephone calls, or discussions where the Request for Revision or the decision to grant or deny the Request for Revision was discussed.

On April 2, 2014, the Agency filed a motion for protective order regarding the deposition riders. On April 4, 2014, KCBX filed its response to the motion. The Agency has not sought leave to file a reply.

This order will first briefly summarize the respective pleadings and then rule accordingly.

Agency's Motion for Protective Order Regarding Deposition Riders

The Agency argues that the riders KCBX attached to the depositions contain requests that are not calculated to lead to relevant information, are unduly burdensome, and will not expedite the resolution of the proceeding. Agency Mot. at 2. The Agency argues that the information KCBX requests is not part of the administrative record, and thus was not used by the Agency in their decision to deny KCBX's permit application. *Id.* The Agency cites Illinois Environmental Protection Agency v. Illinois Pollution Control Board, 896 N.E.2d 479, 492 (Ill. App. Ct. 2008) in order to show the Board's ruling that the Board's procedural rules as well as the Act mandated the Board conduct the permit appeal hearing exclusively with material on the record in front of the Agency at the time of their ruling. *Id.* at 2-3. The cited case further stated that the Board could not consider additional evidence or testimony that may become available through additional discovery. *Id.*

The Agency further argues that the information requested by KCBX is subject to the predecisional deliberative process privilege. *Id.* at 3, citing West Suburban Recycling and Energy Center, L.P. v. Illinois Environmental Protection Agency, PCB Nos. 95-119 and 95-125, 1996 WL 633368 at *4-6 (Oct. 17, 1996). Within footnote 3 the Agency also objects to KCBX's requests using any other privilege, including the attorney-client privilege. Agency Mot. at 3.

The Agency asks, that due to the time constraints imposed by the legislature applicable to the permit appeal, the operational needs of the Agency and the intensive deposition schedule imposed on the Agency's counsel, the Agency asks the Board to grant a protective order against KCBX's requests within the Deposition Riders. *Id.* at 3. The Agency ends it's argument by citing Joliet Sand and Gravel Co. v. Illinois Environmental Protection Agency, PCB No. 86-159, 1986 WL 27226, at *2 (Dec. 23, 1986), which states that, "discovery in a permit appeal must be viewed in the procedural context of such appeal . . . What is 'reasonable' discovery must be determined in the light of these practical time constraints as well as the legislative 120 day constraint of Section 40(a)". *Id.*

KCBX's Response to Agency's Motion for Protective Order

KCBX argues that in the administrative record the Agency omitted documents that contain information which the Agency relied on when making its decision. KCBX Resp. at 2. The first example KCBX gives is a sign-in sheet from a meeting between representatives from the Agency and KCBX. While the sign-in sheet is in the record, the record lacks notes taken by the representatives of the Agency during the meeting. *Id.* KCBX also argues that the Agency left out the notes taken by inspectors while visiting the site. *Id.* Finally, KCBX argues that emails regarding a draft permit are absent from the administrative record. *Id.* Due to the length and subject name of one of the emails found in the Agency's privilege log, KCBX assumes it includes a draft construction permit, and argues this would be relevant to the proceeding. *Id.* KCBX argues that the deposition riders attached to the notices of deposition were narrowly tailored to seek only the documents KCBX believes were improperly omitted from the administrative record. *Id.*

KCBX argues that the Agency's motion for a protective order does not deny the existence of the documents requested by KCBX's deposition riders. KCBX Resp. at 4. KCBX also argues that the documents requested were created by the Agency during the Agency's review of KCBX's request for revision. *Id.* Further, KCBX argues that the Board has already decided that the hearing before the Board is an opportunity for the petitioner to challenge the reasons given by the Agency for denying such permit by means of cross examinations, and therefore is an opportunity to test the validity of the information relied upon by the Agency. *Id.*, citing Community Landfill Company, et al. v. IEPA, PCB No. 01-170, 2001 Ill. ENV LEXIS 553, at *8-9 (Dec. 6, 2001).

KCBX then opines that the Board has already rejected an argument similar to the Agency's current argument in KCBX Terminals Company v. IEPA, PCB Nos. 10-110, 11-43, 2011 ENV LEXIS 155 (May 19, 2011), where the Board rejected the Agency's argument that Agency did not rely on emails between counsel of the two parties. KCBX Resp. at 5. KCBX also analogizes KCBX Terminals, where the Board decided the Agency provided no basis or explanation for its claim that the request is "not calculated to lead to relevant information, is unduly burdensome and will not expedite the resolution of the proceeding." *Id.*at 5-6.

KCBX argues that the Agency incorrectly relies on West Suburban Recycling and Energy Center, L.P. v. Illinois Environmental Protection Agency, PCB Nos. 95-119 and 95-125, 1996 WL 633368, at *4-*6 (Oct. 17, 1996), when claiming the existence and application of the predecisional deliberative process privilege is applicable in the current case. KCBX Resp. at 7. KCBX states that the Agency overlooked the subsequent opinion by the Illinois Supreme Court, People ex rel. Birkett v. City of Chicago, 184 Ill. 2d 521 (1998), where the Supreme Court held that existing Illinois policy disfavored privileges, and that there was no predecisional deliberative process privilege in Illinois. *Id.* at 6-8. KCBX supplements this argument by stating that the Illinois Supreme Court considered and rejected the notion that the Freedom of Information Act was evidence of an Illinois policy favorable to privileges. *Id.* at 8.

KCBX then acknowledges the Agency's footnote claiming other privileges, including the attorney-client privilege. KCBX Resp. at 9. KCBX argues that neither the assertion of attorney-client privilege, nor "any other privilege" is sufficiently raised in the footnote. *Id.* Citing Lake County Forest Preserve Dist. V. Neil Ostro, et al., PCB No. 92-80, 1993 Ill. ENV LEXIS 438, at *4-5 (Apr. 22, 1993), KCBX states that a party asserting privilege has the burden of proving privilege. *Id.* KCBX further argues that in order for a party to prove that privilege exists they must satisfy the test found in Illinois EPA v. Celotex Corp., PCB No. 79-145, 1984 Ill. ENV LEXIS 568, at *6 (Dec. 6, 1984). KCBX Resp. at 10. The criteria asserted in Celotex includes: (1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are at his instance permanently protected, (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived. KCBX Resp. at 10.

Generally KCBX argues that the documents that it requests are the exact documents that the Board contemplated for inclusion in the record of a permit appeal. *Id.* at 11. KCBX also argues that the information requested from the Agency "may help clarify and narrow issues for

hearing," which KCBX argues is one of the primary purposes of discovery. *Id.*, quoting KCBX Terminals, 2011 Ill. ENV LEXIS 155, at *29-30, (citing P.R.S. International, Inc. v. Shred Pax Corp., 184 Ill. 2d 224, 237 (1998)).

KCBX prays that the hearing officer will enter an order denying the Agency's motion for Protective Order Regarding Deposition Riders, and mandate the Agency to produce the documents requested in the riders. KCBX Resp. at 12.

Discussion and Ruling

Section 101.616(a) of the Board's procedural rules provides that "[a]ll relevant information and information calculated to lead to relevant information is discoverable, excluding those materials that would be protected from disclosure in the courts of this State pursuant to statute, Supreme Court Rules or common law, and materials protected from disclosure under 35 Ill. Adm. Code 130." 35 Ill. Adm. Code 101.616(a). Additionally, the Board may look to the Code of Civil Procedure and the Supreme Court Rules for guidance where the Board's procedural rules are silent. *Id.*

The Agency first argues that the documents and communications that KCBX seeks are outside the record, not reasonably calculated to lead to relevant information, and unduly burdensome. Agency Mot. at 2. It is well settled that the Board's review of permit appeals is based exclusively on the record before the Agency at the time the Agency issued its permit decision. Accordingly, though the Board hearing affords petitioner the opportunity to challenge the validity of the Agency's reasons for its decision, information developed after the Agency's decision typically is not admitted at hearing or considered by the Board. *See* Alton Packaging Corp. v. PCB, 162 Ill. App. 3d 731, 738, 516 N.E.2d 275, 280 (5th Dist. 1987); Community Landfill Co. & City of Morris v. IEPA, PCB 01-170 (Dec. 6, 2001), *aff'd sub nom*; Community Landfill Co. & City of Morris v. PCB & IEPA, 331 Ill. App. 3d 1056, 772 N.E.2d 231 (3d Dist. 2002).

Furthermore, "if there was information in the Agency's possession upon which it reasonably should have relied, the applicant may also submit such information to the Board for the Board's consideration." Joliet Sand & Gravel Co. v. IEPA, PCB 86-159, slip op. at 5 (Feb. 5, 1987), citing Waste Management, Inc. v. IEPA, PCB 84-45, 61, 68 (Nov. 26, 1984). In Joliet Sand & Gravel Co., the Board held that if the Agency has relied on information beyond what is contained in the application, the information must be included in the permit record filed with the Board. *Id.* If the information is not included in the record, the applicant may properly submit the information to the Board during the course of the Board's hearing. *Id.* Lastly, it is "proper to inquire, and discovery should be allowed, to insure that the record filed by the Agency is complete and contains all of the material concerning the permit application that was before the Agency when the denial statement was issued." Owens-Illinois, Inc. v. IEPA, PCB 77-288, slip op. at 1 (Feb. 2, 1978).

Here, KCBX is seeking notes relating to the deponent's review of the permit application, draft permits that address the Request for Revision, and notes taken during meetings, telephone calls, and discussions where the Request for Revision was discussed. *See* KCBX Resp. at 3.

Such information is clearly relevant to this proceeding. Drafts permits as well as notes taken at meetings discussing the Request for Revision is information that the Agency relied on, or should have relied on, in making its decision regarding the Request for Revision. The cases above are clear that because this information was not originally provided in the record submitted by the Agency, KCBX as applicant may submit such information to the Board. *See* Joliet Sand & Gravel Co., PCB 86-159, slip op at 5. Furthermore, the Agency's claim that the requested production is not reasonably calculated to lead to relevant information and is unduly burdensome is too vague. The Agency provides no reasons why the requested production is unduly burdensome and does not indicate specifically which requested production is not calculated to lead to relevant information. I find, based on the Board's procedural provisions and the abundance of case law, that the discovery requested by KCBX is both relevant and reasonably calculated to lead to relevant information, as well as not unduly burdensome.

The Agency next argues that the production KCBX seeks in the deposition riders is protected by the predecisional deliberative process privilege. Agency Mot. at 3, citing West Suburban Recycling, PCB Nos. 95-119 and 95-125, slip op. at *4-6. KCBX responds by arguing that Illinois courts no longer recognize the existence or application of the privilege in Illinois. KCBX Resp. at 7, citing People ex rel. Birkett v. City of Chicago, 184 Ill. 2d 521 (1998). In Birkett, the Illinois Supreme Court determined whether the privilege applies to discussions between government officials regarding the formulation of decisions and policy of the government. Birkett, 184 Ill. 2d at 522. The Court noted that "privileges are strongly disfavored because they operate to 'exclude relevant evidence and thus work against the truthseeking function of legal proceedings.'" Birkett, 184 Ill. 2d at 527-28 (internal citations omitted). The court declined to recognize the privilege because:

> [a]lthough the privilege may be applied on a qualified basis, its scope is unreasonably broad. The City appears to claim a privilege over all 'deliberative' communications regarding any proposed expansion or alteration to the airport or a layout plan, no matter have trivial or routine. Further, the City does not restrict the privilege based upon the importance or relevance of the particular communication to the decision or decisions, or to the level of the official either compiling or relying upon the communication.

Birkett, 184 Ill. 2d at 532. Here, the Agency is claiming the predecisional deliberative process privilege in a similarly broad manner. The Agency is claiming the privilege over all notes taken during meetings, telephone calls, and discussions where the Request for Revision was discussed, as well as over permit drafts. Agency Mot. at 3. Similar to Birkett, the Agency also does not restrict the privilege based upon the importance or relevance of a particular communication.

Thus, it is clear from Birkett that the predecsional deliberative process privilege does not apply to the production requested by KCBX here.

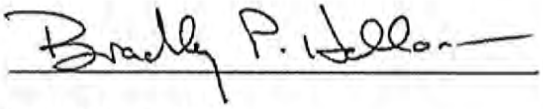
Lastly, the Agency objects to KCBX's requests to the extent that they are "subject to any other privilege, including the attorney-client privilege." Agency Mot. at 3. The purpose of the attorney-client privilege is "to encourage and promote full and frank consultation between a client and legal advisor by removing the fear of compelled disclosure of information." Consolidation Coal Co. v. Bucyrus-Erie, 89 Ill. 2d 103, 117-18, 432 N.E.2d 250, 256 (1991).

"Material prepared by or for a party in preparation for trial is subject to discovery only if it does not contain or disclose the theories, mental impressions, or litigation plans of the party's attorney." Waste Management, Inc. v. Int'l Surplus Lines Ins. Co., 144 Ill. 2d 178, 196, 579 N.E.2d 322, 329-30 (1991).

Here, the Agency is making very broad brush objections by simply claiming "any other privilege" and the attorney-client privilege without arguing that a privilege applies to any specific document requested. These objections fail to establish the particular reasons for such disclosures being privileged and exempt from discovery. It is well established that the "mere assertion that a matter is protected by the attorney-client privilege is insufficient to prove the existence of that privilege." Lake County Forest Preserve Dist. v. Neil Ostro, et al., PCB 92-80, slip op. at 4-5 (Apr. 22, 1993). The party claiming attorney-client privilege must prove the following elements: "(1) [w]here legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are at his instance permanently protected, (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived". IEPA v. Celotex Corp., PCB 79-145, 1984 Ill. ENV LEXIS 568, at *6 (Dec. 6, 1984). The Agency did not argue that any of the elements necessary to establishing attorney-client privilege existed, nor did it provide any evidence specific to the requested production that could be evaluated under these elements. I find that the Agency has failed to establish that any privilege, including the attorney-client privilege, applies to the requested production.

For all of these reasons, the Agency's motion is denied.

IT IS SO ORDERED.



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CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing order were mailed, first class, on April 8, 2014, to each of the persons on the attached service list.

It is hereby certified that a true copy of the foregoing order was hand delivered to the following on April 8, 2014:

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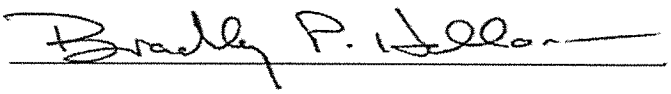

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