

ILLINOIS POLLUTION CONTROL BOARD  
May 1, 2014

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

ORDER OF THE BOARD (by J.D. O’Leary):

On February 21, 2014, KCBX Terminals Company (KCBX) timely filed a petition asking the Board to review a January 17, 2014 determination of the Illinois Environmental Protection Agency (Agency or Illinois EPA). *See* 415 ILCS 5/40(a)(1) (2012); 35 Ill. Adm. Code 101.300(b), 105.206. The determination concerns KCBX’s bulk material terminal at 10730 South Burley Avenue in Chicago, Cook County (South Facility or South Terminal). The Agency denied KCBX’s “Request for Revision to Revised Construction Permit for its South Facility.” KCBX appealed the Agency’s determination on various grounds.

On April 21, 2014, the Agency filed a motion to reconsider a Board order adopted April 17, 2014, as that order addresses documents listed in the Agency’s privilege log. KCBX responded to the motion on April 23, 2014.

On April 28, 2014, KCBX filed its second motion to supplement the record, to which the Agency has not responded.

Below, the Board first provides an abbreviated procedural history of this proceeding and a summary of the Board’s April 17, 2014 order. Next, the Board summarizes the motion to reconsider and the response before discussing the issues and deciding the motion. The Board then summarizes KCBX’s motion to supplement the record with specified documents and then decides the motion on a document-by-document basis. Then Board then states its conclusion.

**ABBREVIATED PROCEDURAL HISTORY**

On February 21, 2014, KCBX Terminals Company (KCBX) timely filed a petition (Pet.) asking the Board to review a January 17, 2014 determination of the Illinois Environmental Protection Agency (Agency or Illinois EPA). *See* 415 ILCS 5/40(a)(1) (2012); 35 Ill. Adm. Code 101.300(b), 105.206. On March 6, 2014, the Board accepted the petition for review. On March 24, 2014, the Board received the administrative record of the Agency’s determination (R.).

On April 2, 2014, the Agency filed a motion for a protective order regarding deposition riders attached by KCBX to notices of deposition. KCBX filed its response on April 4, 2014. On April 8, 2014, the hearing officer issued an order denying the Agency's motion. On April 14, 2014, the Agency filed an interlocutory appeal of the hearing officer order. KCBX filed its response opposing the appeal on April 15, 2014.

On April 7, 2014, KCBX filed a motion to supplement the record seeking to include in the Administrative Record documents including those listed in a Privilege Log. On April 11, 2014, KCBX filed a motion for leave to amend its motion to supplement. On April 14, 2014, the Agency filed a response to KCBX's motion for leave to supplement the record. On April 15, 2014, the Agency filed a response to KCBX's motion for leave to amend its motion. Also on April 15, 2014, KCBX filed a motion for leave to reply, accompanied by its reply.

On April 17, 2014, the Board adopted an order affirming the April 8, 2014 hearing officer order in its entirety. The Board also partially granted and partially denied KCBX's motion to supplement the record and directed the Agency to include specified documents in the record.

On April 21, 2014, the Agency filed a motion for reconsideration of the Board's April 17, 2014 order (Mot. Recon.). On April 23, 2014, KCBX filed its response (Resp.).

On April 28, 2014, KCBX filed its second motion to supplement the record (Mot. Supp.).

#### **SUMMARY OF BOARD'S APRIL 17, 2014 ORDER**

In its April 17, 2014 order, the Board reviewed the hearing officer's April 8, 2014 order denying the Agency's motion for a protective order. After reviewing the arguments raised by the Agency in its interlocutory appeal and KCBX's response, the Board agreed with the hearing officer's conclusion that "the predecisional deliberative process privilege does not apply to the production requested by KCBX here." The Board also agreed with the hearing officer's finding "that the discovery requested by KCBX is both relevant and reasonably calculated to lead to relevant information, and is not unduly burdensome." Finally, the Board agreed with the hearing officer's finding "that the Agency has failed to establish that any privilege, including the attorney-client privilege, applies to the requested production." Accordingly, the Board affirmed the April 8, 2014 hearing officer order in its entirety.

The order also addressed KCBX's motion to supplement the record. The Board noted that it had upheld the hearing officer's April 8, 2014 order denying the Agency's motion for a protective order. Having affirmed that the Agency failed to establish that privileges including the predecisional deliberative process privilege and the attorney-client privilege apply to the requested production of certain documents, the Board directed the Agency to include in the record documents including those listed in its privilege log.

## **AGENCY MOTION TO RECONSIDER**

### **Summary of Motion**

The Agency requests that the Board reconsider the April 17, 2014 Order only as it relates to the requirement that the Agency include in the record certain emails listed in the Agency's Privilege Log. Mot. Recon. at 3. The Agency listed the emails for which it seeks reconsideration: (1) Michael Dragovich's e-mail and Chris Pressnall's response (Mot. Recon., Exh. A at 1-2 (P000023-24)); (2) Bob Bernoteit's e-mail and Chris Pressnall's response (Mot. Recon., Exh. A at 3 (P000025)); (3) Brad Frost's e-mail and Chris Pressnall's response (Mot. Recon., Exh. A at 4 (P000026)); (4) Bob Bernoteit's and Julie Armitage's e-mail and James Morgan's response (Mot. Recon., Exh. A at 5-9 (P000030-33); and (5) James Morgan's e-mail (Mot. Recon., Exh. A at 10-14 (P000040-44)).

The Agency states that the purpose of a motion to reconsider is to bring to the Board's attention newly discovered evidence that was not available at the time of hearing, changes of law, or errors in the Board's previous application of the law. Mot. Recon. at 4, citing T-Town Drive Thru, Inc. v. IEPA, PCB 07-85, slip op. at 1 (June 19, 2008).

The Agency argues that the attorney-client privilege protects communications relating to legal advice of any kind sought from a legal advisor in his capacity as such. Mot. Recon. at 4, citing Fischel & Kahn, Ltd. v. van Straaten Gallery, Inc., 189 Ill. 2d 579, 584 (2000). The Agency argues that *in camera* inspections are an appropriate mechanism to evaluate whether a communication is protected by the attorney-client privilege. Mot. Recon. at 5, citing In re Marriage of Granger, 197 Ill. App. 3d 363, 374 (5th Dist. 1990). The Agency states that the Board upheld the Hearing Officer's determination regarding the attorney-client privilege, but did not provide for an *in camera* inspection of the documents listed in the Privilege Log. Mot. Recon. at 5.

The Agency states that in Lake County Forest Preserve Dist. v. Ostro, PCB 92-80, slip op. at 3 (Apr. 22, 1993), the Board directed the respondent to produce all documents for an *in camera* inspection to determine whether such documents were privileged. Mot. Recon. at 5. The Agency also stated that the Board in Celotex noted the hearing officer's authority to conduct *in camera* inspections. *Id.*, citing IEPA v. Celotex Corp., PCB 79-145, slip op. at 1 (Dec. 6, 1984).

The Agency argues that this authority cited by the Board in its April 17, 2014 Order requires that an *in camera* inspection of the emails be conducted before requiring the Agency to produce them. Mot. Recon. at 5. Because the April 17, 2014 Order did not provide for such review, the Agency requests the Board to reconsider its ruling and allow for an *in camera* review of the emails provided in Exhibit A, attached to the motion. *Id.* at 5-6. The Agency argues that if it is directed to produce the emails without such review, it would be prejudicial to the Agency. *Id.* at 6.

### **Summary of Response**

KCBX argues that the Agency has not set forth any valid grounds for the Board to grant the motion. Resp. at 1. KCBX states that the Board has held that the purpose of a motion for reconsideration is to bring to the Board's attention: "(1) newly discovered evidence that was not available at the time of the hearing; (2) changes in the law; or (3) errors in the Board's previous application of existing law." *Id.* at 7 (citations omitted). KCBX argues that newly discovered evidence is evidence that is "not available prior to the hearing." Resp. at 7, citing Emrikson v. Morfin, 2012 IL App (1st) 111687, ¶ 30. KCBX argues that the Agency does not claim that the law has changed and fails to establish either that the Board misapplied the law or that newly discovered evidence justifies reconsideration. Resp. at 7.

KCBX argues that the Agency's motion has not presented evidence that was not available at the time of the April 17, 2014 decision. Resp. at 7. KCBX further argues that the only material presented by the Agency is a "further description of precisely the same documents it claimed were privileged from disclosure or inclusion in the Record in its Privilege Log, [Motion for Protective Order], and in response to KCBX's Motion to Supplement." *Id.* at 7-8. KCBX claims that, because the Agency was in sole possession of these documents at all relevant times, the documents were therefore available to the Agency well before the Board's ruling. *Id.* at 8. The failure to describe the documents in prior filings or submit the documents for *in camera* inspection, KCBX argues, does not make the documents "newly discovered." *Id.* KCBX states that the Agency has not provided any reasonable explanation as to why it did not provide the information earlier. *Id.* KCBX argues that the Board need not consider the additional information. *Id.*, citing Emrikson v. Morfin, 2012 IL App (1st) 111687. KCBX argues that the Agency has failed to establish that any newly-discovered evidence exists to support reconsideration of the Board's rulings. Resp. at 8.

Furthermore, KCBX argues that the Board correctly applied the law. Resp. at 8. First, KCBX notes that the Agency has changed its view on *in camera* inspection. *Id.* Previously, the Agency told the Board that there was no reason to conduct an inspection 15 days before hearing. *Id.* KCBX states that, after denial of its Interlocutory Appeal, the Agency claims that inspection is mandatory and that the Board incorrectly applied the law by not conducting one. *Id.* KCBX notes that it had suggested an *in camera* inspection, but the Agency chose to refrain from providing any additional information. *Id.* at 9. KCBX argues that the Agency "had every opportunity to provide additional information in support of its privilege claims, and could have requested, instead of eschewed, *in camera* review." *Id.*

KCBX continues by arguing that the Board correctly found that the Agency had not met its burden of proving that the attorney-client privilege applied. Resp. at 10. KCBX claims that the Agency merely asserted the privilege without providing additional information regarding the documents. *Id.* KCBX also argues that, although the Board in Lake County Forest Preserve ordered an *in camera* inspection, it did not hold that such is mandatory before any ruling is made on a privileged claim. *Id.*, citing Lake County Forest Preserve v. Ostro, PCB 92-80, slip op. at 3 (Apr. 22, 1993). Additionally, KCBX argues that the court in Celotex Corporation, which also ordered an *in camera* inspection, did not hold that it is mandatory whenever a party claimed privilege "even where the elements of the privilege had not been proven." Resp. at 10, citing

IEPA v. Celotex Corp., PCB 79-145, slip op. at 2-3 (Dec. 6, 1984). KCBX argues that neither the Board nor the hearing officer claims that the Hearing Officer lacks authority to order an *in camera* inspection. Resp. at 10.

KCBX claims that neither the Hearing Officer nor the Board can be faulted for not conducting an *in camera* inspection where the party claiming privilege never requested that remedy, “while simultaneously wholly failing to submit evidence necessary to meet its burden of establishing the privileged nature of requested documents.” Resp. at 11. KCBX argues that the Agency had multiple opportunities to provide additional information to the Board, and the fact that it failed to do so does not establish that the Board incorrectly applied existing law. *Id.* For these reasons, KCBX argues that the Agency has failed to establish that a change in law, newly discovered evidence, or an error in applying existing law requires reconsideration of the Board’s decision. *Id.*

### **Board Discussion**

In ruling on a motion for reconsideration, the Board considers factors including new evidence or a change in the law, to determine whether the Board’s decision was in error. 35 Ill. Adm. Code 101.902. A motion to reconsider may be brought “to bring to the [Board’s] attention newly discovered evidence that was not available at the time of hearing, changes in the law or errors in the [Board’s] previous application of existing law.” Citizens Against Regional Landfill v. County Board of Whiteside, PCB 92-156, slip op. at 2 (Mar. 11, 1993), citing Korogluyan v. Chicago Title & Trust Co., 213 Ill. App. 3d 622, 627, 572 N.E.2d 1154, 1158 (1st Dist. 1992). The Board may also reconsider evidence in the record that was overlooked. *See* People v. Packaging Personified, Inc., PCB 04-16, slip op. at 16 (March 1, 2012).

The Board has reviewed the parties’ filings and is not persuaded to reconsider its April 17, 2014 order. The Agency’s motion does not cite any change in the law. The Board is not persuaded that the motion cites newly discovered evidence showing that the Board erred by directing the Agency to include in the record specified documents listed in the privilege log.

In its April 17, 2014 order, the Board decided issues including the Agency’s interlocutory appeal of an April 8, 2014 hearing officer order. In that order, the hearing officer stated that “[t]he 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.” In deciding the Agency’s interlocutory appeal, the Board among other findings agreed with the hearing officer’s determination “that the Agency has failed to establish that any privilege, including the attorney-client privilege, applies to the requested production.” The Board is not persuaded that this conclusion erred in the application of existing law to the record then before it. While the Agency’s motion to reconsider seeks *in camera* review of documents listed in the privilege log, the Board concludes that its order did not err by declining to provide for this review. The Board, therefore, finds that the motion presents no basis to conclude that the Board’s decision was in error and movants’ motion to reconsider is denied.

## **KCBX'S SECOND MOTION TO SUPPLEMENT THE RECORD**

Section 101.500(d) of the Board's procedural rules provides that, "[w]ithin 14 days after service of a motion, a party may file a response to the motion. . . . Unless undue delay or material prejudice would result, neither the Board nor the hearing officer will grant any motion before expiration of the 14 day response period except in deadline driven proceedings where no waiver has been filed." 35 Ill. Adm. Code 101.500(d).

At a March 20, 2014 status conference with the hearing officer, KCBX indicated that it was not prepared to file a waiver of the statutory decision deadline (KCBX Terminals Co. v. IEPA, PCB 14-110 (Mar. 20, 2014)), and KCBX has filed no waiver or extension of that deadline. *See* 415 ILCS 5/40 (2012); 35 Ill. Adm. Code 101.308(c). While the 14-day response deadline has not run, the Board under these circumstances will proceed to decide KCBX's second motion to supplement the record.

### **Summary of Motion**

KCBX states that, since it filed a motion to supplement the record on April 7, 2014, the Agency "has produced and supplemented the record with numerous documents." Mot. Supp. at 3. KCBX moves to supplement the record with additional documents the Agency "relied upon or should have relied upon" in issuing its January 17, 2014 determination. *Id.* at 1. KCBX states that the record must include "all documents on which the Agency relied *or reasonably should have relied.*" *Id.* at 3 (emphasis in original) (citations omitted). KCBX adds that the Board's rules provide that "[t]he Agency must file its entire record of decision. . . ." *Id.*, citing 35 Ill. Adm. Code 105.212(a).

KCBX's motion seeks to supplement the record with eight specific documents, each of which is separately addressed in the following subsections of the order.

### **Petition Exhibit 6**

**KCBX's Motion.** KCBX states that its "Request for Revision" at issue in this appeal seeks to revise an existing construction permit, which has previously been revised. Mot. Supp. at 4. KCBX adds that the February 2, 2009 permit application attached to the petition for review as Exhibit 6 and to the motion as Exhibit A "sought to revise a previous version of this same construction permit." Mot. Supp. at 4. KCBX claims that it is therefore "part of the same ongoing application as the Request for Revision and is relevant to the continuing modification of the construction permit." *Id.*

KCBX adds that Mr. Dragovich has stated that, when the Agency receives a construction permit application, the file clerk assembles a file, which in this case would be an existing file because KCBX submitted a revision request. Mot. Supp. at 4, citing Exh. B at 34. Thus, KCBX opines, prior construction permits and permit applications sharing the same permit application number were before the Agency when it made the permit decision challenged in this appeal. Mot. Supp. at 5. KCBX adds that the Board has ordered the Agency to supplement the record "with a subsequent construction permit application seeking to revise this same permit (R-000563)." *Id.*

**Board Discussion.** The Board notes Mr. Dragovich's deposition testimony regarding Agency procedures for permit application files. Based on the description of those procedures, the Board concludes that Exhibit A was before the Agency during its review of KCBX's request and that the Agency either relied upon or should have been relied upon it in reviewing KCBX's construction permit application. Accordingly, KCBX's motion to supplement the record with that exhibit is granted.

### **Petition Exhibit 29**

**KCBX's Motion.** KCBX states that its "Request for Revision" at issue in this appeal seeks to revise an existing construction permit, which has previously been revised. Mot. Supp. at 5. KCBX adds that the May 21, 2009 permit attached to the petition for review as Exhibit 29 and to the motion as Exhibit C "is a previous version of this same construction permit (Application No. 07050082) that KCBX now seeks to revise." *Id.*

KCBX adds that Mr. Dragovich has stated that, when the Agency receives a construction permit application, the file clerk assembles a file, which in this case would be an existing file because KCBX submitted a revision request. Mot. Supp. at 5, citing Exh. B at 34. Thus, KCBX opines, prior construction permits and permit applications sharing the same permit application number were before the Agency when it made the permit decision challenged in this appeal. Mot. Supp. at 5.

**Board Discussion.** The Board notes Mr. Dragovich's deposition testimony regarding Agency procedures for permit application files. Based on the description of those procedures, the Board concludes that Exhibit C was before the Agency during its review of KCBX's request and that the Agency either relied upon or should have been relied upon it in reviewing KCBX's construction permit application. Accordingly, KCBX's motion to supplement the record with that exhibit is granted.

### **March 11, 2013 Supplement to Pending Application**

**KCBX's Motion.** KCBX states that its "Request for Revision" at issue in this appeal seeks to revise an existing construction permit, which has previously been revised. Mot. Supp. at 5. KCBX states that the supplement attached to the motion as Exhibit D "was a supplement to a pending construction permit application that sought to revise a previous version of this same construction permit (Application No. 07050082)." *Id.*

KCBX adds that the Agency received this document as a supplement to a pending application included in the record. Mot. Supp. at 6, citing R - 000563. KCBX argues that the supplement "led to the existing construction permit (Application No. 07050082)." Mot. Supp. at 6. In addition, KCBX states that Mr. Bernoteit of the Agency addressed this supplement in the record and attaches a portion of it to an e-mail. *Id.*, citing R-000698, R-000721-42.

In addition, KCBX notes Mr. Dragovich's statement that, when the Agency receives a construction permit application, the file clerk assembles a file, which in this case would be an

existing file because KCBX submitted a revision request. Mot. Supp. at 6, citing Exh. B at 34. Thus, KCBX opines, the supplement was before the Agency when it made the permit decision challenged in this appeal. Mot. Supp. at 6.

**Board Discussion.** The Board notes Mr. Dragovich's deposition testimony regarding Agency procedures for permit application files. Based on the description of those procedures, the Board concludes that Exhibit D was before the Agency during its review of KCBX's request and that the Agency either relied upon or should have been relied upon it in reviewing KCBX's construction permit application. Accordingly, KCBX's motion to supplement the record with the supplement to the construction permit application is granted.

### **FESOP Applications (Exhibit E)**

**KCBX's Motion.** KCBX states that its "Request for Revision" at issue in this appeal addresses equipment now in operation at its North Terminal pursuant to a Federally Enforceable State Operating Permit (FESOP). Mot. Supp. at 6. KCBX further states that it repeatedly noted its intent to transfer that equipment from its North Terminal to its South Terminal and also noted the FESOP. *Id.* (citations omitted). KCBX stresses that the North Terminal FESOP is now in the record. *Id.*, citing R-000538 – 000561.

KCBX adds that the Agency engineer assigned to its request for revision has explained that he examined permits and applications for the North Terminal in examining the request at issue. Mot. Supp. at 7, citing Exh. B at 82-83. KCBX also notes that the Agency has supplemented the record with a program and plan from the North Terminal, which indicates that the Agency considered the North Terminal in its review. Mot. Supp. at 7, citing R-001390. KCBX argues that this FESOP application attached as Exhibit E "was relied upon or reasonable should have been relied upon" by the Agency. Mot. Supp. at 7.

**Board Discussion.** The Board notes that the FESOP for the North terminal is now in the record. The Board further notes that the Agency permit engineer examined North Terminal applications and permits for the North Facility. Accordingly, the Board finds that the documents as Exhibit E were before the Agency during its review of KCBX's request and that that the Agency either relied upon or should have relied upon it in reviewing that request. Accordingly, the motion to supplement the record is granted as to Exhibit E.

### **2008- 2013 FPOPs for North Terminal (Exhibit F)**

**KCBX's Motion.** KCBX states that equipment described in its request now operates at its North Terminal pursuant to a FESOP. Mot. Supp. at 7. KCBX further states that it repeatedly noted its intent to transfer that equipment from its North Terminal to its South Terminal. *Id.* (citations omitted).

KCBX also notes that the Agency has supplemented the record with a Consolidated Fugitive Particulate Operating Program and Contingency Measures Plan from the North Terminal. *Id.*, citing R – 001390. KCBX claims that other revisions of the program and plan were also before the Agency at the time of its decision. Mot. Supp. at 7. KCBX concludes that

these documents attached as Exhibit F “were relied upon or reasonable should have been relied upon” by the Agency. Mot. Supp. at 7.

**Board Discussion.** The Board notes KCBX’s citation to the Consolidated Fugitive Particulate Operating Program and Contingency Measures Plan from the North Terminal in the record. The Board agrees that previous revisions of this plan were before the Agency during its review of KCBX’s request and that that the Agency either relied upon or should have relied upon them in reviewing that request. Accordingly, the motion to supplement the record is granted as to these revisions.

### **November 5, 2013 E-mail**

**KCBX’s Motion.** KCBX notes that this e-mail from Kathryn Pamerter to Katherine Hodge is dated November 5, 2013 and is attached as Exhibit G. The message responds to KCBX’s submission of a revised fugitive particulate operating program for the South Terminal to the Agency. Mot. Supp. at 7. KCBX notes that the e-mail refers to a separate review of a subsequent revision. *Id.* KCBX adds that both programs are already part of the record. *Id.*, citing R-000150, 001197.

**Board Discussion.** The Board notes that this e-mail dated November 5, 2013, comments on an FPOP submitted to the Agency by KCBX on October 3, 2013. The Board also notes KCBX’s citation to the programs in the record. As the Agency issued its determination on KCBX’s request for revision on January 17, 2014, the Board finds that this e-mail submitted as Exhibit G was before the Agency during its review of KCBX’s request, and that that the Agency either relied upon or should have relied upon it in reviewing that request. Accordingly, the motion to supplement the record is granted as to this e-mail.

### **December 5, 2013 Sign-In Sheet**

**KCBX’s Motion.** KCBX states that this document attached as Exhibit H is sign-in sheet is for a meeting at which the Agency “learned of the fully operation status and facility-wide capacity of the dust suppression system at the KCBX South Terminal.” Mot. Supp. at 8.

**Board Discussion.** The Board has reviewed Exhibit H, which is clearly captioned “KCBX Meeting December 5, 2013,” and includes signatures of Agency and KCBX representatives. As the Agency issued its determination on KCBX’s request for revision on January 17, 2014, the Board finds that the sign-in submitted as Exhibit H was before the Agency during its review of KCBX’s request and that that the Agency either relied upon or should have relied upon it in reviewing that request. Accordingly, the motion to supplement the record is granted as to this sign-in sheet.

### **KCBX Slides (December 5, 2013)**

**KCBX’s Motion.** KCBX states that these slides attached as Exhibit I were provided to the Agency on December 5, 2013. Mot. Supp. at 8.

**Board Discussion.** The Board notes that these slides are dated December 5, 2013, and according to KCBX were supplied to the Agency on that date. The cover states that the slides were prepared by KCBX Terminals Company, and the slides plainly address aspects of KCBX's sites and operation. As the Agency issued its determination on KCBX's request for revision on January 17, 2014, the Board finds that the slides submitted as Exhibit I were before the Agency during its review of KCBX's request and that that the Agency either relied upon or should have relied upon them in reviewing that request. Accordingly, the motion to supplement the record is granted as to these slides.

### **CONCLUSION**

For the reasons stated above, the Board denies the Agency's motion to reconsider and grants KCBX's second motion to supplement the record.

IT IS SO ORDERED.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on May 1, 2014 by a vote of 4-0.



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John T. Therriault, Clerk  
Illinois Pollution Control Board