

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

KCBX TERMINALS COMPANY,)
)
Petitioner,)
)
v.)
)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

PCB No. 14-110
(Air Permit Appeal)

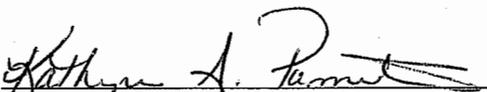
NOTICE OF ELECTRONIC FILING

To: *Via Facsimile and Regular Mail*
Katherine D. Hodge
Edward W. Dwyer
Matthew C. Read
Hodge Dwyer & Driver
3150 Roland Avenue
Springfield, IL 62705

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

PLEASE TAKE NOTICE that on the 2nd day of April, 2014, the Respondent's Motion for Protective Order Regarding Deposition Riders was filed with the Illinois Pollution Control Board, a true and correct copy of which is attached hereto and is hereby served upon you.

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. LISA MADIGAN, Attorney General
of the State of Illinois

By: 
Kathryn A. Pamenter
Christopher J. Grant
Assistant Attorneys General
Environmental Bureau
69 W. Washington St., 18th Floor
Chicago, IL 60602
(312) 814-0608
(312) 814-5388

DATE: April 2, 2014

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

KCBX TERMINALS COMPANY,)	
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Petitioner,)	
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v.)	PCB No. 14-110
)	(Air Permit Appeal)
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**RESPONDENT'S MOTION FOR PROTECTIVE ORDER REGARDING
DEPOSITION RIDERS**

Respondent, Illinois Environmental Protection Agency, pursuant to 35 Ill. Adm. Code 101.100, 101.500, 101.506 and 101.616, hereby moves this Board for a protective order to deny discovery requested in the Deposition Riders attached to the Notices of Deposition of Robert W. Bernoteit, Michael Dragovich, Raymond Pilapil and Joseph Kotas. In support thereof, Respondent states as follows:

1. On February 21, 2014, KCBX Terminals Company ("KCBX") filed its Petition for Review of the Illinois Environmental Protection Agency's ("Illinois EPA") Permit Denial dated January 17, 2014 to the Request for Revision to Revised Construction Permit that KCBX submitted to Illinois EPA on July 23, 2013.
2. On March 24, 2014, Respondent timely filed the Administrative Record in the above-captioned Permit Appeal.
3. KCBX has advised that it does not intend to waive the 120-day deadline for the Illinois Pollution Control Board (the "Board") to issue its decision in this Permit Appeal. 415 ILCS 5/40 (2012). Accordingly, on March 25, 2014, a Hearing Officer Order was entered

scheduling the hearing in this matter on April 29, 2014, and ordering the close of discovery on or before April 18, 2014.

4. On March 28, 2014, KCBX filed its Notice of Discovery Deposition of Robert W. Bernoteit 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, 2014.¹ 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.

5. Respondent seeks a protective order to preclude the production of the documents requested in the Deposition Riders because the requested production is not calculated to lead to relevant information, is unduly burdensome and will not expedite the resolution of the proceeding. 35 Ill. Adm. Code 101.616. KCBX's request for the production of documents through the Deposition Riders seeks information that is not part of the Administrative Record and thus was not considered in Respondent's denial of KCBX's permit application. *Illinois Environmental Protection Agency v. Illinois Pollution Control Board*, 896 N.E.2d 479, 492 (Ill. App. Ct. 2008) ("[d]enying appellants' request for discovery, the Board found that the Act and the Board's procedural rules mandated the Board to conduct the permit appeal hearing exclusively on the record before the Agency [IEPA] at the time the permit or decision was

¹ Depositions also have been scheduled on April 14, April 15 and April 17, 2014, including of two alleged opinion witnesses. (See Dkt. Entry on 3.31.14.)

issued. . . . Therefore, we agree the Board could not properly consider additional evidence or testimony that might be disclosed through additional discovery. . . .”) (internal citations omitted).

6. In addition, the 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, if any, are subject to the predecisional deliberative process privilege.² *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).

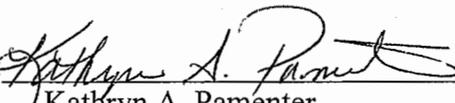
7. Based on the foregoing, and due to the time constraints imposed by the legislature applicable to this Permit Appeal, the operational needs of Respondent and the intensive deposition schedule imposed on Respondent's counsel, Respondent requests that a protective order be entered denying KCBX any documents requested in the Deposition Riders. *Joliet Sand and Gravel Co. v. Illinois Environmental Protection Agency*, PCB No. 86-159, 1986 WL 27226, at *2 (Dec. 23, 1986) (“[d]iscovery 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).”)

² Respondent also objects to the extent KCBX seeks documents subject to any other privilege, including the attorney-client privilege.

WHEREFORE, Respondent, Illinois Environmental Protection Agency, respectfully requests that the Board grant Respondent's Motion for Protective Order Regarding Deposition Riders, enter a protective order denying KCBX Terminals Company's requested documents in the Deposition Riders and grant such other relief as this Board deems proper.

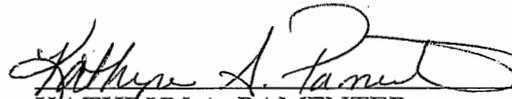
Respectfully Submitted,

PEOPLE OF THE STATE OF ILLINOIS
ex. rel. LISA MADIGAN, Attorney General
of the State of Illinois

BY: 
/ Kathryn A. Pamerter
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CERTIFICATE OF SERVICE

I, KATHRYN A. PAMENTER, an Assistant Attorney General, do certify that I caused to be served this 2nd day of April, 2014, the attached Notice of Electronic Filing and Respondent's Motion for Protective Order Regarding Deposition Riders upon (a) Edward W. Dwyer, Katherine D. Hodge and Matthew C. Read *via facsimile and via regular mail* addressed as set forth on said Notice of Electronic Filing by placing a true and correct copy in an envelope addressed as set forth on said Notice of Electronic Filing, first class postage prepaid, and depositing same with the United States Postal Service at 100 West Randolph Street, Chicago, Illinois, at or before the hour of 5:00 pm, and (b) Bradley P. Halloran *via email*.


KATHRYN A. PAMENTER