

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

TO: Mr. John Therriault	Mr. Bradley P. Halloran
Assistant Clerk of the Board	Hearing Officer
Illinois Pollution Control Board	Illinois Pollution Control Board
100 West Randolph Street	100 West Randolph Street
Suite 11-500	Suite 11-500
Chicago, Illinois 60601	Chicago, Illinois 60601
(VIA ELECTRONIC MAIL)	(VIA FIRST CLASS MAIL)

(SEE PERSONS ON ATTACHED SERVICE LIST)

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board **PETITIONER'S MOTION TO SUPPLEMENT THE RECORD**, a copy of which are herewith served upon you.

Respectfully submitted,

KCBX TERMINALS COMPANY,
Petitioner,

Dated: April 7, 2014

By: /s/ Matthew C. Read
Matthew C. Read

Katherine D. Hodge
Edward W. Dwyer
Matthew C. Read
HODGE DWYER & DRIVER
3150 Roland Avenue
Post Office Box 5776
Springfield, Illinois 62705-5776
(217) 523-4900

CERTIFICATE OF SERVICE

I, Matthew C. Read, the undersigned, hereby certify that I have served the attached PETITIONER'S MOTION TO SUPPLEMENT THE RECORD upon:

Mr. John Therriault
Assistant Clerk of the Board
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601

via electronic mail on April 7, 2014 and upon:

Mr. Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601

Division of Legal Counsel
Illinois Environmental Protection
Agency
1021 North Grand Avenue
Post Office Box 19276
Springfield, Illinois 62794-9276

by depositing said documents in the United States Mail, postage prepaid, in Springfield, Illinois on April 7, 2014 and upon:

Kathryn A. Pamenter, Esq.
Christopher J. Grant, Esq.
Assistant Attorney General
Office of the Attorney General
69 West Washington Street, Suite 1800
Chicago, Illinois 60602

by depositing said document in the United States Mail, postage prepaid, in Springfield, Illinois on April 7, 2014, and by in-person service on April 8, 2014.

/s/ Matthew C. Read
Matthew C. Read

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PETITIONER'S MOTION TO SUPPLEMENT THE RECORD

NOW COMES Petitioner, KCBX TERMINALS COMPANY ("KCBX"), a North Dakota corporation, by and through its attorneys, HODGE DWYER & DRIVER ("HD&D"), and hereby moves to supplement the record before the Illinois Pollution Control Board ("Board") with certain documents the Illinois Environmental Protection Agency ("Illinois EPA") relied upon or should have relied upon in making its determination regarding KCBX's July 23, 2013 Request for Revision to Revised Construction Permit ("Request for Revision") for KCBX's bulk solids materials terminal located at 10730 South Burley Avenue, Chicago, Illinois 60617 ("South Terminal"). In support of its Motion, KCBX states as follows:

1. On January 17, 2014, Illinois EPA issued a Permit Denial letter to KCBX in response to KCBX's Request for Revision.
2. On February 21, 2014, KCBX initiated this proceeding by filing with the Board its Petition for Review ("Petition") regarding the Permit Denial.
3. On March 24, 2014, Illinois EPA filed the Administrative Record with the Board ("Record") in this permit appeal.

4. During its review of the Record, KCBX discovered that several documents that should have been included in the Record were omitted from the Record. Therefore, KCBX is filing this Motion in order to add these documents to the Record.

5. Section 40(d) of the Illinois Environmental Protection Act (“Act”) provides that when the Board hears a permit appeal, the Board’s decision must “be based exclusively on the record before the Agency including the record of the hearing, if any, held pursuant to paragraph (f)(3) of Section 39 unless the parties agree to supplement the record.” 415 ILCS 5/40(d).

6. Section 105.212 of the Board's Rules provides, in relevant part, that “[t]he Agency must file its *entire record of its decision* with the Clerk in accordance with Section 105.116 of this Part. The record must include . . . [a]ny other information the Agency relied upon in making its final decision.” 35 Ill. Admin. Code § 105.212(a) and (b)(5) (emphasis added).

7. Further, the Board has explained that the record must include “all documents on which the Agency relied *or reasonably should have relied.*” *Ameren Energy Resources Generating Co. v. Illinois EPA*, PCB 14-41, 2014 Ill. ENV LEXIS 100 at *23 (Ill.Pol.Control.Bd. Mar. 20, 2014) (citing *United Disposal of Bradley, Inc. v. IEPA*, PCB 03-235, slip op. at (June 17, 2004); *Joliet Sand and Gravel v. IEPA*, PCB 86-159, slip op. at 4 (Feb. 8, 1987), *aff'd*, 163 Ill. App. 3d 830, 516 N.E.2d 955 (3d Dist. 1987)) (emphasis added).

8. For permit appeals, “[i]t is the Agency's responsibility to file the complete record that is before it” *KCBX Terminals Co. v. Illinois EPA*, PCB Nos. 10-110, 11-43, 2011 Ill. ENV LEXIS 155, at *7 (Ill.Pol.Control.Bd. May 19, 2011) (quoting

Industrial Salvage, Inc. v. IEPA, PCB Nos. 93-60, 93-61, slip op. at 2 (Ill.Pol.Control.Bd. Feb. 17, 1994)); *see also* 35 Ill. Admin. Code § 105.116 (requiring Illinois EPA to “file with the Board the entire record of its decision”).

9. The Board requires Illinois EPA to file the complete record of its decision in permit appeals because “[t]he filing of a partial record places the Board in a difficult situation, causing the Board to be faced with making its decision based upon the incomplete record and pleadings as they stand.” *Industrial Salvage, Inc.*, slip op. at 2-3.

10. When Illinois EPA has not filed a complete record in a permit appeal, petitioners have been afforded the opportunity to supplement the record. *See, e.g., KCBX Terminals Co.*, 2011 Ill. ENV LEXIS 155, at *18.

11. KCBX attached the following documents as exhibits to its Petition and hereby seeks to have these documents included in the Record in order to make available to the Board all documents relevant to this matter:

- **Petition Exhibit 2 – Federally Enforceable State Operating Permit (“FESOP”) issued to KCBX Terminal at 3259 East 100th Street, Chicago, Illinois 60617 (“North Terminal”) on April 5, 2012.** Attached hereto as Exhibit A.
 - Justification: The equipment described in the Request for Revision is currently operated at KCBX’s North Terminal pursuant to this FESOP. KCBX noted its intent to transfer the equipment from the North Terminal to the South Terminal in its cover letter to the Request for Revision (Administrative Record, PCB 14-110 at R-000186-R-000187 (Ill.Pol.Control.Bd. Mar. 24, 2014) (hereafter cited as “AR at ___”), the September 3, 2013 e-mail from Terry Steinert to Mike Dragovich (AR at R-000182), and its January 13, 2014 letter to Raymond E. Pilapil (AR at R-000011 – R000016). Notably, the cover letter to the Request for Revision alerts Illinois EPA to the FESOP issued to the North Terminal and KCBX’s plan to operate the North Terminal and South Terminal as a single source. The January 13, 2014 letter explained that the equipment at issue in the Request for Revision is operated pursuant to the FESOP issued to the North Terminal. Therefore, this FESOP was

relied upon or reasonably should have been relied upon by Illinois EPA.

- **Petition Exhibit 9 – December 20, 2012 Letter from Monica T. Rios to Lori Pennington.** Attached hereto as Exhibit B.
 - Justification: This letter notifies Illinois EPA of the transfer of the South Terminal to KCBX and KCBX's intent to operate in accordance with the permit issued to DTE on December 18, 2012. The construction permit at issue in this letter is the construction permit that KCBX attempts to revise in its Request for Revision. Therefore, this document was relied upon or reasonably should have been relied upon by Illinois EPA.

- **Petition Exhibit 10 – Full September 17, 2012 Construction Permit Application for DTE Fuels Terminal, LLC (“DTE”) for Permit at Issue in this Appeal, and December 20, 2012 Letter from Katherine D. Hodge to Edwin C. Bakowski Enclosing Same.** Attached hereto as Exhibit C.
 - Justification: This letter requests that the construction permit application attached to it, which was submitted by DTE, be considered as a supplement to the pending FESOP application for the South Terminal. KCBX's Request for Revision references this permit application, and Illinois EPA has included excerpts of the permit application in the Record. *See* AR at R-0000205 – R-000221. The Request for Revision requests an update of the April 18, 2013 construction permit, which was issued as a result of this application. The Permit Denial was issued under the same permit number as the April 18, 2013 construction permit. The April 18, 2013 construction permit is contained in the Record as filed by Illinois EPA. *See* R-000130 – R-000148. Therefore, the full application for that permit, and the December 20, 2012 letter, were relied upon or reasonably should have been relied upon by Illinois EPA. In the alternative, if the Board determines that the December 20, 2012 letter should not be added to the Record, KCBX requests that the September 17, 2012 DTE Construction Permit Application alone be added to the Record for the reasons described above.

- **Petition Exhibit 11 – December 20, 2012 Letter from Edwin C. Bakowski to KCBX.** Attached hereto as Exhibit D.
 - Justification: This letter confirms that Illinois EPA received KCBX's request for an ownership change and updated the pending FESOP application for the South Terminal accordingly. Further, this letter explains that KCBX is subject to requirements in

existing permits for the South Terminal that Illinois EPA had issued to DTE. Therefore, this document was relied upon or reasonably should have been relied upon by Illinois EPA.

- **Petition Exhibit 12 – December 20, 2012 Letter from Edwin C. Bakowski to KCBX and Attached Construction Permit issued to KCBX on December 20, 2012.** Attached hereto as Exhibit E.
 - Justification: This letter and construction permit confirm that Illinois EPA transferred the construction permit at issue in this appeal to KCBX. The construction permit has the same construction permit number as the April 18, 2013 construction permit KCBX attempts to revise as described in the Request for Revision. Therefore, this document was relied upon or reasonably should have been relied upon by Illinois EPA.

- **Petition Exhibit 13 – July 23, 2013 Request for Revision.** Attached hereto as Exhibit F.
 - Justification: Illinois EPA included KCBX's Request for Revision in the Record beginning at R-000186. However, it is not clear from the Record that KCBX included the Conveyor Transfer Points Process Flow Diagram with its Request for Revision. Therefore, a complete copy of the materials provided by KCBX in the Request for Revision should be added to the Record. This document was relied upon or reasonably should have been relied upon by Illinois EPA.

- **Petition Exhibit 31 – November 1, 2013 e-mail from Katherine D. Hodge to Kathryn Pamerter, cc: to Chris Pressnall with revised Fugitive Particulate Operating Program ("FPOP") attached.** Attached hereto as Exhibit G.
 - Justification: The e-mail in Petition Exhibit 31 notifies Illinois EPA that a new water cannon system at the South Terminal was operational on a full manual and/or limited automated basis. The November 2013 FPOP is attached to this e-mail. The November 2013 FPOP is in the Record as filed by Illinois EPA, so the e-mail transmitting the FPOP should be included in the Record as well. The e-mail contains information regarding the operational status of the dust suppression system at the South Terminal. Illinois EPA gathered information regarding the operation of the South Terminal from inspectors and the general public, so it should have considered information provided by KCBX itself. Likewise, an inspector gathered information related to the operational status of the facility, and in particular the new water cannon system, which

was apparently considered by Illinois EPA when finding the South Terminal might violate 35 Ill. Admin. Code § 212.301. *See* AR at R-000042. Illinois EPA should have considered additional information regarding this system provided by KCBX. Therefore, this document was relied upon or reasonably should have been relied upon by Illinois EPA.

- **Petition Exhibit 32 – Letter from Katherine D. Hodge to Kathryn A. Pamerter, pc: to Chris Pressnall dated November 15, 2013.** Attached hereto as Exhibit H.
 - Justification: This letter notified Illinois EPA that the new water cannon system at the South Terminal was fully operational. This exhibit contains a letter that KCBX sent to the same Illinois EPA attorney and Assistant Attorney General that Petition Exhibit 31 was sent to. The FPOP in Petition Exhibit 31 was included in the Record. This letter contains information regarding the operational status of the dust suppression system at the South Terminal. Illinois EPA gathered information regarding the operational status of the South Terminal from inspectors and the general public, so it should have considered information provided by KCBX itself. Likewise, an inspector gathered information related to the operational status of the facility, and in particular the new water cannon system, which was apparently considered by Illinois EPA when finding the South Terminal might violate 35 Ill. Admin. Code § 212.301. *See* AR at R-000042. Illinois EPA should have considered additional information regarding this system provided by KCBX. Therefore, this document was relied upon or reasonably should have been relied upon by Illinois EPA.

12. KCBX has become aware of an Illinois EPA policy during the permit review period to “halt” action on pending permits issued to facilities handling petroleum coke such as the South Terminal. Specifically, a January 13, 2014 press release issued by the Illinois Governor’s Office explains that Illinois EPA “halted permit activity for petcoke operations pending a review of their impacts on air, land and water.” Governor Quinn Announces Emergency Rules to Protect Illinois Residents from Petcoke Rules (Jan. 13, 2014) (available at <http://www3.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=3&RecNum=>

11850, last accessed Apr. 6, 2014), attached hereto as Exhibit I. In addition, in an audio clip imbedded in the online press release, the Director of Illinois EPA, Lisa Bonnett, explains on January 13, 2014 (four days prior to the date of the Permit Denial on January 17, 2014) that Illinois EPA has permit transactions before it related to petroleum coke and asserts that the Governor asked Illinois EPA to take “a time out on permits.”

Electronic file attached hereto as Exhibit J. Governor Quinn again affirms the policy in a second audio clip imbedded in the January 13, 2014 online press release by confirming that permits are pending but noting that “we are not going to let anything go forward until these rules are promulgated.” Electronic file attached hereto as Exhibit K. Illinois EPA’s policy regarding petroleum coke facilities and direction from the Governor of Illinois were apparently relied upon by Illinois EPA when deciding to deny the Request for Review. Accordingly, these records of the policy should be included in the Record.

13. Likewise, Illinois EPA communicated with the Illinois Governor’s Office regarding pending permitting matters at petroleum coke handling facilities and a moratorium policy related to those permits. However, no documents in the record identify conversations with the Governor’s Office. Such documents should be included in the Record as well.

14. In addition to the items listed above, based upon information in the Record, Illinois EPA omitted additional documents directly related to the Request for Revision that contain information relied upon or information that should have been relied upon by Illinois EPA when making its decision.

15. For example, the record contains a sign-in sheet from a meeting with representatives of KCBX. AR at R-0000183. However, the Record does not contain any notes taken by Illinois EPA staff in attendance at that meeting.

16. Similarly, the Permit Denial is based, in part, on observations made by the Division of Air Pollution Control's field staff. The record contains inspection reports, but those inspection reports are directed to Illinois EPA field staff. *See* AR at R-00031. How were those observations relayed to those reviewing the Request for Revision? Presumably the inspections and other grounds for denial were discussed in meetings and/or by email or other written communications. Notes from any such meetings, and any such emails or other written communications, should be included in the Record.

17. Illinois EPA's Privilege Log contains references to e-mails regarding a draft permit. *See* Privilege Log, PCB 14-110 at P000002-P000023 (hereafter cited as "PL at ___"). One of those e-mails in particular is 21 pages long and, based on its length and subject name, and the length of the existing revised construction permit, appears to contain a draft revised construction permit. PL at P000002-P000022. Such a draft revised construction permit is relevant here, where Illinois EPA claims it needed additional information to issue a revised construction permit. *See* Permit Denial, ¶ 1(b). Thus, this draft revised construction permit should be included in the Record.

18. Finally, the Permit Calculation Sheet filed with the Record, AR at R-000004 – R-000009, indicates that the permit engineer was prepared to issue a permit, but that decision was abruptly changed. The Record contains no notes or records of meetings related to this decision. Clearly, internal Illinois EPA deliberations occurred, but any record of those deliberations has been omitted from the Record. Such records –

whether meeting notes, email messages, or other documents – should be included in the Record.

19. Upon information and belief, these additional documents omitted from the Record include:

- Notes related to the review of the Request for Revision by Illinois EPA personnel;
- Draft permit(s) addressing the activities described in the Request for Revision; and
- Notes taken by Illinois EPA personnel during meetings, telephone calls or discussions regarding the Request for Revision and Illinois EPA's decision to grant or deny the Request for Revision.

20. Due to the omission of the above-described documents from the Request for Revision, KCBX attached Deposition Riders to the Notices of Deposition issued for the following Illinois EPA employees: Michael Dragovich (deposition scheduled for April 9, 2014), Robert W. Bernoteit (deposition scheduled for April 9, 2014), Raymond Pilapil (deposition scheduled for April 10, 2014), and Joseph Kotas (deposition scheduled for April 11, 2014). *See* Exhibit L, Notices of Deposition for Robert W. Bernoteit, Michael Dragovich, Raymond Pilapil, and Joseph Kotas. The KCBX Deposition Riders were narrowly drafted and sought only the above-described documents that KCBX understands were omitted from the Record. The Notices of Deposition requested that the documents described in the KCBX Deposition Riders be produced at the time of the deposition.

21. The documents sought by KCBX in the Deposition Riders are documents that were created by Illinois EPA following its receipt of the Request for Revision and in connection with its review of the Request for Revision. As the Board has explained:

It is well-settled that the Board's review of permit appeals is limited to information before the Agency during the Agency's statutory review period, and is not based on information developed by the permit applicant, or the Agency after the Agency's decision. [Cite omitted.] *However, it is the hearing before the Board that provides a mechanism for the petitioner to prove that operating under the permit if granted would not violate the Act or regulations. Further, the hearing affords the petitioner the opportunity "to challenge the reasons given by the Agency for denying such permit by means of cross-examination and the Board the opportunity to receive testimony which would test the validity of the information (relied upon by the Agency). [Cite omitted.]*

Community Landfill Company, et al. v. Illinois EPA, PCB No. 01-170, 2001 Ill. ENV LEXIS 553, at *8-9 (Dec. 6, 2001) (emphasis added).

22. The documents sought by KCBX in the Deposition Riders are Request for Revision review notes, draft permits based on the Request for Revision, and notes from meetings or discussions concerning the Request for Revision, *i.e.*, documents that were created or generated by Illinois EPA personnel in connection with their review of the Request for Revision and during the air permitting review application process for the Facility. *See Estate of Gerald Slightom v. Illinois EPA*, PCB No. 11-25, 2012 Ill. ENV LEXIS 148, at *30-31 (Ill.Pol.Control.Bd. Apr. 19, 2012) (denying Illinois EPA request for interlocutory appeal of Board order mandating the inclusion of additional documents in the administrative record, noting that "[e]ach of the documents previously requested by the Board is a document submitted to the Agency, prepared by the Agency, or relied upon by the Agency in making its final determination of the Estate's reimbursement claim").

23. In its Privilege Log, Illinois EPA identifies emails, a draft permit calculation sheet, and a FOIA exemption reference sheet that Illinois EPA withheld from the Record, citing the deliberative process privilege and/or the attorney-client privilege as

the ground(s) for not producing these documents in the Record. See PL at P000001 – P000052.

24. However, Illinois EPA ignores the Illinois Supreme Court and appellate court decisions that rejected the existence and application of the predecisional deliberative process privilege in Illinois. See *People ex rel. Birkett v. City of Chicago*, 184 Ill. 2d 521 (1998); see also *Fox Moraine, LLC v. United City of Yorkville*, 2011 IL App (2d) 100017 (2011); *Thomas v. Page*, 361 Ill. App. 3d 484 (2005).

25. In *Birkett*, the Illinois Supreme Court considered whether “to recognize a ‘deliberative process privilege’ to protect certain advice and discussions between government officials concerning formulation of governmental decisions and policy.” *Birkett*, 184 Ill. 2d at 522. In reaching its rejection of the deliberative process privilege in Illinois, the Court acknowledged that this privilege was “[w]idely recognized in federal courts . . . [to] protect[] certain classes of intra-agency communications offered in the course of governmental decisionmaking.” *Id.* at 526. Federal courts have interpreted such classes of communications to include “intra-governmental documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.” *Id.* Despite the federal courts’ acceptance of the deliberative process privilege to protect such intra-governmental communications from disclosure, the *Birkett* Court instead focused on Illinois’ existing policies disfavoring privileges:

[P]rivileges are strongly disfavored because they operate to “exclude relevant evidence and thus work against the truth seeking function of legal proceedings.” Further, it is believed that governmental privileges, if created and applied indiscriminately, will undermine public trust “in the integrity of the government and its commitment to serving the public

interest.” As such, courts will not create or apply any evidentiary privilege unless it “promotes sufficiently important interests to outweigh the need for probative evidence.” For these reasons, this court has repeatedly concluded that the extension of an existing privilege or establishment of a new one is a matter best deferred to the legislature.

Id. at 527-28 (internal citations omitted).

26. Moreover, the Court considered and rejected the notion that the existence of a Freedom of Information Act (“FOIA”) exemption for predecisional materials was evidence of the Illinois legislature’s intent to adopt the deliberative process privilege in Illinois. The Court drew a sharp distinction between confidentiality from the general public and privilege from disclosure to a litigant:

The existence of an FOIA exemption for predecisional materials is evidence of a public policy favoring the confidentiality of such communications. However, it is not dispositive of whether the legislature sought to create an analogous evidentiary privilege. The FOIA was intended to further the citizens’ general desire or need to know about the affairs of government, thus enhancing public discourse and governmental accountability. However, the concerns underlying this purpose often differ greatly from those of a party in litigation *who needs governmental information in order to establish his case. . . .* The drafters of the Illinois FOIA also acknowledged a distinction, observing that the FOIA was “more in the *** interest of citizen involvement in public records” and that “*litigation, depositions, request for documentation*” were all “*far beyond the range*” of the bill.

Id. at 528-29 (internal citations omitted) (emphasis added).

27. Here, Illinois EPA did not include certain emails and the draft permit calculation sheet in the Record due to Illinois EPA’s assertion of the deliberative process privilege. *See* PL at P000040 – P000044, P000047 – P000052. However, as explained above, the Illinois Supreme Court issued its decision in *Birkett*, in which the Court refused to acknowledge the existence of the deliberative process privilege in Illinois. *Birkett*, 184 Ill. 2d at 522-23, 525, 534. Thus, the Board must reject Illinois EPA’s

assertion of the deliberative process privilege in light of the Illinois Supreme Court's holding in *Birkett* that the deliberative process privilege is not recognized in Illinois, and order Illinois EPA to include the documents allegedly subject to this privilege to be included in the Record.¹

28. Illinois EPA also references the attorney-client privilege as a ground for not including every document identified in the Privilege Log, with the exception of the draft permit calculation sheet. PL at P000001 – P000046. However, Illinois EPA's merely stating the privilege is insufficient for Illinois EPA to meet its burden of proving the attorney-client privilege applies to the identified documents. *Lake County Forest Preserve Dist. v. Neil Ostro, et al.*, PCB No. 92-80, 1993 Ill. ENV LEXIS 438, at *4-5 (Ill.Pol.Control.Bd. Apr. 22, 1993) ("A party asserting privilege has the burden of proving that privilege. The mere assertion that a matter is protected by the attorney-client privilege is insufficient to prove the existence of that privilege." (internal citations omitted)).

29. In establishing the attorney-client privilege, the Board has found that the party claiming the privilege must prove the following:

(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.

¹ Appellate court decisions after *Birkett* have recognized a limited *judicial-deliberation* privilege, but have refused to extend the applicability of that limited privilege beyond the deliberations of judges. See *Fox Moraine*, 2011 IL App (2d) at ¶ 73 ("[Petitioner] argues that *Thomas* and *Birkett* provide *only* that judges, and not members of other branches of government, may be protected by this [deliberation] privilege. We are inclined to agree with [Petitioner] that, while the [Respondent city] council members were definitely acting in a quasi-judicial and quasi-legislative role, the supreme court's holding in *Birkett* and the narrow holding in *Thomas* would not warrant us extending the privilege to the council."). The judicial-deliberation privilege is not applicable to the documents identified in Illinois EPA's Privilege Log.

Illinois EPA v. Celotex Corp., PCB No. 79-145, 1984 Ill. ENV LEXIS 568, at *6 (Ill.Pol.Control.Bd. Dec. 6, 1984) (citing 8 Wigmore, Evidence, Sec. 2292). In addition, regarding the confidentiality requirement, the Board has held that “the factual basis for Agency decision-making on permits does not result in an expectation of confidentiality.” *Waste Management, Inc. v. Illinois EPA*, PCB Nos. 84-45, 84-61, 84-68, 1984 Ill. ENV LEXIS 221, at *3 (Ill.Pol.Control.Bd. Aug. 10, 1984).

30. Illinois EPA’s mere assertion of the attorney-client privilege, fails to establish that the documents identified in the Privilege Log are subject to the attorney-client privilege because Illinois EPA has not proven that such documents fall within the Board’s criteria established in *Celotex Corp.* Nor has Illinois EPA demonstrated that any or all of the requested documents are not and do not contain any of the factual basis for Agency decision-making on the Request for Revision. Unless and until Illinois EPA has made such a demonstration, the documents listed on the Privilege Log are not entitled to any expectation of confidentiality. The Board should reject Illinois EPA’s mere assertions of the attorney-client privilege and order Illinois EPA to include these documents in the Record. At a minimum, the Board should conduct an in-camera review of the documents listed on the Privilege Log and make an independent determination.

31. Because the Record is incomplete, KCBX requests that it be supplemented with the documents described in this Motion, in order to make available to the Board all documents relevant to this matter.

32. In addition, KCBX respectfully requests that Illinois EPA confirm whether there exists “[a]ny other information [Illinois EPA] relied upon in making its final decision,” which was not included in the Record. *See* 35 Ill. Admin. Code § 105.212.

WHEREFORE Petitioner, KCBX TERMINALS COMPANY, for the above stated reasons, respectfully prays that the Hearing Officer will enter an Order granting this Motion to Supplement the Record, and mandating Respondent to promptly supplement the administrative record with the documents described and identified above, and that the Hearing Officer award KCBX TERMINALS COMPANY all other relief just and proper in the premises.

Alternatively, to the extent that the Hearing Officer finds that Illinois EPA has sufficiently asserted privileges recognized under Illinois law in relation to any documents listed in the Privilege Log or identified above, KCBX TERMINALS COMPANY respectfully prays that the Hearing Officer enter an Order granting this Motion to Supplement the Record, and mandating Respondent to supplement the administrative record with those documents dealing with factual information regarding the draft permits, but ordering all other documents described in this Motion to be provided by Respondent to be subjected to an *in camera* review to screen out the mental impressions and/or attorney work product documents.

Respectfully submitted,

KCBX TERMINALS COMPANY,
Petitioner,

Dated: April 7, 2014

By: /s/ Matthew C. Read
One of Its Attorneys

Katherine D. Hodge
Edward W. Dwyer
Matthew C. Read
HODGE DWYER & DRIVER
3150 Roland Avenue
Post Office Box 5776
Springfield, Illinois 62705-5776
(217) 523-4900