

CERTIFICATE OF SERVICE

I, Edward W. Dwyer, the undersigned, hereby certify that I have served the attached PETITIONER'S RESPONSE IN OPPOSITION TO MOTION FOR RECONSIDERATION OF ORDER DATED APRIL 17, 2014 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 23, 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 23, 2014 and upon:

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

via facsimile and by depositing said document in the United States Mail, postage prepaid, in Springfield, Illinois on April 23, 2014.

/s/ Edward W. Dwyer
Edward W. Dwyer

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

**PETITIONER'S RESPONSE IN OPPOSITION TO MOTION
FOR RECONSIDERATION OF ORDER DATED APRIL 17, 2014**

NOW COMES Petitioner, KCBX TERMINALS COMPANY ("KCBX"), a North Dakota corporation, by and through its attorneys, HODGE DWYER & DRIVER, and for its Response in Opposition to Respondent's Motion for Reconsideration of Order Dated April 17, 2014, states as follows:

I. INTRODUCTION

1. The Motion for Reconsideration should be denied. The Illinois EPA does not set forth any valid grounds for the Board to grant the Motion for Reconsideration. The emails it claims are privileged are not "newly discovered evidence," and the Motion for Reconsideration fails to establish that the Board misapplied the law. The Illinois EPA's failure to establish its claims of privilege in its previously filed pleadings does not justify reconsideration by the Board. Thus, the Board should deny the Motion for Reconsideration and order production of the emails in question.

2. On February 21, 2014, KCBX filed with the Illinois Pollution Control Board ("Board") its Petition for Review ("Petition") of the Permit Denial issued to KCBX by the Illinois Environmental Protection Agency ("Illinois EPA") on January 17,

2014, in response to its July 23, 2013 Request for Revision to Revised Construction Permit (“Request for Revision”). The Illinois EPA filed the Administrative Record (“Record”) in this permit appeal with the Board on March 24, 2014, along with a Privilege Log of documents not included in the Record (“Privilege Log”). 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.

3. On March 28, 2014, KCBX filed Notices of Depositions for Illinois EPA employees as follows: Robert W. Bernoteit on April 9, 2014, Michael Dragovich on April 9, 2014, Raymond Pilapil on April 10, 2014, and Joseph Kotas on April 11, 2014. Based on the obvious omission of certain documents from the Record, KCBX attached to each of the deposition notices a narrowly focused “Deposition Rider” (“Riders”) requesting production of certain documents, including 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, notes related to observations of the KCBX facility, 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.¹

4. On April 2, 2014, the Illinois EPA filed a Motion for Protective Order (“MPO”) regarding the Riders. In the MPO, the Illinois EPA argued that the documents requested in the Riders were not relevant and were subject to the “predecisional deliberative process privilege.” MPO, pp. 2-3. In a footnote, the Illinois EPA stated that it “also objects to the extent KCBX seeks documents subject to any other privilege,

¹ The Deposition Rider for Mr. Kotas sought slightly different information due to his position as an inspector.

including the attorney-client privilege.” *Id.* at p. 3 n. 1. This is the only reference to the attorney-client privilege in the MPO.

5. On April 4, 2014, KCBX filed its Response in Opposition to the MPO. KCBX argued that the documents requested in the Riders were relevant and should be part of the Record, that the deliberative process privilege was not recognized in Illinois, and that the Illinois EPA had failed to meet its burden of proving that the attorney-client privilege applied by merely referencing that privilege in a footnote.

6. On April 7, 2014, KCBX filed a Motion to Supplement the Administrative Record (“Motion to Supplement”). The Motion to Supplement sought to have added to the Record various documents, including the documents contained in the Privilege Log. KCBX again argued that the deliberative process privilege did not exist in Illinois and that the Illinois EPA had failed to submit sufficient information to meet its burden of establishing the attorney-client privilege as to the documents in the Privilege Log. KCBX noted that, at a minimum, the Board should conduct *in camera* review of the documents listed in the Privilege Log to make an independent determination.

7. On April 8, 2014, the Hearing Officer entered an Order denying the motion for protective order. The Hearing Officer found that the documents requested in the Riders were both relevant and reasonably calculated to lead to relevant information, that the predecisional deliberative process privilege did not apply, and that the Illinois EPA had failed to establish that any privilege, including the attorney-client privilege, applied to the documents requested by KCBX. Hearing Officer Order (Ill.Pol.Control.Bd. Apr. 8, 2014), pp. 5-6.

8. On April 9, 10, and 11, 2014, KCBX took the depositions of Robert W. Bernoteit, Michael Dragovich, Raymond Pilapil, and Joseph Kotas. On April 16, 2014, KCBX took the deposition of Julie Armitage.

9. On April 14, 2014, the Illinois EPA filed an “Interlocutory Appeal from Hearing Officer April 8, 2014 Order Denying Motion for Protective Order” (hereinafter “Interlocutory Appeal.”) The Illinois EPA maintained that the deliberate process privilege applied, again contended the documents requested were not relevant, and claimed that its Privilege Log was sufficient to establish the attorney-client privilege. The Interlocutory Appeal did not contain any further specific information regarding the content of any documents claimed to be within the attorney-client privilege. Further, the Illinois EPA acknowledged that *in camera* inspection by the Board was a possible remedy, but did not submit the documents to the Board for *in camera* review and asserted that “[t]here is no reason for the Board to order such an extraordinary procedure 15 days before hearing in this case.”

10. Also on April 14, 2014, the Illinois EPA filed its response to the Motion to Supplement. As to the privilege issues, the Illinois EPA merely incorporated by reference its arguments regarding the attorney-client privilege and the deliberative process privilege set forth in the Interlocutory Appeal. Again, no further information was provided regarding the content of the documents, and *in camera* review was not suggested or offered. KCBX moved for leave to file a reply on April 15, 2014 and, in its proposed reply, incorporated by reference its arguments with respect to the privilege issues.

11. On April 15, 2014, KCBX filed its Response in Opposition to Respondent's Interlocutory Appeal from the Hearing Officer's April 8, 2014 Order Denying Motion for Protective Order. KCBX reiterated that the documents requested in the Riders were relevant and should be part of the Record, that the deliberative process privilege was not recognized in Illinois, and that the Illinois EPA had failed to meet its burden of proving that the attorney-client privilege applies. KCBX's position was that the Hearing Officer's April 8, 2014 Order was correct and should be affirmed. Alternatively, however, KCBX suggested that the documents identified in the Privilege Log should be inspected *in camera* to determine if they were discoverable.

12. On April 17, 2014, the Board issued an Order ruling on, among other pending motions, the Interlocutory Appeal and the Motion to Supplement. With respect to the Interlocutory Appeal, the Board affirmed the Hearing Officer's April 8, 2014 Order in its entirety, agreeing with the Hearing Officer that the predecisional deliberative process privilege does not apply, the documents requested were relevant and discoverable, and that the Illinois EPA had failed to establish that any privilege, including the attorney-client privilege, applied to the requested production. Board Order (Ill.Pol.Control.Bd. Apr. 17, 2014), p. 5. "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 granted the Motion to Supplement the Record with the documents claimed to be privileged and directed the Illinois EPA "to include the documents listed in its privilege log in the record." *Id.* p. 25.

13. On April 21, 2014, the Illinois EPA filed a Motion for Reconsideration of Order Dated April 17, 2014 (“Motion for Reconsideration.”) It claimed that it “included a footnote [in the MPO] regarding the attorney-client privilege so as to not waive such privilege.” Motion for Reconsideration, p. 2, ¶ 3. The Illinois EPA seeks reconsideration of the Board’s April 17, 2014 Order, but only as to certain emails. *Id.* at p. 3, ¶ 11. The Motion for Reconsideration then sets forth additional information not previously provided to the Board or KCBX regarding the content of these emails, indicating that they contain requests for legal advice from Illinois EPA employees to Illinois EPA attorneys as well as legal advice from Illinois EPA attorneys. *Id.* Further, it appears that the Illinois EPA submitted the identified emails to the Board for *in camera* review (providing redacted copies to KCBX). *Id.* and Exhibit A to Motion for Reconsideration.

14. The Illinois EPA contends in its Motion for Reconsideration that the Board erred in its April 17, 2014 Order by affirming the Hearing Officer’s ruling regarding the attorney-client privilege while failing to order *in camera* inspection of the documents listed in the privilege log. Motion for Reconsideration, p. 5. It is argued that the Hearing Officer, and thus the Board, relied upon *Lake County Forest Preserve District v. Ostro*, PCB No. 92-80, 1993 Ill. ENV LEXIS 438 (April 22, 1993), and *IEPA v. Celotex Corp.*, PCB No. 79-145, 1984 Ill. ENV LEXIS 568 (Dec. 6, 1984), but those decisions provide for *in camera* inspection of documents claimed to be privileged. *Id.* Thus, the Illinois EPA claims that “[t]he authority relied on by the Board in its April 17, 2014 Order establishes that an *in camera* inspection of the emails included in Exhibit A must be conducted before” requiring production, and that requiring production without *in camera* inspection “is prejudicial to the Illinois EPA.” *Id.* at 5-6.

II. APPLICABLE LAW

15. “In ruling on a motion for reconsideration, the Board will consider factors including new evidence or a change in the law, to conclude that the Board's decision was in error.” *People v. Intra-Plant Maintenance Corp.*, PCB No. 12-21, 2013 ENV LEXIS 282, * 6 (September 19, 2013). The Board has held that the intended 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.* (citing *Citizens Against Regional Landfill v. County Board of Whiteside*, PCB 93-156 (Mar. 11, 1993) and *Korogluvan v. Chicago Title & Trust Co.*, 213 Ill. App. 3d 622, 627 (1st Dist. 1992)). The Appellate Court for the First District has held that, for purposes of a motion to reconsider, “newly discovered evidence” is evidence not available prior to the hearing. *Emrikson v. Morfin*, 2012 IL App (1st) 111687, ¶ 30. The court further held that “[i]n the absence of a reasonable explanation regarding why the evidence was not available at the time of the original hearing, the circuit court is under no obligation to consider it.” *Id.* The Illinois EPA does not claim that the law has changed but has failed to establish that *newly discovered* evidence justifies reconsideration or that the Board misapplied the law. Thus, the Motion to Reconsider should be denied.

III. THE ILLINOIS EPA HAS NOT PRESENTED ANY “NEWLY DISCOVERED EVIDENCE”

16. As stated above, for evidence to be appropriately presented in the context of a motion for reconsideration, it must be *newly discovered* evidence that was *not available at the time of the hearing*. The Illinois EPA presents no such evidence. The

only material presented by the Illinois EPA is a further description of precisely the same documents it claimed were privileged from disclosure or inclusion in the Record in its Privilege Log, MPO, and response to KCBX's Motion to Supplement.

17. The Illinois EPA was in sole possession of these documents at all times. The documents were therefore available to the Illinois EPA (and only the Illinois EPA) well prior to the Board's ruling. Its failure to sufficiently describe the documents in its prior filings, or to submit those documents to the Board for *in camera* inspection, does not render the documents newly discovered. Indeed, the Illinois EPA has not provided any reasonable explanation as to why it did not provide the information in its Motion for Reconsideration at an earlier time. *Emrikson* holds that the Board therefore need not even consider the additional information. Accordingly, the Illinois EPA has failed to establish that newly discovered evidence warrants reconsideration of the Board's rulings.

IV. THE BOARD DID NOT INCORRECTLY APPLY THE LAW

18. The Illinois EPA claims that the Board did not correctly apply the law because it did not conduct an *in camera* inspection. The Illinois EPA's changing positions on this subject are noteworthy as an initial matter.

19. As noted above, the Illinois EPA previously told the Board that there was "no reason for the Board to order such an extraordinary procedure 15 days before hearing in this case." After the denial of its Interlocutory Appeal and the granting of KCBX's Motion to Supplement, the Illinois EPA now believes that procedure is *mandatory* and the Board incorrectly applied the law by not conducting such inspection. It was also not until *after* the above rulings that the Illinois EPA provided additional information regarding the content of the documents claimed to be privileged. Indeed, the Illinois

EPA's attorney-client privilege argument has transformed from a footnote in passing to the entire basis of its claim of privilege.

20. KCBX discussed the elements the Illinois EPA had to prove to establish the attorney-client privilege in its filings, and even suggested *in camera* inspection. The Illinois EPA, however, chose to stand on its non-specific privilege log (along with a separate, non-existent privilege—the deliberative process privilege), chose to refrain from providing the Board with any additional information to establish the necessary elements of the attorney-client privilege, did not provide the documents to the Board for *in camera* inspection, and specifically stated that *in camera* review was not necessary or desirable when it was only 15 days prior to the hearing. After the Board ruled in KCBX's favor, the Illinois EPA, eight days prior to the hearing, then claimed that *in camera* inspection was *mandatory* all along and finally decided to attempt to prove the elements of the attorney-client privilege.² The Illinois EPA had every opportunity to provide additional information in support of its privilege claims, and could have requested, instead of eschewed, *in camera* review. The Board did what the Illinois EPA asked—it avoided *in camera* review due to the proximity to the hearing date.

21. In any event, the Board did not misapply the law. The Illinois EPA relies upon *Lake County Forest Preserve*, but that decision stated that:

The Board is also puzzled as to how we are expected to decide the motion to quash when none of the documents in dispute have been provided to the Board. A party asserting privilege has the burden of proving that privilege.

² Interestingly, although the Illinois EPA claimed the attorney-client privilege with respect to every single document identified in the Privilege Log (52 pages total) (see Exhibit 1 to Interlocutory Appeal), it now only identifies 12 pages of the Privilege Log that purportedly contain requests for legal advice or the provision of legal advice, necessary elements of the application of the attorney-client privilege. *Illinois EPA v. Celotex Corp.*, PCB No. 79-145 (Ill.Pol.Control.Bd. Dec. 6, 1984) (citing 8 Wigmore, Evidence, Sec. 2292).

... The mere assertion that a matter is protected by the attorney-client privilege is insufficient to prove the existence of that privilege. ... We will not order the production of documents which are privileged, but American States must prove the privilege.

Lake County Forest Preserve, 1993 Ill. ENV LEXIS 438, *5 (citations omitted). The Hearing Officer and the Board therefore correctly found that the Illinois EPA had the burden to prove that the attorney-client privilege applied, and correctly found that it had not met its burden. As in *Lake County Forest Preserve*, it is puzzling as to why the Illinois EPA persisted with its “take our word for it” privilege claim instead of either providing more information regarding the documents (as it has now done as to some documents in its Motion for Reconsideration) or submitting the documents to the Hearing Officer or Board for *in camera* review. Further, while the Board in *Lake County Forest Preserve* ordered *in camera* review of documents claimed to be privileged, the Board did not hold that *in camera* review is *mandatory* before any ruling is made on a privilege claim. *See id.* at *5. Thus, *Lake County Forest Preserve* does not support reconsideration of the Board’s April 17, 2014 Order.

22. Similarly, *Celotex Corporation* does not support reconsideration. There, the Board held that “[t]he hearing officer has all necessary authority to rule on discovery issues, including *in camera* inspections and protective orders.” *Celotex Corporation*, 1984 Ill. ENV LEXIS 568. The Board did not hold that *in camera* inspection was *mandatory* whenever a party claimed privilege, even where the basic elements of the privilege had not been proven. Here, neither the Hearing Officer nor the Board claimed that the Hearing Officer did not have the authority to conduct an *in camera* inspection. In fact, KCBX prayed in the alternative that an *in camera* inspection be conducted to

determine if the documents were privileged. The Illinois EPA, however, was not interested in having an *in camera* inspection performed and so advised the Board in its Interlocutory Appeal. Neither the Hearing Officer nor the Board can be faulted for not ordering *in camera* inspection where the party claiming privilege never requested such a remedy while simultaneously wholly failing to submit evidence necessary to meet its burden of establishing the privileged nature of requested documents.

23. As discussed above, the Illinois EPA had multiple opportunities to provide additional information or submit the actual documents to the Board to attempt to meet its burden. The fact that the Illinois EPA failed to do so and suffered an adverse ruling as a result of its failure is not a basis for the Board to now conduct an *in camera* inspection of the documents and does not establish that the Board incorrectly applied the existing law.

V. CONCLUSION

24. The Illinois EPA has failed to establish that newly discovered evidence, a change in the law, or an error in applying existing law requires reconsideration of the Board's April 17, 2014 Order. The Hearing Officer and the Board correctly ruled that the Illinois EPA failed to meet its burden of proving the documents at issue are privileged, and neither was required to conduct an *in camera* inspection, particularly where the Illinois EPA specifically stated that it was not seeking such a remedy. The Board need not even consider the additional information provided by the Illinois EPA in its Motion for Reconsideration, as it was available to the Illinois EPA at all times. Accordingly, the Motion for Reconsideration should be denied and the Board should order the immediate production of the documents at issue.

WHEREFORE Petitioner, KCBX TERMINALS COMPANY, respectfully prays
that the Board deny Illinois EPA's Motion for Reconsideration.

Respectfully submitted,

KCBX TERMINALS COMPANY,
Petitioner,

Dated: April 23, 2014

By: /s/ Edward W. Dwyer
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