

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 COMPEL PRODUCTION OF DOCUMENTS RESPONSIVE TO DEPOSITION RIDER FOR JULIE ARMITAGE**, a copy of which is herewith served upon you.

Respectfully submitted,

KCBX TERMINALS COMPANY,
Petitioner,

Dated: April 25, 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 COMPEL PRODUCTION OF DOCUMENTS RESPONSIVE TO DEPOSITION RIDER FOR JULIE ARMITAGE 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 25, 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 25, 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 25, 2014.

/s/ Matthew C. Read
Matthew C. Read

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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**PETITIONER'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS
RESPONSIVE TO DEPOSITION RIDER FOR JULIE ARMITAGE**

NOW COMES Petitioner, KCBX TERMINALS COMPANY ("KCBX"), a North Dakota corporation, by and through its attorneys, HODGE DWYER & DRIVER, pursuant to 35 Ill. Admin. Code §§ 101.500, 101.502, 101.610, and 101.614, and for its Motion to Compel Production of Documents Responsive to Deposition Rider for Julie Armitage, states as follows:

1. 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 in this permit appeal with the Board on March 24, 2014. A Hearing Officer Order entered on March 25, 2014, ordered the close of discovery on April 18, 2014, and scheduled a hearing in this matter on April 29, 2014.

2. As explained in prior filings by KCBX, KCBX's initial review of the Administrative Record revealed that documents directly related to the Request for

Revision were omitted by Illinois EPA from the Administrative Record, including notes taken by Illinois EPA staff during meetings with KCBX regarding the Request for Revision, internal Illinois EPA communications regarding Illinois EPA inspection reports, and a draft permit prepared by Illinois EPA staff which was specifically referenced on the Illinois EPA privilege log. *See Petitioner's Response in Opposition to Motion for Protective Order*, pp. 2-3. Based on the omission of such documents, KCBX attached narrowly-drafted Deposition Riders to the Notices of Deposition issued on March 28, 2014, for Illinois EPA employees Robert W. Bernoteit, Michael Dragovich, Raymond Pilapil, and Joseph Kotas¹, requesting that the following documents be produced at the depositions of these individuals: (1) notes related to the review of the Request for Revision by Illinois EPA personnel, (2) draft permits addressing the activities described in the Request for Revision, and (3) 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.

3. On April 2, 2014, the Illinois EPA filed a Motion for Protective Order Regarding Deposition Riders ("MPO"), which requested that the Board enter a protective order denying KCBX's request for production of the documents described in the KCBX Deposition Riders.

4. Illinois EPA's MPO was denied by the Hearing Officer in an Order dated April 8, 2014.

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

5. Also on April 8, 2014, Petitioner issued and filed a Notice of Discovery Deposition for Illinois EPA employee Julie Armitage. The Notice of Deposition included the identical Deposition Rider (“Armitage Deposition Rider”) that was included with the Notices of Deposition issued for Robert W. Bernoteit, Michael Dragovich, and Raymond Pilapil.

6. On April 14, 2014, Illinois EPA filed Respondent’s Interlocutory Appeal from the Hearing Officer’s April 8, 2014 Order Denying Motion for Protective Order (“Interlocutory Appeal”). On page 2 of the Interlocutory Appeal, Illinois EPA states as follows:

Given the schedule in this matter, Respondent filed its Motion for Protective Order regarding deposition riders attached to the Notices of Deposition of Robert Bemoteit, Michael Dragovich, Raymond Pilapil and Joseph Kotas. *On April 8, 2014, KCBX served its Notice of Deposition of Julie Armitage, containing a similar deposition rider to which Respondent asserts the same objections.*

Interlocutory Appeal, p. 2 (emphasis added).

7. On April 17, 2014, the Board ruled on Respondent’s Interlocutory Appeal and affirmed the April 8, 2014 Hearing Officer Order in its entirety. *Order of the Board*, dated April 17, 2014, p. 5.

8. On April 21, 2014, Illinois EPA filed Respondent’s Motion for Reconsideration of Order dated April 17, 2014. Respondent’s Motion for Reconsideration seeks reconsideration of the Board’s April 17, 2014 Order with respect to certain e-mails attached to the Motion for Reconsideration as Exhibit A. *Respondent’s Motion for Reconsideration of Order dated April 17, 2014*, ¶ 11, Exh. A. The e-mails for which reconsideration is sought include e-mails authored by Julie Armitage. *Id.*

9. Based upon counsel for KCBX's recollection from the telephonic status conference with the Hearing Officer on April 22, 2014, counsel for Illinois EPA, Kathryn Pamerter, stated that she had been unable to confer with Ms. Armitage regarding notes and other documents in preparing to supplement the Administrative Record because Ms. Armitage was not in the office.

10. It is not clear from a review of Illinois EPA's supplements to the Administrative Record, whether documents responsive to the Armitage Deposition Rider were included. Based on subsequent correspondence described below, it appears they were not.

11. On April 24, 2014, counsel for KCBX sent the attached letter to counsel for Illinois EPA requesting that the Administrative Record be supplemented with certain documents that were discussed during the deposition of Ms. Armitage. Exhibit A, *Letter from Matt Read to Kathryn Pamerter*, dated April 24, 2014.

12. In an e-mail response received by counsel for KCBX on April 25, 2014, Ms. Pamerter stated that "the Board's April 17, 2014 Order . . . did not address the deposition rider attached to Julie Armitage's Notice of Deposition." Exhibit B, E-mail from K. Pamerter to M. Read, dated April 25, 2014.

13. It now appears that Respondent is taking the position that the Board's April 17, 2014 Order did not address the Armitage Deposition Rider. This position is insupportable and unacceptable in light of the following:

- The Armitage Deposition Rider is identical to the deposition riders addressed in the Hearing Officer's April 8, 2014 Order (and the Board's April 17, 2014 Order).

- Illinois EPA's Interlocutory Appeal referenced the Armitage Deposition Rider and indicated that Illinois EPA was asserting the same objections to the Armitage Deposition Rider that it had asserted to the other deposition riders.
- Ms. Pamentor's representation to the Hearing Officer and opposing counsel on April 22, 2014, that she intended to confer with Ms. Armitage regarding documents responsive to the Armitage Deposition Rider.

14. It is disingenuous for Illinois EPA to seek an interlocutory appeal of the Hearing Officer's April 8, 2014 Order with respect to the Armitage Deposition Rider, and now take the position that the April 8, 2014 and April 17, 2014 Orders did not address the Armitage Deposition Rider. On the basis of the Illinois EPA's Interlocutory Appeal filing, the Board's April 17, 2014 Order addressed all of the identical deposition riders attached to the Notices of Deposition issued for Illinois EPA employees.

15. For the above reasons, KCBX respectfully requests that the Hearing Officer issue an order compelling Illinois EPA to produce and supplement the Administrative Record with all documents responsive to the Armitage Deposition Rider.

WHEREFORE, for the reasons stated above, Petitioner, KCBX TERMINALS COMPANY, respectfully prays that the Hearing Officer will grant Petitioner's Motion to Compel Production of Documents Responsive to Armitage Deposition Rider and order

Respondent to supplement the Administrative Record with all documents responsive to the Armitage Deposition Rider.

Respectfully submitted,

KCBX TERMINALS COMPANY,
Petitioner,

Dated: April 25, 2014

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

Katherine D. Hodge
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KCBX:004/Filings Permit Appeal/Motion to Compel Production of Documents Responsive to Deposition Rider for J. Armitage



HODGE DWYER & DRIVER

ATTORNEYS AT LAW

MATTHEW C. READ
E-mail: mread@hddattorneys.com

April 24, 2014

VIA FACSIMILE

(Original via U.S. Mail)

Kathryn A. Pamerter, Esq.
Assistant Attorney General
Illinois Attorney General's Office
69 W. Washington St., 18th Floor
Chicago, Illinois 60602

RE: Follow up from Depositions
KCBX Terminals Company v. Illinois EPA, PCB 2014-110
Our File No. - KCBX:195.004

Dear Katie,

During discovery depositions, Julie Armitage and Joseph Kotas discussed documents related to the review of the July 23, 2013 Request for Revision that do not appear in the Administrative Record. Those documents, in addition to redacted or additional withheld documents are described in more detail below. KCBX Terminals Company now requests that the Illinois Environmental Protection Agency ("Illinois EPA") immediately produce these documents and incorporate them into the Administrative Record.

- In her deposition, Ms. Armitage described responses to letters from Senator Dick Durbin and Congresswoman Robin Kelly. With regard to a letter from both Senator Durbin and Congresswoman Kelly dated December 16, 2013 (R-000029), Ms. Armitage confirmed that a response was prepared and that she worked with others to prepare it. Discovery Deposition of Julie Armitage at 37 (Apr. 16, 2014). In Illinois EPA's Second Supplement to the Administrative Record, a letter to Congresswoman Kelly dated November 25, 2013 is provided (R-000845). However, no response to the December 16, 2013 letter to either Senator Durbin or Congresswoman Kelly has been provided or incorporated into the Administrative Record.
- In his deposition, Mr. Kotas explained that he was instructed by e-mail to visit the South Terminal by Jim Ross or Harish Narayan. Deposition of Joseph Kotas at 23 (Apr. 11,

Kathryn A. Pamenter, Esq.
April 24, 2014
Page 2

2014). However, no such e-mails have been produced or incorporated into the Administrative Record.

- Mr. Kotas explained that he discussed the November FPOP in the Administrative Record (R-000150) with others at Illinois EPA. *Id.* at 48. Mr. Kotas was unable to recall when those discussions occurred, but noted that notes or e-mails would probably be able to refresh his recollection about when they occurred. *Id.* at 49. No such e-mails or notes have been produced or incorporated into the Administrative Record.
- Mr. Kotas explained that he shared a draft inspection report with Jim Morgan, Harish Narayan, and Emilio Salis, and that those individuals recommended revisions to the draft inspection report. *Id.* at 34. The Administrative Record does not contain comments from Mr. Morgan, Mr. Narayan, or Mr. Salis regarding the inspection report, any e-mails or other written communications regarding these persons' review, or any draft inspection reports shared with these individuals.
- Ms. Armitage explained that she reviewed a draft of her witness disclosure and the final version of her witness disclosure. Deposition of Julie Armitage at 21-22 (Apr. 16, 2014). However, the draft of her witness disclosure and any correspondence related to the same have not been produced or incorporated into the Administrative Record.

Therefore, we request that Illinois EPA produce these documents to us, and move to supplement the record with these documents, immediately. In addition, the supplements to the Administrative Record filed by the Respondent on April 21 and 22, 2014, include documents that have been redacted or withheld for various reasons, including attorney-client privilege and as exempt under the Freedom of Information Act. In light of the Board's order on April 17, 2014, we again renew our request for these documents to be provided in full.

Please contact me if you would like to discuss this request.

Sincerely,



Matthew C. Read

MCR:jrs

KCBX:004/Corr/Pamenter02 - Additional Documents

Exhibit B

Jennifer R. Sheley

From: Pamenter, Kathryn <KPamenter@atg.state.il.us>
Sent: Thursday, April 24, 2014 4:06 PM
To: Matthew C. Read
Cc: Katherine D. Hodge; Edward W. Dwyer; Morgan, James (James.Morgan@illinois.gov); Grant, Christopher J.; Petti, Robert
Subject: KCBX Terminals Company v. Illinois Environmental Protection Agency (14-110)
Attachments: Notice of Electronic Filing and Third Supplement to the Administrative Record 4.24.14.pdf; Letter to E. Dwyer 4.17.14.pdf

Matthew

Reference is made to your correspondence of 10:56 am earlier today. The Illinois EPA responds to KCBX's bulleted items in that letter as follows:

- The Illinois EPA has not located a response letter to Senator Durbin's and Congresswoman Kelly's December 16, 2013 letter.
- Please see the email in the first attachment (R1428).
- Except for documents that are already included in the Administrative Record and supplements thereto, Mr. Kotas has advised that he has not been able to locate any e-mails or notes responsive to your third bulleted item.
- Except for the documents labeled R1429 – R1431 and the documents that are already included in the Administrative Record and supplements thereto, Mr. Kotas has advised that he has not been able to locate any additional drafts of the inspection reports.
- Please see my correspondence to Mr. Dwyer dated April 17, 2014, a copy of which is attached hereto as a courtesy.

The last paragraph of your correspondence requested that the redacted documents included in the Supplements to the Administrative Record dated April 21 and 22, 2014 be filed in unredacted form as a further supplement. First, the remaining redacted documents that were included in the Privilege Log are the subject of the Motion for Reconsideration pending before the Illinois Pollution Control Board. Second, the redacted portions of the documents not originally listed in the Privilege Log are not responsive to the deposition riders. Further, the Board's April 17, 2014 Order did not require the production of documents concerning other cases, and did not address the deposition rider attached to Julie Armitage's Notice of Deposition.

Please contact me if you have any questions.

Sincerely,
Katie Pamenter

Kathryn A. Pamenter
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