

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
<b>(VIA ELECTRONIC MAIL)</b>	<b>(VIA FIRST CLASS MAIL)</b>

**(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 FOR LEAVE TO FILE REPLY TO RESPONDENT'S OBJECTION TO PETITIONER'S MOTION FOR PROTECTIVE ORDER REGARDING RESPONDENT'S WITNESS DISCLOSURE and PETITIONER'S REPLY TO RESPONDENT'S OBJECTION TO PETITIONER'S MOTION FOR PROTECTIVE ORDER REGARDING RESPONDENT'S WITNESS DISCLOSURE** , a copy of which is herewith served upon you.

Respectfully submitted,

KCBX TERMINALS COMPANY,  
Petitioner,

Dated: April 15, 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 FOR LEAVE TO FILE REPLY TO RESPONDENT'S OBJECTION TO PETITIONER'S MOTION FOR PROTECTIVE ORDER REGARDING RESPONDENT'S WITNESS DISCLOSURE and PETITIONER'S REPLY TO RESPONDENT'S OBJECTION TO PETITIONER'S MOTION FOR PROTECTIVE ORDER REGARDING RESPONDENT'S WITNESS DISCLOSURE 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 15, 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 15, 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

via facsimile and by depositing said document in the United States Mail, postage prepaid, in Springfield, Illinois on April 15, 2014.

/s/ Matthew C. Read  
Matthew C. Read

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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Petitioner,	)	
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v.	)	PCB 14-110
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ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Respondent.	)	

**PETITIONER'S MOTION FOR LEAVE TO FILE  
REPLY TO RESPONDENT'S OBJECTION TO PETITIONER'S  
MOTION FOR PROTECTIVE ORDER REGARDING  
RESPONDENT'S WITNESS DISCLOSURE**

NOW COMES Petitioner, KCBX TERMINALS COMPANY ("KCBX"), a North Dakota corporation, by and through its attorneys, HODGE DWYER & DRIVER, and, pursuant to 35 Ill. Admin. Code §§ 101.100, 101.500, and 101.502(a), moves the Illinois Pollution Control Board ("Board") for leave to file its Reply to Respondent's Objection to Petitioner's Motion for Protective Order Regarding Respondent's Witness Disclosure. In support thereof, Petitioner states as follows:

1. On April 4, 2014, Respondent, Illinois Environmental Protection Agency ("Illinois EPA") filed Respondent's Witness Disclosure with the Illinois Pollution Control Board ("Board"), as required by the Hearing Officer Order entered on March 25, 2014.
2. Respondent's Witness Disclosure lists Katherine D. Hodge, counsel of record for KCBX in this proceeding, as a witness that Illinois EPA may call at the hearing scheduled for April 29, 2014.

3. On April 8, 2014, KCBX filed a Motion for Protective Order Regarding Respondent's Witness Disclosure, requesting that the Board issue a protective order prohibiting Illinois EPA from calling Katherine D. Hodge, counsel of record for KCBX, as a witness at the hearing to be held in this matter on April 29, 2014.

4. On April 14, 2014, Illinois EPA filed Respondent's Objection to Petitioner's Motion for Protective Order Regarding Respondent's Witness Disclosure ("Objection to MPO"). The Objection to MPO explains that Katherine Hodge was the author of a letter dated January 13, 2014 ("the January 13 Hodge Letter"), which responded to the "Wells" letter sent to KCBX by Illinois EPA on December 10, 2014. *Objection to MPO*, ¶¶ 2-3.

5. Petitioner's Witness Disclosure provided no explanation or basis for the identification of Ms. Hodge as a witness at the April 29, 2014 hearing. The Objection to MPO filed by Illinois EPA on April 14, 2014, contains the only explanation articulated by Illinois EPA for Ms. Hodge's inclusion on Illinois EPA's Witness Disclosure.

6. For this reason, KCBX requests leave to file a short Reply to address the information and arguments set forth in the Illinois EPA's Objection to MPO.

7. Since hearing in this matter will not begin until April 29, 2014, neither the Illinois EPA nor any other interested parties will be materially prejudiced if the Board allows KCBX to file a brief Reply (attached hereto as Exhibit A) to Illinois EPA's Objection to MPO.

WHEREFORE, the Petitioner, KCBX TERMINALS COMPANY, respectfully prays that the Illinois Pollution Control Board grant it leave to file its Reply to Respondent's Objection to Petitioner's Motion for Protective Order Regarding Respondent's Witness Disclosure (attached hereto as Exhibit A) *instanter*, and that the Illinois Pollution Control Board grant all other relief just and proper in the premises.

Respectfully submitted,

KCBX TERMINALS COMPANY,  
Petitioner,

Dated: April 15, 2014

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

Katherine D. Hodge  
Edward W. Dwyer  
Matthew C. Read  
HODGE DWYER & DRIVER  
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KCBX:004/Filings Permit Appeal/Petitioner's Motion for Protective Order Regarding Respondent's Witness Disclosure

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

**PETITIONER'S REPLY TO RESPONDENT'S OBJECTION TO  
PETITIONER'S MOTION FOR PROTECTIVE ORDER  
REGARDING RESPONDENT'S WITNESS DISCLOSURE**

NOW COMES Petitioner, KCBX TERMINALS COMPANY ("KCBX"), a North Dakota corporation, by and through its attorneys, HODGE DWYER & DRIVER, and, pursuant to 35 Ill. Admin. Code §§ 101.100, 101.500, 101.502(a), 101.610 and 101.614, hereby files the following Reply to Respondent's Objection to Petitioner's Motion for Protective Order Regarding Respondent's Witness Disclosure. In support thereof, Petitioner states as follows:

1. On April 4, 2014, Respondent, Illinois Environmental Protection Agency ("Illinois EPA") filed Respondent's Witness Disclosure with the Illinois Pollution Control Board ("Board"), as required by the Hearing Officer Order entered on March 25, 2014.
2. Respondent's Witness Disclosure lists Katherine D. Hodge, counsel of record for KCBX in this proceeding, as a witness that Illinois EPA may call at the hearing scheduled for April 29, 2014.

3. On April 8, 2014, KCBX filed a Motion for Protective Order Regarding Respondent's Witness Disclosure, requesting that the Board issue a protective order prohibiting Illinois EPA from calling Katherine D. Hodge, counsel of record for KCBX, as a witness at the hearing to be held in this matter on April 29, 2014.

4. On April 14, 2014, Illinois EPA filed Respondent's Objection to Petitioner's Motion for Protective Order Regarding Respondent's Witness Disclosure ("Objection to MPO"). The Objection to MPO explains that Katherine Hodge was the author of a letter dated January 13, 2014 ("the January 13 Hodge Letter"), which responded to the "Wells" letter sent to KCBX by Illinois EPA on December 10, 2014. *Objection to MPO*, ¶¶ 2-3. According to Illinois EPA, the KCBX construction permit application and the January 13 Hodge Letter "constitute KCBX's two substantive submissions to the Illinois EPA at issue in this Permit Appeal." *Id.* at ¶ 3.

5. Illinois EPA's Objection to MPO contends that KCBX's Motion for Protective Order is premature and should be denied pending the depositions of KCBX personnel scheduled for April 14, 2014, and April 15, 2014. *Id.* at ¶ 10.

6. In the alternative, Illinois EPA's Objection to MPO contends that KCBX's Motion for Protective Order should be denied because Katherine Hodge "was the sole preparer of KCBX's response to the December 13, 2013 letter." *Id.* at ¶ 11. Illinois EPA further contends that "[b]y serving in a capacity typically held by a consultant, Katherine D. Hodge placed herself in this matter and is the proper person to answer questions regarding the January 13 Hodge Letter." *Id.*

7. The Objection to MPO filed by Illinois EPA includes a copy of the January 13 Hodge Letter as Exhibit A.

8. The first paragraph of the January 13 Hodge Letter states that the letter is written “on behalf of my client, KCBX Terminals Company.” *Id.*, Exh. A., p. 1. The letter includes a short background section addressing the permitting status and operations of the KCBX North and South Terminals, which information had been previously communicated to Illinois EPA by KCBX. *Id.*, Exh. A., pp. 1-2. The remainder of the letter is devoted to addressing the legal issue of whether “moving the equipment at issue from KCBX North to KCBX South would cause a violation of the Act or regulations.” *Id.*, Exh. A., p. 2. The January 13 Hodge Letter provides a legal analysis of the above issue, and requests that Illinois EPA issue the revised construction permit on the basis of the legal analysis. *Id.*, Exh. A., pp. 2-6.

9. A review of the January 13 Hodge Letter clearly demonstrates that, contrary to Illinois EPA’s assertions, Ms. Hodge was acting as legal counsel for KCBX when she prepared and sent the January 13 Hodge Letter on behalf of her client, KCBX.

10. The Motion for Protective Order filed by KCBX is not premature given the April 4, 2014 Petitioner’s Witness Disclosure and the April 29, 2014 hearing date. As set forth in KCBX’s Motion for Protective Order, under decisions issued by the Board and Illinois appellate courts, Illinois EPA has to make a showing under the factors outlined in *Shelton v. American Motors Corp.*, 805 F.2d 1323 (8<sup>th</sup> Cir. 1986) that Ms. Hodge, who is counsel of record for KCBX, should be ordered to appear as a witness, in order to overcome the presumption against allowing counsel to testify at deposition or



hearing. *See Citizens Against Regional Landfill v. Whiteside County*, PCB No. 92-156, 1993 Ill. ENV LEXIS 187 (February 25, 1993).

11. Because Petitioner's Witness Disclosure provided no explanation or justification for the identification of Ms. Hodge as a witness, KCBX had no choice but to file its Motion for Protective Order. By raising these issues now and seeking a determination from the Board, KCBX seeks to avoid surprise or prejudice to either party, allow the parties to prepare for hearing, and ensure that the hearing proceeds smoothly.

12. Neither the April 4, 2014 Witness Disclosure nor the Objection to MPO filed by Illinois EPA address the *Shelton* factors or provide a sufficient justification for the identification of Ms. Hodge as a witness. Other than stating she was the sole preparer of the January 13 Hodge Letter, the Objection to MPO provides no explanation as to what information Illinois EPA seeks to elicit from Ms. Hodge or how that information is relevant and nonprivileged, crucial to the preparation of the case, or why such information cannot be obtained by other means. *Shelton*, 805 F.2d at 1327.

WHEREFORE Petitioner, KCBX TERMINALS COMPANY, respectfully prays that the Hearing Officer grant a Protective Order which prohibits Illinois EPA from calling Katherine D. Hodge as a witness at the April 29, 2014 hearing.

Respectfully submitted,

KCBX TERMINALS COMPANY,  
Petitioner,

Dated: April 15, 2014

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

Katherine D. Hodge  
Edward W. Dwyer  
Matthew C. Read  
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KCBX:004/Filings Permit Appeal/Pet.'s Reply to Resp.'s Obj. to Pet.'s MPO