

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: Katherine D. Hodge
 Edward W. Dwyer
 Matthew C. Read
 Hodge Dwyer & Driver
 3150 Roland Avenue
 Springfield, IL 62705

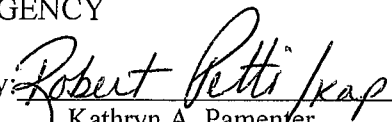
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PLEASE TAKE NOTICE that on the 16th day of May, 2014, Respondent's Motion for Reconsideration of Order Dated May 1, 2014 was filed with the Illinois Pollution Control Board, a true and correct copy of which is attached hereto and is hereby served upon you.

ILLINOIS ENVIRONMENTAL PROTECTION
 AGENCY

By: 
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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)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

RESPONDENT'S MOTION FOR RECONSIDERATION OF
ORDER DATED MAY 1, 2014

Respondent, Illinois Environmental Protection Agency ("Illinois EPA"), pursuant to 35 Ill. Adm. Code 101.520, respectfully requests that the Illinois Pollution Control Board ("Board") reconsider its Order entered on May 1, 2014 ("May 1, 2014 Order") as it relates to the decision to not allow Respondent to file a response. In support thereof, Respondent states as follows:

I. INTRODUCTION

In a permit appeal the Board is to afford a party fourteen days to file a response to any motion filed with the Board. See 35 Ill. Admin. Code 101.500(d). The Board is expressly precluded from granting any motion before the expiration of the fourteen day response period, except when facing a deadline in a proceeding where no waiver of the decision deadline has been filed, or in matters where undue delay or material prejudice would result. *Id.* Here, the Board ruled on the Petitioner's Second Motion to Supplement the Record ("SMTS") three days after it was filed, without affording the Respondent the required fourteen day period to respond. Because there was no claim or finding of prejudice or undue delay, and because the fourteen day response period did not infringe on the decision deadline in this matter, the Board erred in ruling without allowing Respondent fourteen days to respond.

II. ARGUMENT

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. *Citizens Against Regional Landfill v. County Board of Whiteside*, PCB 93-156 (Mar. 11, 1993); see also *Korogluvan v. Chicago Title & Trust Co.*, 213 Ill. App. 3d 622, 627 (1st Dist. 1992)). In this matter, the Board erred in its application of Section 101.500(d) when it failed to allow the Respondent an opportunity to file a response to the SMTS. Section 101.500(d) states as follows:

Within 14 days after service of a motion, a party may file a response to the motion. If no response is filed, the party will be deemed to have waived objection to the granting of the motion, but the waiver of objection does not bind the Board or the hearing officer in its disposition of the motion. Unless undue delay or material prejudice would result, neither the Board nor the hearing officer will grant any motion before expiration of the 14 day response period except in deadline driven proceedings where no waiver has been filed. . . 35 Ill.Admin. Code 101.500(d).

As discussed below, no material prejudice or undue delay was claimed in the SMTS or cited in the Board's May 1, 2014 Order, and the timing of the SMTS and the fourteen day response period did not infringe on the statutory decision deadline in this matter in any manner whatsoever.

In this permit appeal, the Board is required to render a decision no later than 120 days after the petition for review is filed. In this matter the decision deadline is June 23, 2014. On April 28, 2014, at 4:15 pm, one day prior to commencement of hearing, the Petitioner served Respondent with a copy of the SMTS. Pursuant to Section 101.500(d), absent a showing of undue delay, material prejudice, or that the decision deadline was in jeopardy, the Respondent

should have been afforded until May 12, 2014 to file a response to the SMTS. May 12, 2014 is 42 days before the Board is required to render a decision in this matter, clearly enough time for the Board to consider the Response before encountering any deadline. However, on May 1, 2014, a scant three days after Petitioner's filing, and three days into the four day hearing in this matter, the Board issued its Order granting the Petitioner's SMTS.

There is no basis in either the SMTS or the May 1, 2014 Order, that even hints at the need for a waiver of the fourteen day response period. There is not showing in either the SMTS or the May 1, 2014 Order, that any undue delay or material prejudice will result if the fourteen day response period is not waived. Likewise, there is no showing that the Board was faced with an immediate deadline that required a waiver of the fourteen day response period.

Indeed, it is noted in the May 1, 2014 Order, that there has been no waiver of the decision deadline in this matter. However, the decision deadline in this matter is June 23, 2014, 42 days after the fourteen day response period would expire. The Board was not pressed to rule on the SMTS by an impending deadline, and to find that the Board may waive the fourteen day response period for any motion in any proceeding where the decision deadline is not waived would be a misstatement, and misuse, of Section 101.500(d).

Clearly, if this was another case where a motion was filed three days before the expiration of the Board's decision deadline, and where there was no waiver of the deadline, in that scenario waiver of the fourteen day decision deadline would be appropriate. Here, the timing of events is much different. It is obvious from the language of Section 101.500(d) that absent a showing of undue delay or material prejudice, or where a deadline would be exceeded by allowing the fourteen day response period, the Respondent is entitled to a timely response. To find otherwise would allow the Board to rule on any motion at any time without affording

time for a responsive pleading in any case where there has not been a waiver of the decision deadline. Such an interpretation of Section 101.500(d) would obviate the need for this rule altogether.

III. CONCLUSION

Because the Board erred in not allowing the Respondent an opportunity to file a response to the Petitioner's SMTS, the Board should reconsider the May 1, 2014 Order, and afford the Respondent an opportunity to file its Response, only as to Exhibits H and I to the SMTS, which is included as part of Respondent's post-hearing argument in this matter.

ILLINOIS ENVIRONMENTAL PROTECTION
AGENCY

By:



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CERTIFICATE OF SERVICE

I, Kathryn A. Pamenter, an Assistant Attorney General, do certify that I caused to be served this 16th day of May, 2014, the attached Notice of Electronic Filing and Respondent's Motion for Reconsideration of Order Dated May 1, 2014 upon (a) Katherine D. Hodge, Edward W. Dwyer and Matthew C. Read, of Hodge Dwyer & Driver, *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, (b) Bradley P. Halloran and John Therriault *via email* and (c) Stephen A. Swedlow and Michelle Schmit, of Quinn Emanuel Urquhar Sullivan LLP, *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.


KATHRYN A. PAMENTER