

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

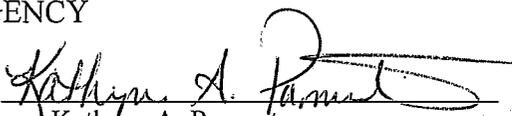
Bradley P. Halloran and John Therriault
Hearing Officer/Assistant Clerk to the Board
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PLEASE TAKE NOTICE that on the 18th day of August, 2014, Respondent's Response to Petitioner's Motion for Leave to File Reply to Respondent's Response to Petitioner's Motion for Reconsideration and Modification 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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**RESPONDENT'S RESPONSE TO PETITIONER'S MOTION FOR LEAVE TO FILE
REPLY TO RESPONDENT'S RESPONSE TO PETITIONER'S MOTION FOR
RECONSIDERATION AND MODIFICATION**

In its Motion for Leave to File Reply, KCBX Terminals Company ("Petitioner") claims it "would be materially prejudiced if it is not permitted by the Board to reply to Illinois EPA's comments on its review of the Administrative Record, Illinois EPA's mischaracterization of KCBX's argument, and Illinois EPA's argument regarding the Board's procedural rules." (Motion for Leave to File Reply at ¶ 4.) None of Petitioner's purported bases satisfy the requisite showing of material prejudice. Moreover, Petitioner does not refute that it failed to set forth any new evidence, change in law or errors in the Illinois Pollution Control Board's ("Board") application of existing law to warrant reconsideration of the Board's June 19, 2014 Opinion and Order. 35 Ill. Adm. Code 101.902. Accordingly, Petitioner's Motion for Leave to File Reply should be denied with its Motion for Reconsideration.

ARGUMENT

Section 101.500(e) of the Board's procedural rules provides that, "[t]he moving person will not have the right to reply, *except* as permitted by the Board or the hearing officer *to prevent material prejudice.*" 35 Ill. Adm. Code 101.500(e) (emphasis added). First, Petitioner contends material prejudice will occur if it is not permitted to reply to Illinois EPA's "comments on its

review of the Administrative Record.” (Motion for Leave to File Reply at ¶ 4.) Contrary to Petitioner’s contention, Illinois EPA did not provide any comments in its response to the Motion for Reconsideration. The Board’s June 19, 2014 Opinion and Order required that Illinois EPA conduct an “additional consideration of the information in the application consistent with this order and with the requirements of the Act and applicable regulations. . . .” (Opinion and Order at p. 57.) Mr. Bernoteit’s Affidavit addressed the status of Illinois EPA’s compliance with the Board’s directive. Petitioner’s desire to itself comment on Illinois EPA’s status does not satisfy the material prejudice prerequisite for filing a reply.

Second, Petitioner claims that Illinois EPA mischaracterized an argument. (Motion for Leave to File Reply at ¶ 4.) In Petitioner’s Motion for Reconsideration, Petitioner states:

Illinois EPA did not appeal the Board’s Final Order, and its time to do so has lapsed. *Therefore*, KCBX respectfully requests that the Board direct Illinois EPA to issue the requested revised construction permit immediately.

(Motion for Reconsideration at ¶ 2 (emphasis added).) In the Response to Motion for Reconsideration, Illinois EPA stated:

Petitioner contends that because [the Illinois EPA] did not appeal the June 19, 2014 Opinion and Order, the Board is required to direct the Illinois EPA to immediately issue a construction permit to Petitioner.

(Response to Motion for Reconsideration at p. 1.) Even if Illinois EPA’s statement misconstrued two sentences from Petitioner’s ten-page motion, which Illinois EPA disputes, Petitioner’s claim does not rise to the level of material prejudice to warrant the filing of a reply.

Lastly, Petitioner baldly states that it must have the opportunity to reply to Illinois EPA’s argument regarding the standard for a motion for reconsideration. (Motion for Leave to File Reply at ¶ 4.) Petitioner, though, does not contend that its Motion for Reconsideration asserted new evidence, a change in law or errors in the Board’s application of existing law in its June 19,

2014 Opinion and Order, as required by 35 Ill. Adm. Code 101.902. *See also Broderick Teaming Co. v. Illinois Env't'l Protection Agency*, PCB 00-187, 2001 WL 376542 at *2 (April 5, 2001). Rather, Petitioner acknowledges that it simply “outlined why the Board’s findings support a different directive” in its opinion. (Reply at ¶ 6.) A different directive constitutes only a suggested alternative, not an error in the application of existing law.¹ Petitioner has not shown that it must be permitted to file a reply to avoid being materially prejudiced regarding Illinois EPA’s unrefuted argument concerning the motion for reconsideration standard.

CONCLUSION

The standard for filing a reply requires a showing of material prejudice, while the standard for a motion for reconsideration requires a showing of new evidence, a change in the law or an error in the application of existing law. 35 Ill. Adm. Code 101.500(e); 35 Ill. Adm. Code 101.902. Petitioner has not met either standard. Accordingly, Petitioner’s Motion for Leave to File a Reply should be denied, along with its Motion for Reconsideration.

ILLINOIS ENVIRONMENTAL PROTECTION
AGENCY

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¹The Board previously rejected Petitioner’s desired alternative remedy, by stating in the June 19, 2014 Opinion and Order that it was not “remanding with a direction to issue the permit.” (Opinion & Order at p. 57.) In its Post-Hearing Brief, Petitioner “requested that the Board direct Illinois EPA to issue the requested permit upon entry of the Board’s Order.” (Motion for Reconsideration at ¶ 7.)

CERTIFICATE OF SERVICE

I, Kathryn A. Pamenter, an Assistant Attorney General, do certify that I caused to be served this 18th day of August, 2014, the attached Notice of Electronic Filing and Respondent's Response to Petitioner's Motion for Leave to File Reply to Respondent's Response to Petitioner's Motion for Reconsideration and Modification upon (a) Katherine D. Hodge, Edward W. Dwyer and Matthew C. Read, of Hodge Dwyer & Driver, (b) Stephen A. Swedlow and Michelle Schmit, of Quinn Emanuel Urquhar Sullivan LLP, and (c) Keith Harley, Chicago Legal Clinic, by placing a true and correct copy in an envelope addressed as set forth on the 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. and upon Bradley P. Halloran and John Therriault *via email*.


KATHRYN A. PAMENTER