

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 RESPONSE TO RESPONDENT'S MOTION FOR RECONSIDERATION OF ORDER DATED MAY 1, 2014**, a copy of which is herewith served upon you.

Respectfully submitted,

KCBX TERMINALS COMPANY,
Petitioner,

Dated: May 20, 2014

By: /s/ Katherine D. Hodge
Katherine D. Hodge

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CERTIFICATE OF SERVICE

I, Katherine D. Hodge, the undersigned, hereby certify that I have served the attached PETITIONER'S RESPONSE TO RESPONDENT'S MOTION FOR RECONSIDERATION OF ORDER DATED MAY 1, 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 May 20, 2014 and upon:

Mr. Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
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Division of Legal Counsel
Illinois Environmental Protection
Agency
1021 North Grand Avenue
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by depositing said documents in the United States Mail, postage prepaid, in Springfield, Illinois on May 20, 2014 and upon:

Kathryn A. Pamentor, 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 May 20, 2014.

/s/ Katherine D. Hodge
Katherine D. Hodge

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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**PETITIONER’S RESPONSE TO RESPONDENT’S MOTION
FOR RECONSIDERATION OF ORDER DATED MAY 1, 2014**

NOW COMES Petitioner, KCBX TERMINALS COMPANY (“KCBX” or “Petitioner”), a North Dakota corporation, by and through its attorneys, HODGE DWYER & DRIVER and QUINN EMANUEL URQUHART SULLIVAN LLP, and for its Response to Respondent’s Motion for Reconsideration of Order Dated May 1, 2014, states as follows:

I. INTRODUCTION

On April 28, 2014, KCBX moved to supplement the record before the Illinois Pollution Control Board (“Board”) with certain documents the Illinois Environmental Protection Agency (“Illinois EPA” or “Respondent”) relied upon or should have relied upon in making its determination regarding KCBX’s July 23, 2013 Request for Revision to Revised Construction Permit (“Request for Revision”). This was the second such motion to supplement; the first was filed on April 7, 2014, approximately two weeks after the Illinois EPA filed the Administrative Record (“Record”) with the Board in this appeal. The Board granted, in part, and denied, in part, KCBX’s Motion to Supplement the Record on April 17, 2014.

During the time period between KCBX's first Motion to Supplement and its second Motion to Supplement, KCBX deposed five Illinois EPA employees: Michael Dragovich, Robert Bernoteit, Raymond Pilapil, Joseph Kotas, and Julie Armitage. Additionally, Illinois EPA produced and supplemented the record with numerous documents.

On May 1, 2014, the Board granted KCBX's Second Motion to Supplement, specifically addressing the 14-day response period provided for by 35 Ill. Admin. Code § 101.500 and stating that "[w]hile the 14-day response deadline has not run, the Board under these circumstances will proceed to decide KCBX's second motion to supplement the record." On May 16, 2014, Illinois EPA filed its Motion for Reconsideration of Order Dated May 1, 2014 ("Motion for Reconsideration.") In its Motion for Reconsideration, Illinois EPA makes no arguments regarding the substantive rulings in the Board's May 1, 2014 order and solely argues that the Board erred in ruling on the Second Motion to Supplement without allowing it 14 days to respond.

II. ANALYSIS

The Board has explained that the record before it must include "all documents on which the Agency relied or should have relied." *Ameren Energy Resources Generating Co. v. Illinois EPA*, PCB 14-41, 2014 Ill. ENV LEXIS 100 (Mar. 20, 2014), *22 (citing *United Disposal of Bradley, Inc. v. IEPA*, PCB 03-235, slip op. at (June 17, 2004); *Joliet Sand and Gravel v. IEPA*, PCB 86-159, slip op. at 4 (Feb. 8, 1987), *aff'd*, 163 Ill. App. 3d 830, 16 N.E.2d 955 (3d Dist. 1987). Section 40(d) of the Illinois Environmental Protection Act ("Act") provides that when the Board hears a permit appeal, the Board's decision must "be based exclusively on the record before the Agency including the record

of the hearing, if any, held pursuant to paragraph (f)(3) of Section 39 unless the parties agree to supplement the record.” Section 105.212 of the Board’s Rules provides, in relevant part, that “[t]he Agency must file its *entire record of its decision* with the Clerk in accordance with Section 105.116 of this Part. The record must include... *[a]ny other information the Agency relied upon in making its final decision.*” 35 Ill. Admin. Code § 105.212(a) and (b)(5) (emphasis added). In the event Illinois EPA fails to file the entire record of its decision, petitioners are afforded the opportunity to supplement the record. *See KCBX Terminals Co. v. Illinois EPA*, PCB Nos. 10-110, 11-43, 2011 Ill ENV LEXIS 155 (May 19, 2011) (quoting *Industrial Salvage, Inc. v. IEPA*, PCB Nos. 93-60, 93-61, slip op. at 2 (Ill.Pol.Control.Bd. Feb. 17, 1994)). As mentioned above, KCBX filed a Second Motion to Supplement the Record on April 28, 2014, which was granted by the Board on May 1, 2014.

Illinois EPA complains that it did not have the 14 days allowed by § 101.500(d) of the Board’s procedural rules to file its response to KCBX’s Second Motion to Supplement. 35 Ill. Admin. Code § 101.500(d). In announcing its May 1, 2014 ruling, the Board acknowledged the typical 14-day response time, but pointed out that KCBX has not filed a waiver or extension of the statutory decision deadline and concluded that “under these circumstances [the Board] will proceed to decide KCBX’s second motion to supplement the record.” *KCBX v. Illinois EPA*, PCB No. 14-110 (Ill.Pol.Control.Bd. May 1, 2014). Section 101.500(d) specifically exempts the 14-day response period in “deadline driven proceedings where no waiver has been filed.” 35 Ill. Admin. Code § 101.500(d). The Board properly applied this exception to the case at bar and issued a ruling prior to the 14-day time response period.

Respondent argues that because the decision deadline in this case is June 23, 2014, the Board should have delayed issuing its decision until May 12, 2014 (14 days after the April 28, 2014 Second Motion to Supplement the Record was filed) to allow Respondent to file a response. While delaying the ruling on KCBX's Second Motion to Supplement until May 12, 2014 would not have exceeded the decision deadline of June 23, 2014, Section 101.500(d) does not state that the Board may only rule prior to the 14-day response period where the 14-day period would exceed the actual decision deadline. Instead, Section 101.500(d) allows the Board, in its discretion, to grant a motion prior to the 14-day period in "*deadline driven proceedings* where no waiver has been filed."

This case is an example of "deadline driven proceedings" because "no waiver has been filed." The parties conducted expedited discovery and motion practice leading up to the hearing date – a date selected in order to allow the Board sufficient time after post-hearing briefing to issue its decision. The Illinois EPA has repeatedly urged the Board to consider the "expedited schedule in this matter" based on non-waiver of the statutory deadline. *See, e.g.*, Interlocutory Appeal from Hearing Officer April 8, 2014 Order Denying Motion for Protective Order, pp. 2, 5, 6.

KCBX filed the Second Motion to Supplement the Record on April 28, 2014. The four-day hearing in this matter began on April 29, 2014. The Board held its regularly scheduled public meeting on May 1, 2014. The Second Motion to Supplement the Record inherently presented issues related to evidence that could be presented at the ongoing hearing. If the Board chose to delay its decision until its next meeting on May 15, 2014, the hearing would have been over, the post-trial briefing schedule may have been delayed, and the Board ultimately may have had less time to deliberate and consider

the substance of the case. It was therefore logical and appropriate for the Board to rule on KCBX's motion at its May 1, 2014 meeting. Accordingly, "the Board under these circumstances" properly proceeded "to decide KCBX's second motion to supplement the record" so that the hearing could be completed in light of those rulings.

Affirming the Board's May 1, 2014 ruling would not be equivalent to ruling that "the Board may waive the fourteen day response period for any motion in any proceeding where the decision deadline is not waived" as suggested by Illinois EPA. Motion for Reconsideration, p. 3. Instead, affirming this ruling would be a finding that the Board properly considered the circumstances of this case and appropriately applied its own rules to resolve issues that affected an ongoing hearing expeditiously.

Finally, while Illinois EPA contends that it should have been given the full 14-day response period, Illinois EPA was fully aware of the circumstances discussed above and could have filed a written response immediately after receiving KCBX's Second Motion to Supplement to ensure that its objections were heard prior to a ruling by the Board. In light of the exceptions to the 14-day response period, the lack of a waiver in this case, and the ongoing hearing, Illinois EPA knew that the Board could rule on the Second Motion to Supplement the Record at its May 1, 2014 meeting. Further, Illinois EPA's Motion for Reconsideration -- filed four days after its proposed May 12, 2014 response deadline -- does not contain any arguments regarding the substance of the May 1, 2014

Board ruling and does not attach a proposed response.¹ Instead, Respondent filed a Motion for Reconsideration on the day the record in this appeal was to close, solely arguing that the Board erred in its application of Section 101.500(d). Thus, the only issue is whether the Board correctly applied its own rule in finding that these were “deadline driven proceedings where no waiver has been filed.” 35 Ill. Admin. Code § 101.500(d). They clearly were, the Board properly applied Section 101.500(d), and the Illinois EPA’s motion to reconsider should be denied.

III. CONCLUSION

The Board had before it a pending motion to supplement the record during an ongoing hearing in proceedings where no waiver had been filed. The Illinois EPA did not file a response to the substance of that motion prior to the Board’s ruling, but now asks the Board to reconsider the fact that it ruled prior to the usual 14-day response period. This case clearly meets the exception to the 14-day period in Section 101.500(d) for “deadline driven proceedings where no waiver has been filed.” Therefore, the Board did not err in its application of 35 Ill. Admin. Code § 101.500(d) and Respondent’s Motion for Reconsideration should be denied.

WHEREFORE Petitioner, KCBX TERMINALS COMPANY, for the above stated reasons, respectfully prays that the Illinois Pollution Control Board deny

¹ Illinois EPA suggests that its response to the Second Motion to Supplement the Record is contained in its post-hearing brief. Motion for Reconsideration, p. 4. As established in KCBX’s reply brief, however, Illinois EPA cites no authority that supports its position on the merits and the evidence in question is admissible under Illinois law.

Respondent's Motion for Reconsideration of Order Dated May 1, 2014, and grant KCBX TERMINALS COMPANY all other relief just and proper in the premises.

Respectfully submitted,

KCBX TERMINALS COMPANY,
Petitioner,

Dated: May 20, 2014

By: /s/ Katherine D. Hodge
One of Its Attorneys

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