

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

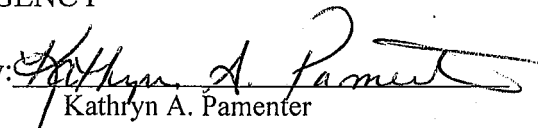
KCBX TERMINALS COMPANY,)	
)	
Petitioner,)	
)	
v.)	PCB No. 14-110
)	(Air Permit Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

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 Illinois Pollution Control Board James R. Thompson Center, Suite 11-500 100 W. Randolph Street Chicago, Illinois 60601
	Stephen A. Swedlow Michelle Schmit Quinn Emanuel Urquhart Sullivan LLP 500 W. Madison Street, Suite 2450 Chicago, IL 60661	Keith Harley Chicago Legal Clinic 211 W. Wacker Drive, Suite 750 Chicago, IL 60606

PLEASE TAKE NOTICE that on the 6th day of August, 2014, 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: 
Kathryn A. Pamenter
Christopher J. Grant
Robert Petti
Assistant Attorneys General
Environmental Bureau
69 W. Washington St., 18th Floor
Chicago, IL 60602
(312) 814-0608
(312) 814-5388

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RESPONDENT'S RESPONSE TO PETITIONER'S MOTION FOR RECONSIDERATION AND MODIFICATION

On June 19, 2014, the Illinois Pollution Control Board ("Board") issued its Opinion and Order in the above-captioned Permit Appeal, concluding that:

[t]he Agency's January 17, 2014 determination to deny the permit is therefore reversed, and the Board remands this case to the Agency. As the Agency's denial was based substantially on a lack of information, the Board remands for additional consideration of the information in the application consistent with this order and with the requirements of the Act and applicable regulations rather than remanding with a direction to issue the permit.

(Opinion and Order at p. 57.) On July 28, 2014, KCBX Terminals Company ("Petitioner") filed its Motion for Reconsideration and Modification of the June 19, 2014 Opinion and Order ("Motion for Reconsideration").¹ Petitioner contends that because the Illinois Environmental Protection Agency ("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.² (Motion for Reconsideration at ¶ 2.) The Illinois EPA, though, is complying with

¹ The affidavit attached to Petitioner's Motion for Reconsideration is unsigned. 35 Ill. Adm. Code 101.504.

² Petitioner alternatively argues that "to the extent the Illinois EPA contends the Board did not issue a final order," it may consider the construction permit deemed issued. (Motion for Reconsideration at ¶ 3.) Because the June 19, 2014 Opinion and Order constitutes a "final action by the Board within 120 days after the date on which it received the petition," the construction permit may not be deemed issued. 415 ILCS 5/40(a)(2) (2012); *see also* Opinion and Order at p. 57 (citing 415 ILCS 5/41(a) (2012)).

the Board's directive of giving additional consideration to the information in Petitioner's construction permit application consistent with the order and the requirements of the Illinois Environmental Protection Act (the "Act") and applicable Board regulations. (See Affidavit of Robert W. Bernoteit, a true and correct copy of which is attached hereto as Exhibit A.) Accordingly, Petitioner's Motion for Reconsideration should be denied.

ARGUMENT

Section 101.902 of the Board's procedural rules provides that, "[i]n ruling upon a motion for reconsideration, the Board will consider factors including new evidence, or a change in the law, to conclude that the Board's decision was in error." 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) (in discussing the standard for a reconsideration motion, the Board recognized that it may consider "errors in the court's previous application of the existing law") (quoting *Citizens Against Regional Landfill v. County Bd. of Whiteside County*, PCB 92-156, slip op. at 2 (March 11, 1993) (citing *Korogluyan v. Chicago Title & Trust Co.*, 213 Ill. App. 3d 622 (1st Dist. 1991))). In its Motion for Reconsideration, Petitioner does not set forth any new evidence, change in the law or errors in the Board's application of the existing law in rendering its June 19, 2014 ruling. Accordingly, Petitioner's Motion for Reconsideration should be denied.

Ignoring the Section 101.902 standard upon which it bases its Motion for Reconsideration,³ Petitioner argues that "Illinois EPA may not develop additional reasons for denial on remand." (Motion for Reconsideration at p. 5 (citing *Grigoleit Co. v. Illinois Env't'l Protection Agency*, PCB 89-184, 1991 WL 273769 (Dec. 6, 1991).) In *Grigoleit*, the Board

³ Petitioner also cites 35 Ill. Adm. Code 101.500 and 101.520, which set forth the general rules for filing motions and responses, the timing requirements for filing a motion for reconsideration or modification of a final Board order and any response thereto, and the effect of a timely-filed motion for reconsideration or modification on the final Board order, namely a stay.

struck two permit denial reasons and remanded the matter to the Illinois EPA to determine whether The Grigoleit Company (“Grigoleit”) was in compliance with 35 Ill. Adm. Code 215.301. 1991 WL 273769 at *2. On remand, the Illinois EPA cited two additional regulatory sections rather than focusing on 35 Ill. Adm. Code 215.301 as the Board had directed, and sought additional information regarding new process operations at the facility, the existence of which Grigoleit had previously notified the Illinois EPA in its permit application. *Id.* Against this backdrop, the Board stated in its entirety:

Specifically, the Agency attempted to elicit information regarding Grigoleit’s compliance with 35 Ill. Adm. Code 201.157 and 201.160. It appears that the Agency waited until its July 29, 1991 letter and until after the Board’s November 29, 1990 and June 2, 1991 remand orders to express its concern over these additional regulatory sections. The Agency cannot now express concern about these additional regulations in this permit appeal at this juncture, nor can it argue that the Board did not require the Agency to base its review only on the state of affairs at Grigoleit’s facility as of the date of its earlier permit application. Although we did not explicitly state that our November 29, 1990 mandate was limited in scope, it is implicit in any remand order that the order is limited to only those facts that were before the Agency when it denied the permit. To hold otherwise would allow the Agency, in effect, to conduct a *de novo* permit review on remand. . . . As for the Agency’s argument that Section 39(a) of the Environmental Protection Act would not allow the Agency to issue a permit if Grigoleit’s operations would cause violations, we remind the Agency that it already made its 39(a) determination in this case when it reviewed Grigoleit’s permit application and chose not to list its concerns about Grigoleit’s additional operations in its October 11, 1989 permit denial letter.

1991 WL 273769 at * 3. As a sanction for failing to comply with two orders, the Board directed the Illinois EPA to issue the operating permit to Grigoleit. *Id.* at *4-*5.

Unlike in *Grigoleit*, the Board remanded this case to the Illinois EPA for “additional consideration of the information in the application consistent with this order and with the requirements of the Act and applicable regulations. . .” and did not limit the Illinois EPA’s additional consideration to any particular statutes or regulations. (Opinion and Order at p. 57.) The June 19, 2014 Opinion and Order does not foreclose the Illinois EPA from issuing a

construction permit with conditions or denying the permit application. At this time, though, the Illinois EPA has not completed its review of the application in accordance with the June 19, 2014 Opinion and Order, causing Petitioner's reliance upon *Grigoleit* to be misplaced.⁴

CONCLUSION

As Petitioner recognizes, the Board knows how to direct the Illinois EPA to issue a permit through an order in a permit appeal. (Motion for Reconsideration at ¶¶ 24-26.) In this Permit Appeal, though, the Board expressly stated that it was not remanding with a direction to issue the permit. (Opinion and Order at p. 57.) Petitioner does not cite any new evidence, change in the law or errors in the Board's application of the existing law. See 35 Ill. Adm. Code 101.902. In addition, the *Grigoleit* decision, on which Petitioner relies, is inapposite. The Illinois EPA is considering the information in the approximately 2,100 pages of the Administrative Record and Supplements thereto consistent with the Board's June 19, 2014 Opinion and Order, the Act and the Board regulations. (Exhibit A at ¶ 3.) Therefore, Petitioner's Motion for Reconsideration should be denied.

ILLINOIS ENVIRONMENTAL PROTECTION
AGENCY

By: 

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Robert Petti

Assistant Attorneys General

Environmental Bureau

69 W. Washington St., 18th Floor

Chicago, IL 60602

⁴ Similarly, *Joliet Sand and Gravel Co. v. Illinois Env't'l Protection Agency*, PCB 86-159, 1987 WL 55908 (Feb. 5, 1987) and *Reichhold Chemicals, Inc. v. Illinois Pollution Control Bd.*, 204 Ill. App. 3d 674 (3d Dist. 1990), to which Petitioner cites, do not apply, as neither concerned a Board's remand to the Illinois EPA for additional consideration of the information in a construction permit application.

EXHIBIT A

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AFFIDAVIT OF ROBERT W. BERNOTEIT

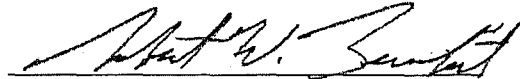
I, Robert W. Bernoteit, after being duly sworn on oath, state that if called upon to testify in this matter, I would competently testify as follows:

1. I am employed by the State of Illinois Environmental Protection Agency ("Illinois EPA") as a Public Service Administrator in the Illinois EPA's Bureau of Air. I have been employed in this position since February 1, 2004.

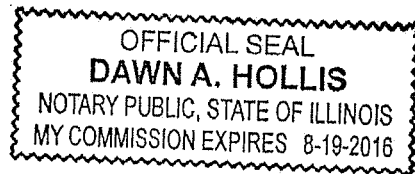
2. As a part of my duties, I am responsible for the review of construction and operating permit applications for sources seeking Federally Enforceable State Operating Permits.

3. Since June 19, 2014, the Illinois EPA has been reviewing the information in the approximately 2,100 pages of the Administrative Record and Supplements thereto consistent with the Board's June 19, 2014 Opinion and Order, the Illinois Environmental Protection Act and the corresponding Illinois Pollution Control Board regulations.

FURTHER AFFIANT SAYETH NOT



Subscribed and Sworn to
Before me this 5th day of
August, 2014.


NOTARY PUBLIC

CERTIFICATE OF SERVICE

I, Kathryn A. Pamenter, an Assistant Attorney General, do certify that I caused to be served this 6th day of August, 2014, the attached Notice of Electronic Filing and 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