

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

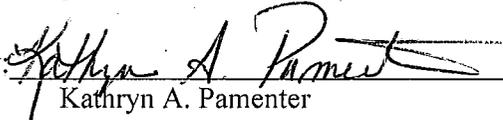
Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 W. Randolph Street
Chicago, Illinois 60601

Stephen A. Swedlow
Michelle Schmit
Quinn Emanuel Urquhart Sullivan LLP
500 W. Madison Street, Suite 2450
Chicago, IL 60661

John Therriault
Assistant Clerk to the Board
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 W. Randolph Street
Chicago, Illinois 60601

PLEASE TAKE NOTICE that on the 19th day of May, 2014, Respondent's Response to Petitioner's Motion to Revise Hearing Officer Schedule to Complete the Record 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
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Environmental Bureau
69 W. Washington St., 18th Floor
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(312) 814-0608
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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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RESPONDENT'S RESPONSE TO PETITIONER'S MOTION TO REVISE HEARING OFFICER SCHEDULE TO COMPLETE THE RECORD

Pursuant to the Hearing Officer's Order dated March 25, 2014, the Record in this Permit Appeal closed on May 16, 2014 in accordance with the case management schedule that KCBX Terminals Company ("KCBX"), through its counsel, demanded at the beginning of this case. On March 19, 2014 and March 24, 2014, KCBX expressly and knowingly agreed to the May 16, 2014 Record closing date. Additionally, KCBX expressly and knowingly agreed neither party would be permitted to file a reply brief. During the hearing on May 2, 2014, KCBX reaffirmed this agreement. As a result, the Hearing Officer included the May 16, 2014 Record closing date and agreed-upon briefing schedule, which did not include a reply brief, in his May 6, 2014 Hearing Report. On May 16, 2014 at approximately 5:15 pm, KCBX served *via email* the Hearing Officer and the Illinois Environmental Protection Agency (the "Illinois EPA") with its "Motion to Revise Hearing Officer Schedule to Complete the Record" ("Motion to Revise"). In so titling its motion, KCBX ignores the fact that it set the schedule in this Permit Appeal.¹ Based

¹ KCBX attempts to justify its Motion to Revise by contending "it may be necessary to file a post-hearing reply brief in this matter. KCBX just received Respondent's Post-hearing Response Brief and has yet to have an opportunity to fully review it." (Motion to Revise at p. 2.) If KCBX was concerned about what the contents of a response brief might be, KCBX should not have previously waived filing a reply brief on three separate occasions, March 19, March 24 and May 2, 2014.

upon the Hearing Officer's March 25, 2014 Order, the May 6, 2014 Hearing Report, KCBX's own admissions and the Board's Procedural Rules, KCBX's Motion to Revise must be denied.

ARGUMENT

On February 21, 2014, KCBX filed this Permit Appeal. Thereafter, on March 19, 2014, KCBX filed its Motion for Entry of Proposed Discovery Schedule and Hearing Location ("Motion for Case Management Schedule"). KCBX proposed a case management schedule that would have set a deadline for filing simultaneous post-hearing briefs on May 12, 2014, and the "Record completed" date on May 15, 2014. (*Id.*) During status hearings on March 20 and 24, 2014, counsel for KCBX and the Illinois EPA discussed the proposed schedule. (Hearing Officer Orders dated March 20, 2014 and March 25, 2014.) Upon learning that KCBX was requesting a hearing on April 30, 2014 and would not be waiving the Illinois Pollution Control Board's ("Board") 120-day statutory ruling deadline, the Hearing Officer explained to counsel for both parties that the Board required 30 complete days before June 19, 2014 to issue its decision in this Permit Appeal, and that May 26, 2014, a federal holiday, did not count as one of the 30 days. Separately, the Illinois EPA stated that it would not agree to the simultaneous filing of post-hearing briefs, as KCBX has the burden of proof in this Permit Appeal. Counsel for KCBX, participating in the telephonic status hearings, stated they understood the schedule provided no time for a reply. As a result of the discussions during telephonic status hearings and among counsel for the parties, on March 24, 2014, counsel for KCBX forwarded to the Hearing Officer an agreed-upon case management schedule, which provided for no reply brief and a Record closing date of May 16, 2014. (*See* March 24, 2014 E-mail from Matthew C. Read to Brad Halloran, a true and correct copy of which is attached hereto as Exhibit A.)

Based upon the case management schedule that KCBX prepared and agreed to, the Hearing Officer entered an Order on March 25, 2014, setting forth the schedule for the Permit Appeal. (Hearing Officer Order dated March 25, 2014.) Specifically, KCBX had agreed:

The agreed case management schedule is accepted to the extent as follows. . . . The hearing will be held on April 29, 2014, and will continue as necessary. Based on an expedited transcript, petitioner's post-hearing brief due to be filed on or before May 9, 2014. Respondent's post-hearing brief due to be filed on or before May 16, 2014. Record closed May 16, 2014.

(*Id.*)

On May 2, 2014, the last day of the hearing in this Permit Appeal, KCBX's counsel expressly affirmed its agreement regarding the May 16, 2014 Record closing date and that it had waived any reply brief:

Mr. Halloran: Based on an expedited transcript, Petitioner's post-hearing brief is due to be filed on or before May 9th. . . . Respondent's post-hearing brief is due to be filed on or before May 16th, and the record will be closed on May 16th. It doesn't look like we have any time for reply from KCBX. I think we agreed on that. . . . Are all parties in agreement with that?

Mr. Swedlow: Yes.

Ms. Pamenter: Yes.

(May 2 Tr. at p. 24, line 16 – p. 25, line 13.) Katherine Hodge, counsel for KCBX who participated in the March status hearings, was in attendance at the May 2, 2014 hearing and tacitly confirmed Mr. Swedlow's affirmation of the May 16, 2014 Record closing date and the fact that KCBX had previously agreed that it would not file a reply. (*Id.*; *see also* May 2 Tr. at p. 2.) As a result, the Hearing Officer issued his Hearing Report on May 6, 2014 which provided, in pertinent part, as follows:

A post-hearing briefing schedule was addressed in the March 25, 2014 Hearing Officer Order and again at the close of the May 2, 2014 hearing and is as follows: KCBX's post-hearing brief is due to be filed on or before May 9, 2014; the Agency's post-hearing brief is due to be filed on or before May 16, 2014; Public comment must be filed on or before May 6, 2014. The record in the above-captioned appeal closes on May 16, 2014.

(Hearing Officer's Hearing Report dated May 6, 2014.)

In addition to depriving the Board of the complete 30 days it requires to review the Record in this Permit Appeal, granting KCBX's Motion to Review would deny the Illinois EPA due process of law. KCBX is not entitled to file a reply brief as a matter of right in a case pending before the Board. Section 101.500(e) of the Board's Procedural Rules provides, "[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. A motion for leave to file a reply must be filed with the Board. . . ." 35 Ill. Adm. Code 101.500(e). KCBX has not filed such a motion because it cannot claim material prejudice. KCBX, through its counsel, expressly waived filing a reply brief in this Permit Appeal as set forth in KCBX's March 19, 2014 motion and March 24, 2014 email to Mr. Halloran and as it stated at the May 2, 2014 hearing. The Illinois EPA relied upon KCBX's counsel's representations in agreeing to the case management schedule set on March 25, 2014. Had the Illinois EPA known then that KCBX intended to file a motion for leave to file a reply brief, the Illinois EPA would have required a case management schedule that afforded it time to file a motion for leave to file a surreply. *See, e.g., People v. Sheridan-Joliet Land Development, LLC et al. v. Sheridan Sand & Gravel Co.*, PCB 13-19 and 13-20, slip op. at p. 4 (Aug. 8, 2013) (granting People's motion to file a surreply to respond to an argument made for the first time in a reply brief). To prevent undue prejudice to the Illinois EPA, KCBX's request to revise the case management schedule, made at 5:15 pm on the Record closing date, must be denied.

CONCLUSION

KCBX, through its counsel, demanded the case management schedule that the Hearing Officer and the Illinois EPA have complied with since March 25, 2014. This schedule included a May 16, 2014 Record closing date and KCBX's waiver of filing any reply brief. KCBX must be required to adhere to its own schedule. Granting KCBX's Motion to Revise will render a Hearing Officer Order and the Board's Procedural Rules, including 35 Ill. Adm. Code 101.500, meaningless. Such a decision would also have severe consequences, as petitioners would require a case management schedule at the beginning of a permit appeal only to then seek a change to the schedule when it suits them best, claiming this case as precedent. Accordingly, KCBX's Motion to Revise must be denied.

ILLINOIS ENVIRONMENTAL PROTECTION
AGENCY

By: 

Kathryn A. Pamerter

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

(312) 814-2069

EXHIBIT A

Pamenter, Kathryn

From: Matthew C. Read <mread@hddattorneys.com>
Sent: Monday, March 24, 2014 12:58 PM
To: Halloran, Brad
Cc: Katherine D. Hodge; Edward W. Dwyer; Pamenter, Kathryn; Grant, Christopher J.
Subject: RE: KCBX Terminals Company v. Illinois Environmental Protection Agency (PCB 14-110)
Attachments: Agreed Case Management Schedule - 3.24.14.docx

Brad,

I attached a revised schedule to this e-mail. We ran it past Chris and Katie first.

Matthew C. Read

HODGE DWYER & DRIVER
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Post Office Box 5776
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Fax (217) 523-4948
mread@hddattorneys.com

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From: Halloran, Brad [<mailto:Brad.Halloran@illinois.gov>]
Sent: Thursday, March 20, 2014 11:49 AM
To: Katherine D. Hodge; Jennifer R. Sheley; Pamenter, Kathryn; CGrant@atg.state.il.us
Cc: Edward W. Dwyer; Matthew C. Read
Subject: RE: KCBX Terminals Company v. Illinois Environmental Protection Agency (PCB 14-110)

Got it. Thanks.

From: Katherine D. Hodge [<mailto:khodge@hddattorneys.com>]
Sent: Thursday, March 20, 2014 11:28 AM
To: Jennifer R. Sheley; Halloran, Brad; Pamenter, Kathryn; CGrant@atg.state.il.us
Cc: Edward W. Dwyer; Matthew C. Read
Subject: RE: KCBX Terminals Company v. Illinois Environmental Protection Agency (PCB 14-110)

Brad – Please see email sent yesterday. We want to make sure that we have your correct email address, so could you please confirm receipt? Thank you, Kathy

Katherine D. Hodge

HODGE DWYER & DRIVER
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khodge@hddattorneys.com

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From: Jennifer R. Sheley
Sent: Wednesday, March 19, 2014 12:09 PM
To: Brad.Halloran@illinois.gov; Pamentor, Kathryn; CGrant@atg.state.il.us
Cc: Katherine D. Hodge; Edward W. Dwyer; Matthew C. Read
Subject: KCBX Terminals Company v. Illinois Environmental Protection Agency (PCB 14-110)

Please see the attached that was filed today.

Thank you

Jennifer R. Sheley
Legal Secretary
HODGE DWYER & DRIVER
Attorneys at Law
3150 Roland Avenue
Post Office Box 5776
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(217) 523-4900

jsheley@hddattorneys.com

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AGREED CASE MANAGEMENT SCHEDULE

This cause comes before the Hearing Officer on submission by Petitioner of the proposed Agreed Case Management Schedule. Having considered the foregoing, and being duly advised, the Hearing Officer now finds that the Agreed Case Management Schedule should be APPROVED, and accordingly, hereby enters the following Agreed Case Management Schedule in this matter:

<u>DATES</u>	<u>TASK</u>
March 28, 2014	Petitioner's witnesses and any opinions disclosed.
April 4, 2014	Respondent's witnesses and any opinions disclosed.
April 18, 2014	Depositions completed.
April 18, 2014	Close of all discovery.
April 22, 2014, noon	Prehearing motions due.
April 23, 2014, noon	Responses to prehearing motions due.
April 29, 2014, and continuing as necessary	Hearing date.
May 9, 2014	Petitioner's post-hearing brief due.
May 16, 2014	Respondent's post-hearing brief due.
May 16, 2014	Record completed.

Hearing in this matter will be held in Chicago, Illinois, commencing at 9:30 a.m. in Room ___ at the James R. Thompson Center, 100 W. Randolph.

Dated: _____

Hearing Officer

Distribution to: Petitioner; counsel for Respondent

CERTIFICATE OF SERVICE

I, Kathryn A. Pamenter, an Assistant Attorney General, do certify that I caused to be served this 19th day of May, 2014, the attached Notice of Electronic Filing and Respondent's Response to Petitioner's Motion to Revise Hearing Officer Schedule to Complete the Record upon (a) Katherine D. Hodge, Edward W. Dwyer and Matthew C. Read, of Hodge Dwyer & Driver, *via facsimile*, (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*.


KATHRYN A. PAMENTER