

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

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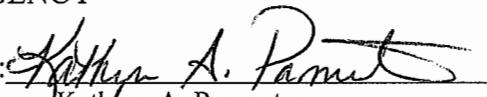
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PLEASE TAKE NOTICE that on the 21st day of May, 2014, Respondent's Response to Petitioner's Motion for Leave to File Post-Hearing Reply Brief was filed with the Illinois Pollution Control Board, a true and correct copy of which is attached hereto and is hereby served upon you.

ILLINOIS ENVIRONMENTAL PROTECTION
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**RESPONDENT'S RESPONSE TO PETITIONER'S MOTION FOR LEAVE TO FILE
POST-HEARING REPLY BRIEF¹**

On May 20, 2014, the Hearing Officer entered his Order denying KCBX Terminals Company's ("KCBX") Motion to Revise Hearing Officer Schedule to Complete the Record ("Motion to Revise"), which sought to extend the Record closing date by four days for KCBX to file a reply brief.² (May 20, 2014 Order at p. 1, 2.) In so ruling, the Hearing Officer stated:

The Agency is correct in arguing that the case management schedule was agreed to and that I repeatedly sought and received affirmation of the agreed briefing schedule, including the record close date of May 16, 2014. KCBX does not allege that it would be materially prejudiced should I deny their motion.

KCBX's statement that it just received the Agency's [response] brief and has not had the opportunity to review it could not have come as a surprise to KCBX as it knew 53 days beforehand that the Agency's post-hearing brief and the record close date was on May 16, 2014. All parties were aware and in agreement that the briefing schedule did not allow for replies.

KCBX's motion to revise hearing officer schedule to complete record is denied in its entirety.

¹ As discussed herein, the Illinois Environmental Protection Agency (the "Illinois EPA") recognizes the May 16, 2014 Record closing date in this Permit Appeal and the deference that should be afforded to the Hearing Officer and his Orders. The Illinois EPA files this Response to preserve its arguments should an appeal follow the Illinois Pollution Control Board's ("Board") ruling on June 19, 2014.

² In its Motion to Revise, KCBX quoted with emphasis Section 101.612(b) of the Board's Procedural Rules, providing that the Hearing Officer may revise the schedule "to the extent that the revised schedule provides for a completed record **at least 30 days before the decision date or to prevent material prejudice.**" (Motion to Revise at ¶ 3 (citing 35 Ill. Adm. Code 101.612(b)) (emphasis in original.)

(*Id.* at p. 2.) Only a few hours after entry of this Order, KCBX filed its Motion for Leave to File Post-Hearing Reply Brief (“Motion for Leave”) and its Post-Hearing Reply Brief. In so doing, KCBX contravened the Hearing Officer’s March 25, 2014 and May 20, 2014 Orders and ignored its own agreement regarding the case management schedule in this Permit Appeal. Based upon the Hearing Officer’s prior orders and pursuant to 35 Ill. Adm. Code 101.612, KCBX’s Motion for Leave must be denied, and its Post-Hearing Reply Brief must be stricken.

ARGUMENT

Section 101.612(a) of the Board’s Procedural Rules provides, “[t]he hearing officer must establish a schedule to complete the record. . . . The schedule must provide for a completed record at least 30 days before the decision date, unless the hearing officer orders otherwise to prevent material prejudice.” 35 Ill. Adm. Code 101.612(a). KCBX chose not to extend the 120-day statutory deadline for the Board to issue its ruling in this Permit Appeal, and does not dispute that the decision deadline in this case is June 19, 2014. (Motion for Leave at ¶ 11.) Understanding that neither May 26, 2014, a federal holiday, nor June 19, 2014, the decision date, counted in determining the “30 days before the decision date,” KCBX agreed to a case management schedule that provided a May 16, 2014 Record closing date and, as a result, no time for filing a reply or surreply brief. (*See Exhibit A.*)³ Subsequently, in his May 20, 2014 Order, the Hearing Officer rejected KCBX’s argument for extending the Record closing date, determining that KCBX had repeatedly agreed to May 16, 2014 as the Record closing date, and that the briefing schedule did not allow for replies. (May 20, 2014 Hearing Officer Order.)

Selectively summarizing the Illinois EPA’s response to the Motion to Revise and selectively quoting the May 20, 2014 Hearing Officer Order, KCBX now contends that it will be

³ The Illinois EPA incorporates by reference its Response to Petitioner’s Motion to Revise Hearing Officer Schedule to Complete the Record filed on May 19, 2014, which includes Exhibit A.

materially prejudiced if it is not permitted to file a reply brief pursuant to 35 Ill. Adm. Code 101.500(e). (Motion for Leave at ¶¶ 5-7.) KCBX's Motion for Leave is in direct contravention with the Hearing Officer's Orders of March 25, 2014 and May 20, 2014, KCBX's own agreed-upon case management schedule and the May 16, 2014 Record closing date. In addition, as the Hearing Officer recognized, "the Agency's [response] brief . . . could not have come as a surprise to KCBX as it knew 53 days beforehand that the Agency's post-hearing brief and the record close date was on May 16, 2014." (May 20, 2014 Hearing Officer Order.) Accordingly, the Motion for Leave should be denied outright, and KCBX's Post-Hearing Reply Brief should be stricken.

In addition, KCBX's bases for now claiming material prejudice are without merit. First, KCBX contends that the Illinois EPA presented an argument for the first time regarding Section 9 of the Act in its Post-Hearing Response Brief. (Motion for Leave at p. 3.) The Illinois EPA was responding to Section F and footnote 2 of KCBX's Post-Hearing Brief in which KCBX argued about the reference to Section 9 of the Act in the Illinois EPA's January 17, 2014 Permit Denial letter. (KCBX's Post-Hearing Brief at p.9, fn.2 and pp. 48-49.) Second, citing only one sentence in the "Introduction" of the Illinois EPA's Post-Hearing Response Brief, KCBX claims that the Illinois EPA mischaracterized KCBX's discussion regarding the burden of proof. (Motion for Leave at pp. 2-3 (citing Illinois EPA's Post-Hearing Response Brief at p. 2).) The Illinois EPA was responding to KCBX's argument that the Illinois EPA must allege an actual violation of Section 212.301. (Illinois EPA's Post-Hearing Response Brief at pp. 13-14 (citing KCBX's Post-Hearing Brief at pp. 25, 28).) Third, KCBX asserts that the Illinois EPA mischaracterizes KCBX's January 13, 2014 response to the Wells Letter. (Motion for Leave at p. 4.) KCBX cannot dispute that it did not attach any documentation to the January 13, 2014

response, or that it set forth case citations and legal argument therein, thereby rendering the Illinois EPA's description of the response accurate. (R11-R16.) Finally, KCBX offers no basis to justify Section II, the second through seventh arguments in Section IV and Section V of its twenty-five page Post-Hearing Reply Brief. Therefore, KCBX's claim of material prejudice in its Motion for Leave is baseless.

Finally, granting KCBX's Motion for Leave would unduly prejudice the Illinois EPA in this Permit Appeal. 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). Due to the agreed-upon May 16, 2014 Record closing date, the Illinois EPA is unable to respond in a surreply to, among other things, the new arguments that KCBX presents for the first time, KCBX's statements without citations to the Record, KCBX's selective quotations of the hearing transcripts, and KCBX's citation to a Discovery Deposition Transcript that is not part of the Administrative Record and was not admitted into evidence at the hearing. Granting KCBX's Motion for Leave would deprive the Illinois EPA of "fundamentally fair" proceedings in this Permit Appeal.

CONCLUSION

Pursuant to 35 Ill. Adm. Code 101.612(a), the Hearing Officer established the schedule to complete the Record in this Permit Appeal. (March 25, 2014 Hearing Officer Order.) By filing

its Motion to Revise and Motion for Leave, KCBX repeatedly disregarded the Hearing Officer's schedule and his corresponding Orders. KCBX should not be rewarded by granting its Motion for Leave or giving any consideration to its Post-Hearing Reply Brief. In fact, granting KCBX's Motion for Leave will render Hearing Officer Orders and the Board's Procedural Rules, including 35 Ill. Adm. Code 101.612, meaningless. Accordingly, KCBX's Motion for Leave must be denied, and KCBX's Post-Hearing Reply Brief must be stricken.

ILLINOIS ENVIRONMENTAL PROTECTION
AGENCY

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CERTIFICATE OF SERVICE

I, Kathryn A. Pamenter, an Assistant Attorney General, do certify that I caused to be served this 21st day of May, 2014, the attached Notice of Electronic Filing and Respondent's Response to Petitioner's Motion for Leave to File Post-Hearing Reply Brief 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*, (c) Stephen A. Swedlow and Michelle Schmit, of Quinn Emanuel Urquhar Sullivan LLP, *via facsimile* and (d) Keith Harley, Chicago Legal Clinic, 211 W. Wacker Drive, Suite 750, Chicago, IL 60606, by placing a true and correct copy in an envelope addressed as set forth herein, 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