

ILLINOIS POLLUTION CONTROL BOARD
September 4, 2014

KCBX TERMINALS COMPANY,)	
)	
Petitioner,)	
)	
v.)	PCB 14-110
)	(Permit Appeal - Air)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

ORDER OF THE BOARD¹ (by J.D. O’Leary):

On February 21, 2014, KCBX Terminals Company (KCBX) filed a petition asking the Board to review a January 17, 2014 determination of the Illinois Environmental Protection Agency (Agency or Illinois EPA). *See* 415 ILCS 5/40(a)(1) (2012); 35 Ill. Adm. Code 101.300(b), 105.206. The determination concerned KCBX’s bulk material terminal at 10730 South Burley Avenue in Chicago, Cook County. The Agency denied KCBX’s “Request for Revision to Revised Construction Permit for its South Facility,” and KCBX appealed the Agency’s determination on various grounds.

On June 19, 2014, the Board found that KCBX had demonstrated that the Agency’s reasons for denial were insufficient. KCBX Terminals Company v. IEPA, PCB 14-110, slip op. at 46-57 (June 19, 2014) (Board Order). The Board found that KCBX’s submitted application did not demonstrate violations of the provisions of the Act and regulations cited by the Agency’s denial letter. *Id.* at 57. The Board reversed the Agency’s January 17, 2014 determination. *Id.* As the Agency’s denial was based substantially on a lack of information, the Board remanded for additional consideration of the application consistent with the Board’s order and with the requirements of the Act and applicable regulations. *Id.*

On July 28, 2014, KCBX filed a motion for reconsideration and modification of the Board’s June 19, 2014 order (Mot.). On August 6, 2014, the Agency filed its response (Resp). On August 12, 2014, KCBX filed a motion for leave to file a reply (Mot. Leave) accompanied by its reply (Reply). On August 18, 2014, the Agency filed its response to KCBX’s motion for leave to file (Resp. Leave). In the following sections of this order, the first addresses the preliminary issue of KCBX’s motion for leave to file a reply. The Board then summarizes the parties’ filings on reconsideration before deciding KCBX’s motion and issuing its order.

¹ Chad Kruse, who worked for the Illinois Environmental Protection Agency prior to joining the Board as an attorney assistant on March 19, 2013, took no part in the Board’s drafting or deliberation of any order or issue in this matter.

PRELIMINARY ISSUE

Summary of KCBX's Motion for Leave to File

KCBX states that it filed its motion for reconsideration on July 28, 2014, and that the Agency filed its response on August 6, 2014. Mot. Leave at 1. KCBX argues that the Agency's response "comments on its review of the Administrative Record for the first time since the Board's Order [of June 19, 2014], mischaracterizes an argument presented by KCBX, and argues that KCBX's Motion for Reconsideration and Modification does not meet requirements in the Board's procedural rules." *Id.* at 1-2.

KCBX cites the Board's procedural rules, which provide that the moving party "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). KCBX argues that 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." Mot. Leave at 2.

Summary of Agency's Response

The Agency first notes that KCBX claims that it will suffer material prejudice if it cannot reply to Agency comments on review of the administrative record. Resp. Leave at 1-2, citing Mot. Leave at 2. The Agency notes that the Board's June 19, 2014 order required that the Agency give "additional consideration of the information in the application consistent with this order and the requirements of the Act and applicable regulations. . . ." Resp. Leave at 2. The Agency states that Mr. Bernoteit's affidavit attached to its response reports compliance with this direction. *Id.* The Agency claims that it "did not provide any comments in its response to the Motion for Reconsideration." *Id.* The Agency argues that KCBX's "desire to itself comment on Illinois EPA's status does not satisfy the material prejudice prerequisite for filing a reply." *Id.*

Second, the Agency notes KCBX's request that, because the Agency's appeal deadline has passed, the Board direct the Agency to issue the revised permit immediately. Resp. Leave at 2, citing Mot. at 2. The Agency also notes the statement in its response that KCBX "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." Resp. Leave at 2, citing Resp. at 1. The Agency argues that, even if it misconstrued KCBX's request, KCBX's "claim does not rise to the level of material prejudice to warrant the filing of a reply." Resp. Leave at 2.

Third, the Agency notes KCBX's argument that "it must have the opportunity to reply to Illinois EPA's argument regarding the standard for a motion for reconsideration." Resp. Leave at 2. The Agency argues that KCBX's motion for reconsideration fails to assert the existence of new evidence, a change in the law, or errors in the Board's application of existing law in its June 19, 2014 order. *Id.*, citing 35 Ill. Adm. Code 101.902; Broderick Teaming Co. v. IEPA, PCB 00-187, slip op. at 2 (Apr. 5, 2001). The Agency cites the statement in the reply that KCBX "outlined why the Board's findings support a difference directive." Resp. Leave at 3, citing

Reply at 3. The Agency claims that “[a] different directive constitutes only a suggested alternative, not an error in the application of existing law.” Resp. Leave at 3. The Agency further claims that its argument regarding the standard for reconsideration does not necessitate a reply to avoid material prejudice. *Id.*

The Agency argues that none of the arguments in KCBX’s motion for leave meets the standard of showing material prejudice. Resp. Leave at 1, 3. The Agency further argues that KCBX has failed to show new evidence, a change in the law, or error in the application of existing law. *Id.* The Agency concludes that the Board should deny both KCBX’s motion for leave and its motion for reconsideration. *Id.*

Board Discussion

KCBX cites Section 101.500(e) of the Board’s procedural rules in claiming that it will suffer material prejudice if it is not granted leave to file a reply to the Agency’s response to the motion for reconsideration. The Board grants the motion, accepts the reply, and summarizes it below.

SUMMARY OF KCBX’S MOTION

KCBX claims that the Agency has not taken action on its remanded application for a revised permit. Mot. at 2, 4. KCBX requests that the Board reconsider its June 19, 2014 order and modify it by directing the Agency to issue the revised permit immediately. *Id.* at 4, 10. Alternatively, KCBX requests that, if the June 19, 2014 order was not final action, the Board modify that order to so state. *Id.* at 4, 10. KCBX states that such a modification will have the effect of issuing the requested revised construction permit by operation of law.” *Id.* at 2, 10; *see* 415 ILCS 5/40(a)(2) (2012).

First, KCBX argues that the Board found that the application for a revised permit did not lack sufficient information to determine compliance with the Act and regulations. Mot. at 6-7. KCBX claims that “[a]ny subsequent decision by Illinois EPA denying the permit would be an improper reconsideration of its final decision.” *Id.* at 7. KCBX argues that the Agency cannot perform such a *de novo* review. *Id.*, citing Grigoleit Co. v. IEPA, PCB 89-184 (Dec. 6, 1991) (Grigoleit), *aff’d. in part, rev’d. in part sub nom Grigoleit Co. v. PCB*, 245 Ill. App. 3d 337, 613 N.E. 2d 371 (4th Dist. 1993). KCBX claims that, because the Agency’s appeal deadline has passed, nothing remains for the Agency to determine, and the Agency “must issue the requested permit.” Mot. at 8; *see* 415 ILCS 5/41(a) (2012).

KCBX states that the Board’s June 19, 2014 order “is a final action.” Mot. at 7. KCBX claims that, if the order provides a basis for the Agency to either clarify its previous denial or develop additional denial reasons, then the Board’s order was only interim in nature. *Id.* KCBX argues that an interim order does not constitute final action with the statutory deadline of 120 days, allowing KCBX to “deem the permit issued.” *Id.*, citing 415 ILCS 5/40(a)(2) (2012).

KCBX also argues that “the Board has issued orders requiring Illinois EPA to issue permits when Illinois EPA’s decision to deny a permit is overturned.” Mot. at 8 (citations

omitted). KCBX claims that, “[u]nless the Board directs Illinois EPA to issue the requested permit, the Board is allowing Illinois EPA to continue to delay in this matter.” *Id.* at 9. KCBX further claims that “[t]he Board must remedy this situation by directing Illinois EPA to issue immediately the requested revised construction permit.” *Id.*

Finally, KCBX surmises that the Agency may argue that the Board’s June 19, 2014 order was not final action under Section 40(a)(2) of the Act. Mot. at 9, citing 415 ILCS 5/40(a)(2) (2012). KCBX states that, if the Board accepts such an argument, it did not take final action on KCBX’s petition within 120 days of receiving it. Mot. at 9. KCBX claims that, under Section 40(a)(2), KCBX may then deem the permit to have been issued. *Id.*

SUMMARY OF AGENCY’S RESPONSE

Citing the Board’s procedural rules, the Agency argues that KCBX’s motion for reconsideration “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.” Resp. at 2, citing 35 Ill. Adm. Code 101.902.

The Agency argues that KCBX instead relies on Grigoleit to argue that the Agency “may not develop additional reasons for denial on remand.” Resp. at 2, citing Grigoleit. The Agency claims the Board in Grigoleit struck all but one of the Agency’s denial reasons and remanded to determine compliance with 35 Ill. Adm. Code 215.301. Resp. at 2-3, citing Grigoleit at 1-2. The Agency indicates that its subsequent review exceeded the scope of the Board’s remand orders by citing and seeking information about compliance with additional provisions. Resp. at 3, citing Grigoleit at 4. The Agency states that the Board sanctioned this action by directing the Agency to issue the operating permit. Resp. at 3, citing Grigoleit at 6. The Agency notes that the Board’s remand in this case “did not limit the Illinois EPA’s additional consideration to any particular statutes or regulations.” Resp. at 3, citing Board Order at 57. The Agency argues that KCBX’s reliance on Grigoleit is “inapposite.” Resp. at 4. The Agency also argues that KCBX cites other cases that do not address a Board remand to the Agency for additional consideration and do not apply to this case. *Id.*, n.4.

The Agency’s response includes the affidavit of Mr. Bernoteit, an employee responsible in part for reviewing permit applications. Resp., Exh. A. Mr. Bernoteit states in part that, “[s]ince 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.” *Id.* The Agency states that, while it has not completed its review according to the Board’s order, it “is complying with the Board’s directive of giving additional consideration to the information in Petitioner’s construction permit application. . . .” Resp. at 1-2.

In addition, the Agency notes KCBX’s claim that, if the Board’s June 19, 2014 order was not a final order, KCBX may deem its construction permit issued. Resp. at 1, n.2, citing Mot. at 2. The Agency claims that the order constitutes final Board action and that “the construction

permit may not be deemed issued.” Resp. at 1, n.2, citing 415 ILCS 5/40(a)(2) (2012); Board Order at 57.

SUMMARY OF KCBX’S REPLY

KCBX claims that the Agency’s response comments on its review of the record for the first time since the Board issued its order, addresses arguments in KCBX’s motion for reconsideration, and claims that the motion does not satisfy the Board’s procedural rules. Reply at 1.

First, KCBX argues that the Agency has had ample time to review the administrative record. Reply at 2. KCBX stresses that it filed its permit application more than one year ago and that the administrative record closed with the issuance of the permit denial. *Id.* KCBX claims that the Agency “does not have unlimited time for its additional consideration of KCBX’s construction permit application.” *Id.* at 1. KCBX notes that the Act provides the Agency 90 days to consider a permit application. *Id.* at 2-3, citing 415 ILCS 5/39(a) (2012).

Second, KCBX argues that the Agency mischaracterized one of its arguments. Reply at 3. KCBX claims it has not asserted that, because the Agency did not appeal the Board’s order, the Board must direct the Agency to issue the permit. Reply at 3, citing Resp. at 1. KCBX states that it argued “that the Board’s findings and directive for additional consideration of information in the application leave Illinois EPA no other options but to issue the revised construction permit.” Reply at 3.

Finally, KCBX confronts the Agency’s argument that the motion for reconsideration sets forth no new evidence, change in the law, or error in the application of existing law. Reply at 3, citing Resp. at 2. KCBX states that its motion “outlined why the Board’s findings support a different directive, specifically, that the Board require Illinois EPA to complete its additional consideration of information in the application and issue a revised construction permit *immediately*.” Reply at 3 (emphasis added). KCBX claims that the Agency has provided only a “vague characterization” of its review on remand. *Id.* at 2. KCBX argues that “it is clear that Illinois EPA must be given a deadline for acting.” *Id.* at 3.

KCBX renews its requests that the Board reconsider its June 19, 2014 order and modify that order by directing the Agency to issue the requested revised construction permit immediately. Reply at 4.

BOARD DISCUSSION

Motion for Reconsideration

A motion to reconsider may be filed in order “to bring to the [Board’s] attention newly discovered evidence which was not available at the time of the hearing, changes in the law or errors in the [Board’s] previous application of existing law.” Citizens Against Regional Landfill v. County Board of Whiteside County, PCB 92-156, slip op. at 2 (Mar. 11, 1993), citing Korogluyan v. Chicago Title & Trust Co., 213 Ill. App. 3d 622, 627, 572 N.E.2d 1154, 1158 (1st

Dist. 1991); *see* 35 Ill. Adm. Code 101.902. A motion to reconsider may also specify “facts in the record which were overlooked.” Wei Enterprises v. IEPA, PCB 04-23, slip op. at 3 (Feb. 19, 2004).

Discussion of Motion

The Board is not persuaded by KCBX’s motion that newly-discovered evidence, a change in the law, or an error in the application of existing law warrants reconsideration of its June 19, 2014 order remanding this case to the Agency. Accordingly, the KCBX’s motion for reconsideration is denied.

However, the parties have called to the Board’s attention the issue of the timing of the Agency’s determination on remand. *See* Mot. at 9; Resp. at 1-2, 4; Reply at 2-3. On its own motion and to clarify this issue, the Board modifies its June 19, 2014 order to include a deadline for the Agency’s determination on remand.

Section 39(a) of the Act addresses issuance of permits and provides in part that, “[i]f there is no final action by the Agency within 90 days after the filing of the application for permit, the applicant may deem the permit issued. . . .” 415 ILCS 5/39(a) (2012). The Board directs the Agency to issue its determination on the remanded permit application within 90 days, beginning 35 days from the date of the Board’s June 19, 2014 order, on or before Wednesday, October 22, 2014. Consideration of applications for approval of pollution control facility sites also includes a statutory deadline provision (415 ILCS 5/39.2(e) (2012), and the Board has issued similar directions in remanding those cases. *See* Concerned Citizens of Williamson County, Rev. Paul Crain and Rose Rowell v. Bill Kibler Dev. Corp., a/k/a Kibler Dev. Corp, and Williamson County Bd. of Comm’rs., PCB 94-262, slip op. at 14 (Jan. 19, 1995); Alice Zeman, et al., v. Village of Summit, and W. Suburban Recycling and Energy Ctr. PCB 92-174; Donna Quilty v. Bd. of Trustees & Mayor of the Vill. of Summit and W. Suburban Recycling and Energy Ctr., PCB 92-177 (consolidated), slip op. at 26 (Feb. 25, 1993). While the Board dismissed Calvary Temple Church v. IEPA, PCB 90-3 (Apr. 25, 1991), as untimely filed, it also proceeded to address the issue of an Agency deadline on remand. The Board views that order as stating only that the statutory 90-day decision deadline does not apply automatically on remand. In addition, the Board cannot conclude that the General Assembly, after providing for a 90-day review of the application, intended to allow unlimited review of the same application on remand.

CONCLUSION

The Board first grants KCBX’s motion for leave to file a reply and accepts the reply. The Board then denies KCBX’s motion to reconsider the Board’s order of June 19, 2014. On its own motion, the Board modifies its June 19, 2014 order to include a deadline of Wednesday, October 22, 2014, for the Agency’s determination on remand.

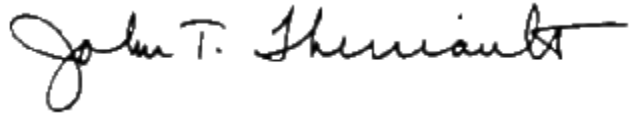
ORDER

KCBX’s application is remanded to the Agency for additional consideration of the information in the application consistent with this order and with the requirements of the Act and

applicable regulations. The Board directs the Agency to issue its determination on the remanded permit application within 90 days, beginning 35 days from the date of the Board's June 19, 2014 order, on or before Wednesday, October 22, 2014.

IT IS SO ORDERED.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on September 4, 2014 by a vote of 4-0.

A handwritten signature in black ink that reads "John T. Therriault". The signature is written in a cursive style with a long horizontal stroke at the end.

John T. Therriault, Clerk
Illinois Pollution Control Board