

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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PLEASE TAKE NOTICE that on the 14th day of October, 2014, Respondent's Motion for Leave to File Reply to KCBX Terminals Company's Response to Motion for Reconsideration and Modification of Order Dated September 4, 2014 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: 

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)	(Air Permit Appeal)
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RESPONDENT'S MOTION FOR LEAVE TO FILE REPLY TO KCBX TERMINALS COMPANY'S RESPONSE TO MOTION FOR RECONSIDERATION AND MODIFICATION OF ORDER DATED SEPTEMBER 4, 2014

Respondent, Illinois Environmental Protection Agency, pursuant to 35 Ill. Adm. Code 101.500(e), hereby moves the Illinois Pollution Control Board ("Board") for leave to file a reply to KCBX Terminals Company's Response to Motion for Reconsideration and Modification of Order Dated September 4, 2014 (the "Response"). In support of its motion, Respondent states as follows:

1. On June 19, 2014, the Board entered its Opinion and Order ("June 19 Order") in the above-captioned Permit Appeal, stating, in pertinent part, that "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." (June 19 Order at p. 57.)

2. On July 28, 2014, KCBX Terminals Company ("KCBX") filed its Motion for Reconsideration and Modification, requesting that the Board modify its June 19 Order to direct the Illinois EPA to immediately issue a revised construction permit or, alternatively, to find that the June 19 Order did not constitute a final action such that the requested revised construction permit would issue by operation of law. By filing the July 28, 2014 motion for reconsideration,

the June 19 Order was stayed. 35 Ill. Adm. Code 101.520 (“[a] timely-filed motion for reconsideration or modification stays the effect of the final order until final disposition of the motion in accordance with Section 101.300(d)(2) of this Part.”)

3. On September 4, 2014, the Board entered an Order denying KCBX’s July 28, 2014 Motion for Reconsideration and Modification. The Board also, on its own motion, modified the June 19 Order to include a deadline of Wednesday, October 22, 2014, for the Illinois EPA to issue its determination on remand.

4. On September 17, 2014, Respondent filed its Motion for Reconsideration and Modification of Order Dated September 4, 2014, arguing that the September 4, 2014 Order did not consider the applicability of the Illinois EPA’s regulations concerning Public Participation in the Air Pollution Control Permit Program (“Illinois EPA Public Participation Regulations”) and Procedures for Permit and Closure Plan Hearing (“Illinois EPA Permit Hearing Procedure Regulations”).

5. On October 1, 2014, KCBX filed and served its Response, in which KCBX misconstrues the Board’s orders and Respondent’s reconsideration motion and ignores the mandatory provisions of the Illinois EPA Public Participation Regulations and the Illinois EPA Permit Hearing Procedure Regulations.

6. Section 101.500(e) of the Board’s Procedural Rules states, “[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 within 14 days after service of the response.” 35 Ill. Adm. Code 101.500(e).

7. In the absence of an opportunity to file a reply to KCBX’s Response, Respondent will be materially prejudiced. 35 Ill. Adm. Code 101.500(e); *see also KCBX Terminals*

Company v. Illinois Environmental Protection Agency, PCB 14-110, slip op. at p. 3 (Sept. 4, 2014) (granting KCBX's motion for leave to file reply). Specifically, Respondent must be permitted to reply to KCBX's incorrect arguments that (a) the Motion for Reconsideration is untimely, (b) Respondent is seeking to reopen the Administrative Record, and (c) Respondent may not conduct any additional public outreach that may "delay" issuance of a permit. A copy of the proposed reply is attached hereto as Exhibit A. By this Motion, Respondent seeks leave to file its reply with the Board to avoid material prejudice.

WHEREFORE, Respondent, the Illinois Environmental Protection Agency, respectfully requests that the Board grant it leave to file its Reply to Petitioner's Response to Motion for Reconsideration and Modification of September 4, 2014 Order and such other relief as the Board deems proper.

ILLINOIS ENVIRONMENTAL PROTECTION
AGENCY

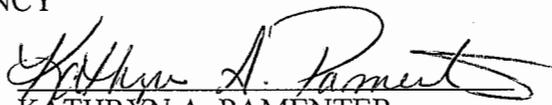
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EXHIBIT A

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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**RESPONDENT'S REPLY TO KCBX TERMINALS COMPANY'S RESPONSE TO
MOTION FOR RECONSIDERATION AND MODIFICATION OF
ORDER DATED SEPTEMBER 4, 2014**

On September 17, 2014, in its Motion for Reconsideration, Respondent sought the establishment of a public comment and hearing schedule in accordance with the Illinois EPA's regulations concerning Public Participation in the Air Pollution Control Permit Program ("Illinois EPA Public Participation Regulations") and Procedures for Permit and Closure Plan Hearings ("Illinois EPA Permit Hearing Regulations"). (Motion for Reconsideration at pp. 2, 6.) In its Response, KCBX Terminals Company ("KCBX") incorrectly argues that (a) the Motion for Reconsideration is untimely, (b) Respondent is seeking to reopen the Administrative Record, and (c) Respondent may not conduct any additional public outreach, thereby misconstruing the Illinois Pollution Control Board's ("Board") order and Respondent's motion and ignoring the mandatory provisions of the public participation regulations. Indeed, the Board's September 4, 2014 Order (the "September 4 Order") does not preclude Respondent's compliance with the Illinois Environmental Protection Act (the "Act") or any regulation. (September 4 Order at pp. 6-7.) Because the September 4 Order did not address the applicability of the public participation regulations, reconsideration of the order, and the establishment of a public notice period and public hearing schedule, is necessary.

I. Respondent Timely Raised the Applicability of the Illinois EPA Public Participation Regulations and Illinois EPA Permit Hearing Procedure Regulations in its Motion for Reconsideration of the September 4 Order.

The Board's Opinion and Order dated June 19, 2014 ("June 19 Order") did not include any deadline for Respondent's "additional consideration [on remand] of the information in the application consistent with this order and with the requirements of the Act and applicable regulations." (June 19 Order at p. 57.) As a result, Respondent could have complied with the timing requirements of the Illinois EPA Public Participation Regulations and the Illinois EPA Permit Hearing Procedure Regulations. Only with the setting on September 4, 2014 of the October 22, 2014 deadline for Respondent's determination on remand did compliance with such regulations become an issue.

For example, to the extent that the Director determines that KCBX's emission units are of public interest, Respondent is required to "issue a notice for the issuance of any permit," including the proposed permit and fact sheet, that provides for a minimum 30-day public comment period. 35 Ill. Adm. Code 252.201(a), (d), (e). Similarly, to the extent that the Director orders a hearing, the minimum notice period is 45 days, and the Hearing Record must thereafter be compiled and completed. 35 Ill. Adm. Code 252.205; 35 Ill. Adm. Code 166.130, 166.180, 166.192. The forty-eight (48) day period between September 4, 2014 and October 22, 2014, does not afford Respondent sufficient time to satisfy the regulatory time requirements for public notice and a hearing upon the Director's determination. Accordingly, Respondent properly sought reconsideration of the September 4 Order, which set the conflicting deadline, as

opposed to the June 19 Order, which afforded Respondent the ability to comply with the public participation regulations.¹

II. Respondent Asserts a Proper Basis for Reconsideration of the September 4 Order.

KCBX agrees that a motion for reconsideration is appropriate to address errors in the Board's previous application of existing law. (Response at p. 3 (quoting *Citizens Against Regional Landfill v. County Bd. of Whiteside County*, PCB 92-156, slip op. at 2 (March 11, 1993)).) In its Motion for Reconsideration, Respondent argued that the Board must reconsider the September 4 Order because it erred in not considering the applicability of the existing Illinois EPA Public Participation Regulations and Illinois EPA Permit Hearing Procedure Regulations. (Motion for Reconsideration (Argument section) at pp. 2-3.) In doing so, Respondent met the standard for a motion for reconsideration. *See Citizens Against Regional Landfill v. County Bd. of Whiteside County*, PCB 92-156, slip op. at 2 (March 11, 1993).

Contrary to KCBX's contention, Respondent's use of the word "may" in a sentence of an Introduction paragraph in its motion does not require a different conclusion. (Response at pp. 4-5.) In stating, "[h]owever, consistency with the requirements of the Illinois Environmental Protection Act (the "Act") and applicable regulations may require the Illinois EPA to provide notice, conduct a public hearing and allow for public comment before it may issue any permit," Respondent recognized that the Director's decision regarding a public comment period and

¹ Section 101.520 of the Board's Procedural Rules provides that a motion for reconsideration must be filed within 35 days of receipt of an order. 35 Ill. Adm. Code 101.520. As such, the deadline for moving for reconsideration of the September 4 Order was October 9, 2014. The Board's scheduled October hearings are October 2, 2014 and October 16, 2014, with the present deadline for Respondent's determination on remand being October 22, 2014. Given that no deadline before October 22, 2014 presently exists for the Director to make her determinations regarding the need for a public comment period and public hearing, and considering the October 9 motion deadline in conjunction with the Board's hearing dates and the remand determination deadline, Respondent elected to promptly file its motion for reconsideration following the entry of the September 4 Order.

public hearing could not be predetermined. (Motion for Reconsideration at pp. 2, 4; *see also* fn. 1, *supra*.) The Director may find that the emission units are not of public interest, such that the permit may issue on October 22, 2014. 35 Ill. Adm. Code 252.102(a)(8), (b); 35 Ill. Adm. Code 252.205. If, however, the Director determines that the emission units are of public interest and that a hearing is required, *id.*, a schedule for public comment, public hearing, preparation of the hearing record and preparation of the final permit, beyond the October 22, 2014 deadline, is necessary. Therefore, because the September 4 Order did not consider the applicability of the Illinois EPA Public Participation Regulations and Illinois EPA Permit Hearing Procedure Regulations, the September 4 Order must be reconsidered. *Citizens Against Regional Landfill*, PCB 92-156, slip op. at 2.

III. Respondent Does Not Seek to Reopen the Administrative Record in this Permit Appeal.

The September 4 Order “ordered” that:

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.

(September 4 Order at pp. 6-7.) Pursuant to the Board’s directive, Respondent was given two alternatives, namely to deny or to grant KCBX’s remanded permit application on or before October 22, 2014, based upon its review of the Administrative Record in this Permit Appeal. Having stated in its September 17, 2014 Motion for Reconsideration that it will be issuing a draft permit on October 22, 2014, Respondent has determined on remand to grant KCBX’s permit application. As a result, Respondent’s Motion for Reconsideration neither requests authority to

gather support for new bases to deny KCBX's construction permit application, nor seeks to reopen the Administrative Record in this Permit Appeal.

Rather, Respondent seeks the establishment of a schedule for compliance with the Illinois EPA Public Participation Regulations and the Illinois EPA Permit Hearing Procedure Regulations after October 22, 2014, should the Director find that a public comment period and/or public hearing are required before issuing the final permit to KCBX. (*See* Motion for Reconsideration at p. 6.) Respondent would consider the public comments, whether written or given at a hearing, in preparing the "conditions" or "terms" of the final permit. To the extent KCBX contested any of the "conditions" within the final permit, KCBX would file a new permit appeal. 415 ILCS 5/40 (2012). The public comments would be included in the record in the new proceeding before the Board.

The foregoing is consistent with the Board's September 4 Order, which did not limit or qualify Respondent's ability to comply with applicable regulations to accept public comments and/or conduct a public hearing. In fact, the Board recognized that Respondent must execute its determination consistently "with the requirements of the Act and applicable regulations." (September 4 Order at pp. 6-7.) This includes the mandatory provisions of the Illinois EPA Public Participation Regulations and the Illinois EPA Permit Hearing Procedure Regulations.

KCBX contends that Respondent is seeking a second *de novo* review of its construction permit application, citing *The Grigoleit Co. v. Illinois EPA*, PCB 89-184, 1991 WL 273769 (Dec. 6, 1991).² (Response at p. 7.) In *Grigoleit*, the Board struck two permit denial reasons and remanded the matter to the Illinois EPA to determine whether The Grigoleit Company

² KCBX's citation to *Ash v. Iroquois County Board*, PCB 87-29, 1987 WL 56144 (July 16, 1987), is misplaced as this permit appeal does not concern a county board's denial of site location suitability for a new regional pollution control facility.

(“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.* As a sanction for failing to comply with its orders, the Board directed the Illinois EPA to issue an operating permit to Grigoleit. *Id.* at *4-*5. In this case, the Board did not limit the Illinois EPA’s determination on remand to a particular regulation or direct the Illinois EPA to issue a permit,³ and Respondent has expressly stated it will issue a permit to KCBX, thereby rendering *Grigoleit* inapposite. (*See* September 4 Order at pp. 6-7; Motion for Reconsideration at pp. 2, 6.)

KCBX also asserts that the Director “apparently determined” that the Illinois EPA Public Participation Regulations and Illinois EPA Permit Hearing Procedure Regulations did not apply in this matter. (Response at p. 10.) KCBX does not cite to any page of the Administrative Record in this Permit Appeal or the trial transcripts regarding whether the Director made any finding on the applicability of such regulations. (*Id.* at pp. 10-11.) As supported by the Administrative Record of the permit denial proceeding, no formal consideration of a public notice and comment period under the Illinois EPA Public Participation Regulations, or of a public hearing under the Illinois EPA Permit Hearing Regulations, was undertaken during the application review process, as such requirements do not apply until Respondent decides to issue a permit. *See generally* 35 Ill. Adm. Code Part 252, Subpart B; 35 Ill. Adm. Code Part 166, Subpart A. In this case, Respondent issued a permit denial letter on January 17, 2014. (R1-R3.)

³ In the June 19 Order, the Board stated that it “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.*” (June 19 Order at p. 57 (emphasis added).)

In addition, KCBX offers no support for its contention that Respondent is foreclosed from complying with the public participation regulations because it held a prior environmental justice meeting, not a public hearing, on KCBX's permit application.⁴ (Response at pp. 9-13.)

Contrary to KCBX's repeated statements, Respondent does not seek to reopen the Administrative Record to develop additional denial reasons on remand. (*See, e.g.*, Response at pp. 13-14.) Rather, Respondent has determined to grant KCBX's permit application. (Motion for Reconsideration at pp. 2, 6.) Compliance with the mandatory provisions of the Illinois EPA Public Participation Regulations and Illinois EPA Permit Hearing Procedure Regulations, should the Director find that KCBX's emission units are of public interest, is therefore required. *See, e.g.*, 35 Ill. Adm. Code 252.201(a), (d), (e). This is consistent with portions of the Board's September 4 Order. (September 4 Order at pp. 6-7.) Due to the October 22, 2014 deadline, though, the September 4 Order must be reconsidered to establish an appropriate schedule for Respondent to comply with the applicable public comment and public hearing regulations.

IV. No "Delays" Have Occurred in this Permit Appeal.

Pursuant to Section 39(a) of the Act, Respondent generally has 90 days to grant or deny a permit application, unless the permit applicant extends such deadline. 415 ILCS 5/39(a) (2012). KCBX elected to extend Respondent's statutory review period of the construction permit application from October 21, 2013 until January 20, 2014. (R27-28, R73, R178.) On January 17, 2014, Respondent timely issued its permit denial letter. (R1-R3.) On February 21, 2014, KCBX timely filed its Permit Appeal. 415 ILCS 5/40(a)(1) (2012). The parties engaged in expedited discovery and pre-trial motion practice, followed by a four-day trial and agreed-upon

⁴ KCBX states that "Environmental Justice Policies alone cannot justify additional public outreach here." (Response at p. 13; *see also id.* at pp. 11-12.) Respondent made no such argument in its Motion for Reconsideration. Rather, Respondent stated that the Environmental Justice Policies apply to the Director's consideration of the location of the source, one of the factors in determining whether emission units are of public interest. (Motion for Reconsideration at p. 5.)

briefing schedule to ensure that the Board could render its ruling within the 120-day statutory period for its decision. 415 ILCS 5/40(a)(2) (2012). On June 19, 2014, the Board timely entered its Opinion and Order. *Id.* The parties had 35 days to move for reconsideration or appeal the June 19 Order. 35 Ill. Adm. Code 101.520; 415 ILCS 5/41(a) (2012). On July 28, 2014, KCBX timely moved for reconsideration of the June 19 Order, thereby staying the effect of that order until final disposition of the motion. 35 Ill. Adm. Code 101.520. On September 4, 2014, the Board denied KCBX's motion for reconsideration and, on its own motion, set the October 22, 2014 deadline for Respondent's determination on remand. The parties have 35 days to move for reconsideration or appeal the September 4 Order. 35 Ill. Adm. Code 101.520; 415 ILCS 5/41(a) (2012). On September 17, 2014, well in advance of the 35-day deadline, Respondent moved for reconsideration of the September 4 Order.

The foregoing does not reflect delays, as KCBX asserts. Rather, the Board and the parties have complied with the statutory and regulatory time periods applicable in permit appeals. Similarly, through its Motion for Reconsideration, Respondent does not request authority to delay issuance of the permit to KCBX. Instead, Respondent properly seeks an appropriate schedule for receiving public comments and conducting a hearing, as determined applicable by the Director, concerning the draft permit for KCBX's ten additional conveyers, box hopper and stacker.

V. Conclusion.

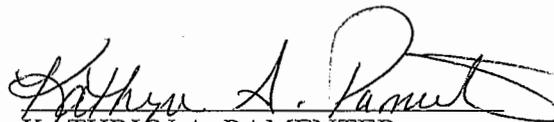
Respondent's Motion for Reconsideration seeks to safeguard the opportunity for public input provided by the applicable regulations in permit decisions of public interest. Specifically in this case, Respondent is required to comply with the Illinois EPA Public Participation Regulations and Illinois EPA Permit Hearing Procedure Regulations if the Director determines that KCBX's additional emission units are of public interest. 35 Ill. Adm. Code 252.102(a)(8), (b). In addition, the Director may order a public hearing on the draft permit. 35 Ill. Adm. Code 252.205. Because the September 4 Order did not consider such regulations in setting the October 22, 2014 deadline, Respondent's request for reconsideration of such order is necessary. Moreover, KCBX did not offer an alternative schedule to Respondent's proposal. (Response at p. 13.) Accordingly, Respondent seeks approval of the schedule set forth in its Motion for Reconsideration. (Motion for Reconsideration at p. 6.)

ILLINOIS ENVIRONMENTAL PROTECTION
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CERTIFICATE OF SERVICE

I, Kathryn A. Pamentor, an Assistant Attorney General, do certify that I caused to be served this 14th day of October, 2014, the attached Notice of Electronic Filing and Respondent's Motion for Leave to File Reply to KCBX Terminals Company's Response to Motion for Reconsideration and Modification of Order Dated September 4, 2014 upon (a) Katherine D. Hodge, Edward W. Dwyer and Matthew C. Read, of Hodge Dwyer & Driver and Stephen A. Swedlow and Michelle Schmit, of Quinn Emanuel Urquhar Sullivan LLP *via facsimile and via regular mail* 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., (b) 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 (c) Bradley P. Halloran and John Therriault *via email*.


KATHRYN A. PAMENTER