

ILLINOIS POLLUTION CONTROL BOARD
October 16, 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 September 17, 2014, the Illinois Environmental Protection Agency (Agency) filed a motion for reconsideration and modification of an order adopted by the Board on September 4, 2014. KCBX Terminals Company (KCBX) responded to the motion on October 1, 2014. For the reasons below, the Board denies the motion.

The Board first provides an abbreviated procedural history of this matter and then addresses the preliminary matter of the Agency’s motion for leave to file a reply. Next, the Board summarizes the Agency’s motion to reconsider, the response filed by KCBX, and the reply filed by the Agency. The Board then discusses the issues and reaches its conclusion.

ABBREVIATED PROCEDURAL HISTORY

On February 21, 2014, KCBX filed a petition asking the Board to review a January 17, 2014 determination by the Agency. *See* 415 ILCS 5/40(a)(1) (2012); 35 Ill. Adm. Code 101.300(b), 105.206. The Agency denied KCBX’s application for a revised construction permit for its South Facility, a bulk materials terminal at 10730 South Burley Avenue in Chicago, Cook County. The Agency filed the administrative record (R.) on March 24, 2014, and later filed six supplements to the administrative record. The hearing in this matter began as scheduled on April 29, 2014, and continued day-to-day until concluding on May 2, 2014. On May 2, 2014, the Board received the transcript of proceedings on April 29, 2014 (Tr. 4/29); April 30, 2014 (Tr. 4/30); and May 1, 2014 (Tr. 5/1). On May 5, 2014, the Board received the transcript of proceedings on May 2, 2014 (Tr. 5/2).

On June 19, 2014, 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. The Board reversed the Agency’s January 17, 2014 determination. KCBX Terminals Company v. IEPA, PCB 14-110, slip op. at 46-57 (June 19, 2014) (June 19 Order). As denial

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.

was based substantially on lack of information, the Board remanded to the Agency 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. On August 6, 2014, the Agency filed its response. On August 12, 2014, KCBX filed a motion for leave to file a reply accompanied by its reply. On August 18, 2014, the Agency filed its response to KCBX's motion for leave to file.

In an order dated September 4, 2014, the Board granted KCBX's motion for leave to file a reply, accepted its reply, and denied KCBX's motion to reconsider the Board's June 19, 2014 order. On its own motion, the Board modified that order to include a deadline of October 22, 2014, for the Agency's determination on remand. KCBX Terminals Company v. IEPA, PCB 14-110, slip op. at 6-7 (Sept. 4, 2014) (Sept. 4 Order).

On September 18, 2014, the Agency filed a motion to reconsider and modify the Board's September 4, 2014 order (Mot.). On October 1, 2014, KCBX filed its response (Resp.). On October 14, 2014, the Agency filed a motion for leave to file a reply (Mot. Leave) accompanied by its reply (Reply).

PRELIMINARY MATTER

On October 14, 2014, the Agency filed a motion for leave to file a reply. The Agency claims that KCBX's response misconstrues both the Board's orders and the motion for reconsideration and also ignores Agency regulations regarding a hearing and public participation. Mot. Leave at 2. The Agency argues that, without leave to file a reply, it "will be materially prejudiced." *Id.*, citing 35 Ill. Adm. Code 101.500(e). The Agency specifically claims that leave to file is necessary to address KCBX's arguments that the Agency's motion for reconsideration was untimely, that the Agency seeks to reopen the administrative record, and that the Agency may not perform additional public outreach. Mot. Leave at 3.

Section 101.500(e) of the Board's procedural rules provides that "[t]he moving person will not have the right to reply, except as permitted by the Board . . . to prevent material prejudice." 35 Ill. Adm. Code 101.500(e). The procedural rules also provide that, "[w]ithin 14 days after service of a motion, a party may file a response to the motion. . . . Unless undue delay or material prejudice would result, neither the Board nor the hearing officer will grant any motion before the expiration of the 14 day response period. . . ." 35 Ill. Adm. Code 101.500(d).

The Agency notes that this is the date of the last regularly-scheduled Board meeting before the current deadline of October 22, 2014, for the Agency's decision on remand. Reply at 3, n.1. The Agency also notes that there is no deadline before October 22, 2014, requiring "the Director to make her determination regarding the need for a public comment period and public hearing. . . ." *Id.* Taking these factors into account, the Board finds that undue delay would result from allowing the 14-day response period to run and deciding this motion at the next regularly-scheduled Board meeting on November 6, 2014, more than two weeks after the current Agency decision deadline. The Agency has argued that it would be materially prejudiced if

unable to correct arguments made by KCBX in its response to the motion for reconsideration. *See* 35 Ill. Adm. Code 101.500(e). The board grants the motion for leave to file, accepts the reply submitted with the Agency's motion, and summarizes the reply below.

SUMMARY OF AGENCY'S MOTION

The Agency notes that the Board's June 19, 2014 order remanded KCBX's application "for additional consideration of the information in the application consistent with this order and with the requirements of the Act and applicable regulations." Mot. at 1, citing June 19 Order at 57. The Agency cites the Board's procedural rules to claim that KCBX's motion for reconsideration stayed the effect of that order. Mot. at 2, citing 35 Ill. Adm. Code 101.520. The Agency states that the Board's September 4, 2014 order set a deadline of October 22, 2014 for the Agency to issue its determination on remand. Mot. at 2. The Agency notes that the Board's order repeated the direction that KCBX's application is remanded for additional consideration. Mot. at 2, citing Sept. 4 Order at 6-7.

The Agency states that it "is preparing a draft permit in response to the Board's direction in its June 19 Order and September 4 Order." Mot. at 2. The Agency argues, however, that the requirements of the Act and applicable regulations may obligate it to provide notice, conduct a hearing, and receive comment before it can issue a permit. *Id.* The Agency requests that the Board reconsider its October 22, 2014 deadline. *Id.* The Agency argues that, because the Board did not specifically consider the applicability of public participation and hearing procedure regulations, it must grant the motion to reconsider in order to consider any errors in its previous application of existing law. Mot. at 3, citing Citizens Against Regional Landfill v. County Board of Whiteside County, PCB 92-156, slip op. at 2 (Mar. 11, 1993).

The Agency states that KCBX's permit application seeks to install 12 emission units at its South Facility. Mot. at 4, citing R. at 186-204; Tr. 4/29 at 192. The Agency further states that the Director must consider seven regulatory factors to determine whether the emission units are "of public interest." Mot. at 3-4, citing 35 Ill. Adm. Code 252.102(a), (b) (Applicability). If the Director determines that the emission units are "of public interest," the Agency claims that it must then provide notice, prepare a draft permit for public review, make specified documents available to public inspection, and conduct a public hearing. Mot. at 4, citing 35 Ill. Adm. Code 166.110 *et seq.*, 252.201(a), 252.202, 252.204, 252.205.

The Agency states that one of the seven regulatory factors the Director must consider is "[t]he interest in the source exhibited by the public, based on comments and inquiries received by the Agency." Mot. at 4-5, citing 35 Ill. Adm. Code 252.102(b)(5). The Agency claims that its administrative record includes comments and inquiries regarding the South Facility. Mot. at 5, citing R. 29, 119-20, 172-73, 222-537. The Agency also notes a letter dated June 26, 2014, from the Chicago Legal Clinic on behalf of the Southeast Environmental Task Force, an organization "including residents who live in homes that are immediately adjacent to the KCBX facility located at 10730 South Burley Avenue in Chicago." Mot. at 5, Exh. A at 1. The letter states that it is "formally requesting that IL EPA hold a public hearing and a subsequent written comment period" regarding KCBX's request for a revised permit. Mot. at 5, Exh. A at 1.

The Agency states that another of the seven regulatory factors the Director must consider is “[t]he location of the source.” Mot. at 5, citing 35 Ill. Adm. Code 252.102(b)(4). The Agency claims that this factor encompasses “whether the emission units are or will be located in a community with a low-income and/or minority population greater than twice the statewide average (a “Potential Environmental Justice Community”).” Mot. at 5. The Agency states that its demographic assessment process has concluded that the South Facility falls within a Potential Environmental Justice Community. *Id.*, citing Tr. 5/1 at 115-16. The Agency argues that this conclusion triggers its policies on environmental justice and public participation, which require enhanced public outreach. Mot. at 5, Exh. B (Agency environmental justice policy). The Agency adds that failure to comply with these regulations and policies may subject it to an administrative complaint under the Civil Rights Act of 1964 or cause it to be in violation of a settlement agreement with the United States Environmental Protection Agency. Mot. at 5-6, citing 42 U.S.C §§ 2000d – 2000d-7; 40 C.F.R Part 7; Exh. C (Settlement Agreement for Administrative Complaint No. 13R-10-R5).

The Agency states that the decision that emission units are of public interest cannot be pre-determined. Mot. at 4. Because the Director may yet make this determination, the Agency proposed a schedule for issuance of a revised permit that accounts for the hearing and other procedures and participation that may be required. *Id.* at 6.

First, the Agency proposes to complete its consideration of KCBX’s application and preparation of a draft permit by October 21, 2014. Mot. at 6.

Second, the Agency proposes to provide a copy of a draft permit to KCBX on October 22, 2014. Mot. at 5. The Agency reports that “KCBX has previously requested a copy of the draft and final permit in advance.” *Id.* n.1.

Third, the Agency proposes to send a notice of opportunity to submit public comments on October 23, 2014. Mot. at 5.

Fourth, if the Agency determines under Section 252.205 to conduct a hearing, it proposes to hold it “no later than December 12, 2014.” Mot. at 6, citing 35 Ill. Adm. Code 252.205 (Opportunity for Public Hearing). The Agency cites its procedural rules requiring that “the first notice of a hearing shall be given at least 45 days before the date of the hearing.” Mot. at 6, citing 35 Ill. Adm. Code 166.130(b) (Notice).

Fifth, the Agency proposes that the hearing record and public comment period would close on January 12, 2015, 30 days after the hearing. Mot. at 6; *see* 35 Ill. Adm. Code 166.191. The Agency notes that its procedural rules establish the required contents of the hearing record. Mot. at 6, n.3, citing 35 Ill. Adm. Code 166.180.

The Agency adds that “[t]he comments period may be extended for good cause shown or by agreement of the parties,” subject to statutory time limits. Mot. at 6-7, citing 35 Ill. Adm. Code 161.191. The Agency cautions that this and subsequent proposed deadlines are subject to extension. Mot. at 7.

Sixth, the Agency proposes to complete the hearing record, includes its Responsiveness Summary, on January 30, 2015. Mot. at 6. The Agency notes that its procedural rules establish the contents of the Responsiveness Summary. *Id.*, n.4, citing 35 Ill. Adm. Code 161.192.

Seventh, the Agency proposes to provide a final copy of the permit to KCBX on February 2, 2015. Mot. at 6, citing 415 ILCS 5/39(v) (2012).

Finally, the Agency proposes to issue the permit on February 3, 2015. Mot. at 6.

The Agency concludes by requesting that the Board grant its motion for reconsideration and modify the deadline in its September 4, 2014 order according to the proposed schedule above. Mot. at 7.

SUMMARY OF KCBX'S RESPONSE

In its response, KCBX makes a number of arguments that the Board must deny the Agency's motion for reconsideration. In the following subsection of the order, the Board separately summarizes those arguments.

Grounds for Reconsideration

KCBX first argues that the Agency has not established a proper basis for the Board to reconsider its September 4, 2014 order. Resp. at 3-4 (citations omitted). KCBX argues that the Agency has not introduced new evidence leading to a conclusion that the order was in error. *Id.* at 4. KCBX states that the Board addressed public comments in its June 19, 2014 order and that "the issue of public participation is not new." *Id.*, citing June 19 Order at 24; PC 1. KCBX then argues that Parts 166 and 252 of the Agency's procedural rules have not been amended since the Board's June 19, 2014 order and provide no change in law supporting reconsideration. Resp. at 4, citing 35 Ill. Adm. Code 166, 252. Third, KCBX claims that the Agency's reference to participation and hearing requirements is at best an argument that the Board "*may* be in error." Resp. at 4 (emphasis in original), citing 35 Ill. Adm. Code 101.902. KCBX suggests that, in the absence of a claim that the Board's order was in error, the Agency's motion provides no basis for reconsideration. Resp. at 4.

Scope of Board's September 4, 2014 Order

KCBX argues that, because the Agency never sought reconsideration of the Board's June 19, 2014 order, it cannot now request that the Board "expand the scope of its remand" to consider additional information through a hearing and public comments. Resp. at 5. KCBX notes the Board's remand "for additional consideration of the *information in the application.*" *Id.* (emphasis in original), citing June 19 Order at 57. KCBX claims that this direction limits the Agency's review to the record. Resp. at 5 (citation omitted).

KCBX argues that the decision deadline imposed by the Board "is the only new issue raised in the September 4, 2014 Order and, thus, the only topic that may be the subject of a motion for reconsideration" of that order. Resp. at 6. KCBX claims that granting the Agency's

motion would require the Board to reconsider its June 19, 2014 order and re-define the scope of the remand. *Id.* KCBX argues that the Agency never sought reconsideration of the order. KCBX urges that this inappropriate and untimely request should be denied. *Id.*

Record on Remand

KCBX notes the Board's determination that the permit application was not missing information and argues that "[t]he Record in this matter is closed." Resp. at 6. KCBX argues that, once the Agency makes a permit decision, it "must file its *entire* record of its decision with the Clerk of the Board." Resp. at 7 (emphasis in original), citing 415 ILCS 5/39(a) (2012); 35 Ill. Adm. Code 105.212(a). KCBX states that the Board's review is limited to the record before the Agency, and that the Board does not consider information developed after the Agency reaches its decision. Resp. at 7. KCBX argues that allowing the Agency to re-open the record effectively allows the Agency a second review. *Id.*

Permitting Procedures

KCBX states that the Agency's initial consideration of the application included preparation of a fact sheet, a public meeting, and the filing of public comments. Resp. at 9-10, citing R. at 124-26. KCBX adds that, although the Agency prepared a draft permit, it opted not to provide notice of it. Resp. at 10, citing R. at 650-70, 2039; Tr. 4/30 at 199-200.

KCBX claims that the Board should not allow the Agency to invoke public participation and hearing requirements that may apply to its review on remand. Resp. at 10. KCBX argues that, during its initial review of the application, the Agency apparently determined that these requirements did not apply. *Id.* KCBX stresses that, although the Agency did not implement these regulations, it conducted a public meeting, and sought and considered public comments. *Id.* at 11. KCBX suggests that the Agency should not now be able to revisit the determinations it made on these matters.

Environmental Justice

KCBX claims that the Agency has invoked its environmental justice policies as a basis for further delay. Resp. at 11-12. KCBX argues that these policies give the Agency no authority beyond its regulations to reopen the record on remand. *Id.* at 12. KCBX acknowledges that, "[t]o the extent that the Environmental Justice Policies fit within Illinois EPA's existing statutory and regulatory scheme, they may be appropriate guidelines for determining how to apply existing law and regulations." *Id.* KCBX notes that the Agency appears to recognize that its application of environmental justice policies is limited by the location factor in its public participation regulations. *Id.*, citing 35 Ill. Adm. Code 252.102(b)(4). KCBX concludes that additional public outreach is not now authorized by statute, regulation, or case law, and that environmental justice policies alone cannot now justify such outreach. Resp. at 13.

Agency Consideration

KCBX stresses that it granted three waivers of the Agency's review deadline and that the Agency's review period ran for 178 days. Resp. at 13, citing R. at 18-19, 73, 177. KCBX also stresses that the Agency engaged in public outreach during that time. Resp. at 13. KCBX argues that the Agency now requests that the Board delay issuance of the permit more than one year beyond the date of its denial letter and indicates that additional delay may be appropriate. *Id.* KCBX suggests that granting the Agency's motion "would unnecessarily and unfairly delay issuance." *Id.*

KCBX further argues that the Agency "may not develop additional reasons for denial on remand." Resp. at 14 (citation omitted). KCBX concludes that, "since the Board has found that all of Illinois EPA's denial reasons were insufficient, Illinois EPA has no other alternative but to issue the revised construction permit to KCBX." *Id.*; *see id.* at 3.

KCBX argues that the Board must deny the Agency's motion for reconsideration of the Board's September 4, 2014 order. Resp. at 14-15; *see id.* at 2.

SUMMARY OF AGENCY'S REPLY

The Agency's reply claims that KCBX's response raised incorrect arguments. The Agency argues that the Board's September 4 order did not address applicability of public participation regulations, reconsider of that order "is necessary." Reply at 1. In the following subsections, the Board summarizes the arguments in the Agency's reply.

Timeliness

The Agency argues that the Board's June 19 order did not establish an explicit decisions deadline for the Agency on remand and therefore did not necessarily conflict with the timing established by the Agency's public participation and hearing regulations. Reply at 2, citing June 19 Order at 57. The Agency argues that the September 4 order established a decision deadline and raised the issue of this timing. Reply at 2. The Agency claims that, "to the extent that the Director determines that KCBX's emission units are of public interest," the Agency will be required to follow procedural requiring specific time periods. *Id.*, citing 35 Ill. Adm. Code 166.130, 166.180, 166.192, 252.201(a), (d), (e) 252.205. The Agency further claims that the Board's October 22, 2014 deadline does not provide adequate time to meet these requirements. Reply at 2. The Agency argues that it appropriately sought review only of the subsequent Board order setting that deadline. *Id.*

Basis for Reconsideration

The Agency argues that KCBX has acknowledged errors in the previous application of existing law as one basis for reconsideration. Reply at 3, citing Resp. at 3. The Agency argues that the Board's September 4 order erred because it set a decision deadline without considering the timing of Agency hearing and participation requirements. Reply at 3.

The Agency states that “[t]he Director may find that the emission units are not of public interest, such that the permit may issue on October 22, 2014.” Reply at 4, citing 35 Ill. Adm. Code 252.108(a)(8), (b), 252.205. If the Director determines that the emission units are of public interest and that a hearing is required, then a schedule to issue a permit must extend beyond October 22, 2014. Reply at 4. The Agency states that this finding may not be predetermined. *Id.* at 3-4, citing Mot. at 2, 4. The Agency indicates that it had not previously considered these requirements because it did determine to issue a denial letter on January 17, 2014. Reply at 5, citing 35 Ill. Adm. Code 166.Subpart A, 252.Subpart B; R. at 1-3. The Agency suggests that, even though the Director’s decision may not trigger an extended deadline, the Board erred by failing to consider the Agency hearing and public participation rules. *Id.* at 4.

Administrative Record

The Agency stresses that it “has determined on remand to grant KCBX’s permit application.” Reply at 4. The Agency argues that its proposed schedule for issuance seeks to comply with hearing and participation requirements in the event that the Director finds that they apply. The Agency adds that it does not seek to re-open the record or establish new grounds for denial. *Id.* at 4-5, citing Mot. at 6. The Agency states that the Board’s June 19 order remanded KCBX’s application to the Agency for additional consideration consistent with the requirements of the Act and applicable regulations. Reply at 5, citing June 19 Order at 57. The Agency disputes KCBX’s argument that an earlier environmental justice meeting precludes the Agency from conducting additional public participation. Reply at 7, citing Resp. at 9-13. The Agency also counters KCBX’s reliance on Grigoleit Co. v. IEPA PCB 89-194 (Dec. 6, 1991), arguing that the Board in that case directed the Agency to issue a permit as a sanction for failure to comply with Board orders on remand. Reply at 6.

Allegation of Delay

The Agency argues that KCBX filed a timely motion to reconsider the Board’s June 19 order. Reply at 8, citing 415 ILCS 5/41(a) (2012); 35 Ill. Adm. Code 101.520. The Agency further argues that the timely motion stayed the effect of the Board’s June 19 order until final disposition of the motion. Reply at 8, citing 35 Ill. Adm. Code 101.520. The Agency claims that it filed a motion to reconsider the Board’s September 4 order well in advance of the 35-day deadline to do so. Reply at 8, citing 35 Ill. Adm. Code 101.520. The Agency states that its motion intends not to delay issuance of a permit but to set an appropriate schedule for hearing and comments “as determined applicable by the Director.” Reply at 8. The Agency renews its request that the Board approve the schedule proposed in the motion for reconsideration. *Id.* at 9, citing Mot. at 6.

BOARD DISCUSSION

Motions 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 Agency’s request that the Board modify the deadline to issue its determination on remand is explicitly based on the possibility that “the Director *may determine* that KCBX’s emission units are of public interest.” Mot. at 6 (emphasis added). The Agency’s reply acknowledges that “[t]he Director may find that the emission units are not of public interest, such that the permit may issue on October 22, 2014.” Reply at 4. The Agency’s motion indicates that a determination that the units are of public interest triggers various requirements under the Agency’s participation and hearing regulations. Mot. at 6, citing 35 Ill. Adm. Code 166.130(b), 166.180, 166.192, 252.205.

The record before the Board does not indicate that this possible determination has been made. The record does not indicate whether the Director intends to make it or, if so, when she intends to do so. The Agency’s reply indicates that no deadline requires the Director to make this determination before October 22, 2014. The Agency has stressed that this determination “may not be predetermined” (Mot. at 4), and it requires the consideration of seven regulatory factors. 35 Ill. Adm. Code 252.102(b).

In the absence of an actual determination that the KCBX emissions units are “of public interest,” the Board today declines to adopt the schedule for issuance of a revised construction permit as requested by the Agency. Faced only with the possibility that the Agency may trigger applicable regulatory requirements, the Board cannot conclude that its September 4, 2014 order erred in its application of the existing law. The Agency’s September 17, 2014 motion for reconsideration and modification is denied. However, to reflect the fact that the motion has been pending for 29 days since it was filed on September 17, 2014, the Board extends the Agency’s deadline to issue its determination on remand by 29 days to Thursday, November 20, 2014.

In the event that the Agency has arguments or information it wishes to bring to the Board’s attention, it may do so in a filing as authorized by the Act and the Board’s procedural rules.

CONCLUSION

The Board grants the Agency’s motion for leave to file a reply. The Board concludes that its September 4, 2014 order did not err in its application of existing law and denies the Agency’s motion to reconsider that order. To reflect the time during which the motion has been pending, the Board extends the Agency’s deadline to issue its determination on remand to Thursday, November 20, 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 October 16, 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