BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

CHICAGO COKE CO., INC., an Illinois corporation,	)	
Petitioner,	)	
v.	)	PCB 10-75 (Permit Appeal--Air)
THE ILLINOIS ENVIROMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

NOTICE OF FILING

To: Andrew B. Armstrong
Assistant Attorney
General Environmental Bureau
69 West Washington Street, 18th Floor
Chicago, Illinois 60602

PLEASE TAKE NOTICE that on this 28th day of June 2010, the following were filed electronically with the Illinois Pollution Control Board, which are attached and herewith served upon you.

- **Petitioner's Response to Motion to Vacate Stay**
- **Petitioner's Response in Opposition to Motion to Dismiss**

CHICAGO COKE CO., INC.

By: *s/Elizabeth S. Harvey*
One of its attorneys

Michael J. Maher
Elizabeth Harvey
Erin E. Wright
SWANSON, MARTIN & BELL, LLP
330 North Wabash Avenue, Suite 3300
Chicago, Illinois 60611
Telephone: (312) 321-9100

CERTIFICATE OF SERVICE

I, the undersigned non-attorney, state that I served a copy of the foregoing to counsel of record via U.S. Mail at 330 North Wabash Avenue, Chicago, IL 60611, at or before 5:00 p.m. on June 28, 2010.

Jeanette Podlin

[x] Under penalties as provided by law pursuant to 735 ILCS 5/1-109, I certify that the statements set forth herein are true and correct.

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

CHICAGO COKE CO., INC., an Illinois corporation,	)	
Petitioner,	)	
v.	)	PCB 10-75 (Permit Appeal--Air)
THE ILLINOIS ENVIROMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

RESPONSE TO MOTION TO VACATE STAY

Petitioner, CHICAGO COKE, INC. ("petitioner"), by its attorneys Swanson, Martin & Bell, LLP, responds to respondent ILLINOIS ENVIRONMENTAL PROTECTION AGENCY's ("IEPA") motion to vacate stay.

1. This matter began with the March 29, 2010 filing of the petition for review of IEPA's "final decision" denying petitioner's application to use certain Emission Reduction Credits ("ERC") as emission offsets. On May 6, 2010, the Board granted petitioner's request for a stay of proceedings in this matter.
2. On June 14, 2010, petitioner received IEPA's motion to vacate that stay. IEPA moves the Board to vacate the stay and to hear IEPA's motion to dismiss petitioner's appeal. IEPA asserts that it did not previously respond to the petition for review because it did not receive that petition.
3. In support of its contention that it did not receive notice of the petition for review until it received a copy of the Board's May 6, 2010 order, IEPA included the affidavit of John Kim, Chief Legal Counsel to IEPA. Mr. Kim states that, to the best of his knowledge after inquiry, IEPA did not receive a copy of the petition for review. IEPA

does not contend that petitioner failed to properly serve the petition for review: it contends only that IEPA did not receive the petition for review.

4. As is clearly shown on the certificate of service of the petition for review, petitioner mailed the petition to IEPA, directed to the Division of Legal Counsel, at IEPA's address in Springfield. The certificate of service includes the verification of an employee of petitioner's attorneys that the petition, attorney appearance, and limited waiver of decision deadline were in fact mailed on the same day the petition was filed. Pursuant to Sections 101.304 and 105.106 of the Board's regulations, the mailing of the petition to IEPA, directed to Division of Legal Counsel, fulfilled the petitioner's obligation to properly serve the petition.
5. Petitioner does not know why IEPA did not receive the properly-mailed petition. However, given Mr. Kim's sworn statement that IEPA did not, in fact, receive the petition, it appears that the petition may have been lost in the mail. Based upon those circumstances, petitioner has no objection to the Board hearing the motion to dismiss.[1] Therefore, petitioner does not object to a temporary suspension of the stay, for the limited purpose of the Board's consideration of the motion to dismiss.
6. However, petitioner does object to the substance of the motion to dismiss, and asks the Board to deny the motion. If the Board decides to vacate the stay for the limited purposed of hearing the motion to dismiss, petitioner asks the Board to consider the attached response in opposition to dismissal. Petitioner further asks the Board to reimpose a stay of this proceeding after deciding the motion to dismiss.

[1] Petitioner does object to IEPA's statement, in paragraph 10 of its motion, that "Petitioner and Respondent apparently agree that the Board is an improper venue for Petitioner's appeal." Petitioner disputes that statement. Petitioner's agreement not to object to the Board hearing the motion to dismiss is not to be interpreted as agreement with IEPA's mischaracterization.

CHICAGO COKE CO., INC.

By: _____
One of its attorneys

Michael J. Maher
Elizabeth S. Harvey
Erin E. Wright
SWANSON, MARTIN & BELL, LLP
330 North Wabash Avenue, Suite 3300
Chicago, Illinois 60611
Telephone: (312) 321-9100

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

CHICAGO COKE CO., INC., an Illinois corporation,	)	
Petitioner,	)	
v.	)	PCB 10-75 (Permit Appeal--Air)
THE ILLINOIS ENVIROMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

RESPONSE IN OPPOSITION TO MOTION TO DISMISS

Petitioner, CHICAGO COKE, INC. ("petitioner"), by its attorneys Swanson, Martin & Bell, LLP, responds in opposition to respondent ILLINOIS ENVIRONMENTAL PROTECTION AGENCY's ("IEPA" or "Agency") motion to dismiss the petition for review. Contrary to IEPA's assertions, petitioner does have standing to petition the Board for review of IEPA's final decision. The motion to dismiss should be denied.

INTRODUCTION

Petitioner filed its petition for review on March 29, 2010, seeking review of IEPA's self-described "final decision" determining that petitioner's emission reduction credits are not available as emission offsets. On February 22, 2010, IEPA issued a letter stating:

> ...Illinois EPA's final decision on this issue remains the same... That is, the Illinois EPA does not find that the ERCs[1] claimed are available as offsets, since it is our position that the Chicago Coke facility is permanently shut down.
>
> (IEPA February 22, 2010 letter (emphasis added), attached to the petition for review as Exhibit D. An additional copy of that letter is attached to this response

[1] An "ERC" is an "emission reduction credit".

as Exhibit 1, for the Board's convenience.)

The Agency's decision was the result of two and a half years of discussion of the issue of petitioner's ERCs. IEPA and petitioner met for the first time on this issue on July 11, 2007, resulting in a series of letters from petitioner (August 3, 2007; July 18, 2008; and January 15, 2010) seeking a determination by IEPA.[2] Following those letters, IEPA issued its final decision on February 22, 2010.

Because IEPA's stated basis for its final decision---that petitioner's facility is supposedly shut down---is both factually incorrect and lacks any basis in statute or regulation, petitioner filed this appeal. Petitioner also filed a complaint in Cook County Circuit Court, for declaratory judgment and for writ of certiorari. (*See* Exhibit E to the petition for review.) Petitioner took both of these actions because each forum provides different causes of action and different forms of relief. Petitioner could not delay filing its appeal with the Board, because the Act and the Board's regulations require a petition for review to be filed within 35 days.

In its petition for review, petitioner asked the Board to stay the proceedings before it. On May 6, 2010, the Board granted that request, and stayed the case. On June 14, 2010, petitioner was served with IEPA's motion to vacate the stay and asking the Board to hear its motion to dismiss. IEPA asserted that it did not receive a copy of the petition for review, and that it had no knowledge of the filing of the appeal until it received the Board's May 6 order.[3] Based upon that contention and the supporting affidavit, petitioner did not object to the Board temporarily suspending the stay for the limited purpose of hearing IEPA's motion to dismiss. Petitioner does, however, object to

---

[2] Petitioner's letters to IEPA are attached to the petition for review as Exhibits A, B, and C.

[3] IEPA did not allege that petitioner failed to properly serve IEPA. IEPA alleged it never received the petition.

the substance of the motion to dismiss, and thus files this response in opposition.

ARGUMENT

Petitioner first notes that IEPA asserts conflicting bases for its motion to dismiss. IEPA asserts that it seeks dismissal pursuant to Section 105.108(d). That section provides for dismissal of a petition for review where the petitioner lacks standing to seek review. (35 Ill. Adm. Code 105.108(d).) IEPA then states, however, that the petition should be dismissed as "frivolous", claiming that IEPA's decision is not a final decision that is subject to review. IEPA has confused the basis for dismissal of a final IEPA decision with the basis for dismissal of a citizen's enforcement action. A citizen enforcement action can be dismissed if it is frivolous or "duplicitous". (415 ILCS 5/31(d); 35 Ill. Adm. Code 103.212(a).) However, the "frivolous" standard is applicable only to citizen's enforcement actions, and is not applicable here. The only applicable basis for dismissal asserted by IEPA is the contention that petitioner lacks standing to seek review by the Board. For the reasons set forth below, petitioner does have standing to seek review. The motion to dismiss should be denied.

The Board's procedural rules provide for appeals of "final Agency decisions"

IEPA asserts that petitioner lacks standing to bring this appeal and that the Board therefore lacks jurisdiction to hear the appeal. According to IEPA, the Board may hear only "traditional" permit appeals. On the contrary, the Board's procedural rules specifically provide for appeals of "other final decisions of the Agency". Section 105.100(a) of the Board's rules provides: "This Part applies to appeals of final decisions of the Agency...". (35 Ill.Adm.Code 105.100(a)(emphasis added). Likewise, Section 105.200 provides:

> This Subpart applies to any appeal to the Board of the Agency's final permit decisions and other final decisions of the Agency, except:
>
> a) When the appeal is of a final CAAPP decision of the Agency....and
> b) When the appeal is of a final leaking underground storage tank decision of the Agency...
>
> 35 Ill. Adm. Code 105.200(emphasis added).

These two rules demonstrate that the Board hears appeals of "final Agency decisions", not merely permit appeals. In fact, the Board has held that it hears appeals of IEPA "seal" orders under Part 105 of its rules:

> [T]he Board's rules at 35 Ill. Adm. Code 105.Subpart B govern appeals of final IEPA decisions, including permit decisions. 35 Ill. Adm. Code 105.200-105.214. Therefore, the Board will conduct this matter as an appeal of an IEPA decision...
>
> *Tarkowski v. Illinois Environmental Protection Agency*, PCB 09-62, 2009 WL 1511352 (May 21, 2009).

The use of the phrase "final IEPA decisions, including permit decisions" demonstrates that the Board's jurisdiction is not limited to permit appeals.

It is clear that the Board is not limited to hearing only traditional permit appeals. The Board's procedural rules specifically provide for appeals of "other final Agency decisions". IEPA's February 22, 2010 letter sets forth IEPA's "final decision" on the use of petitioner's ERCs. IEPA's own words demonstrate that the February 22, 2010 letter constitutes the Agency's final decision. Because that letter is IEPA's final decision on the use of the ERCs, petitioner has standing to appeal that decision, and the Board has jurisdiction.

IEPA's February 2010 letter was a "final decision"

Despite its own use of the language "final decision" in its February 22, 2010 letter (Ex. 1), IEPA now asserts that it was not authorized to do what it did when it made a

binding determination on petitioner's ability to use its ERCs in a permit application. IEPA claims that it can only act upon traditional permit applications under 35 Ill. Adm. Code 1203.302 and 203.303. Thus, IEPA asserts it has not issued any final decision.

IEPA's February 22, 2010 letter is very clear: "...Illinois IEPA's final decision on this issue remains the same..." (Ex. 1 (emphasis added).) The following sentences leave no room for doubt on the finality of IEPA's decision:

> [T]he Illinois EPA does not find that the ERCs claimed are available as offsets, since it is our position that the Chicago Coke facility is permanently shutdown. Pursuant to applicable federal guidance, the ERCs are thus no available for use as you described.
>
> Ex. 1.

This language, immediately following IEPA's statement that this is its final decision, demonstrates that IEPA has no intention of reconsidering the issue. IEPA itself termed the decision "final". It cannot now fairly argue that the decision was not final, in an attempt to avoid review by the Board. It is especially telling that only now, when faced with review by the Board, does IEPA claim its decision is not final. At no time, during the two and a half years of discussion of this issue, did IEPA state or indicate that it could not provide a final decision on the issue. (Ex. 1; Ex. A, B, C, and D of the petition for review.)

Requiring petitioner to file a formal permit application to use the ERCs that IEPA has said are not available to petitioner would clearly be an exercise in futility. IEPA has stated that its decision is final, and that it believes the ERCs are not available to petitioner. IEPA has already determined, in its final statement, that the ERCs are not available. Petitioner disputes that decision, and should be allowed to appeal that decision to the Board. Anything else makes a mockery of petitioner's good faith

dealings and interaction with IEPA over two and a half years.

IEPA's decision, by its own terms, is final, and is subject to review by the Board.

The pendency of a proceeding in circuit court does not impact petitioner's standing to appeal to the Board

IEPA attempts to distract the Board from the real issue here---whether petitioner has standing to appeal IEPA's final decision---by claiming that petitioner's pending action in circuit court somehow bars the Board from hearing the appeal. This assertion is a red herring. There is no indication in the Environmental Protection Act, or in the Board's regulations, that a petitioner's decision to seek alternative relief in a completely separate forum, somehow divests the Board from jurisdiction over the appeal. IEPA has not cited any such authority.

Petitioner is seeking alternative relief in circuit court and at the Board in order to avail itself of all forms of relief. The circuit court and the Board do not have overlapping authority: each has its own separate authority to hear, act upon, and provide relief under different circumstances and different causes of action. Petitioner's action in circuit court seeks a writ of certiorari and a declaratory judgment---causes of action that even IEPA would likely admit the Board has no authority to act upon. Conversely, the circuit court lacks authority to hear appeals from IEPA final decisions: that authority is vested in the Board. Seeking alternative relief, in the circuit court, does not deprive petitioner of standing to appeal IEPA's final decision.[4] The Board has jurisdiction over final IEPA appeals, and should deny the motion to dismiss.

CONCLUSION

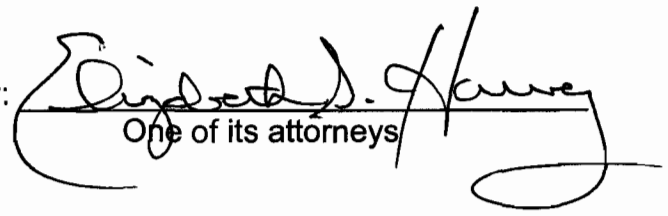
As demonstrated above, petitioner does have standing to seek review of IEPA's

[4] Petitioner sought a stay of this appeal, while the circuit court action is pending, only to allow the parties to focus on one proceeding at a time, and to lessen any burden on the Board.

February 22, 2010 final decision. By the IEPA's own words in that decision, that decision is "final". Sections 105.100(a) and 105.200 clearly provide for the Board to hear appeals of "other final decisions of [IEPA]." The contention that petitioner's action in circuit court somehow deprives the Board of jurisdiction is a red herring. Because petitioner has standing to appeal, the motion to dismiss should be denied.

Petitioner asks the Board to deny IEPA's motion to dismiss, and to reimpose a stay of this proceeding.

CHICAGO COKE CO., INC.

By: 
One of its attorneys

Michael J. Maher
Elizabeth S. Harvey
Erin E. Wright
SWANSON, MARTIN & BELL, LLP
330 North Wabash Avenue, Suite 3300
Chicago, Illinois 60611
(312) 321-9100

EXHIBIT 1

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

1021 North Grand Avenue East, P.O. Box 19276, Springfield, Illinois 62794-9276 • (217) 782-2829
James R. Thompson Center, 100 West Randolph, Suite 11-300, Chicago, IL 60601 • (312) 814-6026

PAT QUINN, GOVERNOR DOUGLAS P. SCOTT, DIRECTOR

(217) 782-5544
(217) 782-9143 (TDD)

February 22, 2010

Katherine D. Hodge
Hodge Dwyer & Driver
3150 Roland Avenue
P.O. Box 5776
Springfield, Illinois 62705

Re: Chicago Coke Co., Inc.
Emission Reduction Credits

Dear Kathy:

Thank you for your letter dated January 15, 2010. You asked that the Illinois Environmental Protection Agency ("Illinois EPA") respond as to our final decision on whether certain Emission Reduction Credits ("ERCs") claimed by Chicago Coke Co., Inc. ("Chicago Coke"), are available for use as emission offsets for the permitting of major new sources and/or major modifications in the Chicago area.

Based on a discussion I had with Laurel Kroack, Bureau Chief for the Illinois EPA's Bureau of Air, I can confirm for you that the Illinois EPA's final decision on this issue remains the same as was previously conveyed to you. That is, the Illinois EPA does not find that the ERCs claimed are available as offsets, since it is our position that the Chicago Coke facility is permanently shutdown. Pursuant to applicable federal guidance, the ERCs are thus not available for use as you described.

I hope this makes clear the Illinois EPA's position on this issue. If not, or if you have any further questions, please do not hesitate to contact me. Thank you.

Sincerely,

John J. Kim
Chief Legal Counsel

EXHIBIT
D

Rockford • 4302 N. Main St., Rockford, IL 61103 • (815) 987-7760
Elgin • 595 S. State, Elgin, IL 60123 • (847) 608-3131
Bureau of Land – Peoria • 7620 N. University St., Peoria, IL 61614 • (309) 693-5462
Collinsville • 2009 Mall Street, Collinsville, IL 62234 • (618) 346-5120
Des Plaines • 9511 W. Harrison St., Des Plaines, IL 60016 • (847) 294-4000
Peoria • 5415 N. University St., Peoria, IL 61614 • (309) 693-5463
Champaign • 2125 S. First St., Champaign, IL 61820 • (217) 278-5800
Marion • 2309 W. Main St., Suite 116, Marion, IL 62959 • (618) 993-7200