

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

TO: Michael J. Maher
Elizabeth Harvey
Erin E. Wright
Swanson, Martin & Bell, LLP
330 North Wabash Avenue, Suite 3300
Chicago, Illinois 60611

PLEASE TAKE NOTICE that on the 12th day of July, 2010, I filed with the Office of the Clerk of the Illinois Pollution Control Board the attached Response to Petitioner's Response to Motion for Leave to File Reply and Motion to File a Surreply, a copy of which is hereby served upon you.

Respectfully submitted,

LISA MADIGAN,
Attorney General of the
State of Illinois

By: 
ANDREW B. ARMSTRONG
Assistant Attorney General
Environmental Bureau
69 West Washington Street, Suite 1800
Chicago, Illinois 60602
(312) 814-0660

WHEREFORE, Respondent, THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, respectfully seeks leave to file the attached Reply to Petitioner's Response in Opposition to Motion to Dismiss.

THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, by

LISA MADIGAN,
Attorney General of the
State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement/Asbestos
Litigation Division

ROSEMARIE CAZEAU, Chief
Environmental Bureau

BY: 
ANDREW B. ARMSTRONG
Assistant Attorney General
Environmental Bureau
69 West Washington Street, 18th Floor
Chicago, Illinois 60602
Tel: (312) 814-0660

II. The Board's Enabling Statute Does Not Provide It With Jurisdiction to Entertain the Petition

According to Petitioner, Respondent contends that the Board “may hear only ‘traditional’ permit appeals.” (Resp. at 3.) Petitioner insists that Sections 105.100(a) and 105.200 of the Board’s Procedural Rules, 35 Ill. Adm. Code 105.100(a) and 105.200, authorize the Board to hear a petition for appeal of any “final decision” by the Agency. (*Id.* at 3-4.)

Respondent does not contend that the Board may hear only “traditional” permit appeals. Instead, Respondent correctly notes that the Board may hear appeals only when authorized to do so by its enabling statute, the Illinois Environmental Protection Act, 415 ILCS 5/1, *et seq.* (2010). It is a basic principle of administrative law that an agency takes its authority solely from its enabling statute, and cannot increase that authority by promulgating an administrative rule. *See Illinois Dep’t of Revenue v. Illinois Civil Serv. Comm.*, 357 Ill. App. 3d 352, 364 (1st Dist. 2005) (“If an agency promulgates rules that are beyond the scope of the legislative grant of authority or that conflict with the statute, the rules are invalid.”).

In this case, no portion of the Act authorizes the Board to review the legal opinion expressed in the Agency’s February 22, 2010 Letter. In its Petition, Petitioner cited only to Section 40 of the Act, 415 ILCS 5/40 (2010). As discussed in the Motion, that section is clearly inapplicable in this case, a point that Petitioner does not even attempt to address in its Response. Petitioner’s argument that the Board has provided—or even could provide—itsself with authority to hear the review of any imaginable “final decision” by the Agency by promulgating an administrative rule is flatly inconsistent with basic administrative law. The only decision cited by Petitioner in support of its argument, *Tarkowski v. Illinois Environmental Protection Agency*, PCB 09-62 (May 21, 2009), is distinguishable because Section 34(d) of the Act, 415 ILCS 5/34(d) (2010), explicitly provides for the Board’s review of seal order decisions like the one at

issue in that proceeding. As argued in the Motion, the Board has no jurisdiction to hear the Petition, and Petitioner has no standing to bring it.

III. The Agency's February 22, 2010 Letter Does Not Contain a Reviewable Decision

Petitioner contends that the February 22, 2010 Letter contains the Agency's "binding determination" as to the use of emission offsets related to Petitioner's Facility in a permit application. (Resp. at 4-5.) Petitioner further contends that it should not be required "to file a formal permit application to use" its supposed emission reductions. (*Id.* at 5.)

Petitioner's argument further demonstrates that it misconstrues the treatment of emission offsets under the Act and pertinent regulations. Emission offsets are relevant in only one context: the issuance of permits to new or modified air pollution sources. There is no provision in the Act or pertinent regulations allowing an existing source like Petitioner to file a "formal permit application" to "use" emission reductions as offsets. Not until a new or modified source files an application for a construction permit could the Agency have any responsibility, or authority, to issue a binding determination as to the use of any particular emission offsets. Petitioner does not allege that any new or modified source has submitted a permit application seeking to utilize Petitioner's supposed emission reductions. Thus, the Agency to date has made no binding determination as to the availability of any emission offsets related to Petitioner's Facility.

Petitioner's attempt to attach significance to the use of the term "final decision" in the February 22, 2010 Letter misses the mark. Petitioner, in the form of three letters to the Agency, repeatedly demanded that the Agency express an opinion regarding the legitimacy of Petitioner's attempts to market emission offsets. In the third letter, dated January 15, 2010, Petitioner requested that the Agency issue a "final decision, in writing," on the subject. (Petit.,

Ex. C at 2.) In the February 22, 2010 Letter, the Agency, in its single written response to Petitioner on the matter, simply expressed its opinion on the question posed by Petitioner, using the language requested by Petitioner. (Petit., Ex. D.) Petitioner cannot create a new form of binding decisional process, unknown to the Act and pertinent regulations, simply by sending repetitive letters demanding a legal opinion to the Agency. As argued in the Motion, the February 22, 2010 Letter does not contain a binding determination, or a decision that is reviewable by this Board or any other body.

IV. Petitioner Is Presently Seeking Mutually Exclusive Remedies Before the Board and the Circuit Court of Cook County

Finally, according to Petitioner, Respondent contends that Petitioner's filing of a suit in the Circuit Court of Cook County seeking review of the Agency's February 22, 2010 Letter has "divested" the Board of jurisdiction over the Petition. (Resp. at 6.) Petitioner argues, instead, that it merely has decided to pursue "separate" causes of action in each forum. (*Id.*)

Respondent does not contend that the act of filing a suit in circuit court could strip the Board of jurisdiction in any case. Instead, Respondent is pointing out that the causes of action that Petitioner is pursuing in two different fora are mutually exclusive. A common law writ of *certiorari*—which Petitioner currently is seeking in the circuit court—can be had only when administrative review of a decision is unavailable. *See Walters v. Department of Labor*, 336 Ill. App. 3d 785, 789 (1st Dist. 2005). The converse point is that petitions for review before this Board are improper in cases where common law writs of *certiorari* could be issued. The Board and the Circuit Court of Cook County ultimately will assess the propriety of Petitioner's assertion of irreconcilable legal positions before those two bodies.

WHEREFORE, Respondent, THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, requests that the Board grant its Motion to Dismiss Petition for Review.

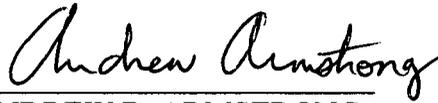
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CERTIFICATE OF SERVICE

I, ANDREW B. ARMSTRONG, do certify that I filed electronically with the Office of the Clerk of the Illinois Pollution Control Board the foregoing Notice of Filing and Response to Petitioner's Response to Motion for Leave to File Reply and Motion to File a Surreply and caused them to be served this 12th day of July, 2010 upon the persons listed on the foregoing Notice of Filing by depositing true and correct copies of same in an envelope, certified mail postage prepaid, with the United States Postal Service at 69 West Washington Street, Chicago, Illinois.


ANDREW B. ARMSTRONG