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

Bradley P. Halloran
Hearing Office
Illinois Pollution Control Board
James R. Thompson Center
Suite 11-500
100 West Randolph Street
Chicago, Illinois 60601

PLEASE TAKE NOTICE that on the 24th day of September, 2010, I filed with the Office of the Clerk of the Illinois Pollution Control Board the attached Motion to Reconsider, a copy of which is hereby served upon you.

Respectfully submitted,

LISA MADIGAN,
Attorney General of the
State of Illinois

By: Andrew Armstrong

ANDREW B. ARMSTRONG
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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

CHICAGO COKE CO., INC., an Illinois corporation,	)	
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THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	PCB 10-75 (Permit Appeal)
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MOTION TO RECONSIDER

Respondent, THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, by and through its attorney, LISA MADIGAN, Attorney General of the State of Illinois, hereby moves the Pollution Control Board ("Board") to reconsider its September 2, 2010 Order. In support of the Motion, Respondent states as follows:

On September 2, 2010, the Board issued an Order denying Illinois EPA's motion to dismiss due to the Board's lack of jurisdiction and Petitioner's lack of standing, and accepting the Petition for review. The Petition concerns a February 22, 2010 letter from Illinois EPA to Petitioner, in which Illinois EPA stated its opinion on the availability of emission reduction credits claimed by Petitioner. (Petit. at Ex. D.) ("February 22, 2010 Letter"). In its surreply brief, Petitioner for the first time contended that the Board had jurisdiction to hear the Petition because the February 22, 2010 letter represented a "final determination" that was made pursuant to the Illinois Environmental Protection Act ("Act") or Board rule, and which involved a subject which the Board is authorized to regulate. *See* 415 ILCS 5/5(d) (2010). In its September 2, 2010 Order, the Board agreed with that conclusion and accepted the petition for hearing.

"A motion to reconsider may be brought 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." *Charter Hall Homeowner's Assoc. v.*

Overland Transp. Sys., Inc., PCB 98-81, 1998 WL 884923, *2 (Dec. 3, 1998). In this case, Illinois EPA contends that the Board incorrectly applied Section 5(d) of the Act, 415 ILCS 5/5(d) (2010), in asserting its jurisdiction over the Petition, insofar as the February 22, 2010 Letter cannot constitute a determination made pursuant to any provision of the Act or Board rule. Petitioner admits (as Illinois EPA argued in both its Motion to Dismiss and Reply) that there is no provision of the Act or Board rule that authorizes Illinois EPA to make a binding determination that an existing source's claimed emission reductions could be used by a new or modified source for purposes of the New Source Review ("NSR") Program, prior to a new or modified source's application for a permit. (See Petit.'s Surreply at 3.) ("[T]here is no formal mechanism for an existing source, like petitioner, to seek approval for use of its emission credits."). However one views the February 22, 2010 Letter, then, it is undisputed by Petitioner that the Letter did not proclaim a determination made by Illinois EPA pursuant to any provision of the Act or any Board rule. Therefore, the February 22, 2010 Letter cannot meet the standard set forth in 415 ILCS 5/5(d) (2010), and the Board should not have asserted jurisdiction over a petition seeking its review.

In its Order, the Board did identify two sets of rules from the Board's regulations, apparently in reference to Section 5(d)'s requirement that a petition for review be of a final determination that "involves a subject matter which the Board is authorized to regulate." 415 ILCS 5/5 (d) (2010). The cited rules concern an emission reduction market system (35 Ill. Adm. Code 205) and rules on NO_x (35 Ill. Adm. Code 217.Subpart U, V and W). Neither set of rules was mentioned in the parties' briefs, however, and neither was in any way implicated by the February 22, 2010 Letter.

Moreover, the rules' irrelevance underscores why the February 22, 2010 Letter does not constitute a reviewable "final determination which was made pursuant to [the] Act or Board rule." Both sets of rules cited by the Board represent an effort to implement market-based systems to address specific types of air pollution, based on explicit authorization under Sections 9.8 and 9.9 of the Act, 415 ILCS 5/9.8 and 9.9 (2010), respectively. See 35 Ill. Adm. Code 205.110 ("The purpose of this Part is to implement the Emissions Reduction Market System (ERMS) regulatory program consistent with the assurances that are specified in Section 9.8 of the Environmental Protection Act. . . ."); 35 Ill. Adm. Code 217.750 ("The purpose of this Subpart is to control the emissions of nitrogen oxides . . . during the ozone control period . . . from electrical generating units . . . by determining source allocations and implementing the NO_x Trading Program pursuant to 40 CFR 96, as authorized by Section 9.9 of the Act."). These programs are explicitly intended to create markets in emission allowances. Thus, for example, in Section 205.600 of the Board ERMS Regulations, 35 Ill. Adm. Code 205.600, the Board directs Illinois EPA to set up an ERMS database, which identifies currently available allotment trading units.

By contrast, the Illinois NSR program, which is the only subject of this petition, is not intended to be a market-based system. Simply because the Illinois NSR program requires new and modified sources to identify independent reductions in pollution from existing sources does not then of necessity entail that any existing source that reduces pollution at its facility is granted a property interest relative to such reductions. Indeed, as indicated by federal guidance, the NSR program is not intended to provide existing sources with a property interest in their emission reductions. In a July 8, 1996 letter opinion regarding the NSR program, attached hereto as Exhibit A, the United States Environmental Protection Agency stated the following:

> Finally, your letter states that it is unfair for owners of banked [emission reduction credits] not to be able to sell or use them. However, please note that although [emission reduction credits] are a limited authorization to emit, *they are not and never have been an absolute property right*. States have always had the ability to discount banked [emission reduction credits] as needed for attainment purposes.

(See Ex. A, 7/8/96 Seitz Letter at 2.) Petitioner's argument in its surreply that it could have a property interest in past emission reductions is flatly wrong.

That existing sources lack a property interest in emission reductions—or, indeed, any interest at all in the NSR permitting process—is reflected in the Board NSR Regulations. In contrast to the Board ERMS Regulations, the Board NSR Regulations do not provide for any process by which an existing source can obtain pre-permitting confirmation that it possesses emission reduction credits that could be utilized by another source. Indeed, the Board NSR Regulations do not in any way reference existing sources participating in the permitting process. As is argued in Respondent's Motion to Dismiss and Reply brief, Illinois EPA is only authorized to make a binding determination as to emission reductions *after* a new or modified source has applied to use them. That regulatory scheme is in perfect accordance with the purpose of the NSR Program which, contrary to Petitioner's erroneous arguments in its surreply, is not to provide existing sources with a property interest in their emissions, but rather to reduce overall emissions of pollutants.[1]

The lack of any mechanism in the Board NSR Regulations for confirmation of an existing source's emission reductions prior to a new or modified source's application also demonstrates

[1] The Board may have been improperly influenced by Petitioner's irrelevant allegations that 1) Illinois EPA had never advised Petitioner that it believed it lacked authority to make a binding determination on the availability of an existing source's offsets prior to a permit application by a new source and 2) that Illinois EPA had informed other unidentified parties that Petitioner's offsets were unavailable. For the record, were the motion to dismiss not a motion strictly on the pleadings, Illinois EPA would contest both allegations. It has been Illinois EPA's consistent practice not to claim authority to make binding determinations on offsets for use in NSR permitting prior to a new or modified source's permit application. In any case, though, the allegations are irrelevant, because the only issue presented to the Board is whether the February 22, 2010 Letter represented a final determination pursuant to the Act or a Board rule.

why the February 22, 2010 Letter cannot represent a "final determination" made pursuant to the Act or Board rule. For the sake of argument, suppose that the February 22, 2010 Letter had stated that it was Illinois EPA's "final decision" that Petitioner's claimed emission reduction credits were "available" as offsets for use in the NSR permitting process. Would that then mean that Illinois EPA would be bound to accept the use of those offsets in any future permit application by a new or modified source, and would lack authority to consider the actual permit application, or any changed circumstances relating to the offsets following the date of its letter opinion? The answer is clearly "no," because Illinois EPA's pre-permitting "approval" of the offsets would not have been authorized by any provision of the Act or any Board rule.

For purposes of this motion, Illinois EPA's use of the word "final" in the February 22, 2010 Letter is irrelevant. As discussed in Petitioner's Reply, the term "final decision" was first used by Petitioner in *its* January 15, 2010 letter. Illinois EPA used the term only to put an end to Petitioner's repeated, and one-sided, requests, made over the course of two-and-a-half years. Now, Petitioner is seeking to exploit Illinois EPA's use of Petitioner's own requested language with the hopes of compelling Illinois EPA to provide pre-permitting approval of Petitioner's claimed emission reductions, which is something that Illinois EPA has no authority to do. The only relevant inquiry for purposes of this motion is whether the February 22, 2010 Letter represented a "final determination . . . made pursuant to [the] Act or Board rule and which involve[d] a subject which the Board is authorized to regulate." 415 ILCS 5/5(d) (2010). Because the February 22, 2010 Letter does not meet that standard, Illinois EPA respectfully requests that the Board reconsider its September 2, 2010 Order, and grant Illinois EPA's motion to dismiss. In the alternative, Illinois EPA requests that the Board clarify which provision of the Act or Board rule is implicated by the February 22, 2010 Letter.

WHEREFORE, Respondent, THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, requests that the Board grant its Motion to Reconsider.

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

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EXHIBIT A

Electronic Filing - Received, Clerk's Office, September 24, 2010

JUL 8 1996

Mr. Peter F. Hess
President, Joint Commission
of Regulators & Business
3232 Western Drive
Cameron Park, California 95682

Dear Mr. Hess:

This is in response to your letter of May 14, 1996,, in which you present the California Air Pollution Control Officers Association Joint Committee of Regulators and Business (CAPCOA) concerns about a policy memorandum I sent to David Howekamp on August 26, 1994. In the August 1994 memorandum, the Environmental Protection Agency (EPA) requires that banked emission reduction credits (ERC's) be adjusted to reflect current State implementation plan requirements at the time of use.

In your letter, CAPCOA states that reasonably available control technology (RACT) adjusting of ERC's at time of use provides too much uncertainty for sources to voluntarily do early reductions through innovative technology, because EPA may eventually define RACT to be equal to the innovative technology. In the past, EPA has issued guidelines on what could be considered RACT, but, in recent years EPA has been, for the most part, leaving the determination of RACT to States' discretion. Therefore, EPA believes that if RACT is set in a way to discourage early reductions, the State is likely to be responding to particular air pollution problems present in its community.

The CAPCOA letter suggests that discounting for RACT at time of use is unfair to sources that voluntarily shut down or have otherwise reduced emissions because they did not know when the reduction occurred that it would be adjusted for RACT. Since existing sources need to reduce their emissions when new emission reduction requirements are adopted by a State, it seems equitable that emissions in a bank also be subject to emission reduction strategies. Air quality management is an iterative process. A State reduces some emissions and determines the effect on air quality. If the area continues to experience air quality problems, then the State must refine its attainment strategy to further reduce emissions. Therefore,. the use of ERC's that would either increase emissions above the current levels or lead to a shortfall in expected reductions could greatly reduce the effectiveness of a given attainment demonstration.

Electronic Filing - Received, Clerk's Office, September 24, 2010

Finally, your letter states that it is unfair for owners of banked ERC's not to be able to sell or use them. However, please note that although ERCs are a limited authorization to emit, they are not and never have been an absolute property right. States have always had the ability to discount banked ERC's as needed for attainment purposes. Recent examples of this have occurred in the Los Angeles area. States must continue to retain this ability if they are to effectively manage the air resources in their community.

My August 26, 1994 policy memorandum recognized many of the concerns you and Region IX raised regarding this issue by offering several options in lieu of direct discounting of a particular project's ERC's at time of use. I encourage you to work creatively with EPA and State and local officials to explore any option which would address the concerns raised in your letter and the basic test which is outlined here and was explained more fully in the August 26, 1994 memorandum.

I appreciate this opportunity to be of service and trust that this information is helpful.

Sincerely,

(Original signed by Seitz)

John S. Seitz
Director
Office of Air Quality Planning
and Standards

OAQPS:AQSSD:ISEG:REVANS:541-5488:sjoumnigan:MD-15:6/13/96
Control No. AQPS-96-0280 Due Date: 6/6/96
Revised 6/27/96-WEIGOLD:spc:a:HESS.LTR

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 Motion for Leave to Reply and caused them to be served this 24th day of September, 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 Armstrong

ANDREW B. ARMSTRONG