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

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

PLEASE TAKE NOTICE that on this 8th day of October 2010, the following was filed electronically with the Illinois Pollution Control Board, which is attached and herewith served upon you: **Petitioner's Response in Opposition to IEPA's Motion to Reconsider.**

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 October 8, 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.

7012-002

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

RESPONSE IN OPPOSITION TO IEPA's MOTION TO RECONSIDER

Petitioner, CHICAGO COKE, INC. ("petitioner"), by its attorneys Swanson, Martin & Bell, LLP, responds in opposition to respondent ILLINOIS ENVIRONMENTAL PROTECTION AGENCY's ("IEPA") motion asking the Board to reconsider its September 2, 2010 order denying IEPA's motion to dismiss petitioner's petition for review.

IEPA continues to try to deny that it made a final determination, of which it desperately seeks to avoid review. Further, IEPA improperly attempts to include additional evidence -- which has apparently been in existence since 1996 -- in its motion to reconsider. That evidence should be stricken and not relied upon. The Board's September 2, 2010 decision was correct, and IEPA's motion to reconsider should be denied.

STANDARD OF REVIEW

The Board's rules provide that, in ruling upon a motion for reconsideration, the Board will consider factors "including new evidence, or a change in the law, to conclude

that the Board's decision was in error." (35 Ill. Adm. Code 101.902.) A motion to reconsider may be brought to call the Board's attention to "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." *City of Quincy v. IEPA*, PCB 08-86, 2010 WL 2547531, *18 (June 17, 2010).

ARGUMENTS

IEPA improperly reargues its previous claims, and raises new claims, on reconsideration.

IEPA has already filed two documents (the motion and a reply) in support of its attempt to evade review of its own February 22, 2010 decision. Not content to have twice had the opportunity to thoroughly make its claims, IEPA now attempts to rehash old arguments and to raise new arguments. IEPA contends that "the only relevant inquiry for purposes of this motion is whether the February 22, 2010 letter represented a "final determination...". IEPA is wrong: the Board has already found that the February letter was a final determination. The issue on a motion to reconsider (as opposed to the underlying motion to dismiss) is whether the Board's September 2 decision was in error because of a change in the law or errors in the Board's application of the law. IEPA cannot properly reargue all of its claims on reconsideration: instead, it is limited to demonstrating exactly how the Board's decision was erroneous.

The Board should ignore IEPA's attempts to reargue the same claims previously raised by IEPA. For example, IEPA once again argues that the ERCs at issue are not a "property right." (Motion to reconsider at 3-4.) The Board should also disregard IEPA's attempts to make new (and irrelevant) arguments such as claims regarding the implementation of the regulations regarding the New Source Review (NSR) permitting

process. (Motion to reconsider at 4-5.) None of those claims go to the relevant issue in deciding a motion to reconsider: whether the Board's decision was in error.

The Board's decision is correct.

The Board's September 2, 2010 decision is straight forward. The Board's decision is based upon two findings: 1) that it has the authority, under Section 5(d) of the Act, to hear final decisions such as a final decision on ERCs; and 2) that the February 22, 2010 IEPA decision is indeed a final decision. IEPA fails to present clearly articulated reasons that those two findings are erroneous. Attempting to parse out IEPA's arguments on those two issues from the rehashed allegations and improper new arguments in the motion to reconsider still leads to a conclusion that the Board's decision is correct.

First, regarding whether Section 5(d) gives the Board authority to review the February 22 decision, petitioner vehemently objects to IEPA's mischaracterization of petitioner's statements. IEPA asserts that petitioner has "admitted" that no provision of the Act or the regulations allows IEPA to make a binding determination on the applicability of ERCs. Petitioner has made no such admission, and petitioner certainly does dispute IEPA's mischaracterization that "it is undisputed by [p]etitioner that the Letter did not proclaim a determination made by [IEPA] pursuant to any provision of the Act or any Board rule." (Motion to reconsider at p. 2.) The language used by petitioner in its surreply merely points out that there is, as of yet, no formal mechanism to review the actions of IEPA in evaluating, tracking, and applying ERCs.[1] Simply because there are, as of yet, no formal regulations proposed by IEPA to regulate its ongoing work in

[1] Petitioner assumes IEPA is not arguing that its extensive and ongoing work in the area of ERCs is outside the purview of the Act or the regulations. If so, that would raise serious questions about unauthorized activities.

the area of ERCs does not mean that ERCs themselves are outside the Act and the regulations.

The language of Section 5(d) of the Act is broad, and allows for Board review of "final determinations which are made pursuant to the Act or Board rule and which involve a subject the Board is authorized to regulate." (415 ILCS 5/5(d).) The Board properly identified at least two areas of regulations (the emission reduction market system and the rules on NOx) related to ERCs. In addition, as IEPA has admitted, ERCs are relevant to the NSR permitting process. Those three areas of regulation, especially taken together, show that the Act authorizes the Board to regulate ERCs. The Board correctly determined that Section 5(d) provides authority for Board review.

Second, in yet again attempting to show that its February 22, 2010 letter was not final, IEPA makes the interesting claim that it only used the word "final" because petitioner first used the term "final decision" in petitioner's January 2010 letter to IEPA. Is the Board to believe that IEPA will parrot back the language of any request made to it? IEPA's claim that it only used that term to put an end to petitioner's requests, over two and half years, for a determination, is equally surprising. IEPA implies that petitioner somehow bullied IEPA into making a final determination that IEPA did not believe it had the authority to make. Taken on its face, this admission would be startling and would put IEPA's ability to make decisions in a wide range of areas into serious doubt.

On the contrary, petitioner does not believe IEPA can be bullied into making a determination. IEPA made its self-proclaimed "final decision" because it believed it had the authority to make that decision, and used the word "final" because it meant "final."

IEPA certainly knows how to say "no" (as demonstrated by this case), and would have done so instead of making a final determination, if it had believed it lacked authority to decide.

The Board correctly determined that Section 5(d) of the Act provides authority for the Board to hear this appeal, and that IEPA's February 22, 2010 letter was a final determination. IEPA has failed to demonstrate how those findings were in error. The motion to reconsider must be denied.

The Board should not consider IEPA's attempt to include additional material

IEPA has attached, to its motion to reconsider, a document it terms a "letter opinion" from USEPA regarding the new source review program. (See Motion to Reconsider, Ex. A.) Including this document is inappropriate, because the information is improper new evidence. The document is dated July 8, 1996, so clearly it is not evidence that did not exist at the time of briefing of the motion to dismiss. IEPA does not even argue that it could not have obtained this document previously. This type of additional evidence, which existed but which was not submitted during the briefing of the underlying motion to dismiss, does not fall within the parameters allowed on reconsideration.

Further, the document submitted is irrelevant to the consideration of a motion to dismiss. In ruling upon a pleadings motion such as a motion to dismiss, the Board is to take all well-pled facts as true, and to draw all inferences in the light most favorable to the non-movant (here, petitioner). *People v. Stein Steel Mills Svcs., Inc.*, PCB 02-1 (Nov. 15, 2001); *Nash v. Jimenez*, PCB 07-97 (Aug. 19, 2010). In another part of its motion to reconsider, IEPA recognizes that a motion to dismiss is limited to the

pleadings. ("... were the motion to dismiss not a motion strictly on the pleadings, [IEPA] would contest [petitioner's] allegations." Motion to reconsider at p. 4, fn. 1.) Nonetheless, IEPA improperly includes, at this late date, a document outside the pleadings.

Even assuming *arguendo* that considering this document was permissible on reconsideration following denial of a motion to dismiss, the attached document lacks any indicia of reliability. The document states that it is a July 8, 1996 letter from John Seitz of USEPA to the president of the Joint Commission of Regulators & Business, but the document is not on USEPA (or any other) letterhead. It is simply on a plain piece of paper. Further, the document references, but IEPA has not attached, two other communications. It is impossible to understand the context of the document attached as Exhibit A without, at a minimum, those two referenced communications. Additionally, the letter addresses concerns voiced by the "California Air Pollution Control Officers Association Joint Committee of Regulators and Business" and is mostly focused on concerns about the adjustment of emission reduction credits (ERCs) to account for reasonably available control technology (RACT). The concerns of California officials about applying RACT to ERCs are irrelevant to the issue on the motion to reconsider.[2] The issue is whether the Board has the authority to review IEPA's February 22, 2010 decision.

In short, including the additional document for the first time on reconsideration is improper, both because the motion to dismiss is to be decided on the pleadings only and because it is improper to lie in the weeds and produce additional evidence on

[2] For the same reasons, the 1996 document would have been improper and irrelevant even if IEPA had attempted to include it in briefing on the motion to dismiss.

reconsideration. Further, the document lacks any indicia of reliability, and is irrelevant to the issues raised by the motion. Therefore, the Board should strike Exhibit A, and ignore all argument related to the document.[3]

CONCLUSION

The Board's September 2, 2010 decision was straightforward and correct, finding that it has authority under Section 5(d) to review decisions on ERCs, and that IEPA's decision was indeed a final decision. While IEPA continues its anxious attempts to prevent a review of a decision that IEPA itself made and termed -- in no uncertain terms -- as "final," nothing in its motion to reconsider demonstrates that the Board's decision was in error. The Board should deny IEPA's motion to reconsider.

Respectfully submitted,

CHICAGO COKE CO., INC.

By: *s/Elizabeth S. Harvey*
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

[3] For the Board's reference, IEPA's claims related to the 1996 document are found at pages 3-4 of the motion to reconsider. As demonstrated, the Board should ignore those claims.