BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

CHICAGO COKE COMPANY,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 10-75
	)	(Permit Appeal - Air)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondents.	)	

NOTICE OF FILING

To:

John Therriault, Assistant Clerk
Illinois Pollution Control Board
100 West Randoph, Suite 11-500
Chicago, IL 60601-7447

Bradley P. Halloran, Hearing Officer
Illinois Pollution Control Board
100 West Randoph, Suite 11-500
Chicago, IL 60601

Please take notice that on the 14th Day of January, 2011, I filed with the Office of the Clerk of the Illinois Pollution Control Board the attached **Motion for Leave to Intervene**, a copy of which is hereby served upon you.

By: _____
Ann Alexander, Natural Resources Defense Council

Dated: January 14th, 2011

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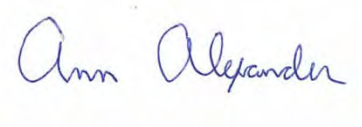
CERTIFICATE OF SERVICE

I, Ann Alexander, the undersigned attorney, hereby certify that I have served the attached **Motion for Leave to Intervene** on all parties of record (Service List attached), by depositing said documents in the United States Mail, postage prepaid, from 227 W. Monroe, Chicago, IL 60606, before the hour of 5:00 p.m., on this 14th Day of January, 2011.



_____

Ann Alexander, Natural Resources Defense Council

SERVICE LIST
Jan. 14, 2011

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ILLINOIS POLLUTION CONTROL BOARD

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MOTION FOR LEAVE TO INTERVENE

I, ANN ALEXANDER, hereby file a MOTION TO INTERVENE in this matter on behalf of NATURAL RESOURCES DEFENSE COUNCIL and SIERRA CLUB and their individual members. In support of this Petition, NRDC states the following:

Introduction

1. Natural Resources Defense Council ("NRDC") and Sierra Club (collectively "Movants") move the Board for leave to intervene pursuant to 35 Il. Admin. Code § 101.402. Movants would be materially prejudiced and adversely affected absent intervention, not only because their members would be adversely impacted by the emissions from the proposed coal gasification project that would make use of the subject emission reduction credits ("ERCs"), but because they would be denied the opportunity to raise arguments that Illinois Environmental Protection Agency ("IEPA") is likely unwilling to make. They would also be prejudiced by a final decision reversing IEPA's challenged determination, as they may be bound by issues decided in that determination in any future challenge to the proposed gasification project.

Parties

2. NRDC is a national, non-profit environmental organization with 447,066 members nationwide, including 19,454 members in Illinois and 6,892 members in Cook County.

It is dedicated to the protection of the environment and public health, and as part of its mission has actively supported effective implementation and enforcement of the Clean Air Act ("CAA") and other environmental statutes on behalf of its members for over 30 years.

3. The Sierra Club is the nation's oldest grassroots environmental organization, with approximately 626,470 members nationwide, including 22,971 members in Illinois, and 10,509 in Cook County. Its mission is to explore, enjoy, and protect the wild places of the earth, and to educate and enlist humanity to protect and restore the quality of the natural and human environment. Since its founding more than 100 years ago, Sierra Club has worked diligently to protect and improve air quality in the United States.

Background

4. Chicago Coke Company ("Chicago Coke") initiated the instant Board adjudicatory proceeding in order to invalidate IEPA's determination that Chicago Coke could not use certain ERCs that it claimed to possess, as emission offsets under the CAA. Chicago Coke Petition for Review dated March 29, 2010 ("Petition") at 1. Chicago Coke initially requested that IEPA rule on the status of the ERCs because it sought to sell property at 11400 South Burley Avenue, Chicago, Illinois ("Property"), which houses a shut down coking facility ("Facility"), to Chicago Clean Energy ("CCE") for redevelopment as a coal gasification plant ("Proposed Project"). Petition Ex. A at 1, Ex. B at 1, and Ex. C at 1. Because the CAA requires that a party seeking to build a new major source in a NA area for a pollutant offset emissions of that pollutant and its precursors, the transaction was also to include a transfer to CCE of ERCs for volatile organic molecules ("VOM"), nitrogen oxides ("NO_x"), and particulate matter of less than 10 micrometers ("PM_{10}"), which Chicago Coke presumably believes it possesses because the

Facility's coke ovens, by-products plant, and boiler have shut down.[1] Petition Ex. A at 2-8. Chicago Coke also appeared interested in attempting to use the PM_{10} ERCs to offset emission of particulate matter of less than 2.5 micrometers ("$PM_{2.5}$"). Petition Ex. A at 2-4; Ex. B at 1.

5. In order to proceed with the transaction, Chicago Coke requested in June of 2007 that IEPA recognize the ERCs as available emission offsets. Petition Ex. B at 1. The discussion between IEPA and Chicago Coke of the status of the ERCs continued until February of 2010, when IEPA issued a letter stating that the ERCs could not be used as emission offsets because the Facility had "permanently shutdown." Petition Ex. D. After receiving this letter, Chicago Coke initiated two actions in connection with the ERCs. It filed suit in Cook County Circuit Court on March 26, 2010 (*Chicago Coke Co., Inc. v. Scott*, No. 10-CH-12662), and filed its petition for review before the Board commencing the instant proceeding on March 29, 2010. The Cook County Circuit Court matter was dismissed on January 7, 2011 for failure to exhaust administrative remedies before the Board.

6. As discussed below, Movants seek intervention to protect their members' interests, and to present arguments that IEPA will likely be unwilling or unable to make. In particular, Movants intend to argue that IEPA's determination was compelled by the federal CAA, an argument that IEPA may be hampered in making given allegations by Chicago Coke that it has applied its policy on the matter inconsistently in the past. Additionally, Movants will argue against use of the ERCs based on their position that PM_{10} ERCs may not be used to offset $PM_{2.5}$ emissions, a practice that IEPA has in the past defended.

[1] Although the date of the shutdown is likely to be disputed in this litigation, it is undisputed that the plant has not operated since December 2001 and was placed into cold shutdown in February 2002.

Argument

PETITIONERS SHOULD BE GRANTED INTERVENTION PURSUANT TO 35 IL. ADMIN. CODE § 101.402 BECAUSE ABSENT INTERVENTION, THEY WILL BE MATERIALLY PREJUDICED AND POTENTIALLY ADVERSELY AFFECTED

7. 35 Il. Admin. Code § 101.402 sets forth the following standard for permissive intervention in a Board adjudicatory proceeding:

> b) In determining whether to grant a motion to intervene, the Board will consider the timeliness of the motion and whether intervention will unduly delay or materially prejudice the proceeding or otherwise interfere with an orderly or efficient proceeding.
>
> d) Subject to subsection (b) of this Section, the Board may permit any person to intervene in any adjudicatory proceeding if:
>
> 1) The person has a conditional statutory right to intervene in the proceeding;
>
> 2) The person may be materially prejudiced absent intervention; or
>
> 3) The person is so situated that the person may be adversely affected by a final Board order.

8. For the reasons stated in the following sections, Movants are entitled to intervention in this action under the second and third prongs of subsection d).

A. Movants Would be Materially Prejudiced Absent Intervention

1. Movants Would be Denied the Opportunity to Make Arguments that IEPA is Unlikely to Make

9. Although IEPA and Movants share the same legal position — that the purported ERCs may not be used as emission offsets in the manner proposed by Chicago Coke — they are likely to make substantially different arguments in support of that position.

10. First, Movants are prepared to argue that even if the Board reverses IEPA's determination with respect to the ERCs, the ERCs for PM_{10} may not be used as a surrogate for $PM_{2.5}$, as Chicago Coke evidently hopes to do. Petition Ex. A at 2; Petition Ex. B at 1.) Movants' basis for this argument is that PM surrogacy is illegal under the CAA. However, IEPA is unlikely to make this argument, since it has in the past defended the practice of using PM_{10} as a surrogate for $PM_{2.5}$.

11. Second, Movants will argue that IEPA's determination that the ERCs from a long-ago shut down source was compelled by the CAA. However, IEPA may have difficulty defending its decision on that ground, given Chicago Coke's allegations that IEPA has not strictly adhered to this policy. Petition Ex. B at 2. Representation of Movants' interests by a party subject to an attack of this sort will distract from the ultimate issue — which is whether the CAA permits ERCs from a facility lying idle for nearly ten years to be used as emission offsets in a NA area — and reduce the chance that Movants' interests can be properly vindicated in this proceeding.

12. The Board has held that intervention is appropriate where the proposed intervenors will take positions in the proceeding that differ from IEPA's positions. *US Steel v. IEPA*, PCB 10-23 (December 3, 2009) ("to the extent ABC seeks party status as an intervenor to object to the CAAPP permit determination, the Board finds that ABC may be materially prejudiced absent intervention, as the pleadings demonstrate that ABC's interests may diverge sharply from those of IEPA and U.S. Steel"); *Cf. Petition of Midwest Generation EME, LLC Waukegan Generating Station for an Adjusted Standard 35 Ill. Admin. Code 225.230,* AS 07-3 (April 17, 2008) (intervention movant "cannot say that their position will be at odds with the Agency")

2. An Outcome Reversing IEPA's Decision May Jeopardize Any Subsequent Challenge by Movants to the Proposed Project

13. The instant Board proceeding will decide issues that Movants would otherwise likely seek to contest in a later challenge to the validity of the use of those ERCs for permitting a new major source of air pollution in the NA areas. These include the issues identified above concerning with Movants' positions may differ from IEPA's, such as the date on which the Facility was permanently shut down and the CAA requirements concerning ERCs from long-shutdown emission sources. A finding by the Board that the Facility had not shut down as of December 2001 could eliminate one of the principal arguments in such a challenge, thereby making it substantially more difficult for Movants to argue that future use of the ERCs is invalid.

14. The Board has held that intervention is appropriate to prevent material prejudice where a proposed intervenor's ability to prosecute a subsequent action may be impacted by a Board proceeding. In *People v. Freeman United Mining Company*, PCB 10-061 (April 15, 2010), the Board determined that intervention was appropriate where the proposed intervenor might be barred by initiation of the Board proceeding from pursuing a separate federal remedy.

B. Movants Would Be Adversely Affected by a Board Decision Allowing the ERCs to be Used for the Proposed Project

15. As discussed above, tens of thousands of movants' members live in Cook County, and a number of those members live in close proximity to the site of the Proposed Project. Should the Board reverse IEPA's determination and allow the ERCs to be used to support the Proposed Project, the members living near the Project would suffer a more specific harm than the general public. The Board has in the past regularly allowed intervention when the proposed intervenors would be affected by emissions from the facility at issue. *Commonwealth Edison Co. v. IEPA*, PCB 91-29 (Nov. 21, 1991); *Village of Round Lake Beach v. IEPA*, PCB 86-59 (Sept. 11,

1986); *Proposed Determination of No Significant Ecological Damage for the Joliet Generating Station*, PCB 87-93 (Nov. 15, 1989). *See generally Bredberg v. City of Wheaton*, 24 Ill. 2d 612, 623 (Ill. 1962); *Yusuf v. Vill. of Villa Park,* 120 Ill. App. 3d 533, 538 (Ill. App. Ct. 2d Dist. 1983) (Illinois Supreme Court recognizes, under standing test interest determination, that adjacent landowners suffer a more specific harm than the general public as a result of zoning decisions).

16. Additionally, many more of Movants' members live within the CAA nonattainment area ("NA") in which the Proposed Project would be sited. A NA designation recognizes the need to regulate land use in a defined area to minimize the negative impacts of certain uses—in the NA context, to protect the public health from the impacts of major new sources. 42 U.S.C. §§ 7409(b), 7501(2), 7503. Chicago is currently a NA area for ozone (for which VOM and NO_x are precursors) and $PM_{2.5}$, meaning that USEPA has determined that ozone concentrations in Chicago exceed the levels acceptable for human health and welfare. Additionally, the USEPA has not yet approved an attainment demonstration for Chicago for the 1997 8-hour ozone National Ambient Air Quality Standard ("NAAQS"), as required before emission reductions can be used by a new or modified source that is not a replacement for the previously shut down facility. 35 Ill. Admin. Code § 203.303(b)(3). Recognition of the ERCs to offset emissions of 55.9 tons of VOM, 1,067 tons of NO_x, and 156.9 tons of PM_{10} would have the practical effect of allowing the release of approximately 1,280 tons of pollutants not previously emitted since December 2001 into air already deemed unsafe. Petition Ex. A at 2; Petition Ex. B at 1. Movants' members reside in the NA areas into which that additional pollution would be emitted should the ERCs be recognized. The effects of such further degradation in air quality, including adverse health effects, will fall disproportionately on residents of the NA areas, threatening the precise harms that NA designation is intended to combat.

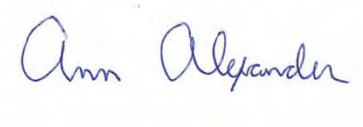
C. Movant's Request Is Timely, and Will Not Unduly Delay or Materially Prejudice the Proceeding or Otherwise Interfere With an Orderly or Efficient Proceeding

17. Movants' request for intervention is timely, as it is being filed before any substantive proceedings have been held in this matter, and within days after the Circuit Court proceeding – pending which the Board matter was stayed – was dismissed.

18. As NRDC, who will be representing Movants in this matter, is well familiar with Board procedures; and as Movants are intervening to assist the Board by providing additional arguments that IEPA may not present, there is no reason to conclude that Movants' participation will in any way interfere with an orderly and efficient proceeding.

19. WHEREFORE, Movants hereby request that the Board GRANT their Motion to Intervene.

Respectfully submitted this 14th day of January, 2011 by:



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Attorneys for Proposed Intervenor-Defendants NRDC and Sierra Club