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: Counsel of Record
(See attached Service List.)

PLEASE TAKE NOTICE that on this 16th day of February 2011, the following was filed electronically with the Illinois Pollution Control Board: **Chicago Coke Co., Inc.'s Response to Motion for Leave to File Reply**, which is attached and herewith served upon you.

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 copies of the foregoing document to counsel of record via U.S. Mail at 330 North Wabash Avenue, Chicago, IL 60611, at or before 5:00 p.m. on February 16, 2011.


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

SERVICE LIST

Chicago Coke Co., Inc. v. Illinois Environmental Protection Agency
PCB 10-75
(Permit Appeal -- Air)

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

Ann Alexander, Senior Attorney
Shannon Fisk, Senior Attorney
Natural Resources Defense Council
2 North Riverside Plaza, Suite 2250
Chicago, Illinois 60606

7012-002

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RESPONSE TO MOTION FOR LEAVE TO FILE REPLY

Petitioner CHICAGO COKE, INC. ("petitioner" or "Chicago Coke"), by its attorneys Swanson, Martin & Bell, LLP, opposes the NATURAL RESOURCES DEFENSE COUNCIL and SIERRA CLUB's (collectively, "NRDC") motion for leave to file a reply.

1. On February 7, 2011, NRDC filed a motion for leave to file a reply to petitioner's response in opposition to NRDC's motion to intervene. Petitioner received the motion for leave to file a reply on February 8, 2011.

2. The Board's procedural rules specifically state that a moving party "will not have the right to reply, except as permitted by the Board or the hearing officer to prevent material prejudice." (35 Ill.Adm.Code 101.501(e).)

3. Chicago Coke objects to the NRDC's motion to file a reply. The Board's rules prohibit a reply, except upon a specific demonstration of material prejudice. Even a quick review of the NRDC's proposed reply shows that the NRDC is simply seeking an opportunity to reply to the arguments made by Chicago Coke and respondent Illinois Environmental Protection Agency ("IEPA"), without identifying any issue that would

create material prejudice without a reply. The NRDC has not provided support for its allegation of material prejudice.

4. Thus, because the NRDC has failed to support its allegations of material prejudice, Chicago Coke asks the Board to deny the NRDC's motion for leave to file a reply.

5. In the alternative, if the Board allows the NRDC to file its reply, Chicago Coke seeks leave to file its attached surreply (Exhibit 1). The proposed surreply is limited to correcting misleading arguments made by the NRDC's reply. It is Chicago Coke that will be materially prejudiced by the NRDC's misstatements and misleading arguments, if Chicago Coke cannot respond.

WHEREFORE, Chicago Coke asks the Board to deny the NRDC's motion to file a reply. In the alternative, if the Board grants the NRDC's motion for leave to file a reply, Chicago Coke moves to be allowed to file the attached surreply, and for such other relief as the Board finds appropriate.

CHICAGO COKE CO., INC.

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

Date: February 16, 2011

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

Exhibit 1

7012-002

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Respondent.	)	

SURREPLY IN OPPOSITION TO MOTION TO INTERVENE

Petitioner CHICAGO COKE, INC. ("Chicago Coke" or "petitioner"), by its attorneys Swanson, Martin & Bell, LLP, files its surreply in opposition to the motion to intervene filed by the NATURAL RESOURCES DEFENSE COUNCIL and the SIERRA CLUB (collectively, "NRDC"). This surreply is limited to replying to "Point I" raised in the NRDC's reply. In addition to the arguments made in this surreply, petitioner refers the Board to the arguments made in petitioner's response, filed with the Board on February 1, 2011.

ARGUMENT

The NRDC is wrong in its claims about the issues on appeal.

The NRDC continues to erroneously claim that this appeal involves matters which, in fact, are not at issue. Despite the NRDC's persistent claims, whether emission reduction credits (ERCs) for PM_{10} can be used as surrogates for $PM_{2.5}$ is not at issue in this appeal. The only issue on appeal is whether the respondent Illinois Environmental Protection Agency ("IEPA") correctly determined Chicago Coke's ERCs are not available as offsets because the Chicago Coke facility is allegedly "permanently shutdown." (*See* Chicago Coke Response, pp. 3-4.) Quite simply, IEPA's decision was

not based upon the "surrogacy issue," and thus is not the basis for this appeal.

The NRDC now asserts that the surrogacy between PM_{10} and $PM_{2.5}$ ERCs is at issue because the surrogacy matter was raised in early correspondence between Chicago Coke and IEPA. However, not every matter raised during the course of a proceeding with IEPA becomes the basis for an appeal. Chicago Coke did discuss the surrogacy between PM_{10} and $PM_{2.5}$ in an August 3, 2007 letter to IEPA. (Petition, Ex. A.) That discussion, however, was merely one part of Chicago Coke's several attempts to obtain a decision from IEPA on the viability of Chicago Coke's ERCs. A second letter, dated July 18, 2008, mentions surrogacy between PM_{10} and $PM_{2.5}$ only in passing (Petition, Ex. B), while Chicago Coke's final letter to IEPA, dated January 15, 2010, does not refer to PM_{10} or $PM_{2.5}$ (Petition, Ex. C). It is clear, from Chicago Coke's submissions to IEPA, that the point of disagreement between Chicago Coke and IEPA was IEPA's position that the ERCs are not viable because the Chicago Coke facility was allegedly permanently shutdown for more than five years. The surrogacy between PM_{10} and $PM_{2.5}$ did not enter into IEPA's decision.

IEPA's written final decision demonstrates that the $PM_{10}/PM_{2.5}$ surrogacy (or lack thereof) issue was not a basis for IEPA's decision. IEPA's decision provides:

> [IEPA's] final decision on this issue remains the same as was previously conveyed to you. That is, the [IEPA] 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.
>
> Petition, Ex. D.

IEPA's decision was clearly based on its belief -- which Chicago Coke disputes -- that the ERCs are unavailable because the Chicago Coke facility is permanently shutdown. There is no mention of the surrogacy between PM_{10} and $PM_{2.5}$ as a factor in IEPA's

decision. This is the decision of which Chicago Coke seeks review by the Board: that the Chicago Coke ERCs are not available because the Chicago Coke facility is permanently shutdown. (Petition, p. 2.)

The NRDC claims that because correspondence mentioning the surrogacy issue was attached to Chicago Coke's petition, any issue raised in that correspondence is now somehow at issue. This contention is illogical. In the course of a proceeding before IEPA, many issues may be raised that do not become a basis for an appealed decision. It would wreck havoc on the permitting and appeal process to allow a non-party to intervene in order to challenge an issue that was not the basis for IEPA's decision. The procedural rule cited by the NRDC is in apposite. That rule (Section 105.214(a)) limits the scope of the hearing to the record before IEPA: it does not provide that every issue discussed during the proceeding before IEPA is open to challenge by a non-party attempting to intervene. (35 Ill.Adm.Code 105.214(a).)

Quite simply, IEPA did not base its decision on the surrogacy between PM_{10} and $PM_{2.5}$. IEPA made no mention of that issue in its written decision; indeed, it is not known what position IEPA would take on the issue. The surrogacy issue is not a basis for the NRDC to intervene in the appeal.

<u>The NRDC is wrong about the date of shutdown.</u>

The NRDC asserts that Chicago Coke agrees that its facility was shut down before 2005. (Reply, p. 4.) Although the date of shutdown of Chicago Coke's facility is not, in any way, relevant to a determination of whether the NRDC should be allowed to intervene, Chicago Coke must correct the NRDC's misstatement. Chicago Coke does not agree that its facility was shutdown prior to 2005. The date of the shutdown will undoubtedly be an issue in the appeal, and IEPA and Chicago Coke will present their

arguments at that time. However, it is already clear that Chicago Coke has not agreed that the date of shutdown was prior to 2005. (See Petition, Ex. A, p. 2-3.)

The NRDC is wrong that in claiming Chicago Coke seeks review in a vacuum.

The NRDC asserts Chicago Coke seeks to "validate" its ERCs in a vacuum, and implies that Chicago Coke is improperly seeking to limit the scope of the appeal. On the contrary, Chicago Coke is focusing the appeal on the decision that was actually made by IEPA. IEPA's decision was based upon its determination that the Chicago Coke facility is permanently shutdown, rendering the ERCs unusable. IEPA did not make any finding on the surrogacy between PM_{10} and $PM_{2.5}$. The NRDC's implication that Chicago Coke is trying to hide something by excluding the surrogacy issue is false. Chicago Coke simply wishes to confine the scope of the appeal to the issue upon which IEPA based its decision.

CONCLUSION

The question is whether the NRDC has demonstrated that it will be materially prejudiced absent intervention. The answer is "no." The NRDC's arguments are based upon an issue -- the surrogacy between PM_{10} and $PM_{2.5}$ -- that was not decided by IEPA and is not the basis for the decision Chicago Coke appeals to the Board. Allowing the NRDC to intervene to challenge an issue that was not the basis for an IEPA decision would wreck havoc on the permitting and appeal process. The Board should prevent such a result, and deny the NRDC's motion to intervene.

Respectfully submitted,

CHICAGO COKE CO., INC.

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

Dated: February 16, 2011

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