BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

CHICAGO COKE CO., INC., an Illinois corporation,	)	
Petitioner,	)	
v.	)	
THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	PCB 10-75 (Permit Appeal)
Respondent,	)	
NATURAL RESOURCES DEFENSE COUNCIL, INC., and SIERRA CLUB,	)	
Intervenors.	)	

NOTICE OF FILING

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PLEASE TAKE NOTICE that on the 12th day of January, 2012, I filed with the Office of the Clerk of the Illinois Pollution Control Board the attached Respondent The Illinois Environmental Protection Agency's Response to Petitioner's Motion to Compel, a copy of which is hereby served upon you.

Respectfully submitted,

LISA MADIGAN,
Attorney General of the
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By: _____

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RESPONDENT THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S RESPONSE TO PETITIONER'S MOTION TO COMPEL

NOW COMES Respondent, THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ("Illinois EPA"), by and through its attorney, LISA MADIGAN, Attorney General of the State of Illinois, and in Response to the Motion to Compel filed by Petitioner CHICAGO COKE CO. INC. ("Petitioner"), states as follows:

INTRODUCTION

On September 7, 2011, the Illinois EPA served its responses to Petitioner's written discovery requests. (See Motion, Exhs 1, 2, and 3). The Illinois EPA fully objected to a number of interrogatories, document requests, and requests to admit on the basis that the requests were oppressive and unreasonably burdensome, were overly broad, required the drawing of legal conclusions, invaded attorneys' mental impressions, and were not relevant to this proceeding.

The Illinois EPA has appropriately responded to all relevant discovery requests, excepting those to which it properly objected. Additionally, the Illinois EPA has produced over

2,338 pages of documents that comprise the administrative record forming the basis of the Agency's decision to deny that Petitioner's emission reductions are available for use as emission reduction credits ("ERCs") ("Administrative Record").

The bulk of Petitioner's discovery requests seek information and documents pertaining to other Illinois EPA decisions regarding requests to use, apply, transfer, or sell ERCs submitted by unrelated facilities that are unconnected to the underlying facts presented in this matter. The purpose of Petitioner's fishing expedition is to relitigate numerous prior Agency decisions in an effort to determine if the Illinois EPA has treated any other facility differently then Petitioner. However, the issue properly on appeal is limited to whether the Petitioner can prove that allowing the claimed ERCs will not cause a violation of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/1 *et seq.* (2010) or applicable regulations, based on the particular facts underlying the Agency's decision as to Petitioner's facility. Any other Agency decisions involving different facilities and underlying facts are irrelevant to the fact-based determination of the Illinois Pollution Control Board ("Board") in this proceeding.

Accordingly, Petitioner's motion must be denied on the bases that the interrogatories, document requests, and requests to admit objected to by the Illinois EPA are overbroad, deal with matters completely irrelevant to the Board's determination of this proceeding, and place an unreasonable burden on the Illinois EPA.

STANDARD OF REVIEW

The General Rules of the Board direct discovery in this matter. Specifically, Section 101.616(a) states that:

> all relevant information and information calculated to lead to relevant information is discoverable, excluding those materials that would be protected from disclosure in the courts of this State pursuant to statute,

> Supreme Court Rules or common law, and those materials protected from disclosure under 35 Ill. Adm. Code 130.

35 Ill. Adm. Code 101.616(a). However, the Hearing Officer has discretion in presiding over discovery on a case-by-case basis and may "deny, limit, condition, or regulate discovery to prevent unreasonable expense, or harassment, to expedite resolution of the proceeding, or to protect non-disclosable materials from disclosure consistent with Section 7 and 7.1 of the Act and 35 Ill. Adm. Code 130." 35 Ill. Adm. Code 101.616(d).

In regard to an appeal of an Agency decision of the type at issue in this matter, Section 40(d) of the Act requires that "the decision of the Board shall be based exclusively on the record before the Agency... unless the parties agree to supplement the record...." 415 ILCS 5/40(d) (2010).[1] The Board's procedural rules reflect this requirement: "[t]he hearing will be based exclusively on the record before the Agency at the time the permit or decision was issued." 35 Ill. Adm. Code 105.214(a). See also, Midwest Generation EME, LLC v. IEPA, PCB 04-185, slip op. at 19-20 (Nov. 4, 2004) (interpreting the scope of discovery limitations contained in Section 105.214(a)). Furthermore, "[t]he Board has consistently held that, in permit appeals, its review is limited to the record that was before IEPA at the time the permitting decision was made." Prairie Rivers Network v. IEPA and Black Beauty Coal Company, PCB 01-112, slip op. at 10 (Aug. 9, 2001), citing Alton Packaging Corp. v. IPCB, 516 N.E.2d 275, 280 (5th Dist. 1987) (disallowing introduction of new evidence not presented to the Agency in the permit proceeding); Community Landfill Co. v. IEPA, PCB 01-48, 01-49 (Apr. 5, 2001); Panhandle Eastern Pipeline Co. v. IEPA, PCB 98-102 (Jan. 21, 1999); West Suburban Recycling and Energy Center, L.P. v. IEPA, PCB 95-125, 95-119 (Oct. 17, 1996). Additionally, the Board's

[1] While the Illinois EPA disputes that the decision at issue is properly reviewable by the Board under Section 40 of the Act, as no permit is at issue and no permit denial has occurred, the Board has ruled that such review is proper. The Illinois EPA's discussion is based upon that determination.

decision "is not based on information developed by the permit applicant, or the Agency, after the Agency's decision." Community Landfill Co. v. IEPA, PCB 01-48, 01-49, slip op. at 3, citing Alton Packaging, 516 N.E.2d at 280. Consequently, "evidence that was not before the Agency at the time of its decision is not admitted at hearing or considered by the Board." Community Landfill Co v. IEPA, PCB 01-48, 01-49, slip op. at 3, citing Alton Packaging, 516 N.E.2d at 280; Panhandle Eastern, PCB 98-102; West Suburban Recycling, PCB 95-125, 95-199.

Moreover, a Section 40 hearing is not "available... as a review of agency policy and procedure in the exercise of its permit authority under Sections 4 and 39 of the Act." Oscar Meyer & Co. v. EPA, PCB 78-14, slip op. at 2 (June 8, 1978) (reversing order compelling discovery of information regarding agency personnel involved in permit decision making process and materials consulted or relied upon).

> Under the statute, all the Board has authority to do in a hearing and determination on a Section 40 petition is to decide... whether or not, based upon the facts of the application, the applicant has provided proof that the activity in question will not cause a violation of the Act or of the regulations.

Id.

The Board only needs to know the underlying facts before the Agency in deciding the ultimate question at issue. Id. at 4. "How or why the Agency arrived at a different conclusion on the same facts is simply not relevant to the Board determination." Id. The Illinois EPA's record of decision "should be sufficient to frame the issue of fact or law in controversy in any hearing on a Section 40 proceeding." Id. at 3.

PETITIONER'S INTERROGATORIES AND DOCUMENT REQUESTS

A. Interrogatories Nos. 4, 14, 15, 16, and 17 and the corresponding Document Requests 6, 14, 15, and 21 are oppressive, unduly broad and burdensome, seek information not relevant to this case, and are not reasonably calculated to lead to relevant information.

Interrogatories Nos. 4, 14, 15, 16 and 17, and Document Requests 6, 14, 15 and 21 seek volumes of information regarding other Illinois EPA decisions involving requests by unrelated facilities to use, apply, transfer or sell ERCs, and/or agency determinations that such facilities were permanently shutdown. (See Motion, Exh. 1). The interrogatories at issue state as follows:

> **Interrogatory No. 4:** For each person identified in response to Interrogatory No.2, state whether that person has analyzed, discussed, provided information, or in any way been involved in any other IEPA action, in addition to the IEPA decision regarding Chicago Coke, involving the use, application, transfer, sale, or denial of use, transfer, or sale of ERCs. Identify each such matter the person was involved in, including the name and address of the entity claiming the ERCs, the name and address of the entity (if any) to which the ERCs were transferred, the facility identification number, any application number, and the date of IEPA's action involving the ERCs.
>
> **Interrogatory No. 14:** Identify any other proceeding, request, or permit application, other than Chicago Coke's request, in which you determined that ERCs were unavailable because the facility owning the ERCs was "permanently shut down." Provide the name and address of the entity owning the ERCs, the name and address of the entity (if any) to which the ERCs were sought to be transferred, the facility identification number, any application number, and the date of IEPA's action involving the ERCs.
>
> **Interrogatory No. 15:** For each proceeding, request, or permit application identified in response to Interrogatory No. 14, state the date on which you believe the facility owning the ERCs was "permanently shut down."
>
> **Interrogatory No. 16:** Have you ever allowed the use of ERCs from a facility you found to be shut down for more than two years? If the answer is anything other than an unqualified "no," provide the name and address of the entity owning the ERCs, the name and address of the entity (if any) to which the ERCs were sought to be transferred, the facility identification number, any application number, and the date of IEPA's action involving the ERCs.

Interrogatory No. 17: For any facility or entity identified in response to Interrogatory No. 16, state the date on which you believe the facility was shut down.

Petitioner's Document Requests 6, 14, and 15 seek the production of "all documents reflecting, referring or relating to" the answers or "proceedings" identified in response to Interrogatories Nos. 4 and 14-17. Document Request 21 seeks the production of "all documents reflecting, referring or relating to" permits issued by the Illinois EPA for specified facilities that were not subject to the Agency's decision at issue before the Board in this proceeding. (See Motion, Exh. 2).

1. The discovery requests are not relevant to this case.

The Illinois EPA objects to Interrogatories Nos. 4, 14-17 and Document Requests 6, 14, 15 and 21 on the basis of relevance. "Relevance" for discovery purposes includes not only what is admissible at trial, but also that which leads to what is admissible. Pemberton v. Tieman, 117 Ill. App.3d 502, 504-05 (1983). However, the right to discovery is limited to disclosure of matters that will be relevant to the case at hand in order to protect against abuses and unfairness, and a court should deny a discovery request where there is insufficient evidence that the requested discovery is relevant. TTX Co. v. Whitley, 295 Ill. App. 3d 548, 556 (1st Dist. 1998); Mistler v. Mancini, 111 Ill. App.3d 228, 233 (2d Dist. 1982). A court must carefully exercise its discretion in matters pertaining to discovery "in order balance the needs of truth and excessive burden to litigants." General Motors v. Bua, 37 Ill.2d 180, 193 (1967). What is "reasonable" discovery must be determined in light of the practical time constraints on the Board hearing process as well as the 120-day constraint in Section 40(a) on the Board's final action. Joliet Sand and Gravel Co. v. Illinois EPA, PCB 86-159, slip op. at 3 (Dec. 23, 1986). "Further limitations on the scope of discovery flow from Section 40(d) of the Act which specifically

provides that in considering air permits, the Board's review is limited to the record before the Agency." Id.

The issues presented by Petitioner's discovery requests are nearly identical to the issues examined by the Board in EPA v. Allaert Rendering, Inc., PCB 76-80 (Sept. 6, 1979). That decision involved an enforcement proceeding wherein the Board reviewed the sufficiency of the Agency's denial of Allaert Rendering's petitions for variances from various permitting requirements for waste treatment works. Allaert Rendering claimed that the Agency's decisions were arbitrary and capricious and Allaert Rendering sought discovery of information regarding another facility's permit application. Allaert, PCB 76-80, slip op. at 1-3. The Hearing Officer ordered the Agency to produce a permit file pertaining to the unrelated, third-party company and ordered the deposition of agency representatives who had reviewed a permit application submitted by the non-party company. Id. at 5. The Board affirmed its prior order reversing the Hearing Officer's discovery order. Id. In doing so, the Board reiterated its holding in the Oscar Meyer decision that "Agency procedures, criteria and activities pertaining to the permit decision-making process were not material to the Petitioner's burden of proof in [a Section 40] proceeding." Id. at 3 (interpreting Oscar Meyer, PCB 78-14). The Board in Allaert further held that "[t]he action of the Agency in the denial of the permit is not the issue; the issue is simply whether or not in the sole judgment of the Board, the applicant has submitted proof that if the permit is issued, no violation of the Act or regulations will result." Id. at 3.

Petitioner's requests are also analogous to those addressed in TTX Co. v. Whitley, 295 Ill. App. 3d 548 (1st Dist. 1998), an appeal of an Illinois corporate tax assessment. TTX Company ("TTX"), a railroad car leasing company, brought an action seeking a declaration that the State Department of Revenue ("Department") had improperly calculated TTX's taxes. The

Department had determined that TTX did not qualify for the tax apportionment formula available to businesses furnishing transportation services. TTX sought tax payer information and tax records from the Department about other companies that used the "transportation company" tax calculation formula. TTX Co., 295 Ill. App. 3d at 550-52. The lower court issued an order compelling production of the tax information and an affidavit from the Department "explaining the criteria used to determine if a taxpayer may use the transportation company tax formula, and whether the criteria were applied in an equal manner to all taxpayers." Id. at 552. The Appellate Court reversed the order, deeming the information irrelevant. The Court held that:

> Whether other companies unrelated to TTX calculated their income taxes as transportation companies, and whether they were audited for doing so, is irrelevant to the issue of whether TTX should be designated a transportation company for income tax purposes. The relevant question is not whether TTX was treated differently from other companies, or whether the Department is interpreting correctly section 304 with regard to other companies.

Id. at 557.

In response to TTX's argument that the information was necessary to determine precisely how the Department has interpreted the Illinois Income Tax Act, the Appellate Court recognized that the issue on appeal was limited to the Department's determination that TTX did not qualify as a transportation company because it did not transport passengers or freight. Id. at 558. It further held that whether TTX was treated differently from other companies was not relevant to that decision. Id. at 557-58.

Here, Petitioner is impermissibly attempting to place the Illinois EPA's entire ERC decision-making process on trial. See Oscar Meyer, PCB 78-14. Petitioner argues that the information sought is relevant to allow a "full review" of the Illinois EPA's decision on

Petitioner's claimed ERCs.[2] (See Motion, p. 6). Petitioner claims that Illinois EPA has treated facilities differently in other decisions and that the Agency should not be allowed to "avoid review of its decisionmaking [*sic*]." (See Motion, p. 6).

Just as in the cases discussed above, however, such issues are not on appeal in this matter, and Petitioner's attempt to significantly expand the scope of the appeal through discovery should not be allowed. Petitioner notably does not allege disparate treatment in its Petition, and provides no legal authority in its Motion to Compel supporting its claim that information regarding other Agency decisions is relevant or likely to lead to the discovery of relevant information (and in fact, Petitioner seems to have difficulty articulating how or why such information is relevant to the present appeal). The only issue before the Board is whether the Petitioner has submitted sufficient proof that overturning the Agency's decision that Petitioner's emission reductions are not available as ERCs would not violate the Act or applicable regulations. Whether the Agency's prior determinations regarding other companies' emission reductions were correct or incorrect, or were consistent or inconsistent with the Agency decision at issue, has, and can have, no bearing upon this matter. See Oscar Meyer, PCB 78-14; Allaert, PCB 76-80; TTX Co., 295 Ill. App. 3d 548. The Board is not bound by the Agency's interpretation of the Act or regulations, but rather must make its determination based upon the information contained in the Administrative Record and applicable statutes and regulations.

The other decisions sought by Petitioner do not involve Petitioner, the facility or claimed ERCs at issue, or the underlying facts upon which the Illinois EPA based its decision to deny

[2] Petitioner's motion also presents that barring information relating to other decisions by the Illinois EPA would allow the agency to "evade review of its decisions" by arguing in the now-dismissed circuit court action that Petitioner must exhaust administrative remedies, "and then contending that the same issue raised in the circuit court action is irrelevant to the appeal before the Board." (See motion, p. 6). However, the circuit court dismissed the action to allow for the exhaustion of the administrative process, including the determination of the scope of discovery in this proceeding. Also, Petitioner's argument incorrectly assumes that review of the Illinois EPA's other decisions would be proper in the circuit court action. The Illinois EPA submits that the Illinois EPA's other decisions are as irrelevant in that forum as they are in this proceeding.

Petitioner's request. As such, the information sought by Petitioner regarding other Illinois EPA decisions as to unrelated ERCs is clearly not relevant to this proceeding. Moreover, it is inconceivable now allowing discovery into such decisions could reasonably lead to the discovery of relevant information.

2. The discovery requests are overly broad and unduly burdensome.

In addition to seeking irrelevant information, Petitioner's discovery requests are clearly overbroad in scope, unrealistic, and oppressive. Petitioner seeks to compel the Illinois EPA to locate and search thousands of pages of documents involving an undetermined number of decisions regarding requests by unrelated facilities for "the use, application, transfer, sale, or denial of use, transfer, or sale of ERCs." (See Motion, Exhs. 1 and 2). Petitioner's discovery requests amount to requiring the production of the entire administrative record of each prior decision, with the purpose of dissecting the facts underlying each decision and then comparing them to the Illinois EPA's denial of ERCs to Petitioner. There is no probative value of such an endeavor given the fact-sensitive nature of each particular decision. In addition, allowing such discovery would open the door for turning each permit appeal into an appeal of each permit that came before. Not only is this untenable and a waste of resources, but it also violates the rules governing the scope of permit appeals as well as prior Board decisions discussed above. The discovery requests are overly broad and unduly burdensome. Accordingly, Petitioner's motion should be denied.

B. Interrogatory No. 6 and the corresponding Document Request 7 are unduly broad and burdensome, seek to invade attorney's mental impressions, and call for legal conclusions.

Interrogatory No. 6: Identify with specificity all facts supporting your position, as stated in IEPA's decision, that "the Chicago Coke facility is permanently shut down."

The Illinois EPA specifically objects to Interrogatory No. 6 on the grounds that it is vague, ambiguous, unduly broad and burdensome, and seeks to invade attorney's mental impressions. Subject to its general and specific objections, the Illinois EPA directs Petitioner to the Administrative Record filed in this matter. (See Motion, Exh. 1).

Similarly, Document Request 7 seeks "all documents supporting [the Illinois EPA's] decision that the Chicago Coke facility is 'permanently shutdown' including but not limited to those relevant to Interrogatories Nos. 6 and 13." In response, the Illinois EPA objects to the request on the grounds that it is vague, ambiguous, unduly broad and burdensome, requires the drawing of legal conclusions, and seeks to invade attorney's mental impressions. (See Motion, Exh. 2).

1. The discovery requests require legal conclusions.

Interrogatory No. 6 and Document Request 7 are improper because they seek legal conclusions. See EPA v. Decatur Sanitary District, PCB 77-157, slip op. 3 (Mar. 2, 1978) (interrogatories requiring listing of statutes or Board Rules and Regulations called for legal conclusions and were irrelevant); Carson v. Healey, 69 Ill. App. 2d 236 (2d Dist. 1966); Nelson v. Pals, 51 Ill. App. 2d 269, 274-75 (1964) ("interrogatory that calls for a legal conclusion is 'not fair or just'"); Reske v. Klein, 33 Ill. App. 2d 302, 305-06 (1st Dist. 1962) (interrogatory seeking information pertaining to "all persons who have knowledge of the relevant facts involving the occurrence" was improper on the basis that it required a legal conclusion as to what facts were relevant). See also Nautilus Ins. Co. v. Raatz, 2011 WL 98843 (N.D. Ill. Jan. 12, 2011) (under

federal law, interrogatory seeking any case law or statute upon which a party "is relying" improperly requested legal conclusion and attorney work product); Burger King Corp. v. Grais, 1992 WL 44406 (N.D. Ill. Feb. 28, 1992) (under federal law, interrogatory requesting identification of particular provisions in franchise agreements relied upon was improper).

Here, Petitioner requires the Illinois EPA to legally conclude which facts and/or documents support its position in this matter and specifically identify each and every fact or document in detail in response to the discovery requests. Petitioner's request is tantamount to a request that the Illinois EPA brief its position for the benefit of Petitioner. As indicated in the Illinois EPA's discovery responses, the facts upon which the Agency based its decision are contained in the Administrative Record, and are equally available to Petitioner to examine and analyze. Accordingly, the discovery requests are improper.

2. The discovery requests are overly burdensome.

Additionally, Interrogatory No. 6 and Document Request 7 are overly burdensome in that they require the Illinois EPA to set forth "in specificity all facts" and "all documents" supporting" its position in this matter that the Chicago Coke facility was permanently shutdown. (See Motion, Exhs 1 and 2). By preparing the Administrative Record and filing it with the Board, the Illinois EPA has provided all the information relied upon in making its decision on appeal. The discovery requests' requirement that the Illinois EPA set forth each fact and/or document in specific detail is oppressive and duplicative. In response, the Illinois EPA directs petitioner to the Administrative Record. Accordingly, the Illinois EPA properly responded to Interrogatory No. 6 and Document Request 7 and Petitioner's motion should be denied.

C. Interrogatories Nos. 7, 8, 10, 11, and 12 and the corresponding Document Requests 9, 10, 12 and 13 are overly broad, unduly burdensome, require legal conclusions and invade attorneys' mental impressions.

Interrogatory No. 7: Identify all federal statutes, regulations, or guidance supporting your position that "the Chicago Coke facility is permanently shut down." Provide the citation or other identifying number, the date, the author, or any other information needed to locate the statute, regulation, or guidance.

Interrogatory No. 8: Identify all state statutes, regulations, or guidance supporting your position that "the Chicago Coke facility is permanently shut down." Provide the citation or other identifying number, the date, the author, and any other information needed to locate the statute, regulation, or guidance.

Interrogatory No. 10: Identify with specificity all "applicable federal guidance" referred to in your statement in the IEPA decision that "[p]ursuant to applicable federal guidance, the ERCs are this not available for use as you described." Provide the name of the guidance, the date, the author of the guidance, any identifying number or citation, and any other information needed to locate the "applicable federal guidance."

Interrogatory No. 11: Identify all federal statutes or regulations supporting your position that, because the Chicago Coke facility is "permanently shut down," its ERCs are not available for use. Provide the citation or other identifying number, the date, the author, and any other information needed to locate the statute, regulation, or guidance.

Interrogatory No. 12: Identify all state statutes, regulations, or guidance supporting your position that, because the Chicago Coke facility is "permanently shut down," its ERCs are not available for use. Provide the citation or other identifying number, the date, the author, and any other information needed to locate the statute, regulation, or guidance.

In response to Interrogatories Nos. 7, 8, 10, 11, and 12, the Illinois EPA objects on the grounds that they are vague, unduly broad and burdensome, require the drawing of legal conclusions, and seek to invade attorneys' mental impressions. The Illinois EPA further objects to Interrogatories Nos. 8 and 12 to the extent they call for the disclosure or production of information or material protected from disclosure by the attorney work-product doctrine. (See Motion, Exh. 1). In response to Interrogatory No. 10, the Illinois EPA directs Petitioner to the

Administrative Record and the federal environmental guidance on the United States Environmental Protection Agency's website that is equally available to Petitioner.

Document Requests 9, 10, 12, and 13 seek the production of "all federal guidance" and "all state guidance" identified in response to Interrogatories Nos. 7, 8, 10, 11, and 12. The Illinois EPA objects to the Document Requests on the grounds that they are vague, ambiguous, unduly broad and burdensome, require the drawing of legal conclusions and seek to invade attorneys' mental impressions. (See Motion, Exh. 2).

These requests improperly require the Illinois EPA to interpret federal and state statutes, regulations, and guidance (see e.g., EPA v. Decatur Sanitary District et al., PCB 77-157; Nautilus Ins. Co. v. Raatz, 2011 MW 98843), all of which are equally available to Petitioner. Petitioner provides no authority in its Motion to Compel justifying such requests either.

Moreover, Petitioner's Interrogatories Nos. 7, 8, 11, and 12, and the corresponding document requests, are not limited in scope to the information that the Illinois EPA relied upon at the time that the Agency made its decision. Rather, the requests require the Agency to examine all federal and state statutes, regulations, and guidance and conclude if they support the Agency's position in this proceeding. The Illinois EPA should not be required to conduct this extensive legal research for the benefit of Petitioner. As such, the requests are overly broad and unduly burdensome.

In the interests of facilitating resolution of these issues, however, the Illinois EPA agrees to supplement its responses to Interrogatories Nos. 7, 8, 10, 11, and 12, and Document Requests 9, 10, 12 and 13 as follows. The Illinois EPA states that subject to, and without waiving, its General and Specific Objections made in response to each discovery request, the Illinois EPA directs Petitioner to the guidance contained on the United States Environmental Protection

Agency's website and the guidance contained in the Administrative Record, including pages 0001 through 0068, 0104 through 0131, 1440 through 1462, and 1537 through 1544.

PETITIONER'S REQUESTS TO ADMIT

In general, Petitioner's Requests to Admit ("RTAs") seek legal conclusions and statutory interpretations from the Illinois EPA that are improper in such written discovery. See e.g., P.R.S. International, Inc. v. Shred Pax Corp., 184 Ill.2d 224, 236-39 (1998) (affirming appellate court holding that "'conclusions of law' should not be contained in requests for admission, because the rule limits such requests to questions of fact" and noting that under federal law "requests for 'opinions or law' or for legal conclusions" are improper); People v. Mindham, 253 Ill. App.3d 792, 798 (2d Dist 1994) (recognizing that "procedure should not be used to admit conclusions or opinion of law") (citing Sims v. City of Alton, 172 Ill. App.3d 694, 699 (5th Dist. 1988)).

RTAs 1-13 and 22-25 each require the Illinois EPA to interpret federal and Illinois statutes, and the regulations promulgated by the Board or the Illinois EPA thereunder. (See Motion, Exh. 3). Specifically, Petitioner wants the Agency to conclude the following:

1. No Board regulation, Illinois EPA regulation, federal statute or Illinois statute defines the terms "permanent shutdown" or permanently shutdown" in the context of the use or availability of ERCs (RTAs 1, 5, 8 and 11);

2. No Board regulation, Illinois EPA regulation, federal statute or Illinois statute sets a "time limitation" on the "useful life" of ERCs (RTAs 2, 6, 9 and 12);

3. No Board regulation, Illinois EPA regulation, federal statute or Illinois statute provides "the ERCs may expire at any set or established time" (RTAs 3, 7, 10 and 13);

4. That the only Board regulations "relating to or referencing ERCs are contained in 35 Ill. Adm. Code Part 203" (RTA 4); and

5. That the Clean Air Act, federal regulations, Illinois statutes, and Illinois regulations do not contain "a provision prohibiting the use of ERCs from a facility determined to be "permanently shutdown" (RTAs 22-25).

Contrary to Petitioner's assertions in its Motion to Compel, these requests are plainly asking for legal, not factual, conclusions. The requests ask that the Agency examine the specified statutes and regulations and share with Petitioner its legal opinions regarding their contents and meaning. Additionally, all of the statutes and regulations that are the subject to the above-RTAs are equally available for Petitioner's legal review and interpretation. As such, the RTAs are improper discovery requests.

Finally, Petitioner's RTAs 14-21 seek admissions regarding other facilities' permits or other ERCs not involving the Chicago Coke facility. (See Motion, Exh. 3). As set forth above in regard to Interrogatories Nos. 4 and 14-17, information regarding other permits, facilities, or ERCs are irrelevant to the Board's determination in this proceeding. See Oscar Meyer, PCB 78-14; Allaert, PCB 76-80; TTX Co., 295 Ill. App.3d 548.

CONCLUSION

The Illinois EPA has properly and completely responded to all of Petitioner's discovery requests. Where Petitioner's requests seek the production of information unrelated to any issue in this matter, the Illinois EPA has properly objected on the basis of relevance. Where Petitioner's requests are unreasonable, oppressive, seek legal conclusions, or invade attorneys' mental impressions, the Illinois EPA has also properly objected.

Information regarding other decisions by the Illinois EPA involving requests by unrelated facilities for the use, application, transfer, or sale of ERCs is not relevant to the Board's determination in this proceeding. Petitioner's requests for same are also overly broad and unduly burdensome. Additionally, Petitioner's requests that the Illinois EPA determine which facts

and/or documents support the Agency's position in this matter improperly require legal conclusions to respond. The discovery requests seeking the identification of all federal and state statutes, regulations, and guidance that may support the Illinois EPA's position require legal conclusions and statutory interpretations, and are not limited to such statutes, regulations, or guidance relied upon by the Agency at the time of its decision. Finally, Petitioner's requests for admissions of fact improperly require the Illinois EPA to interpret various federal and state laws and form legal conclusions and opinions.

WHEREFORE, the Illinois EPA respectfully requests that the Hearing Officer deny Petitioner's Motion to Compel.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS
ex rel. LISA MADIGAN, Attorney General
of the State of Illinois

BY: _____

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CERTIFICATE OF SERVICE

I, THOMAS H. SHEPHERD, do certify that I filed electronically with the Office of the Clerk of the Illinois Pollution Control Board the foregoing Notice of Filing and Respondent The Illinois Environmental Protection Agency's Response to Petitioner's Motion to Compel and caused them to be served this 12th day of January, 2012, 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 located at 100 West Randolph Street, Chicago, Illinois 60601, at of before the hour of 5:00 p.m.

THOMAS H. SHEPHERD