ILLINOIS POLLUTION CONTROL BOARD
March 28, 2012

CHICAGO COKE COMPANY,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	PCB 10-75
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	(Permit Appeal – Air)
	)	
Respondent,	)	
	)	
	)	
NATURAL RESOURCE DEFENSE COUNCIL, and SIERRA CLUB,	)	
	)	
Intervenors.	)	

HEARING OFFICER ORDER

On December 14, 2011, petitioner Chicago Coke Co. (Chicago Coke) filed a motion to compel (Mot.) respondent Illinois Environmental Protection Agency (Agency) complete discovery responses to Chicago Coke's interrogatories, document requests and requests to admit. On January 12, 2012, the Agency filed its response (Resp.). On February 2, 2012, Chicago Coke stated that it does not intend to file a reply. Natural Resource Defense Council and Sierra Club (collectively, NRDC/Sierra Club) have not participated in this discovery issue.

For the reasons discussed below, Chicago Coke's motion is granted in part and denied in part.

Procedural History

On September 2, 2010, the Board accepted Chicago Coke's petition for hearing. The Agency had argued "that no provision of the Act or Board regulations require the Agency to make a binding determination on ERCs, and thus, the Agency's decision on February 22, 2010 letter is not a reviewable decision". Chicago Coke, PCB 10-75, slip op. 8. (Sept. 2, 2010). The Board held that it is authorized by Section 5(d) of the Act (415 ILCS 5/5(d) (2008) to hear this appeal and that the Agency's February 22, 2010 letter was a final decision. *Id.*[1]

[1] A complaint that was filed in Circuit Court by Chicago Coke citing the Agency's actions regarding the ERCs. On January 7, 2011, the Circuit Court granted the Agency's motion to dismiss for failure to exhaust administrative remedies. Mot. Exh. 7.

The following pertinent procedural history and apparently undisputed facts are taken from the April 21, 2011 Board Order, addressing, among other things, NRDC/Sierra motion to intervene:

> Chicago Coke operates a coke facility located at 11400 South Burley Avenue, Chicago, Cook County, which is classified as a non-attainment area, pursuant to the Clean Air Act (42 U.S.C. sec. 7401 *et seq.*). Pet. at 1. Chicago Coke sought to sell ERC's to another buyer in the same non-attainment area. *Id.* In three letters written to the Agency, Chicago Coke requested that the Agency recognize Chicago Coke's claimed ERC's as emissions offsets pursuant to 35 Ill. Adm. Code 203.303. Pet. At 1-2.
>
> On July 11, 2007, Chicago Coke and the Agency met to discuss the potential sale of ERCs as offsets to be used by a purchaser of the real property of Chicago Coke, and the Agency expressed concerns about the transaction. Pet. Exh. A at 1. On August 3, 2007, Chicago Coke contacted the Agency via letter to alleviate the Agency's concern, specifically to state that Chicago Coke did not shut down prior to April 28, 2005 and therefore Chicago Coke has the ability to create ERCs based on the potential future shutdown of the facility. Pet. Exh. A at 9. On January 17, 2008, Bureau Chief Laurel Kroack orally stated that the Agency would not recognize the ERCs because Chicago Coke had shut down more than five years ago, but she agreed to reconsider the determination if presented with proof that the Agency has recognized ERCs from shutdowns in permits issued more than five years beyond the shutdown. Pet. Exh. B at 2.
>
> On July 18, 2008, Chicago Coke wrote another letter to the Agency to present a list of instances in which ERCs were recognized in a facility that had shut down more than five years prior. Pet. Exh. B; Exh. E. The Agency did not respond and on January 15, 2010, Chicago Coke wrote a third letter in which Chicago Coke requested that the Agency issue a final decision regarding the matter. Pet. Exh. C. On February 22, 2012, the Agency wrote a letter confirming that the Agency does not find the ERCs to be available as offsets and that the Agency believes that Chicago Coke is permanently shut down. Pet. Exh. D. The Agency also asserts that this is the final position on the issue. Chicago Coke, PCB 10-75, slip op. 3. (April 21, 2011).

In granting NRDC/Sierra Club's motion for intervention, the Board also addressed Chicago Coke's argument that if NRDC/Sierra Club is allowed to intervene, NRDC/Sierra Club be barred from introducing evidence that is not part of the record. *Id.* at 11. Finding Chicago Coke's proposed evidentiary limit as unnecessary, the Board held that its "review is based only on the materials in the record before the Agency at the time of the permit determination, [and] this well-settled principle limits the scope of evidence that any party may introduce, including Chicago Coke and the Agency. *Id.* (citations omitted).

Petitioner Chicago Coke's Motion To Compel

Chicago Coke's motion encompasses eleven interrogatories, eight corresponding document requests and all twenty-five of its requests to admit. The eleven interrogatories at issue are set forth below:

Interrogatories

Interrogatory No. 4: For each person identified in response to Interrogatory No. 2, [Laurel Kroack, Rob Kaleel and Chris Romaine] 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. 6: Identify with specificity all facts supporting your position, as stated in IEPA's decision that "the Chicago Coke facility is permanently shut down."

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, regulations, 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 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, regulations, 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.

Interrogatory No. 14: Identify any other proceeding, request, or permit application, other that Chicago Coke's request, in which your 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 the IEPA's action involving the ERCs.

Interrogatory No. 15: For each proceeding, request, or permit application identified in response to Interrogatory 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 16, state the date on which you believe the facility was shut down.

Chicago Coke summarizes three categories of information its discovery requests and requests to admit seek. "First, is the Chicago Coke facility 'permanently shutdown'? Second, are the emission reduction credits ("ERCs") from facilities which are 'permanently shutdown' unavailable for use, based upon 'federal guidance'? Third, has IEPA consistently applied the alleged 'federal guidance' regarding the use of ERCs from 'permanently shutdown' facilities?" Mot. at 2-3.

Generally, Chicago Coke argues that Interrogatory No. 4 is relevant and does not invade the pre-decisional deliberative process privilege as the Agency contends. Chicago Coke states that it does not request an explanation of the thought processes, only the "identification of persons who were involved in both the Chicago Coke decision and other IEPA decisions on the use of ERGs". Mot. at 6. Chicago Coke likewise argues that Interrogatories 14-17 are relevant or could lead to relevant information and are not unduly burdensome where responses would only be for the period from January 1, 2000 to the present. *Id.* at 7.

Chicago Coke in addressing Interrogatory No. 6, states that identifying "all facts supporting IEPA's decision that the Chicago Coke facility is permanently shutdown" does not invade an attorneys mental impressions as it does not request any explanation, nor is it vague or unduly burdensome as the Agency contends. Mot. at 3-4. Chicago Coke states that identification of facts in support of the Agency's decision "is particularly important in this case because IEPA previously found in 2005, that Chicago Coke facility was not permanently shutdown". *Id.* at 4.

Interrogatories 7 and 8 request the identification of any state, federal, regulations and guidelines the Agency may have used to support its decision that Chicago Coke is permanently shutdown. Chicago Coke states that it only seeks to learn the bases of the Agency's decision. Chicago Coke states that it does not require a full explanation of how the statues, regulations and guidelines were applied, therefore does not and will not invade an attorney's mental processes, which the Agency contends it will. Mot. at 4. Chicago Coke's Interrogatory 10 is similar to Interrogatories 7 and 8 where it requests any statutes, regulations and/or guidelines used to reach the decision found in the Agency's letter of February 22, 2010. Mot. at 4-5.

Chicago Coke's Interrogatories 11 and 12 are similar to Interrogatories 7, 8 and 10, in that it seeks the statues, regulations and/or guidance used by the Agency it may have used to come to the conclusion that ERCs from a permanently shut down facility cannot be used. Chicago Coke argues that it is not asking a legal conclusion or answers that would result in invading the attorney's mental processes. "On the contrary, Chicago Coke merely asks IEPA to identify the source of the IEPA's own statement that 'pursuant to applicable federal guidance, the ERCs are thus not available for use". Mot. at 5.

Document Requests

Chicago Coke states that the Agency refused to produce Document Requests 6, 7, 9, 10, 12, 13, 14 and 15, which are all related to the interrogatories that the Agency refused to answer. Chicago Cokes argues that if the Agency is ordered to answer the contested interrogatories, the Agency should also be directed to produce documents connected to the Interrogatories. Mot. at 7. Refused Document Request No. 21 is as follows:

> **Request 21**: All documents reflecting, referring, or relating to the permits issued by you to the facilities listed on the chart attached as Exhibit E to Chicago Coke's March 29, 2010 petition for review.

Chicago Coke states that "[a]s demonstrated in connection with Interrogatory 4, the requested documents are relevant and the production would not inherently violate pre-decisional deliberative process". Mot. at 8.[2]

[2] See Exhibit 8 attached to Chicago Coke's Mot. for the list of facilities.

Requests To Admit

Chicago Coke complains that the Agency objected to all 25 of its requests to admit. Chicago Coke argues that it is merely asking for an admission of fact, and does not amount to requesting a legal conclusion, nor are they irrelevant as the Agency contends. Mot. at 8-9; Exhibit 3.

Agency's Response To Chicago Coke's Motion To Compel

Interrogatories and Document Requests

The Agency, citing case law, responds by stating that Interrogatories 4, 14, 15, 16 and 17 and the related 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". Resp. at 5. The Agency argues that they seek information of other unrelated Agency decisions involving ERCs and/ or unrelated permanent shutdown determinations. Resp. at 5.

Specifically, the Agency argues that based on case law, Interrogatories 4, 14-17 and Document Requests 6, 14, 15 and 21 are not relevant. Id. at 6. One of the cases the Agency cites in support is Joliet Sand and Gravel Company v. IEPA, PCB 86-159, (December 23, 1986). In Joliet, the Board, due to time constraints and discovery parameters of the appeal set forth in Section 40 (a) of the Act, modified the hearing officer order allowing the requested discovery. slip op. at 3.

The Agency also states that the above-mentioned interrogatories and document requests are overly broad and burdensome where it would require 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". Resp. at 10.

Regarding Interrogatory 6 and corresponding Document Request 7, the Agency states and cites case law that they are "unduly broad, and burdensome, seek to invade attorney's mental impressions, and call for legal conclusions". Resp. at 11.

The Agency also objects and cites case law in an attempt to support its argument that "Interrogatories 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". Resp. at 13.

Requests To Admit

The Agency next contends that" [i]n general, Petitioner's Requests to Admit...seek legal conclusions and statutory interpretations from the Illinois EPA that are improper in such written discovery". Resp. at 15. In support, the Agency cites to P.R.S. International, Inc. v. Shred Pax Corp., 184 Ill2d 224, 236-239 (1998), where the court held that ultimate facts were a proper subject in requests to admit, but that conclusions of law are not.

Discussion And Ruling

In pertinent part, Section 101.616 (a) of the Board's procedural rules states that "[a] ll 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". Additionally, the Board may look to the Code of Civil Procedure and the Supreme Court Rules for guidance where the Board's procedural rules are silent. *Id.*

It is well settled that the Board's review of permit appeals is based exclusively on the record before the Agency at the time the Agency issued its permit decision. Accordingly, though the Board hearing affords petitioner the opportunity to challenge the validity of the Agency's reasons for its decision, information developed after the Agency's decision typically is not admitted at hearing or considered by the Board. *See* Alton Packaging Corp. v. PCB, 162 Ill App. 3d 731, 738, 516 N.E.2d 275, 280 (5th Dist. 1987); Community Landfill Co. & City of Morris v. IEPA, PCB 01-170 (Dec. 6, 2001), *aff'd sub nom*; Community Landfill Co. & City of Morris v. PCB & IEPA, 331 Ill. App. 3d 1056, 772 N.E. 2d 231 (3rd Dist. 2002). "Additionally, if there was information in the Agency's possession upon which it reasonably should have relied, the applicant may also submit such information to the Board for the Board's consideration". Joliet Sand and Gravel Company, v. IEPA, PCB 86-159, slip op. 5 (February 5, 1987). Finally, the scope of discovery in a permit appeal is in part, "controlled by the general issue presented". Owens – Illinois, Inc. v. IEPA, (PCB 77-288), slip op. 1 (February 2, 1978). "It is proper to inquire, and discovery should be allowed, to insure that the record filed by the Agency is complete and contains all of the material concerning the permit application that was before the Agency when the denial statement was issued". *Id.* at 1.

I find the Agency's arguments, reasons and case law in support of its objections to Chicago Coke's requested interrogatories and document requests unpersuasive, especially in light of the unique posture of this appeal.

In support, the hearing officer reminds the parties that Chicago Coke filed a complaint in the Circuit Court relating to the February 22, 2010 Agency letter, seeking a writ of certiorari, stating that Chicago Coke is unaware of any other method of review or remedy for the Agency's denial of Chicago Coke's ERCs as offsets. On January 7, 2011, the Circuit Court granted the Agency's motion to dismiss for Chicago Coke's failure to exhaust administrative remedies. On September 2, 2010, the Board denied the Agency's motion to dismiss and accepted the case.

Chicago Coke, slip. op. at 7-8 (Sept. 2, 2010). The Agency had argued that the motion to dismiss should be granted because Chicago Coke has no standing where the Agency did not issue a reviewable final decision and/or the Board lacks authority to hear a review of an Agency's final decision on ERCs. *Id.*

To further illustrate the unique posture of this appeal, the dissent in Chicago Coke, PCB 10-75, slip op. at 5 (April 21, 2011), states that "the primary issue on appeal is a purely legal one, namely, whether an unpromulgated rule was relied upon by the Agency".

Finally, on January 17, 2008, an Agency Bureau Chief orally agreed to reconsider the Agency's position on the ERCs if Chicago Coke presented proof that the Agency has recognized ERCs from shutdowns in permits issued more than five years beyond the shutdown. Apparently, on July 18, 2008, Chicago Coke forwarded a list of instances in which ERCs were recognized in a facility that had shut down more than five years prior. The next letter from the Agency was on February 22, 2010, confirming that the Agency does not find the ERCs available as offsets and that the Agency believes that Chicago Coke is permanently shut down.

One of the cases the Agency relies on in support of its argument that Chicago Coke's interrogatories and document requests are unduly broad and burdensome is Joliet Sand and Gravel Company. In Joliet, the Board explained that " [w]hat is reasonable discovery must be determined in light of [procedural] time constraints as well as the legislative 120 day constraint of Section 40 (a)". *Id.* at 3. In a related January 22, 1987 Board order, the Board found that "[t]hroughout this proceeding, Joliet has emphatically stood upon its statutory right to a 120 day decision period". Joliet Sand and Gravel Company v. IEPA PCB 86-159 slip op. at 2 (January 22, 1987). Presumably, the Board was dealing with a statutory decision deadline that the applicant did not or would not waive. Here, and contrary to the applicant in Joliet, the statutory decision deadline has been waived by Chicago Coke four times with the current decision deadline to and including September 21, 2012.

Chicago Coke, with its burden of proof, should be allowed to flesh out the reasons and guidelines the Agency relied upon for the bases of its letter of February 22, 2010. Otherwise, Chicago Coke would be thwarted in its right to challenge the Agency's decision. Further support for compelling discovery can be found in the Board's decision in Community Landfill Company and City of Morris v. IEPA, PCB 01-48; PCB 01-49 (consolidated), slip op at 13 (April 5, 2001). In Community Landfill, the petitioners belatedly requested information by way of *subpoena duces tecum* on ten other unrelated Illinois landfills. *Id.* at 12. The hearing officer quashed petitioners' *subpoena duces tecum*. *Id.* The Board upheld the hearing officer's ruling and found that "petitioners' request was unreasonable since the documents could have been requested earlier to provide the Agency sufficient time to provide the materials". *Id.* at 13.

To that end, finding that the Agency has sufficient time to provide the requested information and that the requested information is relevant or reasonably calculated to lead to relevant information, I direct the Agency to fully respond to Chicago Coke's Interrogatories 4, 6, 7, 8, 10, 11, 12, 14, 15, 16, and 17, and the corresponding Document Requests, including 6, 7, 9, 10, 12, 13, 14, 15 and 21. I do not find this discovery to be overly broad, unduly burdensome or

privileged in some manner or another. The time frame for the requested information in the interrogatories, particularly Interrogatories 4, 14-17 and the corresponding document requests, is from January 1, 2000, to February 22, 2010. Conceivably, the discovery may assist the Agency as well as the petitioner due to the vagueness of its February 22, 2010 letter, where "[t]he Agency may not at hearing assert reliance on any material not included in the record, and disclosed to the applicant...as the basis for Agency denial of the permit". Owens – Illinois, PCB 77-288, slip op. at 1.

Although I do not find any particular invasion of an attorney's mental impressions of the requested information or some other privilege, if the Agency contends portions of this discovery is privileged in some way, the Agency must provide a privilege log identifying the document and contended privilege, not broad brush objections.

Regarding the Chicago Coke's Requests to Admit, I find that Requests to Admit Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 22, 23, 24 and 25 amount to legal conclusions that the Agency is not compelled to answer. However, Requests to Admit Nos. 14, 15, 16, 17, 18, 19, 20 and 21 amount to facts that may be relevant or lead to relevant information. The Agency is compelled to answer those.

Unless the parties agree to extend the date and an additional waiver of the statutory decision deadline is filed, the Agency is directed to comply with this order on or before June 5, 2012.

For all of these reasons, Chicago Coke's motion is granted in part and denied in part.

The parties are reminded that the Board's procedural rules provide that the parties may seek Board review of discovery rulings pursuant to 35 Ill. Adm. Code 101.616 (e). Filing of any such appeal of a hearing officer order does not stay the proceeding.

IT IS SO ORDERED.

Bradley P. Halloran

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CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing order were mailed, first class, on March 28, 2012, to each of the persons on the attached service list.

It is hereby certified that a true copy of the foregoing order was hand delivered to the following on March 28, 2012:

John T. Therriault
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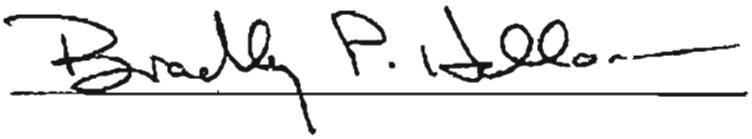

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