BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

To: Counsel of Record
(See attached Service List.)

PLEASE TAKE NOTICE that on this 17th day of August 2012, the following was filed electronically with the Illinois Pollution Control Board: **Chicago Coke Co., Inc.'s Motion for Summary Judgment**, 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
SWANSON, MARTIN & BELL, LLP
330 North Wabash, Suite 3300
Chicago, Illinois 60611
Telephone: (312) 321-9100

CERTIFICATE OF SERVICE

I, the undersigned, state that a copy of the above-described document was served electronically upon all counsel of record on August 17, 2012.

s/Elizabeth S. Harvey

7012-002

SERVICE LIST

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

Thomas H. Shepherd
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

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MOTION FOR SUMMARY JUDGMENT

Petitioner CHICAGO COKE CO., INC. ("Chicago Coke"), by its attorneys Swanson, Martin & Bell, LLP, moves the Board for summary judgment in Chicago Coke's favor. There is no genuine issue of material fact, and Chicago Coke is entitled to judgment as a matter of law. This motion is brought pursuant to Section 101.516 of the Board's procedural rules. (35 Ill.Adm.Code 101.516.)

INTRODUCTION

In April 2005, the Illinois Environmental Protection Agency ("IEPA") determined Chicago Coke's facility was not "permanently shutdown." In 2010, with no change of facts, IEPA completely reversed itself, and determined the Chicago Coke facility had become "permanently shutdown." IEPA then compounded the error by misapplying federal guidance to conclude that Chicago Coke's emission reduction credits ("ERCs") are not available for use as emission offsets. IEPA's decision destroyed the economic

viability of Chicago Coke's ERCs.

The issue in this case is straightforward and limited: are Chicago Coke's emission reduction credits ("ERCs") available for use as emission offsets for another facility? Chicago Coke has appealed the Illinois Environmental Protection Agency's ("IEPA") February 22, 2010 decision finding Chicago Coke's ERCs not "available as offsets, since it is our position that the Chicago Coke facility is permanently shutdown." IEPA claims that federal guidance mandates that Chicago Coke's ERCs are not available as offsets. However, there is no such "applicable federal guidance" prohibiting the use of the ERCs.

This case is not about whether a source using Chicago Coke's ERCs would be subject to new source review, and is not about whether a source replacing the Chicago Coke facility needs emission credits to operate. Chicago Coke's ERCs are a valuable marketable commodity precisely because a source replacing the Chicago Coke facility needs ERCs to operate.

Further, this case is not about the surrogacy between PM_{10} credits and $PM_{2.5}$ credits. Intervenors the Natural Resource Defense Council and the Sierra Club (collectively, "NRDC") have attempted to contest whether ERCs for PM_{10} can be used as offsets for $PM_{2.5}$. However, the surrogacy between PM_{10} and $PM_{2.5}$ was not the basis for IEPA's decision. This Board has already determined the NRDC cannot raise the PM surrogacy issue. In granting the NRDC's motion to intervene, the Board specifically limited the NRDC's participation: "NRDC/Sierra Club may not raise new issues as intervenors that were not raised by Chicago Coke in this appeal." *Chicago Coke Co. v. IEPA*, PCB 10-75, April 21, 2011, p. 11. Chicago Coke's petition for review

does not raise issues about PM surrogacy. Thus, any argument about PM surrogacy is outside the scope of this appeal.

Chicago Coke is entitled to summary judgment for two reasons. First, despite IEPA's claims, there is no federal statute, regulation, or guidance prohibiting the use of ERCs from a "permanently shutdown" facility. Because there is no such guidance, the Board should grant summary judgment and find that Chicago Coke's emission credits are available for use. Second, even if there was federal guidance prohibiting the use of ERCs from facilities which have been shut down for more than five years, the Chicago Coke facility has not been permanently shutdown, and was not permanently shutdown for five years, when IEPA made its decision. The Board should grant summary judgment in Chicago Coke's favor.

SUMMARY JUDGMENT STANDARD

A motion for summary judgment should be granted where the record shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Estate of Slightom v.* IEPA, PCB 11-25 (November 17, 2011), *citing Dowd & Dowd Ltd. v. Gleason,* 181 Ill.2d. 460, 483, 693 N.E.2d 358, 370 (1998). The Board's procedural rules are clear:

> If the record, including pleadings, depositions and admissions on file, together with any affidavits, shows that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law, the Board will enter summary judgment.
>
> 35 Ill.Adm.Code 101.516(b)(emphasis added).

A party opposing a motion for summary judgment may not rest on its pleadings, but must present a factual basis which would arguably entitle it to judgment. *People of the State of Illinois v. Null*, PCB 11-26 (October 6, 2011), *citing Gauthier v. Westfall*, 266

Ill.App.3d 213, 639 N.E.2d 994, 999 (2d Dist. 1994).

FACTS

The following facts are material and are undisputed.

1. Chicago Coke owns a coke production facility ("facility") located at 11400 South Burley Avenue, Chicago, Illinois. (Petition at 1.)

2. The facility was formerly owned by LTV Steel, Inc. LTV operated the facility until December 2001. In December 2001, LTV put the coke oven battery into hot idle mode. In February 2002, the battery was placed into cold idle mode. (IEPA 0283, IEPA 0807.)[1]

3. On December 30, 2002, Calumet Transfer, LLC bought the facility. Chicago Coke was organized to operate the plant. (IEPA 0283, IEPA 0807.)

4. On May 3, 2004, Chicago Coke applied to IEPA for a construction permit for a "pad up" rebuild of the facility. (IEPA 0807.)

5. IEPA issued a draft permit, and initiated a public comment period on that draft construction permit. (IEPA 0284.)

6. In April 2005, IEPA issued its "Responsiveness Summary," in which it responded to the comments received during the public comment period. (IEPA 0282- IEPA 0324.)

7. In the April 2005 Responsiveness Summary, IEPA found that the facility was not "permanently shutdown." (IEPA 0305, IEPA 0313.)

8. On April 28, 2005, IEPA approved Chicago Coke's construction permit application, and issued Construction Permit No. 04100037 to Chicago Coke. (IEPA 0807-IEPA 0927.)

9. Chicago Coke's construction permit expired on October 28, 2006. (IEPA 1584.)

10. Chicago Coke owns emission reduction credits ("ERCs"). (IEPA 0809, Petition at 1.)

11. Chicago Coke seeks to transfer its ERCs to a buyer, for use at that buyer's facility. (Petition at 1, IEPA 1593.)

12. Beginning in 2007, Chicago Coke asked IEPA to recognize Chicago Coke's ERCs as emission offsets under 35 Illinois Administrative Code 203.303.

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[1] "IEPA XXXX" indicates documents contained in IEPA's administrative record.

(Petition at 1.)

13. Chicago Coke met with IEPA officials, regarding Chicago Coke's request, at least three times: on June 1, 2007, July 11, 2007, and January 17, 2008. (IEPA 1580-IEPA 1581.)

14. In the course of the meetings between Chicago Coke and IEPA, IEPA expressed its policy that ERCs from facilities which have been permanently shutdown for five years may no longer be used. (IEPA 1589-IEPA 1590.)

15. Chicago Coke also submitted three written requests to IEPA, providing information and asking for IEPA recognition of Chicago Coke's ERCs. Those written requests are dated August 3, 2007, July 18, 2008, and January 15, 2010. (IEPA 1584-IEPA 1592; IEPA 1580-IEPA 1583; IEPA 1578-IEPA 1579.)

16. On February 22, 2010, IEPA issued its final decision, denying the use of Chicago Coke's ERCs as emission offsets. (IEPA 1593.)

17. IEPA's February 22, 2010 decision stated, in part, "the Illinois EPA 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." (IEPA 1593.)

ARGUMENT

IEPA relied on purported "applicable federal guidance" in rejecting Chicago Coke's request to transfer its ERCs. However, there is no such federal guidance. IEPA also claimed that ERCs from a "permanently shutdown" facility, which has been shutdown for five years or more, have expired and cannot be transferred. On the contrary, the Chicago Coke facility had not been permanently shutdown, and was not permanently shutdown for five years, when IEPA made its decision. Chicago Coke is entitled to summary judgment.

There is no federal guidance prohibiting the use of Chicago Coke's ERCs.

The only basis given for IEPA's decision denying the use of Chicago Coke's ERCs is that "applicable federal guidance" prohibits the use of ERCs from sources

which are "permanently shutdown. IEPA's written decision does not identify the alleged "applicable federal guidance." Thus, Chicago Coke has been in the position of having to guess at the specific basis for IEPA's decision. Nevertheless, analysis of the IEPA administrative record, as well as other research, confirms there is no "federal guidance" prohibiting IEPA from recognizing Chicago Coke's ERCs.

Neither the Clean Air Act nor federal regulations address the issue here: whether ERCs from a source which is "permanently shutdown" are available for use as emission offsets.[2] Indeed, IEPA's decision refers only to "federal guidance," and does not identify any federal or state statute or regulation addressing the issue. Thus, the question is whether there is "applicable federal guidance" which prohibits the use of ERCs from facilities which have been permanently shutdown.

Federal guidance on "permanent shutdowns" does not apply to ERCs.

The IEPA administrative record contains some federal guidance documents which address the issue of when a facility is "permanently shutdown". See, for example only, IEPA 0001-0066, IEPA 0102-0131. However, that federal guidance does not address "permanent shutdown" in the context at issue here: whether the ERCs from a permanently shutdown source are available to others (third parties) as emission offsets. Instead, the federal guidance addresses whether an existing facility, which has not been operating, has been "permanently shutdown" for purposes of determining whether the "prevention of significant deterioration" ("PSD") regulations apply. If an existing facility wishes to restart operations, and if that existing facility has been "permanently shutdown," reopening the facility can be considered a "major new source" or a

[2] Chicago Coke does not admit it was or is permanently shutdown, and does not waive its arguments on that issue.

"significant modification." In a non-attainment area, a major new source or significant modification must have emission credits sufficient to offset that source's emissions. However, a PSD determination is a red herring, and has no application to the question here: can Chicago Coke transfer its ERCs?

For example, one of the "federal guidance" documents in IEPA's record is an August 8, 1980 internal USEPA memo regarding a PSD applicability determination for the "Babylon incinerator #2." That memo contains a discussion of whether the shutdown of that incinerator had been permanent—a determination which USEPA made by analyzing the intention of the owner at the time of the shutdown. USEPA concluded that, for that incinerator, the shutdown was permanent because the shutdown had lasted for five years, and the state had removed the incinerator from its emissions inventory. Because USEPA determined the shutdown had been permanent, USEPA treated the incinerator as a "new source" or a "significant modification" for PSD purposes. (Exh. 1, IEPA 0005.)

Other USEPA guidance in the record also makes clear that the discussion of "permanent shutdown" is limited to the question of whether a facility is a "new source" or a "significant modification." See, for example, the September 6, 1978 internal memo ("a source which had been shutdown would be a new source for PSD purposes upon reopening if the shutdown was permanent," IEPA 0007); the May 27, 1987 internal memo ("whether or not a source which has been shutdown is subject to PSD review upon reactivation depends on whether the shutdown is considered permanent," IEPA 0013), and the November 19, 1991 internal memo ("whether a source which had been shut down is subject to PSD review upon reactivation depends on whether the

shutdown is considered permanent", IEPA 0016). (See attached Group Exh. 2.) IEPA erroneously applied guidance regarding PSD review, to a wholly unrelated issue.

Chicago Coke does not contest that a new facility at the Chicago Coke location would need emission offsets. The need for offsets is exactly what makes Chicago Coke's ERCs valuable. The issue on this appeal is whether there is "applicable federal guidance" which prohibits ERCs from a "permanently shutdown" facility from use as offsets. Because there is no such guidance, IEPA's decision is invalid and summary judgment should be granted.

USEPA guidance allows Chicago Coke's ERCs to remain transferable.

One USEPA guidance documents does address whether there is a time frame in which emission offsets expire. USEPA concluded that in general, offsets continue to exist as long as those offsets are accounted for in the state's emissions inventory. USEPA acknowledged that a state could promulgate a rule providing for an expiration date for emission offsets. USEPA used the example of the Texas Air Control Board, which proposed an emission banking rule that offsets expired in five years if not used. (Exh. 3, IEPA 0031.) However, Illinois has not promulgated, or even proposed, any rule regarding expiration of ERCs. Thus, applying USEPA guidance, Chicago Coke's ERCs remain valid and transferable.

IEPA's decision denying the use of Chicago Coke's ERCs was based upon "applicable federal guidance." However, there is no such federal guidance. The existing federal guidance discusses whether a facility is permanently shutdown, in the context of PSD regulations. The guidance does not conclude ERCs from permanently shutdown facilities are unavailable.

This is a purely legal question, and there is no issue of material fact. IEPA is limited to the bases of its decision. The stated basis for IEPA's decision—federal guidance—does not exist. Chicago Coke is entitled to a judgment, as a matter of law, that its ERCs are available for use as emission offsets.

The Chicago Coke facility was not "permanently shutdown."

Even assuming, *arguendo*, there is federal guidance prohibiting the use of ERCs from facilities that have been permanently shutdown, any such guidance is not applicable here. The Chicago Coke facility was not permanently shutdown, and certainly had not been permanently shutdown for five years, when IEPA made its February 2010 decision.

There is no basis for IEPA's reversal of its own decision that Chicago Coke was not permanently shutdown.

Contrary to the position IEPA takes here, in April 2005 IEPA determined the Chicago Coke facility was not permanently shutdown. As part of the public comment process on Chicago Coke's construction permit application, IEPA prepared a "responsiveness summary," which responded to the public comments on the application. In responding to a comment alleging that a "pad up" rebuild of the Chicago Coke facility would be a major new source, IEPA concluded:

> This source is not considered a new major source because the source was not permanently shutdown.
>
> Responsiveness Summary, p. 24 (IEPA 0305), attached as Exhibit 4 (emphasis added).

IEPA further explained that the facility made "considerable efforts," when operations were temporarily discontinued, to reduce the effort and cost needed when operations resumed. The efforts noted by IEPA included: 1) operating the coke oven battery in a

hot idle mode for a period; 2) maintaining and not dismantling equipment: 3) and preserving the operating permit. IEPA concluded these activities demonstrated Chicago Coke's, and its predecessor's, intent to resume operations. (Exh. 4, IEPA 0305.)

Further, in the construction permit issued to Chicago Coke on April 28, 2005, IEPA specifically states:

> This source is not considered a major new source because the source was not permanently shut down. In particular, the source made considerable efforts when operations were temporarily discontinued to ensure the minimum effort and cost of resuming operations at the facility.
>
> Exh. 5, IEPA 0808.

In responding to another comment, IEPA reiterated that Chicago Coke and its predecessor took reasonable actions to preserve the facility, and that those actions demonstrated a "continuing intent to resume operations." (Exh. 4, IEPA 0313.) IEPA further noted that Chicago Coke took the appropriate administrative actions to preserve its ability to resume operations, including maintaining the CAAPP permit for the facility.

Based on these findings, as of April 2005, IEPA determined the Chicago Coke facility was not permanently shutdown. None of the conditions at the facility changed between April 2005 and February 22, 2010, when IEPA inexplicably reversed itself and determined the facility was indeed permanently shutdown. (Affidavit of Simon Beemsterboer, attached as Exhibit 6.) Thus, there is no basis for IEPA to have suddenly determined, between April 2005 and February 2010, that the Chicago Coke facility was now considered "permanently shutdown."

It is impossible for Chicago Coke to have been permanently shutdown for five years.

Even if the Chicago Coke facility could have been considered permanently shutdown in February 2010[3], the facility could not have been permanently shutdown for five years when IEPA made its decision. In April 2005, IEPA determined the Chicago Coke facility "was not permanently shutdown." (Exh. 4, Exh. 5.) The earliest any five-year expiration period could have run would have been no earlier than April 2010. IEPA made its decision on February 22, 2010, before April 2010. Thus, it is impossible for the Chicago Coke facility to have been permanently shutdown for five years when IEPA made its decision.

Further, there was a lengthy delay in obtaining a final decision from IEPA. The first meeting was held on June 1, 2007, followed by a meeting in July 2007 and one in January 2008. (IEPA 1580-IEPA 1581.) Chicago Coke also provided written correspondence to IEPA in August 2007, July 2008, and January 2010. (Group Exh. 7, IEPA 1584-IEPA 1592; IEPA 1580-IEPA 1583; IEPA 1578-IEPA 1579.) Despite Chicago Coke's efforts, IEPA did not make its decision until February 22, 2010—32 months after the initial meeting. Thus, the period of delay—certainly the period from July 2008 to January 2010—should not be included in any calculation of a five-year period. Additionally, Chicago Coke cannot be considered to have been "permanently shutdown" while it held a valid construction permit (from April 2005 to October 2006). Quite simply, it was impossible for Chicago Coke to have been permanently shutdown for five years, when IEPA made its February 2010 decision.

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[3] Chicago Coke does not admit that its facility was or is permanently shutdown.

IEPA determined, in April 2005, that the Chicago Coke facility was not permanently shutdown. There have been no significant changes at the facility which would support a change in IEPA's position. Even if the facility could have been determined to have become "permanently shutdown," it is impossible for Chicago Coke to have been permanently shutdown for five years, at the time of IEPA's February 2010 decision. There are no material facts in dispute, and Chicago Coke is entitled to judgment as a matter of law.

CONCLUSION

This appeal presents a straightforward question: is there applicable federal guidance which prohibits the use of ERCs from a facility which is permanently shutdown? The answer is "no": federal guidance regarding permanent shutdowns is relevant to determining whether a source is subject to PSD requirements. The guidance does not provide that ERCs from a permanently shutdown source are unavailable for use.

Even assuming, without admitting, there was such federal guidance, it would be inapplicable to this matter. IEPA had already determined, in April 2005, that Chicago Coke was not permanently shutdown. There had been no significant change in circumstance when IEPA made its ERC decision in February 2010. Even if Chicago Coke had somehow become permanently shutdown by February 2010, it is impossible for Chicago Coke to have been permanently shutdown for five years.

There is no issue of material fact, and Chicago Coke is entitled to a judgment as a matter of law. Chicago Coke moves the Board for a judgment that the disputed ERCs are available for use as emission offsets.

CHICAGO COKE CO., INC.

By: _____
One of its attorneys

Dated: August 17, 2012

Michael J. Maher
Elizabeth S. Harvey
SWANSON, MARTIN & BELL, LLP
330 North Wabash, Suite 3300
Chicago, Illinois 60611
Telephone: (312) 321-9100